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An Analytical-Critical Investigation of Differences Between Had and Ta'zir

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According to the basic rules of Islamic criminal law, punishments are classified in to "had" (prescribed punishment fixed in law) and ta'zir (discretionary punishment left to the decision of the judge). In traditional view, it is believed that in addition to the fact that these two types of punishments are stemming from two different types of crimes, the characteristics and precepts of these two kinds of punishments are very different. The recurrence of the differences between "had" and "ta'zir" in jurisprudential books through out the centuries has made these differences determined and fixed and increased problematically and unjustifiably the gap between "had" and "ta'zir". This article reviews this classification and differences between "had" and "ta'zir" as recognized in traditional jurisprudential view. According to the findings of the article, the historical analysis of the origins of these differences may lead us to a new understanding of these differences. The differences mentioned in the orthodox view are often related to the characteristics and rules of all kinds of punishments. A literal and limited approach to religious texts related to the issue and a particular understanding of the word "had" has yielded to the idea that these rules are specific to "had". According to this article, these rational principles have been recognized more or less in almost all rational criminal law systems and therefore, it is not justified to be considered as special characteristics and principles of "had".

Keywords: had, ta'zir, Islamic jurisprudence, Islamic criminal law

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