

**Series of Questions Addressed to Scholar Sheikh Ata Bin Khalil Abu Al-Rashtah,
Ameer of Hizb ut Tahrir through his Fiqhi Facebook Page**

Answer to the Question

Discretionary Penalty (At-Ta'zir): Its Details and Rulings

To Naser Rida Mohammad Othman

(Translated)

Question:

Assalamu alaikum, bless you our Sheikh and Ameer and may we blessed with you, the Answer had the following sentence: "As it has legalized discretionary penalty and showed the details of its rulings and its types", so what are these details of its rulings and types?

Answer:

Your question is about a text that came from an answered question dated ٠٢/٠١/٢٠١٥, being:

"As for the discretionary penalties, which are punishments on sins that the Shari' didn't specify for them any set punishment, but it was left to be decided by the Imam or the judge... they are rules of the method, and since the Shari' didn't specify the punishment, this doesn't mean at all that it has not placed the method of executing the Shariah rulings when punishing those who do not commit to them discretionally, **as it has legalized discretionary penalties and showed the details of its rulings and its types**... and it left to the Imam only to choose among the types of punishments which the Shari' specified, and in the magnitude which he sees appropriate to the status of the sin and situation of the sinner. This means that the Shari' showed how to apply these rulings in order to carry on with the punishment upon those who don't commit to it, but the magnitude of this punishment and its type... this is what the Shari' has left to the Imam or his vice president." **End**

We have not provided much detail in the mentioned answered question to avoid a lengthy answer... even in the answer to your question, it is not preferred to be lengthy in details since the research about discretionary penalty is vast and extensive, and the topic is mentioned in full in our book, *The System of Punishment (Nizam Al Uqubaat)*,... but I will mention part of it:

١. Discretionary penalty differs from the Hudud and felonies, as Hudud and felonies are punishments specified and identified by The Legislator (swt), and it is necessary and it is not allowed to replace it, add to it, nor subtract from it. As for discretionary penalty, it is a punishment unidentified in specific, and it is not specifically necessary. In addition, Hudud and felonies do not accept pardons, nor being dropped by the ruler except by The Owner of Haqq (swt) in felonies and this is different in discretionary penalties, as it accepts pardon and being dropped.

٢. The Shari' has specified the types of discretionary penalties that the judge is allowed to punish with, and that is based on clear Shariah texts, and it is not allowed to punish with anything else, as the punishment is an action that definitely needs evidence for its allowance. It cannot be said that there should be evidence to stop him from punishing with specific punishments, it cannot be said because originally there is no punishment, so punishing with

a specific punishment needs evidence. As for the origins of no punishment it is a general evidence made for the dignity of the person, and not harm him, since deciding a specific punishment on him needs evidence to allow its decision, and if there is no evidence for its allowance, then it is not allowed to decide upon it.

It cannot be said that discretionary penalty has made the ruler absolute without any restrictions, being able to choose the penalty as per his discretion; this cannot be said, since whatever was made for the ruler is to estimate the magnitude of the punishment, and nothing else was made for him. This is because the Shaari' (swt) has interfered to specify its types, that is specifying the types of punishments that can be punished with, so the judge became restricted with these punishments. This means that having the Shaari' (swt) specifying the types of punishments has restricted the judge with them, so he is not allowed to punish with anything otherwise, and he can choose from among them what he sees appropriate. Upon them, the ruler has to comply with the Shariah rules when he's deciding a discretionary penalty, so he cannot punish except with punishments which the Shaari' (swt) has brought upon.

٣. The Shari' has forbidden certain punishments and allowed certain punishments which need to be followed in discretionary penalties. It is forbidden to burn in fire, as punishing with burning in fire is not allowed, and it has been narrated by Bukhari from a Hadith from Abu Hurairah: «وَأِنَّ النَّارَ لَا يُعَذِّبُ بِهَا إِلَّا اللَّهُ» **“It is the fire that no one can punish with except Allah”**, and Bukhari narrated from Akrama that the Prophet (saw) said: «لَا تُعَذِّبُوا بِعَذَابِ اللَّهِ» **“Do not punish with Allah’s punishment”** which means burning with fire. Also, Abu Daoud narrated in his Sunan on the account of Abu Masoud from the Prophet (saw) that he said: «إِنَّهُ لَا يَتَّبِعِي أَنْ يُعَذِّبَ بِالنَّارِ إِلَّا رَبُّ النَّارِ» **“It should not be to punish with fire except the Lord of fire”**. All this explicitly shows the forbiddance of punishing with burning in fire, and tagged along with it whatever is similar to it, inclusive whatever has the ability to burn such as electricity.

