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Continuation or Disappearance of Deterrent Punishments in the Islamic Penal Code of 2013: A Jurisprudential–Legal Critique of Deliberate Distinctions and Legislative Negligence

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ABSTRACT

The Islamic Penal Code enacted in 2013, by expanding the scope of ta'zirat (discretionary punishments), subsumed deterrent punishments (ta'zirat-e hokoomati) under the broader category of ta'zir, creating the impression that the historical distinction between Shari'a-based ta'zirat and state-based deterrent sanctions had been eliminated. Using a descriptive–analytical method combined with jurisprudential–legal critique, the present study demonstrates that despite the legislator's attempt at unification, the 2013 Code in practice remains committed to this dichotomy and at times neglects it. In the area of intentional distinctions by the legislator, Articles 10 and 99 (non-retroactivity and abrogation limited to governmental rules and regulations), Article 18 (explicit differentiation of the grounds of ta'zir into "commission of Shari'a-prohibited acts" and "violation of governmental regulations"), Article 135 (emphasis on fixed Shari'a-based ta'zir and the distinction between divine rights haqq-allāh and private rights haqq-al-nās), and especially the retention of Article 638 of Book Five (public commission of a prohibited act as a clear instance of Shari'a-based ta'zir) all indicate the legislator's awareness of and insistence on preserving foundational, temporal, and legal-effect distinctions between Shari'a-based ta'zirat (fixed and grounded in intrinsic moral wrongfulness) and state-based deterrent punishments (variable and grounded in expediency and extrinsic wrongfulness). In the area of legislative negligence, the legislator—without attending to this distinction—has uniformly applied institutions such as repentance (tawba, Article 115), statutes of limitation for prosecution and punishment (Articles 105–107), and the prohibition of testimonial hearsay (shahāda 'ala al-shahāda) in all ta'zir offenses (Article 189) to both Shari'a-based and deterrent ta'zirat. Yet repentance and strict evidentiary requirements are meaningful in cases involving haqq-allāh (Shari'a-based ta'zirat), whereas they lack jurisprudential grounding in offenses involving purely private rights (haqq-al-nās), such as deterrent sanctions. The conclusion is that deterrent punishments in the 2013 Code continue to maintain an independent existence, and the Code's superficial unification of ta'zirat has ultimately failed due to the Guardian Council's insistence on preserving the foundations of classical jurisprudence.

Keywords: *deterrent punishment, Shari'a-based ta'zir, governmental ta'zir, Islamic Penal Code of 2013*

Introduction

Despite the shared foundations and undeniable similarities between deterrent punishments and Shari'a-based ta'zirat, there are differences between these two categories of sanctions in terms of their source of authority,



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temporal and spatial scope, and the rules governing their implementation. The most important aspects of these differences were examined in the previous chapter. Deterrent punishments and Shari'a-based *ta'zirat* in fact represent the will and discretion of the state as a human—and not exclusively divine—institution that, in order to confront social disorders and deviant behaviors of its members, requires mechanisms and responses grounded not only in the traditional jurisprudential framework but also in human rationality and policy considerations. Even if these mechanisms and responses are considered akin to *ta'zirat* in their conventional Shari'a-based sense, they nevertheless possess distinguishing features—or, more precisely, a degree of conceptual independence—that necessitate a separate classification and analytical structure for proper understanding.

The key question, however, is the extent to which the Iranian criminal legislator in the recent Islamic Penal Code of 2013 has remained committed to these distinguishing features. On this basis, the article proceeds in two main sections:

1. Instances of deliberate legislative differentiation between deterrent punishments and Shari'a-based *ta'zirat* in the 2013 Code.
2. Instances where the legislator neglected this distinction.

Instances of Deliberate Differentiation

In certain instances, the criminal legislator of 2013 knowingly and intentionally distinguished between deterrent punishments and Shari'a-based *ta'zirat*. As noted earlier, this differentiation did not affect the fundamental decision to categorize deterrent punishments under *ta'zir*, and on this particular point, relative agreement was reached between the Guardian Council and the Parliament. However, with respect to certain consequences and scopes of these two categories of sanctions, the legislator's language sometimes reveals explicit differentiation. The removal of the term "deterrent punishments" from Book One of the Code (despite its retention in the title of Book Five, "Ta'zirat and Deterrent Punishments") may have created the impression that the legislator sought to abolish them entirely. Nevertheless, the clear distinguishing characteristics of deterrent punishments were not overlooked by the legislator, as evidenced by the provisions discussed below.

Grounds of Punishment in Shari'a-Based Ta'zirat and Deterrent Sanctions

In this study, "grounds of punishment" refers to the scope within which a particular category of criminal response may operate. Based on this understanding, the scope of grounds for Shari'a-based *ta'zirat*, according to the majority of Shi'i jurists, is limited to the omission of obligatory acts or the commission of Shari'a-prohibited acts. However, as previously noted, the broad foundations and general applicability of the *ta'zir* system, as well as the view of a small group of Shi'i jurists, have made it possible for deterrent punishments to enter the sphere of *ta'zirat*.

As stated earlier, the grounds for deterrent punishments include violations of governmental regulations—acts deemed criminal not by the Shari'a but by the state. Consequently, because such acts are criminalized based on temporal and situational interests and public welfare considerations (1-4), they are subject to change. Certain behaviors may be removed from the category of crimes, while some previously permissible acts may be criminalized, an option unavailable in Shari'a-based *ta'zirat*.

In Sunni jurisprudence, all instances of *ta'zir*—both those mentioned in transmitted texts and those determined by the ruler based on considerations of time and place—are treated as variable rulings. In this framework, the jurist or mufti is considered the delegated lawmaker. From this perspective, Shari'a incorporates even those matters on

which scripture is silent. Thus, in Sunni thought, *ta'zirat*—whose existence depends on public interest—are a set of governmental rulings, whether those *ta'zirat* identified through textual evidence as intrinsically sinful or those criminalized through fatwas or laws (5). According to this view, “the ruling of the ruler in matters of juristic reasoning is the ruling of God Almighty, and obedience to such a ruling is obligatory for the entire community, and its violation is forbidden.” (5)

However, this theory is difficult to uphold. First, not all *ta'zirat* are contingent on temporal or spatial considerations. For example, in *ta'zirat* such as pre-fornication acts (*muqaddimāt al-zinā*), usury, or intercourse with the dead or animals, temporal and spatial factors are irrelevant; Islamic criminal policy in such matters is absolute and unchanging. Second, as noted in the previous chapter, although the ruler’s decision in matters of juristic reasoning embodies divine authority, governmental rulings pertain only to general principles. The government may derive particular applications from these general rules, but in Shari’a-based *ta'zirat*, both the ruling and its application are directly determined by the Shari’a, even though the precise punishment may be left to the judge’s discretion.

In Shi’i jurisprudence, Sunni views on the wholly governmental nature of *ta'zirat* are largely rejected. Alongside the relatively slow evolution of Shi’i criminal jurisprudence, the Islamic legislator of Iran has also remained hesitant to adopt the Sunni framework.

The legislative history of *ta'zirat* in Iran—one of the most significant Shi’i jurisdictions—indicates that Shi’i jurisprudence traditionally faced difficulties both in recognizing state-determined *ta'zir* punishments and in placing deterrent sanctions under the same heading. Until recently, the very idea of categorizing governmental rulings as *ta'zir* was contested, let alone considering all *ta'zirat* as governmental. Many of these disagreements were resolved in Article 18 of the Islamic Penal Code of 2013, which states:

“*Ta'zir* is a punishment that does not fall under *hudud*, *qisas*, or *diyah* and is prescribed by law in cases of committing Shari’a-prohibited acts or violating governmental regulations. The type, amount, manner of execution, and the rules concerning reduction, suspension, extinction, and other aspects of *ta'zir* are determined by law.”

This definition contains three main components.

The first component—“*Ta'zir* is a punishment that does not fall under *hudud*, *qisas*, or *diyah*”—reflects the 2013 legislator’s shift away from the 1996 Code, which had relied on indeterminacy to distinguish *ta'zir* from other sanctions. The earlier Code defined *ta'zir* as a punishment whose type and amount were unspecified in Shari’a and left to the judge’s discretion. However, in practice, many *ta'zir* punishments were in fact specified.

