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# Investigating Causes of the Creation and Elimination of Dissuasive Penalty in Islamic Penal Code of Iran

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## ABSTRACT

Before the Penal Code of the year 1991, criminal penalties were classified into four categories: Hudud, Qisas, Diya and Tazir. But according to the revision done in 1991, another form of punishment, called dissuasive punishments, was added to the above classification. The new type of punishment, unlike the previous ones, had no history in Islamic jurisprudence and so it was confronted with ambiguities. Different views about the nature of dissuasive punishment are presented. It seems that dissuasive punishment is part of Tazir and can be defined as committing criminal actions, which are contrary to the governmental regulations. This way, dissuasive penalties are subset of Tazir and some rules of Tazir would apply to that as well. Nevertheless, legislator considering the broad concept of Tazir in Islamic Penal Code, enacted in 2013, distinguished dissuasive punishments from other punishments, which in turns shows that dissuasive punishment cannot be separated of Tazir punishment.

**KEYWORDS:** Islamic Penal Code, dissuasive punishments, Tazir, time passage.

## INTRODUCTION

In 1989, through the approval of creation of the criminal courts of one and two and branches of the country's Supreme Court, dissuasive penalties based upon the four-class classification in the year 1982 and in the amendment of the Code of Criminal Procedure for the first time in Iran, punishments instead of being classified into three categories of criminal, misdemeanor and violation, were classified into four classes of Hudud; Qisas, i.e. retaliation; Diya, i.e. wergild; and Tazir, i.e. determination of punishment based upon the judgment. Afterwards, in the year 1991, dissuasive penalties was added to this classification as the fifths class of penalties and was defined in Article 17 of this Law (Amini, F., Marashi, Sarei, 2010, pp. 12-13). This law was used for 22 years in our law and during these years was faced with problems until lawmakers in 2013 by approving the new Islamic Penal Code in Article 728 distinguished dissuasive penalties from other penalties.

### Concept of dissuasive penalties

The word dissuasive is a subjective name with the meaning of prevention (Amid, vol. 1, 2006, p. 271) with the meaning of what or who prevents one from doing is something (Dehkhoda, vol. 9, 1994: p. 372). Its meaning, in legal term and based upon Article 17 of Islamic Penal Code, which was enacted in 1991, is chastisement or punishment that is issued by government to maintain order, regulations and the society's expediency against violation of regulations and governmental systems. In other words, the purpose of deterrence crimes and punishments is the cases based upon the Islamic law are considered sin and crime and no punishment have been set for them, but as they have caused corruption, disorder and chaos in the society, the legislature by having the permission from the government and leader of Muslims, have considered them as crime and dissuasive penalties are issued for them (Zare, Mohajeriyan and Abid, 2012: pp. 15-16).

### The nature of dissuasive penalties

In Shiite jurisprudence until the year 1989, there was no history of dissuasive punishments and this term was first presented in the response of Imam Khomeini to question of Supreme Judicial Council. Since the emergence to the elimination of this law, many ambiguities have risen about the nature of these penalties and various interpretations have been made as well as various hypotheses were proposed.

- Some people believe dissuasive penalties are the same Tazir penalties. These people, to justify their claim, stated that Tazir penalties can be divided into two categories: religious Tazir and traditional or governmental Tazir. They considered dissuasive penalties as type of governmental Tazir and to justify that

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had the claim that the basis for committing a sin is not merely committing sin, but the basis for it can also be committing other behaviors such as corruption and anti-social system behaviors.

- Some people believe that dissuasive punishment are different from Tazir punishments and considered the nature of these as being as an instance of the punishments of "enjoining good and forbidding wrong".
- Others have considered the nature of these punishments originating from Hesbi affairs and have discussed it terms of Hesbi affairs.
- Finally, some other people that were not a minority defined the nature of these penalties as governmental rules, which were to some extent relevant to the realities relevant to our Penal Code (Zare, Mohajeriyan and Abid, 2012: pp. 17-19).

**Emergence of dissuasive punishments**

The emergence of dissuasive punishment can be traced to the problems related to implementation and enforcement of the jurisprudence, with an informatics and meaningful view and understanding law, in terms of penal code. The vastness and complexity of social life in todays, from one hand, and the existing limits in the quality and quantity of judicial manpower, on the other hand, requires that penalties accrued on criminalizing acts, even in terms of type and determination of the majority and minority, to be determined. This way, judges in the range of types and given the anticipated amounts in the Law sentences criminal verdicts and avoided substantial various and differences in the judicial judgments in the similar cases. Moreover, today's social realities and executive problems as well as probably judicial philosophy require that some crimes do not be prosecuted for some times until they are not prosecuted or not judgment is made for them, to be delayed.