ξ. The Shari' has allowed punishments in discretionary penalty that are not allowed to rule with anything other, and this is shown clearly and I will mention some of them:

a) **The punishment of killing:** The Khalifah is allowed to reach in the discretionary penalty to the rule of killing in the huge crimes which are not inclusive in the crimes of Hudud, such as the crime of calling for an area to separate from the body of the Islamic state, as it appears in the honorable Hadith: «مَنْ أَتَاكُمْ وَأَمْرُكُمْ عَلَى رَجُلٍ وَاحِدٍ، يُرِيدُ أَنْ يَشُقَّ عَصَائَكُمْ، أَوْ يُفَرِّقَ «**Whoever comes to you and tells you to gather over one man, wants you to separate, or disperse your groups, kill him**” narrated by Muslim from ‘Ajrafah. This means that the Khalifah is allowed to reach in the discretionary penalty to the rule of killing.

b) **Whipping:** It is the hitting with a whip or anything similar... however, the discretionary penalty of hitting and whipping are not allowed to exceed ten hits or ten whips. This has appeared clearly in the texts of the Hadith, where Bukhari narrates from Abdul Rahman bin Jaber from what he heard from the Prophet (saw) who said: «لَا عُقُوبَةَ فَوْقَ عَشْرِ ضَرْبَاتٍ إِلَّا فِي حَدٍّ مِنْ حُدُودِ اللَّهِ» **“No punishment over ten hits except in a Hadd from the Hudud of Allah.”** So, if the ruling was whipping, then it is not allowed to exceed ten whips...

c) Fines are accepted as discretionary penalties for some sins, as texts have mentioned this such as what Abu Daoud extracted in his Sunan upon the account of Abu Hurairah who said: The Prophet (saw) said: «ضَالَّةُ الْإِبِلِ الْمَكْتُومَةُ غَرَامَتُهَا وَمِثْلُهَا مَعَهَا» **“The punishment for the hidden lost camel is to return it and to add another one”**, which means that the person who has the lost camel and hides it from its owner must return it to its owner and is fined by giving the owner another camel. Also, there is a discretionary penalty to the person who withholds from paying Zakat which is taking a portion of his money. This all shows that the Prophet (saw) commanded the punishment of paying a fine as part of a discretionary penalty.

d) Imprisonment is allowed as a discretionary penalty, and the Shraiah compliant imprisonment is delaying a person and stopping him from acting as he wishes, and that is in a country, or in a house, or in a masjid, or in a prison prepped for punishment or anything else. The evidence for that imprisonment is a punishment is one of the Shariah compliant punishment is derived from what At-Tirmidhi narrated from Bahz bin Hakim from his father from his grandfather: «أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ حَبَسَ رَجُلًا فِي تَهْمَةٍ ثُمَّ خَلَّى عَنْهُ» **“That the Prophet (saw) imprisoned a man in an allegation then he let him go.”**

Imprisonment in the days of the Prophet (saw) was in the house, or in the masjid, and it was the same in the days of Abu Bakr (rA), as there was no prison prepped for the enemies. In the days of Umar (rA), he bought a house from Safwan bin Umayyah for four thousand Dirhams and made it a prison. Umar (rA) imprisoned Al-Hateea for satire, and imprisoned Sabeegh for asking about Adh-Dhariyat, Al-Mursalat, An-Nazeeaat and their likes... the length of imprisonment should be specified as imprisonment for life isn't allowed in Shariah, and so the period of imprisonment should be specified upon a certain person.

Imprisonment is detention, not labor, as labor is something other than imprisonment, and so if a person was ruled to be imprisoned, then he should not work, since the word imprison doesn't hold the connotation of labor. However, is it allowed to rule with imprisonment and labor, or keep it only to rule with imprisonment? The answer to this is that there is no Shariah text to have the punishment to be labor, neither harsh labor nor non-harsh, and that is why it not a punishment, and imprisonment is limited to the meaning of detention.

e) **Advise:** That is by having the judge advising the offender via frightening him with the punishment of Allah (swt), and the evidence for that is what Allah (swt) says: ﴿وَاللَّاتِي تَخَافُونَ﴾ **“As to those women on whose part you see ill-conduct, admonish them”**
[An-Nisa: ٣٤]

These are some of the types of the discretionary penalties which the Shariah has provided evidence for allowing the ruler to punish with, and the ruler is not allowed to punish with a type unless there is a text from the Shariah that allows this type.

I hope that this is satisfactory.

Your brother

Ata Bin Khalil Abu Al-Rashtah

٢٧ Rajab ١٤٣٦ AH

١٦/٠٥/٢٠١٥ CE

The link of the answer from the Ameer's Facebook page:

<https://www.facebook.com/Ata.abualrashtah/photos/a.104439224724163,1073741827,104433208058098/441698012664948/?type=1&theater>