The second component—“prescribed in cases of committing Shari’a-prohibited acts or violating governmental regulations”—demonstrates the legislator’s explicit recognition of the dual nature of *ta'zirat*, embracing both Shari’a-based and governmental forms. Placing the phrases “committing Shari’a-prohibited acts” and “violating governmental regulations” side-by-side denotes the transformation in Iranian legislative thought over two decades and acknowledges the influence of prior legislative experience in expanding *ta'zir* to include modern regulatory violations.

Prior to this, as explained earlier, governmental punishments (deterrent sanctions) lacked a robust foundation in Shi’i jurisprudence, and the hesitation found in the 1996 Code reflected the novelty of Islamic criminal legislation in modern Iran. The creation of the category of deterrent punishments allowed new types of offenses, such as traffic violations, to be regulated outside traditional *ta'zirat*. In contrast, the 2013 Code absorbs deterrent sanctions into *ta'zirat*, recognizing both modern penalties—such as business closures and license revocations—and expanding

the grounds for *ta'zir* to include violations of governmental regulations. Nevertheless, by juxtaposing the two categories, the legislator implicitly acknowledges their underlying differences.

The third component—"the type, amount, manner of execution, and related rules ... are determined by law"—reinforces the principle of determinacy in *ta'zirat*. In jurisprudence, this determinacy (*taqdīr al-ta'zīrāt*) is considered exceptional and limited to cases with specific textual support. Yet, the legislator, responding to the complications of the earlier Code, appears to have adopted a unified approach to all *ta'zirat* at least at the definitional level.

Thus, the legislator has effectively ended debates on whether deterrent punishments fall under the category of *ta'zir*. By extending *ta'zir* to include both "committing Shari'a-prohibited acts" and "violating governmental regulations," the legislator adopts the minimalist position of jurists such as Shahid al-Awwal. Nevertheless, the explicit presence of "violating governmental regulations" signals an awareness that meaningful conceptual and doctrinal distinctions remain between the two categories. If no such distinctions existed, there would have been no reason to list both within the definition of *ta'zir*.

If there is no difference between committing Shari'a-prohibited acts and violating governmental regulations—in other words, if violating governmental regulations is synonymous with committing Shari'a-prohibited acts—what justification is there for the legislator to explicitly mention "violation of governmental regulations"? The point is that the legislator has regarded these two categories of conduct as possessing their own specific characteristics and properties, and for this very reason has placed both under the general heading of *ta'zir*. The purpose of including these two headings within the *ta'zir* system is not to overlook the differences and distinctions between them, but rather to achieve a unified perspective on two spectra of punishments that, by virtue of the generality and breadth of *ta'zir*, can be subsumed under a single overarching category.

This interpretation is particularly reinforced when we reflect on certain provisions of the Code that, at least in a general way, distinguish between Shari'a-based and governmental *ta'zirat*. For example, prior to the Guardian Council's objection, Article 2 was drafted as follows: "A crime is an act or omission for which a punishment has been prescribed in law, and no act or omission may be deemed a crime unless a punishment has been prescribed for it in law." This article firmly articulated the principle of legality of crimes and punishments. The Guardian Council objected that "Article 2, insofar as it does not deem acts or omissions that are punishable under the Shari'a but not addressed in statute to be subject to punishment, is contrary to Shari'a, and this objection will be remedied if the article is amended to its previous text." As a result, the second part was deleted. Consequently, we now face the challenge that, under the Guardian Council's interpretation, if a judge refers to jurisprudential sources on the basis of this article, the judge has not acted significantly contrary to law—particularly considering Article 69, which provides: "Perpetrators of offenses for which the type and level of *ta'zir* punishment have not been specified in statutory law shall be sentenced to alternative punishments to imprisonment." Thus, the legislator has effectively allowed judges, in cases where the type and degree of *ta'zir* have not been determined in statute, to impose alternative punishments (6).

Article 135 of the 2013 Code, regarding concurrence (*ta'addod*) of offenses subject to *ḥadd* and *ta'zir* and offenses requiring *qisās* and *ta'zir*, provides: "Article 135 – In the event of concurrence of offenses warranting *ḥadd* and *ta'zir*, and also offenses warranting *qisās* and *ta'zir*, the punishments shall be combined and the *ḥadd* or *qisās* shall be executed first, unless the *ḥadd* or *qisās* results in deprivation of life and the *ta'zir* pertains to private rights (*ḥaqq al-nās*) or a fixed Shari'a-based *ta'zir*, and the execution of *ta'zir* does not delay the *ḥadd*; in that case, the *ta'zir* shall be executed first.

Note – Where the *ḥadd* offense is of the same nature as the *taʿzīr* offense, such as *ḥadd* theft and *taʿzīr* theft, the *taʿzīr* punishment shall be extinguished, except in the case of *qadḥ*, if the *qadḥ* constitutes insult against another person, the perpetrator shall be sentenced to both punishments.”

It is evident that the distinction between divine rights (*ḥaqq Allāh*) and private rights (*ḥaqq al-nās*) can only meaningfully be drawn with respect to Shariʿa-based *taʿzīrat*. As will be explained later, governmental *taʿzīrat* or deterrent punishments are all considered offenses involving private rights, and one cannot meaningfully speak of *ḥaqq Allāh* versus *ḥaqq al-nās* in their regard. Accordingly, the legislator's emphasis on distinguishing between *taʿzīrat* involving private rights and those involving divine rights implicitly recalls the classical jurisprudential division of Shariʿa-based *taʿzīrat* into *ḥaqq Allāh* and *ḥaqq al-nās*.

The emphasis on enforcing “fixed Shariʿa-based *taʿzīrat*” in cases of multiple offenses raises the preliminary question of what, in principle, is meant by “fixed Shariʿa-based *taʿzīrat*.” Does it refer to the so-called “textually specified *taʿzīrat*” (*taʿzīrāt manṣūṣa sharʿan*) mentioned in Note 2 of Article 115 of the same Code, which in jurisprudence are known as “determined *taʿzīrat*,” or does it refer more broadly to those *taʿzīrat* that are at least substantively specified at the level of Shariʿa criminalization? If it is not meant in this broader sense and “fixed Shariʿa-based *taʿzīrat*” are identical to “textually specified *taʿzīrat*,” then why has the legislator used two different expressions for the same concept within a single statute?

In defense of this possibility, it may be argued that despite Shiʿi jurisprudence affirming the permissibility of *taʿzīr* for all Shariʿa-prohibited acts and for breaches of all obligations, some grounds of *taʿzīr* are of such importance that they are repeatedly mentioned in the sources. Acts such as pre-fornication sexual acts between opposite sexes, insults that do not amount to *qadḥ* (for instance, using terms like “dayyūth”), coercion to commit murder, embezzlement, violent robbery (*istilāb*), possession of gambling instruments, intercourse with the dead and with animals, highway robbery, and similar behaviors cannot confidently be placed purely and exclusively under the heading of determined or textually specified *taʿzīrat*. Nonetheless, their significance is such that they can be regarded as a fixed and defined component of the Shariʿa-based *taʿzīr* criminalization framework. The opinion of some jurists who deny the permissibility of *taʿzīr* where there is no Shariʿa-based specification may also support this view, even though such an opinion is considered a minority position in Shiʿi jurisprudence. For example, Grand Ayatollah Safi Golpayegani, in his work *Al-Taʿzīr, Aḥkāmuhu wa Hudūdhu*, writes on the permissibility of punishment in all cases of committing prohibited acts and breaching obligations: “In cases where *taʿzīr* is not definitively or categorically established and remains doubtful, the fundamental principle dictates non-permissibility.” (7)

In this sense, three categories of fixed *taʿzīrat* can be identified in jurisprudence. First, *taʿzīrat* whose type and amount are specified, which the Code refers to as textually specified Shariʿa-based *taʿzīrat*. Second, *taʿzīrat* that, due to the importance and repeated mention of their grounds in the sources, are treated as fixed—such as pre-fornication acts—so that Article 135 may be understood as encompassing both of these categories. Third, *taʿzīrat* that are prescribed in general terms for the commission of prohibited acts or the breach of obligations, where the views of jurists differ.