Iranian lawmakers to keep accompany with this time and locational requirements was faced with the barrier of appearance-oriented jurisprudential understanding of Tazir, because according this approach, firstly, determination of the type of amount of Tazir by the ruler is not compatible with the Law, and secondly, the requirement or permission of Tazir of an act leads to the absolute Tazir and there is no reason that limits or confines it to a particular time so that by passing a particular time prevents of its execution.

Creating a new kind of punishment, known as dissuasive punishment, alongside with Tazir was a solution way through which the legislature was able to pass this legislative obstacle. The license of using o this kind of innovation was the term used by Imam Khomeini in his response to the question asked by Supreme Judicial Council about the punishment and governmental rules.

Following, we have referred briefly to the incident leading to the use of the phrase of "dissuasive punishments" in the Criminal Code (Mehrpoor, 1989, pp. 22-60):

The day of 1982/05/30 was a beginning point for the debate between the judicial and legislative authorities from one hand and Negahban Council on the other hand, i.e. the day on which the verdict of council on the bill about Tazir and retaliation was announced. In the first paragraph of that statement, disapproval of ten clauses and one note, i.e. "due to the determination of the amount of punishment", was announced by the majority of council's jurists. Judicial commission of parliament troubleshoot the problem by using the term "absolutely doing Tazir" instead of determination of the cases of Tazir. Nevertheless, dispute continued and by issuing Tazir bill was intensified.

Chairman of the Supreme Judicial Council on 1982/06/23 asked Imam Khomeini: "about Tazir, can we have proportional punishments in the law to avoid largely lack of heterogeneity and mismatch as well as differences in practical approaches". Imam Khomeini guided him to consult with Negahban Council and finding solutions that are less problematic. Meetings of the President and sometimes other members of the Supreme Judicial Council did not lead to a unity agreement and negotiations terminated without any result. Then, the bill of Tazir was approved by the judicial committee of parliament in 1983. Following controversies and debates on the provision and development of the bill of Tazir, which ultimately ended by the request of that time's president of Imam and Imam's order to investigate the content of the bill of Tazir by the Negahban Council, the council investigated the bill passed by the judicial committee of parliament and on date 1983/10/21 announced many materials contrary to the religion. In the last paragraph of objections, it is stated: "as in Tazir, the verdict of ruler in determining the type and amount of punishment and pardon of offenders is religiously valid and as determination of a specific amount of punishment in some cases may cause the lack of appropriate Tazir and in some other cases may cause cruelty to the offender, thus, this kind of determination is also contrary to the Sharia ....". But, the verdict of Negahban Council was not taken into consideration and in the approval of wide legal materials, which were needed to guarantee Tazir in practical cases, parliament in the following ways tried to object with Negahban Council: stating Tazir in absolute terms; referring determination of punishment to the Tazir law; determination of punishment and simultaneously explicitly stating the lack of limits of the judge in sentencing determined punishment.

The continuing of controversy led that this time, the judicial and legal commission of the parliament to request help of Imam Khomeini. Imam, given the fact that the majority of judges were not completely qualified for judgment and also have not the right of determination of Tazir punishment in their judicial verdict without the necessity permission from completely qualified jurist, emphasized on the necessity of determining a

committee consisting of Parliament's Chairman, the Chairman of the Supreme Judicial Council and two jurists of the Negahban Council to determine temporarily and urgently the laws of Tazir until determination of the overall requirements of judges.

Before order of Imam for the election and appointment of two of the jurists of the Negahban Council on date 1985/09/21, that time's secretary of the council wrote a letter to Imam and discussed with Imam about the license for determining the punishment of Tazir punishments. Imam restated again his points to one of the main judges of that time verbally and, finally, a committee of four individual and began working to determine Tazir punishments that are mandatory to be implemented in court.

