The perspective of Imami jurisprudence regarding the legitimacy of criminalization and punishment of Islamic crimes and punishments

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Abstract

The right to health is one of the fundamental human rights, and the origin of the obligations of private individuals and governments lies in the domestic and international legal systems of human rights. Taking advantage of the right to health and public health helps to improve the level of health in the society. The description of the patient's awareness in expressing consent to medical interventions includes awareness of several elements: the nature of the medical decision, alternative treatment methods to the intervention method in progress, the risks and benefits of the proposed treatment, and the possible side effects of each treatment method.

The way of legislation and regulation in the implementation of the principle of speed and dignity of the patient, in order to intervene in the crisis of the tense behavior of mental patients, is part of a set of challenges in the field of consent and innocence, which in terms of the evolution of the foundations of the civil and criminal responsibility of the doctor in the rights of some Other countries, by the method of theoretical analysis in Iranian jurisprudence and criminal law, have been discussed in this article, and suggestions have been made for reforming the criminal policy governing the "Executive Code of Keeping and Treating the Insane" (enacted in 2018) and related articles in some criminal laws. The content and form of Iran is presented.

Keywords: medical rights, consent, acquittal, emergency interventions, treatment of mental patients

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Introduction

The need for legitimacy in criminalization and sentencing has been given special attention in Islamic law. It is necessary to understand this "special concept". Otherwise, we will either deny the principles of legality from the side of Islamic law, or we will consider this system to be completely in accordance with the codified law system (Roman-Germanic). It is carefully ascertained in Islamic sources, Islamic law has definitely accepted the necessity of legitimacy in criminalization and punishment.

Legitimacy here means having the rightness and legal validity. In this sense, as long as a behavior is not prohibited by a valid legal rule and a punishment is not determined for it, the criminal prosecution and the punishment of its perpetrator do not have legitimacy and legal validity. Imami jurisprudence has accepted the necessity of legitimacy in crime and punishment. It is obvious that the example of legitimacy in the perspective of Imami jurisprudence is different from contemporary legal systems such as common law and Roman Germanic law. Because the reliable sources of crime are different. But the concept of legitimacy, which means the necessity of valid legal rules, has been accepted in all modern and advanced legal systems.

The concern of Islamic law regarding crime is stronger than punishment. From the point of view of Islamic law (Imami jurisprudence), it is necessary to have a fair and just trial, legitimacy in crime and punishment. In order to examine the issue carefully, we will discuss how the principles of legality of crimes and punishments are governed in the Islamic law system (Imamiyah).

In Islamic jurisprudence (Imamiyah), crimes are divided according to the punishments, the types of punishments are; Hudud, retribution, diat, punishment.

1- ***Hodud***: The most obvious form of legitimacy in criminalization and sentencing in the scope of Islamic criminal law is related to limits. In defining the limit, the jurists have addressed the feature of determining the punishment by the Shariah, which takes place following the criminalization of the act; "The special punishment related to the punishment of the body of the obligated person due to the sin of the particular sin of the same street is limited to all people." (Al-Tanqih al-Mawhafih Lam Khutsar al-Sharia / 4/327) and (Masalak al-Afham to Tanfih al-Islam / 14/325) and (Riyaz al-Masal fi research of al-ahkam with evidence / 15433) and (Al-Dar al-Mandud fi hakam al-hudood / 18/1)

At first glance, the need for legitimacy in criminalization seems certain and unexceptional. But the opinions of experts are different in this regard. These ideas can be divided into three categories. First, the idea of absolute sovereignty: for this reason, the need for legitimacy in criminalization and sentencing is more precise than other legal systems today. (Al-Tashree al-Jana'i/1/118 and 121) A number of jurists have considered and believe that the reason for this definiteness of crime and punishments is the word of God in the Qur'an; For this reason, the title of criminality and punishments are within the immutable "limits" and the rights of God. (Wiechman, "Islamic Law"/4)

There are flaws in this analysis. Including the fact that the punishment for all Hudud crimes is not determined in the Qur'an. On the other hand, all Hudud crimes are not against the rights of Allah. The limit of ejaculation has the right to privacy and the right to steal has a special feature.

Second, the idea of relative sovereignty: for this reason; The necessity of legitimacy in criminalization and sentencing in terms of limits is equivalent to the principle of legality in the Roman-Germanic system (modern law) and its followers. (International Criminal Law/1/82). another group; They consider the penal system of Islam to be fundamentally different from the common law system and the written law (Roman-Germanic) and since the crimes of Hudud are defined in the Qur'an and the act and the punishment

are defined in advance, they consider the observance of legitimacy by the Qur'an to be drawn in a way.

It seems that none of the three expressed opinions have sufficient accuracy in terms of explaining the case. In order to explain how and the extent of the necessity of the legitimacy of criminalization and punishment in the circle of limits, it is important to examine the issues related to "limits of fighting and limits of qazf".