Therefore, it appears that with respect both to fixed *taʿzīrat* and to *taʿzīrat* involving private rights, the legislator has had in mind the Shariʿa-based concept of *taʿzīr*. This interpretation is reinforced by the Note to the same article, which refers to instances such as illicit relations short of fornication and *qadḥ* amounting to insult against another person. Although the legislator has not explicitly and clearly articulated a distinction between Shariʿa-based *taʿzīrat*

and deterrent punishments in these provisions, these indications taken together support the inference that, at least implicitly, the legislator assumed a conceptual distinction between these two categories of punishment.

Non-Retroactivity of Criminal Laws and the Principle of the Reprehensibility of Punishment Without Prior Notice

Non-retroactivity of criminal laws means that a law does not apply to offenses committed before the law enters into force. This rule—derived from the principle of legality of crimes and punishments—is discussed in general criminal law under the heading “the temporal scope of criminal laws.” Exceptions to the rule include situations such as enactment of a more lenient subsequent law, temporary or special-purpose laws, and procedural laws. In all such cases, a general consensus exists among jurists that retroactivity is permissible.

At the beginning of the Islamic Revolution, this principle was generally applied to all punishments. Article 6 of the Law on Islamic Punishments, enacted on October 13, 1982, provided: “Punishments and security and corrective measures must be based on a law enacted before the commission of the offense...” Thus, due to the general term “punishments,” this article covered all punishments, including *hudud*, *qisās*, *diyāt*, and *ta‘zīrāt*.

However, shortly before the enactment of this law—on August 28, 1982—the passage of the Law Amending Certain Articles of the Criminal Procedure Code, and specifically Article 284, caused jurists to question whether the primary basis of criminality was the law or also authoritative jurisprudential sources and valid fatwas. (8) Article 284 provided:

“Article 284 – A judgment of the trial court may be quashed and reconsidered only in three cases; in all other cases it is final:

1. Where the judge concludes that his judgment contravenes legal or Shari‘a standards.
2. Where another judge concludes that the trial judge has committed a legal or Shari‘a error such that, if reminded, he would acknowledge his mistake.
3. Where it is proven that the trial judge lacked jurisdiction to adjudicate and issue judgment in the case.”

Historically, the precedent for accepting non-retroactivity with respect to Shari‘a-based punishments dates back to Article 279 of the Public Penal Code of 1973, which implicitly rejected non-retroactivity for Shari‘a-based penalties:

“If a person, before the enactment and publication of this law, has committed an act which is classified under this law as a misdemeanor or felony, prosecution and punishment shall be governed by this law provided, first, that the offense has not become time-barred under this law, and second, that a *ḥadd* has also been prescribed for the act by the Shari‘a.”

Regarding the term *ḥadd*, some jurists believed: “The term *ḥadd* must be taken in its linguistic sense, meaning ‘punishment,’ rather than in its technical jurisprudential sense restricted to *ḥadd* offenses.”

The uncertainty continued until 1986, when the General Assembly of the Supreme Court, in Unifying Decision No. 45 of September 16, 1986, held:

“Article 6 of the Law on Islamic Punishments of October 1982, which bases punishments and security and corrective measures on laws enacted prior to commission of the offense, does not apply to divine laws and rulings—including those concerning *qisās*—which were legislated at the dawn of Islam.”

This decision reflected the Guardian Council’s jurisprudential stance that the temporal scope of Shari‘a-based punishments is so extensive that statutory law cannot constrain it. The effect of this view can be observed in the Islamic Penal Code of 1991. Article 11 of that Code stated:

“In governmental regulations and decrees, punishments and security and corrective measures must be based on a law enacted before commission of the offense, and no act or omission may be punished by a subsequent law...”

Article 10 of the 2013 Code—intended to replace Article 11—was initially drafted to circumvent this view:

“In the draft submitted by the Judiciary and approved by the Commission, the principle of non-retroactivity of criminal laws was accepted for all offenses. It stated: the law does not apply retroactively unless it is favorable to the accused or decriminalizes conduct; otherwise, harsher criminal laws do not apply retroactively.” (6)

However, following the Guardian Council’s objection, the text was modified and essentially restored to its previous form:

“In governmental regulations and decrees, punishment and security and corrective measures must be based on a law enacted before commission of the offense, and no person may be punished or subjected to security or corrective measures for any conduct—whether act or omission—based on a subsequent law...”

As is apparent, aside from minor editorial changes (“has been enacted” replacing “had been enacted,” and adding “any conduct, whether act or omission”), the new Code has not altered the substance or temporal scope of this rule. The legislator’s position on punishments subject to this article is explicit: the restriction on temporal application of criminal laws applies only to violations of “governmental regulations and decrees.”

Thus none of the Shari’a-based punishments—*hudud*, *qisās*, *diyāt*, and Shari’a-based *ta’zīrāt* (whether textually specified or unspecified)—are subject to temporal limitation. The inevitable result is that the legal rule of non-retroactivity simply does not apply to Shari’a-based punishments, including Shari’a-based *ta’zīrāt*—a conclusion fully consistent with Islamic criminal jurisprudence.

The basis of the Guardian Council’s objection, and its differentiation between Shari’a-based and governmental punishments, must be understood in light of Islamic jurisprudential principles governing criminalization, particularly the scope of the rule *qabḥ al-’iqāb bilā bayān* (“the reprehensibility of punishment without prior notice”).

The key point is this: the reprehensibility (*qabḥ*) of governmental offenses is **accidental** (*’araḍī*), whereas the reprehensibility of Shari’a-prohibited acts is **intrinsic** (*dhātī*). Were the latter not intrinsically reprehensible, no need would exist for temporal limitation of enforcement regarding violations of governmental regulations. To understand this distinction more clearly, we must examine the jurisprudential rule itself.

Two preliminary questions arise:

1. Are all offenses intrinsically good or evil?
2. What categories of offenses fall within the temporal scope of the rule *qabḥ al-’iqāb bilā bayān*?

The distinction between intrinsic reprehensibility of Shari’a-prohibited acts and accidental reprehensibility of violations of governmental regulations has already been explained. Here we focus on the second question: the temporal scope of the jurisprudential rule.

This rule concerns the *reaction* to Shari’a-prohibited acts. It has been defined as follows:

“Punishing without prior specification of the offense and punishment, and without explicit legal pronouncement, is reprehensible; and since ascribing reprehensible acts to God is impossible, God does not punish without prior specification of the offense and punishment, because such punishment would be punishment without notice, which is reprehensible, and God is exalted above committing reprehensible acts.”

Thus, in Imami jurisprudence, the domain of intrinsic moral value—*ḥusn* and *qubḥ*—concerning the **nature of acts**, is distinct from the domain of reward and punishment concerning the **effects of acts**, each having its own criteria (9, 10).

Although the Qur'an and Sunnah do not contain an explicit statement equivalent to the principle “no crime and no punishment exist without law,” the substance of the rule can be inferred from various Qur'anic verses and narrations, and its application is evident in jurisprudential practice. While historically traceable to Shaykh al-Ṭūsī, (11) this does not undermine its rational foundation. The rule is logical: independent of legislation, human reason recognizes that reproach and punishment are legitimate only when the offender knew of the prohibition and the possibility of sanction.

Given the premises—intrinsic moral value of Shari'a-based offenses and the rule against punishment without notice—it becomes clear that one of the most significant distinctions between divine lawgiver and human legislator concerns the temporal applicability of the rule.

Comparing *qabḥ al-'iqāb bilā bayān* with the legal principle of non-retroactivity reveals a subtle difference:

The legal principle of non-retroactivity rests on statutory legality and means that “a subsequent law has no effect on events occurring before its enactment and applies only to conduct after its publication.” Offenses subject to governmental *ta'zīrāt* do not possess intrinsic reprehensibility; their wrongfulness is situational and contingent. The legal rule applies only to offenses created by “law”—ones with accidental reprehensibility. In contrast, *qabḥ al-'iqāb bilā bayān* applies to offenses mentioned in the Shari'a and possessing intrinsic reprehensibility (3).

Despite conceptual similarity, in Iran's legal-jurisprudential system—due to the traditional reservation of Shi'i jurisprudence toward governmental authority—these two rules have developed along different trajectories. The Shi'i community's familiarity with the religious concept of crime—acts inherently sinful—extends back not to the post-Revolution era but to the occultation of the Twelfth Imam in 880 CE (265 AH). This extensive history of Shari'a-based “notice” dramatically expands the temporal scope of the jurisprudential rule.