After holding several sessions by this committee, no desirable result was obtained and with continuing disagreement between members of these committee and in order to getting rid of this deadlock, president of the Supreme Judicial Council on 1985/11/16 asked Imam three questions, which Imam answered each of them. The second question and answer to that were as follows: "for the administration of governmental affairs laws such as trafficking, customs and driving violations laws, municipal ordinances and generally Governmental laws may be enacted and some penalties are specified for them. Now the question is that whether these punishments in terms of Tazir are religiously legal and do can we employ such rules or not? Imam answer: "In the name of God, in Governmental commands, which out of the religious Tazir are being considered correct, offenders based upon the verdict of ruler and attorney can be punished by dissuasive penalties."

Without any doubt, the expression "dissuasive penalties" in response of Imam literally means Tazir and not Imam has not aimed to create a new form of punishment than the one already were existed in the jurisprudence. But, insist of Negahban Council to understand the literal meaning of the term exactly excuse to get out of the dispute and its intractable problems on the Tazir punishment.

With this verbal and superficial solution, an agreement was obtained for the two approaches. Consequently, in the revision and approval of the law of constitution of criminal courts 1 and 2 in 1989, the new kind of punishment known as dissuasive penalties was emerged. The distinguishing factor between this new punishment and Tazir was that this kind of offenses can be subject to the passage of time (Hosseini, 2010, pp. 144-141).

**Elimination of dissuasive punishments in Islamic Penal Code (enacted in 2013) and reasons for it**

One of the innovations of the new legislation and its changes in comparison to the law enacted in 1991 was classification of penalties into four categories. Penalties prescribed for real individuals were classified into four categories of Hudud, Qisas, Diya and Tazir and dissuasive penalties, which alongside Tazir was considered as an official penalty, was eliminated in the new law.

The reason for elimination of dissuasive penalties from the existing penalties in the law was that the concept of Tazir was itself so broad that incorporates all other things and there was no need to divide punishments into five categories of Hudud, Qisas, Diya, Tazir and dissuasive penalties and the concept of Tazir would also incorporate the domain of dissuasive penalties. Separation of the concept of dissuasive punishments from Tazir in some cases caused problems. For example, we can refer to the Act 173 of the Procedure of Public and Revolution Courts in the Criminal Affairs, enacted in 1999. According to this act, the scope of regulations relating to the passage of time was limited to the dissuasive penalties and did not include dissuasive punishments. Here, there was a disagreement that the punishment of which of crimes should be determined based upon Tazir and which of them should be judged based upon dissuasive punishments? In some cases, this disagreement led to the issuance of several verdicts by the judges and in turn led to the confusion in the judgment process. For example, sometimes the issued verdicts were based on dissuasive penalties, while many of these offenses had a juristic origin and nobody could exactly to tell that the punishment was dissuasive punishment or Tazir and there was no clear legal separation between the two punishments. In the new Islamic Penal Code, the passage of time was also considered for the Tazir crimes, which this issue is referred to in Article 105 with precisely. Therefore, the existence of dissuasive penalties was no longer rational as well as legally, thus, elimination of the dissuasive punishments alongside he prediction of the passage of time for Tazir penalties is considered as one of the innovations of the new law (Meshkani, Hemayat newspapers).

**Theoretical objections of dissuasive penalties**

Separation of non-forecasted and non-explained penalties in the Shiite religion into two types had no reason or religious justification and was being considered an unacceptably adverse violation. So, the elimination of dissuasive punishment from the criminal law of the Islamic Republic of Iran was an urgent necessity, which fortunately enacted in 2013, because the term Tazir is used is used for all the crimes that no clear verdict is attributed to it in Sharia, including penalties that government enacts for violation from the governmental laws.

So, dissuasive punishment has no place in Shiite jurisprudence and the opinion of Imam Khomeini is the unanimous opinion in the Islamic jurisprudence (Hosseini, 2010, pp. 144-145).

In brief explanation, in the criminal law on the territory of punishment, five promises are seen and prescribing dissuasive punishment in cases of violation of the state provisions, which is different from Tazir, is not consistent with none of provisions.

According to the first approach, hurting citizens is illegal. Accordingly, Tazir which requires hurting people is permissible only in sins with a stipulated penalty in the jurisprudence. However, no punishment as dissuasive or anything else is not considered for the violation of governmental ordinances and so it is not legitimate.

According to the second approach, violation of governmental ordinances related to prevention and opposing with the intruder behaviors in addition to committing the sins that law has prescribed punishments for them, deserve Tazir punishment. Thus, separating the punishment of violations of the governmental rules is no longer rational.

