



Ta'zīrāt and Banā' al-'Uqalā' in Penal Jurisprudence and Criminal Law

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ABSTRACT

The element of banā' al-'uqalā' (the established practice of rational people) in jurisprudence and penal law is a source that has consistently drawn the attention of scholars and is considered a cornerstone of reasoning in penal matters. Islamic punishments—namely ḥudūd (fixed penalties), qiṣās (retribution), and ta'zīrāt (discretionary punishments)—although practiced in various forms before Islam and during the era of the Prophet (s) and the Imams ('a), were generally prevalent among the rational people of the world. Islam, while systematizing these existing punishments, affirmed and endorsed them. It is evident that without such prevalence and common practice, the concept of an endorsed ruling (ḥukm imdā'ī) would not exist. The purpose of this study is to articulate the role of banā' al-'uqalā' in the domain of ta'zīrāt as an effective and clear proof, thereby clarifying its status and active role as a source within penal jurisprudence and criminal law. To elucidate this topic, a library-based methodology involving the review and comparison of reliable documents will be employed. A significant finding of this research is that the penal chapters of Islam not only do not conflict with the sīrat al-'uqalā' (the conduct of rational people) but are also in complete harmony with the principles accepted by rational people globally. Consequently, this research affirms the principle of the individualization and personal nature of punishment, a concept prevalent among rational people. It also serves to refute misconceptions regarding Islamic penal regulations—such as allegations of violence, conflict with human dignity, and incompatibility with modern times—which primarily stem from a lack of understanding of the philosophy behind Islamic penal rulings. The article will first describe and explain the relevant topics based on jurisprudential and legal sources, followed by a critique and analysis of existing views, while also examining legislative documents.

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Introduction

The principle of "*banā' al-ʿuqalā'*"—defined as the established, continuous practice and normative consensus of rational people, based on their practical conduct and innate rational dispositions (*irtekāzāt*)—holds a significant position in Islamic legal reasoning, particularly in the domain of criminal law. While Islamic penalties are categorized as *ḥudūd* (fixed punishments), *qīṣās* (retaliation), and *taʿzīrāt* (discretionary punishments), their foundational concepts were largely prevalent among rational societies globally before the advent of Islam. The Islamic legal system regulated and formally endorsed (*imzā'*) these pre-existing norms, and without such widespread rational acceptance, the notion of an "emulatory ruling" (*ḥukm imzā'ī*) would be meaningless.

This research aims first to elucidate the effective and clear role of *banā' al-ʿuqalā'* as a valid source (*dalīl*) for the establishment of *taʿzīr*. "*Taʿzīr*" refers to disciplinary penalties administered either to non-offenders for corrective purposes or as punishment for offenses for which no fixed penalty (*ḥadd*) has been prescribed by the Sharīʿah. Juristically, it is a punishment whose type and measure are generally not specified in the sacred texts and is primarily applied for prohibited acts that do not constitute capital crimes. The second objective is to demonstrate the active status of *banā' al-ʿuqalā'* as a de facto fifth source for the derivation of rulings in Islamic penal jurisprudence and criminal law. This study seeks to answer how *banā' al-ʿuqalā'* can serve as a foundation for the legitimacy and specification of *taʿzīr* punishments and examines whether a conflict exists between these penalties and the universally accepted principles of rational justice.

Methodology

This study employs an **analytical-descriptive research methodology**. Data collection was conducted through a library-based approach, referencing authoritative primary and secondary sources in the fields of Imāmī jurisprudence (*fiqh*), Islamic legal theory (*uṣūl al-fiqh*), Islamic criminal law, and comparative law. The research corpus includes demonstrative jurisprudential texts (*kutub fiqhiyya istidlāliyya*), narrative sources (*kutub riwāʿiyya*), statutory laws (e.g., the Islamic Penal Code of Iran), the perspectives of legal scholars, and academic articles. Following the description and explanation of the theoretical foundations and historical background, the study proceeds to a critical analysis of existing viewpoints and legal arguments. Furthermore, a review of domestic legislative documents was undertaken to align theoretical discussions with current legal applications, thereby ensuring the research possesses both theoretical depth and practical relevance.

Findings

The most significant findings of this research can be summarized as follows:

Rational Congruence: The chapters on *ta'zīr* punishments in Islamic law do not conflict with the practice of rational agents (*sīrat al-'uqalā'*). On the contrary, they are highly congruent with the principles accepted by rational people worldwide, of whom modern criminologists and legal experts are a prime example. This harmony demonstrates the inextricable link between Islamic jurisprudence and rationality in the penal sphere.

Emulatory Legitimacy and the Role of *Banā' al-'Uqalā'*: The legitimacy of many *ta'zīr* penalties is derived from their emulatory (*imzā'ī*) character, which is predicated on their pre-existing acceptance and practice among nations (*banā' al-'uqalā'*). As a living and dynamic source, this principle endows Islamic criminal jurisprudence with the capacity to respond to the evolving needs of society.

Individualization of Punishments: The primary objectives of *ta'zīr* are the reformation and rehabilitation of the offender and the deterrence of others, which perfectly aligns with the etymological meaning of the term (to restrain, prevent, or assist in reform). This rehabilitative focus positions Islam as a pioneer of the theory of the "**individualization of punishments**," now a cornerstone of modern criminology and criminal law. The contemporary practice of creating a "**personality file**" to understand an offender's physical, psychological, social, and cultural background is fully consistent with the governing spirit of *ta'zīr* and the discretion granted to the Muslim judge (*qāḍī*) to consider the individual circumstances of the offender and the offense.

Refutation of Judicial Arbitrariness: The authority granted to a judge in determining the type and extent of *ta'zīr*, encapsulated in the legal maxim "*al-ta'zīr bi-mā yarāhu al-hākim*" (Ta'zir is what the judge deems appropriate), does not imply arbitrary or capricious action. This discretion is strictly circumscribed by the principles of Sharī'ah, justice, public interest (*maṣlahah*), and the specific conditions of the offender and the offense. Therefore, the objection raised by some Western authors regarding the alleged arbitrariness of *ta'zīr* stems from an incomplete understanding of Islamic criminal policy and the rigorous regulations governing its judiciary.

Conclusion

The results of this research indicate that *banā' al-'uqalā'*, as a valid source for legal deduction, plays a vital role in the legitimization, justification, and determination of *ta'zīr* punishments. This study demonstrates that Islamic criminal jurisprudence, particularly in the domain of *ta'zīr*, is a reason-centric legal tradition consistent with the normative standards of rational agents worldwide. Accordingly, an examination of penal matters solely from the perspective of religious texts (*nuṣūṣ*—i.e., the Qur'ān, Prophetic traditions,

and consensus) is insufficient. A rationalist framework grounded in the *sīrat al-‘uqalā’* must be employed to supplement and complete the understanding of these texts.

Such an integrated approach allows Islamic penal jurisprudence not only to remain flexible in the face of societal change but also, while preserving its immutable principles, to be the most responsive system for addressing the criminal justice challenges of the contemporary era. It is recommended that the judicial system further institutionalizes the principle of the individualization of *ta‘zīr* punishments by systematically incorporating offender "personality files," a practice deeply rooted in both Islamic legal texts and the foundational principle of *banā’ al-‘uqalā’*.

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