Accordingly, the legal principle of non-retroactivity should **not** apply—even today—to Shari'a-based offenses for contemporary offenders, although the rule of *qabḥ al-'iqāb bilā bayān* remains intact. Non-retroactivity is therefore not equivalent to the jurisprudential rule; the inability to apply the former does not negate the application of the latter.

Thus, in the field of *ta'zīrāt*, we face two rules whose content is similar but whose temporal and substantive scopes differ:

- The jurisprudential rule *qabḥ al-'iqāb bilā bayān*, applying to **Shari'a-based *ta'zīrāt***, with temporal scope reaching back to the earliest Islamic era.
- The legal rule of **non-retroactivity**, applying to **governmental *ta'zīrāt*** (deterrent punishments), with temporal scope beginning only from the date of enactment.

This distinction is explicitly reflected in Article 10 of the 2013 Code. Accordingly, the legislator of 2013 did not act negligently but with deliberate attention to the difference between deterrent punishments and Shari'a-based *ta'zīrāt*. The temporal scope of Article 10 must therefore be understood as limited solely to the specified cases—namely, “governmental regulations and decrees.”

Abrogation of Law (*Naskh*)

Linguistically, *naskh* means to eliminate, to rewrite from a copy, or to transmit and quote. In the science of legal theory (‘*ilm al-uṣūl*’), it has been defined as “the removal of a Shari’a ruling by means of a subsequent Shari’a proof” (3). In legal doctrine, abrogation is understood as the nullification of the validity of one law by another law enacted by an authority that, from the standpoint of the legal system, possesses the power to do so. In such cases, the law whose validity is terminated is called the “abrogated” (*mansūkh*), and the later law is called the “abrogating” (*nāsikh*) (12).

Abrogation is commonly divided into two types: explicit and implicit. Explicit abrogation occurs where the legislator, within a new statute, expressly declares the previous law to be abrogated. Implicit abrogation arises where a law governs a specific subject matter, but the legislator later enacts a new law on the same subject without expressly declaring the prior law abrogated, while it is logically impossible to apply both laws concurrently to the same issue. In such circumstances, it is assumed that the later law has implicitly abrogated the earlier one; accordingly, the presumption is that the later law must be applied. The jurisprudential maxim “reconciliation, whenever possible, is preferable” (*al-jam‘ maḥmā umkina awlā*) can be invoked in this context (8).

Abrogation of law is addressed in Article 99 of the Islamic Penal Code of 2013. According to this provision: “Abrogation of the law halts prosecution and execution of punishment. The effects of abrogation of criminal laws are as set forth in Article (10) of this Code.”

What, then, does Article 10 provide in this regard? In general, Article 10 consists of two parts. The first part, discussed in the previous section, concerns the non-retroactivity of criminal laws. The second part—which relates to abrogation of prior punishments or mitigation of their severity—is pertinent here. The substance of the second part is as follows:

“If, after commission of the offense, a law is enacted that provides for mitigation or non-execution of the punishment or security and corrective measure, or is in any respect more favorable to the offender, it shall apply to offenses committed prior to its enactment until the issuance of a final judgment. Where, under the previous law, a final and enforceable judgment has been issued, the following rules shall apply:

(a) If conduct that was previously criminal is no longer recognized as an offense under the subsequent law, the final judgment shall not be executed, and if it is in the process of execution, its execution shall be halted. In these cases, and also where the judgment has already been executed, no criminal consequences shall follow.

(b) If the punishment for an offense is mitigated under the subsequent law, the enforcement judge is obligated, before or during execution, to request modification of the judgment in accordance with the new law from the court that issued the final judgment. The convicted person may likewise request mitigation from the sentencing court. The sentencing court shall reduce the previous punishment with due consideration of the subsequent law. The provisions of this subsection also apply to security and corrective measures imposed on juvenile offenders...”

The first point to note about this article is that the second part follows the first part in terms of its substantive scope. That is, the second part—on abrogation—like the first, applies only to violations of “governmental regulations and decrees.” This approach is also consistent with the well-known *ḥadīth* of Zurārah from Imam al-Ṣādiq (peace be upon him). Al-Kulaynī, citing his chain of transmission from Zurārah, reports: “I asked Imam al-Ṣādiq about what is lawful and unlawful. He replied: ‘The lawful of Muḥammad is lawful forever until the Day of Resurrection, and his

unlawful is unlawful forever until the Day of Resurrection; there will be nothing other than that, and nothing else will come.” (13)

This means that if the Penal Code is to be drafted on the basis of Islamic principles and rules, the premises and implications of those principles must also be accepted. Islamic criminal norms are derived from the two general duties of prohibition (*ḥurmah*) and obligation (*wujūb*). The scope of these prohibitions is, except in exceptional cases, not subject to change. Islamic teachings and rules are fixed and eternal. Hence, one of the most challenging questions for scholars of religion in the doctrine of finality (*khātamiyyat*) is how to reconcile an immutable religion with the changing conditions of human life (4):

“The difficulty in the issue of ‘Islam and the exigencies of time’ lies in reconciling and coordinating two orders which, by their nature, appear opposed to one another: one is, by its very nature, fixed and unchanging, and the other is, by its nature, variable, fluid, and unstable.” (2)

‘Allāmah Ṭabāṭabā’ī, in linking human nature (*fiṭrah*) to divine religion, states: “Islam, which has directed its attention to the natural human being and, through its call, guides human society toward a pure, innate community characterized by pure innate belief, practice, and purpose, has made those unadulterated thoughts of the natural human being in belief and practice the basis of its obligatory program. As a result, it has divided its rules into two parts: fixed and variable. The first part, founded on the nature of human creation and its specific characteristics, it has named the religion and Shari’a of Islam and, under its light, guides humanity toward felicity.” (1)

On this basis, the subject matters of rulings are divided into two categories:

“1. Shari’a-based subject matters: those that the Lawgiver has originated and instituted. Many Shari’a terms had specific meanings in language, but the Sacred Lawgiver, by intervening in these terms, has employed them in new conceptual frameworks; such as *ṣalāh*, *ṣawm*, *ḥajj*, and other worship-related titles and subject matters. Time and place have no effect on this type of subject matter... because both the ruling and the subject have been defined by the Lawgiver.

2. Conventional (‘*urfī*’) subject matters, also referred to as transactions. These are titles not originated by the Lawgiver, whose recognition and determination are referred to the ‘*urf*’ (social convention).” (4)

This classification can be compared to the division of reprehensible acts into Shari’a-based offenses, criminalized directly by the Lawgiver, and governmental offenses, criminalized by the state and characterized by accidental reprehensibility. The legislator in 2013, relying on this framework, confined Articles 10 and 99 to violations of governmental regulations and decrees.

Accordingly, we are compelled to accept that the content of Articles 99 and 10 of the new Code pertains exclusively to situations in which the conduct in question does not constitute an act subject to Shari’a-based *ta’zīr*, but rather involves a violation of “governmental regulations and decrees” that is met with punishment or security and corrective measures. It is the abrogation of such punishments, or mitigation of their type and degree, that must be addressed and regulated by these provisions.

1-4. Non-Abrogation of Article 638 of Book Five

Article 167 of the Constitution and Article 214 of the Code of Criminal Procedure for Public and Revolutionary Courts of 1999 authorize the criminal judge, in cases of silence, conflict, ambiguity, or vagueness of the law, to refer to jurisprudential sources in order to issue a ruling. The ordinary legislator, relying on the apparent breadth of this provision and based on a mistaken interpretation of it—without due regard for other constitutional principles and fundamental legal norms—has deemed recourse by the judge to jurisprudential sources in criminal matters

permissible. This understanding has led the legislator, in Article 638 of the 1996 Islamic Penal Code, by creating a broad and ambiguous criminal title (“openly committing a prohibited act”) and by using a text that is questionably broad in its statement of the punishment for the prohibited act itself, to impliedly authorize recourse to jurisprudential sources in order to determine both the concrete instances and the punishment of the prohibited act. Yet because this practice results in the creation of crimes and the imposition of punishments by the judge, it conflicts with the principle of legality of crimes and punishments, the principle of separation of powers, and the exclusive competence of the legislature to enact criminal law (14).