According to the third approach, dissuasive punishments alongside Tazir for violation of governmental rules is cannot be legitimate, because violation of the provisions of the state are either part of Big Offences or not; if they are the should be judged in Tazir, otherwise hurting offenders is not allowed by religious.

For this reason, those who believe to the fourth approach, i.e. punishment for absolute sins, could not agree with dissuasive punishments for violations of state rules, because if these violations are considered as sin, they can judges in Tazir and otherwise with no justification are punishable. Finally, changing the name and title do not change the nature of penalties.

The fifth approach clearly and absolutely considers violation of the provisions of the Islamic regime requires Tazir to protect the properties of the community and there is no need to new punishments such a dissuasive punishment. This approach is with unanimity agreement among almost all the jurists (see: Abolmaali Hafiz Abolfatah (1976, p. 481; Odeh, (1985), vol. 1, pp. 149-154).

In general, in all these opinions about the scope of Tazir, we aim to determine the scope of penalties and in cases where the holy lawgiver has not determined any clear verdict, thus, as the act is being considered violation of governmental ordinances about the legitimacy or license then Tazir would be necessary, otherwise, it is not allowed and giving a new name to the crime does not provide permission for doing that. In other words, in cases where the jurists do not allow for Tazir, their aim is to ban the punishment and we cannot by changing names to act behind the allowed permissions.

Once again, consider the response of Imam to the question asked by the chairman of the Supreme Judicial Council: "...in governmental rules, which out of the religious Tazir are being considered correct, offenders based upon the verdict of ruler and attorney can be punished by dissuasive penalties ..." (Mousavi Khomeini, vol. 19, 1999, p. 473). In this sentence, "religious Tazir" means Mansoseh Tazir in jurisprudence including either certain or non-certain ones. Now, consider the question that can we allow the emergence of dissuasive punishments as a new kind of punishment alongside Tazir based upon the term used by Imam Khomeini or not? Our answer to this question is no, because in this sentence nothing new is seen that imply that the purpose of Imam Khomeini has been something new.

Therefore, it is clear that according to the opinion of Imam Khomeini about the primary and secondary rules in both meanings, and given he considered governmental rules as including provisions of Sharia and hence mandatory of implementation, his aim of dissuasive punishments has been Tazir. In other words, , the phrase of "dissuasive punishment" in the discussed sentence is used in its literal meaning of Tazir, which one of its meaning is deterrence and prevention, and not as a new term with the aim of for new kind of punishments. Simply, the meaning of the sentence is that any violation of the requirements of the government can be punishment in Tazir (Mousavi Khomeini, vol. 15, 1999, p. 87).

Overall, it was cleared that first, dissuasive punishment as a new penalty is not rational and by religious justifiable, and second opinions of Imam Khomeini about the meaning and scope of Sharia and qualifications of Islamic governor do not imply that the aim of Imam Khomeini has been to enter such an illegal innovation, i.e. dissuasive punishment, into the Judicial Procedure (for example see: Hosseini, 2010, pp. 144-152).

**Conclusions**

With respect to the material contained in this article and the previous studies in legal references, it can be concluded that the dissuasive punishments, like Tazir, are punishment that the type and its amount is not determined by the holy lawgiver but rather it is determined by the judge and should be imposed on offenders.

Emergence of dissuasive punishments alongside Tazir punishment, unlike other punishment, with this meaning has no legal and religious authority in Shiite jurisprudence and the term used by Imam Khomeini cannot does not mean permission of creating a new punishments. In addition, legal barriers and prohibitions had prevented the adoption of such innovations. Aside from the lack of legitimacy, dissuasive punishments were faced by an identity crisis and in practice they were not distinguishable and caused many confusions and discrepancies.

In general, it can be said that legislator in the Islamic Penal Code, enacted in 2013, by elimination of dissuasive punishments from the class of punishes and returning to the previous classification, i.e. Hudud, Qisas,

Diya and Tazir, has finished the confusion and disagreement in decision making by judges. Also in this law, by predicting the passage of time for Tazir crimes, the existence of dissuasive punishments seems to be illegal, irrational and non-intellectual. Therefore, given the fact that the concept of Tazir punishment is so broad that covers all cases, there is no need to the five categories of penalties, including Hudud, Qisas, Diya, Tazir and dissuasive punishments, and the concept of Tazir provide all judicial needs in this field.

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