This reflected part of the position of the Iranian legal community in its approach to Article 638 of the 1996 Islamic Penal Code. Article 638 has been one of the most controversial provisions of that Code over the past two decades, and the scope of disagreement regarding it has been extensive. Under this article:

“Anyone who publicly and openly in public view, public places, or thoroughfares, ostentatiously commits a prohibited act shall, in addition to the punishment for the act itself, be sentenced to ten days to two months’ imprisonment or up to seventy-four lashes. If the person commits an act that in itself carries no punishment but violates public decency, he shall only be sentenced to ten days to two months’ imprisonment or up to seventy-four lashes.”

The prevailing view among jurists was that the article should be repealed or at least its scope significantly restricted: “Considerations of expediency require the legislator to amend or abolish this provision and to show greater regard for the Constitution in doing so” (14). These criticisms were advanced along two main lines: first, the incompatibility of dual criminalization (by both statute and Shari’a) with the principle of legality of crimes and punishments; and second, the practical and doctrinal difficulties of referring to jurisprudential sources and fatwas in the criminal domain (9).

Opponents also argued that Article 638 conflicted with the Constitution. Article 36 of the Constitution provides: “The passing and execution of a sentence must be only by a competent court and in accordance with law.” On this basis, the jurisdiction of judges to impose and execute criminal sanctions must be confined to the limits of enacted statutes. Relying on this principle, some commentators criticized Article 638, contending that “the pretext of maintaining public order and protecting public decency and good morals cannot justify judicial intervention in the legislative function” (9).

If the issue were simply a conflict between a constitutional principle and one provision of the Penal Code, the solution would be straightforward: in the event of a conflict between ordinary law and the Constitution, the ordinary law cannot abrogate the Constitution. Article 638 would thus be deemed unconstitutional and invalid. However, when the conflict arises between two constitutional principles, the matter is not so easily resolved. Article 167 of the Constitution appears, at least on its face, to conflict with Article 36:

“The judge is obliged to endeavor to find the judgment for every case in the codified laws, and if he does not find such a judgment, he must issue a ruling on the basis of authoritative Islamic sources or valid fatwas and may not refrain from adjudication and issuing a judgment on the pretext of silence, deficiency, ambiguity, contradiction, or uncertainty of codified laws.”

To reconcile the apparent conflict between these two principles and to address the tension between Article 167 and the principle of separation of powers, it has been argued that Article 167 does not grant judges the power to enact or create law; rather, it serves as a tool for interpreting and applying law (15). Others have read Article 36 as an implicit limitation on Article 167, maintaining that: “From the combination of these two principles, it can be

concluded that Article 167 does not apply in criminal matters, and a judge is not permitted, by relying on fatwas or authoritative jurisprudential sources, to treat an act that has not been criminalized by statute and is not legally punishable as a crime and impose punishment for it" (14).

Some have argued instead that, "Given the latter part of Article 638, which does not include the qualifier 'prohibited,' the intended meaning of 'prohibited act' is an act for which statute has prescribed punishment; and in the second part, merely wounding public decency is sufficient, even if the act committed is not legally criminal or religiously prohibited" (16).

Others, by contrast, have taken the view that "a prohibited act should not possess an independent criminal title; otherwise, it is prosecuted under the same specific provision" (17). On this basis, some have considered the public commission of religiously prohibited acts that lack a statutory criminal description—such as publicly eating pork—to fall within the first part of the article (18). As disagreements over the scope and foundation of Article 638 multiplied, achieving a collective consensus over its proper meaning and range of application became virtually impossible.

In truth, neither the general content of Article 638 nor that of Article 167 of the Constitution could be meaningfully narrowed by interpretive strategies to the extent that would satisfy the legal community. This latter perspective was particularly reinforced with the adoption of Article 214 of the 1999 Code of Criminal Procedure for Public and Revolutionary Courts—a provision which, in the view of some commentators, "put an end to theoretical debates on the matter and effectively aligned with the second group of jurists (those who rejected limiting Article 167 and Article 638)" (17). Article 214 provides:

"The judgment of the court must be reasoned and well-founded and based on the legal provisions and principles on which it is issued. The court is obligated to find the ruling of every case in the codified laws, and if there is no law on the matter, it shall issue a ruling by relying on authoritative jurisprudential sources or valid fatwas. Courts may not refrain from hearing complaints and claims or from issuing judgments on the pretext of silence, deficiency, ambiguity, contradiction, or vagueness of codified laws."

A review of the debates of the Assembly of Experts at the time of the adoption of Article 167 confirms the broad apparent scope of that provision and its applicability to all disputes, whether civil or criminal (9). Article 167, together with Articles 214 and 638, "clearly indicate that, in the criminal system, the notions of sin and crime are treated as equivalent, and that beyond criminalization by codified law, religious prohibitions are also considered equivalent to legislative criminalization, such that dual criminalization (by secular statute and by Shari'a texts) is in force" (9).

In reality, although the judge does not legislate by invoking Article 167, he nevertheless "discovers" the Shari'a rule through interpretation. Some jurists therefore believe that "the aim of the legislator in adopting Article 167 is to create solidarity between 'Islamic law' and 'state law,' that is, coexistence between political authority and religion, not their merger; and the legislator has pursued this goal by enacting principles such as Articles 167, 72, 91, and 4 of the Constitution" (15). Coexistence and solidarity between Islamic law and state law, in Dr. Katouzian's terms, are conceivable only if it is manifestly impossible to disregard their distinctions. If, on the contrary, it were feasible to subsume all Shari'a-based *ta'zirāt* and deterrent punishments under a single heading and overlook the differences between them, there would be no need to enshrine such principles and provisions in the heart of the country's most fundamental public laws.

Under Article 2 of the former Islamic Penal Code, only those acts were deemed crimes "for which a punishment has been prescribed by law." This provision is reproduced in substantially similar form in the new Code. If no distinction were intended between Shari'a-based *ta'zirāt* and deterrent punishments, then in the wake of the

extensive critiques directed at Article 638 of the 1996 Code, the 2013 legislator should at least have repealed that article in order to establish unity between Shari'a-based and governmental *ta'zirāt*. Such a change was entirely feasible, particularly in light of other amendments made in 2013—such as the express abrogation of Articles 625–629 and 726–728 of Book Five. The only plausible explanation for the legislator's refusal to enter this domain and to repeal Article 638 is the legislator's own awareness of the necessity of maintaining a distinction between deterrent punishments and Shari'a-based *ta'zirāt*. This interpretation is reinforced by the wording of the article itself, especially the phrase “in addition to the punishment for the act,” which indicates that, alongside the governmental statutory punishment, the legislator has prescribed an additional penalty for the mere “public commission of a prohibited act.” This additional penalty is rooted in the Shari'a and is a concrete instance of Shari'a-based *ta'zir*. As explained in the previous chapter, the distinctions between deterrent punishments and Shari'a-based *ta'zirāt* at the foundational, conceptual, and historical levels are undeniable.

Accordingly, given that the legislator is presumed not to act purposelessly, a sound rationale must be sought for the continued existence of Article 638 in the Islamic Penal Code. That rationale must be sought in the light of authoritative jurisprudential sources and fatwas. In Qur'anic language, “crime” refers to the commission of an act or utterance of a statement that the Lawgiver has prohibited and for which He has prescribed punishment—in other words, crime or sin consists in violating the commands and prohibitions of the Sacred Lawgiver (19). Some jurists have used the term “crime” only for those religiously prohibited acts that carry worldly punishment, and have treated the remaining prohibited acts as instances of *ma'siyah* (disobedience), *khaṭī'ah* (fault), or *ithm* (sin) (19). In the foundations of Shi'i jurisprudence, every sin—whether committing a prohibited act or omitting an obligatory act—that lacks an expressly specified punishment in the Shari'a is subject to *ta'zir* (19). On this view, all Shari'a prohibitions without a specified punishment are “subject to *ta'zir*,” and the scope of *ta'zir* covers all religiously prohibited acts and omissions of obligations (19). Article 638 of the Islamic Penal Code appears to have been designed and retained precisely on the basis of this jurisprudential view.

The issue raised by this article, however, concerns not merely the “prohibited act” itself but the “public commission of a prohibited act,” that is, what jurisprudence describes as the manifest, public performance (*tajāhur*) of a prohibited act. A possible objection to the article is that if Shari'a-based *ta'zir* is to be applied whenever a prohibited act is committed, why has the legislator confined it to cases where the commission of the act is public?

In response, it should be noted that “concealment of sin” is one of the distinguishing features of Islamic criminal policy. In Islamic jurisprudence, surveillance and spying (*tajassus*) are in principle prohibited. Pursuing and investigating prohibited acts through intrusive inquiry is akin to probing into factual doubts (*shubuhāt mawḍū'iyya*), which some jurists do not consider obligatory to investigate (20). Moreover, under the *qa'idat al-dar'* (rule of averting punishments in cases of doubt), where doubt or suspicion exists regarding commission of an offense by a person, such doubts are not actionable and the presumption of innocence prevails. There are many verses and narrations that support this point, including verse 12 of Sūrat al-Ḥujurāt: “O you who believe, avoid much suspicion; indeed some suspicion is sin. And do not spy or backbite one another. Would one of you like to eat the flesh of his dead brother? You would abhor it.”

Thus, the mere “public commission of a prohibited act,” irrespective of whether the underlying act has a specific criminal title, is itself subject to *ta'zir*, and it is evident that the *ta'zir* intended by Article 638 is Shari'a-based, not purely statutory or governmental. The non-abrogation of this article—together with the retention of the heading “*Ta'zirāt* and Deterrent Punishments” for Book Five by the 2013 legislator, despite all the controversies and disputes

surrounding the article—demonstrates the legislator's inclination to preserve the traditional distinction between violations of governmental regulations and the commission of Shari'a-prohibited acts.

Aspects of Neglecting the Distinction

In addition to the instances where the 2013 legislator has consciously and deliberately referred to the distinction between deterrent punishments and Shari'a-based *ta'zirāt*, there are certain provisions and institutions in this Code where this distinction has been overlooked. This neglect is, to a considerable extent, open to criticism. One possible justification might be that the Islamic *ta'zir* system possesses such flexibility and breadth that it can absorb such changes as well. However, the answer is clearly that, notwithstanding the flexibility of the *ta'zir* system, Islam—as the final heavenly religion entrusted with the guidance and direction of humankind—must, first and foremost, possess a stable overarching structure that does not change with shifting temporal and spatial circumstances.

That is, if we wish to treat governmental criminal norms as entirely indistinguishable from Shari'a-based *ta'zirāt*, then the reverse must also hold: Shari'a-based *ta'zirāt* would in turn have to be treated as equivalent to governmental *ta'zirāt* and endowed with the same characteristics and implications as governmental rulings, such as temporariness and mutability. Yet such a conclusion is hardly reconcilable with the realities of Islam as a divine religion. To treat Shari'a-based *ta'zirāt* as synonymous with governmental *ta'zirāt* is, in effect, to cast doubt on the ethical principles issued by the Lawgiver. Could one seriously imagine a time when acts such as intercourse with a corpse or caressing and physical intimacy with a non-maḥram would be deemed lawful in Islamic law and no longer punishable? Even if, due to temporal and spatial conditions, the policy rationale for punishing such acts were to disappear, the criminal character of those acts themselves would still be beyond doubt.

In several instances, the Islamic Penal Code of 2013, without regard to the distinction between Shari'a-based *ta'zirāt* and deterrent punishments, has subjected both categories to the same rules—an approach that will undoubtedly produce practical difficulties for judicial authorities in the course of implementation. These instances, which form the subject of the sections in this chapter, are as follows:

1. Repentance (*tawbah*)
2. Statute of limitations (*murūr al-zamān*)
3. Testimony on testimony (*shahādah 'alā al-shahādah*)

Repentance (*Tawbah*)

Article 115 of the Islamic Penal Code of 2013 defines the repentance of the offender in *ta'zir* offenses (without distinguishing Shari'a-based *ta'zirāt* from deterrent punishments) as follows:

"In *ta'zir* offenses of degrees six, seven, and eight, if the offender repents and his remorse and reform are established for the judge, the punishment shall be dropped. In other *ta'zir* offenses, the court may apply the provisions on mitigation of punishment.

Note 1 – The provisions on repentance shall not apply to persons in respect of whom the rules on repetition of *ta'zir* offenses have been applied.

Note 2 – The broad wording of this Article, as well as paragraph (b) of Article (7), subparagraphs (a) and (b) of Article (8), and Articles (27), (39), (40), (45), (46), (93), (94), and (105), does not extend to textually specified Shari'a-based *ta'zirāt* (*ta'zirāt manṣūṣa shar'an*)."

From a religious standpoint, repentance is a covenant between the servant and the Creator. It expresses the degree of remorse and the servant's desire to draw near to God and to distance himself from sin. *Tawbah* occupies a special place in the Qur'an and is mentioned in numerous verses. The word *tawbah* and its derivatives appear ninety-two times, and the word *istighfār* and its derivatives forty-five times; many other verses refer to repentance without employing these specific terms (21).

Linguistically, *tawbah* means "return" or "turning back." In Islamic legal terminology, *tawbah* denotes regret and turning back from the commission of sin. "Repentance is returning from sin; and in the ḥadīth it is said: 'Remorse is repentance'" (22). Al-'Allāmah Shaykh Bahā'ī construes *tawbah* as the human being's return from sin to the Divine Presence, in obedience to His command, and God's turning toward the human being, out of grace and mercy, to forgive and remit punishment (21).

On this basis, *tawbah* is an inherently religious concept and is therefore closely linked to the religious concept of crime. Since offenses in Islam carry an otherworldly dimension, repentance—considered as one of the Shari'a-based excuses for exemption from divine punishment—also possesses a religious and eschatological character. Indeed, many narrations indicate that repentance is taken into account even after the worldly punishment for an offense has been carried out.

For example, Muḥaqqiq Ardabīlī cites a report in which Imam (peace be upon him) is asked whether the testimony of a man who, after accusing several chaste women of fornication (*qadḥ*) and undergoing the prescribed *ḥadd* punishment, has repented, may be accepted. The Imam answers in the affirmative and describes the form of repentance for such a person as follows: "He must present himself before the Imam and deny his earlier accusation, saying: 'I slandered so-and-so,' and thus repent of what he said." (23) This narration shows that in repentance, the religious and otherworldly aspect takes precedence over its legal and worldly dimension. The core and foundation of repentance is returning to God Almighty, not simply refraining from reoffending.

On this basis, the repentance of a person who "repents" merely because he is no longer able to commit the offense, or whose sole motive is to enter paradise rather than genuine remorse for sin, is not regarded as true *tawbah*.

Statute of Limitations (Murūr al-Zamān)

Although the precise historical origin of the statute of limitations in legal doctrine is unknown, some scholars believe that it predates Roman law. The statute of limitations entered French law from Roman law and was later adopted into the laws of many countries, including Iran.

In Islamic law, the existence of a rule under the heading "statute of limitations" (*murūr al-zamān*) is the subject of two fundamentally different views. One group argues that, whether affirmatively or negatively, there is no trace of such a principle in Islamic law and that it cannot be found in the foundational Islamic sources (24). Another group, however, maintains that a functionally equivalent principle does exist in Islamic law (10, 25).

In general, statutes of limitations are divided into three categories: limitation of prosecution, limitation of trial, and limitation of punishment. Before the Islamic Revolution, this rule was recognized in Iranian criminal and civil legislation. For example, Articles 51 and 52 of the Public Penal Code of 1925, Articles 49 to 53 of the amended Public Penal Code of 1973, and subparagraph four of Article 8 of the Code of Criminal Procedure of 1939 all regulated limitation periods for criminal offenses. Under these laws, the statute of limitations was graded according to the seriousness of the offense, and no distinction was drawn between Shari'a-based and governmental offenses.

Following the Islamic Revolution and the requirement that all laws conform to Islamic Shari'a, the jurist members of the Guardian Council, in 1982, expressed the following view on legislative provisions concerning criminal statutes of limitations in the Public Penal Code and Article 1041 of the Civil Code:

"With reference to letter No. 26533/1 of November 1981, following letter No. 4059 of February 1981 concerning the annulment of several provisions of the Penal Code, further provisions of the Public Penal Code and the Civil Code were discussed at the session of the jurist members of the Guardian Council in 1982 and, by majority vote, were found to be contrary to Shari'a under Article 4 of the Constitution."

With this opinion, statutes of limitations were, in effect, implicitly removed from the Iranian legal system. However, since the Guardian Council lacks the authority to abrogate laws directly, doubts persisted as to whether statutes of limitations remained applicable in criminal matters.

In 1990, following a request for an advisory opinion by the Legal Department of the Ministry of Justice regarding the procedure for hearing traffic violations and collecting traffic fines (under the 1971 law as amended) and the applicability of limitation periods to such violations, the Legal Department drew a distinction between Shari'a-based and governmental offenses:

"... 3. According to the prevalent opinion among jurists, the following are not subject to the statute of limitations:

(a) Financial rights of individuals (civil)

(b) *Hudud*, *qisās*, *diyāt*, and those *ta'zir* punishments whose type and quantity have been determined by the Lawgiver.

4. Conventional punishments (*mujāzāt 'urfīyya*)—those enacted to preserve order in society—are subject to the will of the authority that enacts them. For example, if Parliament, for social and public order considerations, declares an act to be criminal and punishable, it may also define the conditions under which the punishment is imposed, aggravated, or extinguished. Where the legitimacy of the punishment rests on its enactment by the Islamic government, if the authority that enacted the punishment provides conditions for its extinction and those conditions are fulfilled, enforcement of the punishment cannot be considered legitimate..."

Ultimately, in 1999, the criminal legislator formally recognized the statute of limitations in deterrent punishments and security and corrective measures by enacting Article 173 of the Code of Criminal Procedure for Public and Revolutionary Courts in Criminal Matters. Article 173 provides:

"In offenses for which the statutory punishment is of the type of deterrent punishments or security and corrective measures, if no request for prosecution has been made within the limitation periods specified below, counted from the date of the offense, or if no judgment has been issued within those periods, counted from the date of the first prosecutorial act, prosecution shall be discontinued..."

Furthermore, Article 106 of the same Code provides:

"In *ta'zir* offenses subject to complaint (*qābil-e gozāsh*t), if the victim does not file a criminal complaint within one year from the date he becomes aware of the offense, his right to file a criminal complaint shall lapse, unless he was under the control of the accused or, for reasons beyond his control, was unable to file a complaint; in such cases, the limitation period shall be calculated from the time the impediment is removed. If the victim dies before expiration of the period and there is no evidence that he intended to forgo his complaint, each of his heirs shall have six months from the date of death to file a complaint."

Article 107 also addresses the statute of limitations for execution of punishment and provides:

"The statute of limitations shall bar the execution of judgments..."

Testimony on Testimony

In jurisprudence, testimony is defined as one of the means of proof as follows: “Linguistically, *shahādah* means presence or knowledge, which is expressed as informing based on certainty; legally, it is definitive information about a right that has become necessary, established, and realized for another person, and this information is given before the judge... its reference point is the social understanding (‘*urf*’) that is capable of distinguishing between testimony and mere reporting.” (26)

Throughout history and in all legal systems, witness testimony has always been employed by litigants as one of the means to prove their claims, though the scope of its use and its probative value vary from one country to another (27).

In fiqh, testimony is, in one respect, divided into “principal testimony” and “derivative testimony”:

1. **Principal witness (original testimony):** a person who testifies to something he has personally seen, heard, or perceived through one of his senses.
2. **Derivative witness (testimony on testimony):** a person who testifies that “I heard from X that he testified that a given matter occurred in a certain way.” This is also called *shahādah ‘alā al-shahādah* (testimony on testimony) (28).

In Iranian law, testimony on testimony was first provided for in Article 1320 of the Civil Code, which stated: “Testimony on testimony shall be admissible if the principal witness has died or, due to another impediment such as illness, travel, imprisonment, and the like, cannot appear.” However, Article 231 of the Code of Civil Procedure for Public and Revolutionary Courts in Civil Matters, adopted in 2000, restricted the admissibility of testimony on testimony to cases where the subject of the dispute is a matter of *ḥaqq al-nās* (private or interpersonal rights):

“In all cases in which the claim concerns *ḥaqq al-nās*, whether in criminal or civil (financial or non-financial) matters, as described in the preceding article, when the appearance of the principal witness is impossible or excessively difficult due to absence, illness, travel, imprisonment, and the like, testimony on the testimony of the principal witness shall be admissible.”

The Code of Criminal Procedure for Public and Revolutionary Courts in Criminal Matters of 1999 also refers to testimony on testimony in the Note to Article 59, although it does not specify its conditions:

“In cases where the confession of the accused, or the testimony of a witness, or testimony on the testimony of a witness constitutes the basis of the court’s judgment, hearing such evidence by the judge rendering the decision is obligatory.”

If we accept that, in cases where the criminal procedure code is silent, recourse must be had to the civil procedure code, then, up to the enactment of the Islamic Penal Code in 2013, testimony on testimony was accepted in Iranian law—in order to prevent the violation of individuals’ rights and in view of the fact that situations requiring testimony on testimony are not rare—albeit subject to certain conditions, including, among others, non-acceptance of testimony on testimony in matters of *ḥuqūq Allāh* (God’s rights) (29).

The Islamic Penal Code of 2013 addresses, in a more systematic and comprehensive manner than previous laws, the instances and limits of admissibility of testimony on testimony in criminal matters:

“Article 188 – Testimony on Shari‘a-based testimony (*shahādah ‘alā al-shahādah*) is valid where the principal witness has died or where his appearance is impossible due to absence, illness, and the like.

Note 1 – The witness to the testimony of the principal witness must possess the same conditions required of the principal witness.

Note 2 – Testimony on the testimony of a derivative witness is not valid.

Article 189 – Offenses punishable by *ḥadd* and *taʿzīr* shall not be proven by testimony on testimony; however, *qīṣāṣ*, *diyāh*, and financial liability (*ḍamān mālī*) may be proven thereby.”

As can be seen, testimony on testimony is not admissible under the new Code where the offense is of the *ḥadd* or *taʿzīr* type. Yet, from a jurisprudential standpoint, the rules of testimony on testimony differ in *ḥuqūq Allāh* and *ḥuqūq al-nās*. “In *ḥaqq Allāh* cases, the Lawgiver has instituted stringent conditions for proving claims and applies strictness to the evidence, seeking to prevent, as far as possible, the establishment of liability. In *ḥaqq al-nās*, by contrast, Islamic law seeks, as far as possible, to ensure that no right is lost” (26).

On this basis, testimony on testimony is accepted in *ḥaqq al-nās* matters, whether they concern punishment—such as *qīṣāṣ*—or other civil matters such as divorce and lineage. Acceptance of testimony on testimony in these cases has been attributed to the general wording of the evidentiary texts on the probative force of testimony and the consensus of jurists in this respect (26). As for the non-acceptance of testimony on testimony in *ḥudūd*, reliance is placed on the trustworthy report (*muwaththaqah*) of Ṭalḥah b. Zayd from Imam al-Ṣādiq (peace be upon him).

However, what can be inferred from the opinions of jurists is that, in the field of *taʿzīr*, this rule—namely, non-acceptance of testimony on testimony—applies only where the *taʿzīr* is of the *ḥaqq Allāh* type (30).

The question then arises: what is the criterion for distinguishing *ḥaqq Allāh* from *ḥaqq al-nās*? According to legal scholars, “*ḥaqq Allāh* refers to those rights in which one side is God Almighty and the other side is the members of society or a group of individuals—for example, the obligation to pay *zakāt* is a *ḥaqq Allāh* (in Islamic fiqh, *ḥaqq Allāh* corresponds to what modern Iranian legislation describes as public rights). *Ḥaqq al-nās* refers to rights recognized for individuals and communities and is used in contrast to *ḥaqq Allāh*” (12). Others have defined *ḥaqq Allāh* as “matters of a public character” and *ḥaqq al-nās* as matters “of a private character” (31).

From a jurisprudential perspective, however, public rights cannot simply be subsumed under *ḥaqq Allāh*: “Rights have been divided into two categories: (a) the right of the servant (*ḥaqq al-ʿabd*), which is that right that is extinguished when the rights-holder waives it, such as the right of *qīṣāṣ*; and (b) *ḥaqq Allāh*, which is that right that is not extinguished by the waiver of the servant, such as prayer, fasting, *jihād*, and pilgrimage” (32).

On this basis, the right to punish in governmental offenses is one of the manifestations of *ḥaqq al-nās*, because the state may, if it deems it expedient, waive that right.

Conclusion

Acceptance of the minimalist view regarding the applicability of the general title of *taʿzīr* to deterrent punishments—which, from a jurisprudential standpoint, fall under the heading of “governmental rulings”—is fully compatible with the broad foundations and adaptive capacities of Islamic criminal jurisprudence in accommodating changing temporal and spatial conditions. Although this view historically had little presence in Shiʿi jurisprudence—due to the traditional distance of this school from the concept of government—the explicit emphasis of the late Imam Khomeini on the necessity of establishing an Islamic government, together with the expansion of the doctrine of *maṣlaḥa* (public interest) during the last half-century, has paved the way for these discussions to enter Shiʿi fiqh. In Sunni jurisprudence, by contrast, governmental rulings and the concept of *maṣlaḥa*, as the principal basis of such rulings, have enjoyed more than a thousand years of doctrinal development. From the perspective of Sunni jurists,

ta'zīrāt fall generally under governmental rulings and are therefore contingent upon the exigencies of time and place. However, from the perspective of Shi'i jurisprudence, *ta'zīrāt* must be divided into Shari'a-based *ta'zīrāt* and governmental *ta'zīrāt*. Governmental *ta'zīrāt*, known in Iranian criminal law as deterrent punishments, were not treated as a subset of *ta'zīrāt* prior to the enactment of the Islamic Penal Code. Narrow interpretations and incorrect understandings of the *ta'zīr* system were largely responsible for this unjustified separation.

Nonetheless, with the enactment of the Islamic Penal Code of 2013, the *ta'zīr* system in Iranian criminal law—through expansion of its scope and inclusion of deterrent punishments—has achieved greater rationality and coherence. Therefore, and based on the policy of rapprochement of Islamic schools, which permits the borrowing of concepts from other Islamic jurisprudential traditions, as well as the establishment of an Islamic government in Iran, which provides for the issuance of rulings with Islamic characteristics, the distinction between Shari'a-based *ta'zīrāt* and deterrent punishments appears far less defensible. Accordingly, the overarching position of this study—consistent with the 2013 Code—is that deterrent punishments fall under the broader category of *ta'zīr*.

The new Code, in Articles 18, 115, and 135, employs three terms—*ta'zīr*, textually specified Shari'a-based *ta'zīrāt*, and Shari'a-determinate *ta'zīrāt*. Because the Code fails to specify the categories that fall under the latter two terms, serious criticisms arise. Aside from this deficiency, and despite earlier objections to the practice of fixing the type and extent of *ta'zīr* punishments, the Islamic *ta'zīr* system appears to possess sufficient structure and doctrinal capacity to encompass deterrent punishments under the sovereignty of the principle of legality of crime and punishment. The maxim *al-ta'zīr bimā yarāh al-ḥākim* in Islamic criminal jurisprudence primarily reflects the goals of Islamic law in individualizing and contextualizing punitive responses. Legislative specification of the types and levels of punitive measures, combined with the use of certain procedural mechanisms developed in Western legal systems, can be an appropriate and effective method for implementing these objectives.

The Islamic Penal Code of 2013, through recognizing deterrent punishments as a subset of *ta'zīr*, has taken a forward step; yet, by failing to distinguish these punishments clearly, it has also produced internal contradictions and inconsistencies in its foundational principles and criminalization framework. These inconsistencies become apparent upon examining Articles 10, 18, 69, 99, and 135 of Book One, as well as the non-repeal of Article 638 of Book Five and the unchanged title of that Book.

Article 10, following the view of the Guardian Council regarding the impossibility of applying the rule of non-retroactivity to Shari'a-based offenses, restricts its scope to violations of governmental regulations. The very act of restricting the temporal reach of the non-retroactivity rule indicates recognition of the distinction between deterrent punishments and Shari'a-based punishments, including Shari'a-based *ta'zīrāt*. Likewise, Article 99 refers to Article 10 in determining the effects of repeal of penal laws—reinforcing, through the immutable nature of Shari'a-based prohibitions, the non-applicability of Articles 10 and 99 to Shari'a-based punishments.

Article 18, by explicitly referring to both violations of governmental regulations and the commission of Shari'a-prohibited acts, affirms the foundational distinction between these two categories of punishments. This distinction is further reinforced by Article 69, which allows *ta'zīr* to be imposed as a substitute for imprisonment when no punishment is prescribed by law for a given offense. Article 135, through its use of the expression “Shari'a-determinate *ta'zīr*,” introduces the possibility that this term applies not only to textually specified *ta'zīrāt* but also to those Shari'a-based *ta'zīrāt* repeatedly emphasized in classical jurisprudence. Taken together, these indications point to a deliberate awareness by the legislator of the need to distinguish Shari'a-based *ta'zīrāt* from deterrent punishments.

The non-repeal of Article 638 of Book Five—one of the most controversial provisions of the Code—further demonstrates the legislator's adherence to the traditional distinction between Shari'a-based and governmental *ta'zīrāt*. Under this Article, "manifest commission of a prohibited act" is punishable. Such punishment is undoubtedly a Shari'a-based *ta'zīr*, because the commission of prohibited acts is, in Islamic jurisprudence, punishable through Shari'a-based *ta'zīr*, whereas governmental *ta'zīrāt* or deterrent punishments only apply to conduct lacking inherent Shari'a-based prohibition. Thus, retaining Article 638 strongly supports the view that the legislator consciously upheld the distinction between Shari'a-based *ta'zīrāt* and deterrent punishments.

Regarding testimony on testimony, the failure to distinguish between Shari'a-based *ta'zīrāt* involving divine rights (*ḥaqq-allāh*) and those involving private rights (*ḥaqq-al-nās*) has caused the law to diverge from the realities of Islamic criminal jurisprudence. In Islamic criminal law, testimony on testimony is admissible in offenses concerning private rights. For divine-right offenses, however, proof must be established through the strictest evidentiary standards—hence the exceptionally stringent conditions for establishing *ḥudūd*. In matters of private rights, Islamic law seeks to utilize all forms of evidence and even presumptions (*amārāt*) to secure justice between parties. Yet the new Code, in Article 189, excludes the use of testimony on testimony for all *ta'zīr* offenses, without regard to whether the offense pertains to private or divine rights. This provision disregards the inherent private-right nature of deterrent punishments and should have been drafted in a manner reflecting the distinction between deterrent punishments and Shari'a-based *ta'zīrāt* involving divine rights.

In conclusion, based on the findings of this study, it is possible to answer the question: What ultimately became of deterrent punishments in the 2013 Islamic Penal Code? The answer is that deterrent punishments remain fully in force. They constitute an enduring part of the historical development of Islamic and Iranian criminal jurisprudence. Expanding the conceptual scope of *ta'zīr* cannot eliminate their distinct nature. Despite the legislature's attempt to remove distinguishing features, the foundational differences between deterrent punishments and classical Shari'a-based *ta'zīrāt* are still observable within the 2013 Code. The Code—fully aware of these distinctions—remains a mirror of the longstanding tension between Shari'a-based and governmental criminal norms. That is, attempts by the legislature to disregard all differences between deterrent punishments and Shari'a-based *ta'zīrāt* have, in several provisions and institutions, been limited by the Guardian Council's commitment to preserving traditional jurisprudence.

Ultimately, the conclusion is this: there is indeed a difference between *ta'zīr* punishments and deterrent punishments. First, because the legislator has explicitly drawn such a distinction; second, because the statute of limitations applies only to deterrent punishments and security and corrective measures, as reflected in the judicial precedents previously discussed.

To distinguish deterrent from *ta'zīr* punishments, one must examine the underlying act that triggered the punitive response—without initially considering the form of reaction. If the conduct is mentioned in the Shari'a, then, regardless of whether the punishment is specified, Shari'a-based *ta'zīr* applies. If the conduct has no mention in the Shari'a but has been criminalized by the Islamic government for the public welfare, then deterrent punishment applies. Therefore, throughout the Islamic Penal Code, identifying whether a punishment is *ta'zīr* or deterrent depends on the nature of the act that renders the offender deserving of punishment.

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All authors equally contributed to this study.

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Transparency of Data

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