1-1- The principles of legitimacy in the limit of war

The criminalization and determination of the punishment for fighting has been done in verses 33 and 34 of Surah Ma'idah. God has considered fighting against God and the Messenger, which means disrupting public security, (Al-Mizan/5/326) as a crime and has determined the punishment of death, crucifixion, amputation, and exile. It has been said about the dignity of the revelation of these verses; Some people from the Bani Dhabiya tribe came to the service of the Holy Prophet (PBUH) in a state of illness. The Prophet (pbuh) sent them to a place outside Madinah to give charity from the milk of camels. When they recovered, they killed some of the camel shepherds and ran away. The Messenger of God (pbuh) sent Ali (pbuh) to chase them. The perpetrators were arrested and brought to the service of the Prophet (PBUH). Then verse 33 of Surah Ma'idah was revealed. (Al-Kafi/7/245) Various sayings have been quoted regarding the way of punishing the perpetrators by the Prophet (PBUH), including that the Prophet (PBUH) cut off the hands and feet of the perpetrators. He also took them out of the bowl. Or the one who killed them and hanged them and cut off their hands and feet and gouged out their eyes. Or he only put out their eyes because they had put out the eyes of the shepherds. There is no mention of taking out the eye in the traditions that have been transmitted from the Shiite imams. (Al-Mizan/5/322) It appears from the narration of Imam Sadiq (a.s.) that "after the arrest of the perpetrators", the verse of Muharibeh was revealed. In this way, we must accept that the divine law has not "criminalized" the case in advance, and the "punishment" has also

been determined after the act has been committed. Therefore, "at first glance" due to the lack of text on the criminal title and the lack of determining the punishment during the commission of the crime, it can be said; None of the two principles of legality in the written (codified) legal system have been observed. Some Muslim researchers have concluded according to the cases of Muharribeh Wafak; Although the basic rule in Islam is that the punishment is determined and enforced based on the valid law at the time of committing the act, but this rule has two exceptions. One is about "dangerous crimes that threaten public peace and order". Based on this point of view, Aya Sharifah was retroactively retroactive due to a serious threat to public order and out of necessity. (Encyclopaedia of Islamic Law, Criminal Law/8/328)

But it seems that the more correct analysis is that due to the concern of the Islamic legal system in the application of legitimacy, the case of Moharebeh cannot be considered as not accepting the principle of legitimacy in the Islamic legal system. Because: the 23-year period of the prophethood of the Prophet (PBUH) should be considered as the "primary legislative period of Islamic law". The methods, tactics and techniques of the Quranic legislation are worthy of attention from many aspects. Gradual legislation, dynamism in legislation, temporary legislation, permanent legislation, waiting for people to legislate, legislating about things that have happened, annulment of the decree, summaries of the decree, explanation of the decree, strengthening of the decree, use of artistic, literary and psychological abilities in the matter of legislation. Among the methods, tactics and techniques of legislation is in the Qur'an. The main core of Islamic law, i.e. the Book and the Sunnah, during the 23-year period of the prophethood of the Prophet (PBUH) provided the evolutionary process of legislation. As a result, the judgment regarding the Qur'an should be made as a whole and after the end of the revelation period. Therefore, if in a case during the prophethood, there was no obligation for a period of time or it was accompanied by summary, then the obligation has been entered and

explained, the temporary state should not be used as the basis of judgment. has been done Because the certainty of what the perpetrators did was to kill the shepherds. Murder as a "natural crime", its criminality as a "customary rule" has been established among all societies. In cases where the committed act is an inherent crime and the principle of its prohibition is established as a customary rule, there should be no fundamental objection to criminalization in terms of compliance with legitimacy. It is deduced from Islamic sources that the perpetrator's brief knowledge is enough to be punished. It is not necessary for the perpetrator to know exactly the type and amount of punishment, but paying attention to the issue and the possibility of giving respect and prohibition makes the person eligible for criminal responsibility. (Tafsir Maraghi/15/25) The acceptance of this point of view in international criminal law in the 40s of the 20th century is well evident. Even today, if we take a look at the set of criminal laws of countries. They do not define natural crimes. Rather, they only deal with its constituent elements.

Regarding the legitimacy of punishment, it should be said that the punishment of murder was known based on Quranic texts before the case of Mohareba. (Tahreer al-Wasila/2/456) and (Ma'ah al-Fiqhiyyah/307) some verses about retribution for the deposit were revealed some time before the regulatory agreement between the Ansar and the Muhajiran in the first year of Hijrah. (Edwar Fiqh/119) As a result, the punishment of the perpetrators in the Moharebeh case did not conflict with the content of the principle of legality of the punishment.

Another point is that if we believe in the theory of the choice of the judge in the punishment of war. In this case, one of the differences between the limits and punishments, which is the lack of authority of the judge and the determination of the punishment in the limits, is faced with an exception. (Al-Qawam al-Fawad/2/685) In order to comply with the legitimacy of punishment, it is preferable to accept the theory of non-choice of the judge from this point of view and from the point of view of justice in punishment.

2-1-Principles of legitimacy in the limit of ghazf

Verses 11 and 12 of Surah Noor are related to Afek's theorem. In Surah Noor, verse 4, God has criminalized Rami Mohsanat (Qazf Afifah) and prescribes the main punishment of 80 lashes and the secondary punishment of permanent non-acceptance of the certificate.

The narrative of Shia and Sunnis is different from Afek case. According to the Shia tradition; The Afek verse was revealed in honor of Mariya Koptiyeh, whom Ayesha gave unfair credit to. It is narrated from Imam Sadiq (a.s.) that when Ibrahim, the son of the Messenger of God (p.a.) passed away, the Prophet (p.a.) was deeply saddened, Ayesha said; Why are you sad, he was not your child but Jarih's child. The Prophet (pbuh) sent Hazrat Ali (pbuh) to kill the wounded man. Jarih was a Coptic man and lived in Medina. Imam Ali (a.s.) entered Jareeh, because he saw Imam angry, he ran into the garden and climbed a tree and threw himself from the tree as a result of being chased. As a result, her nakedness was exposed. It was found that it lacks male and female genitals. Ali (a.s.) returned to the Messenger of God and offered, when you give me an order, should I be like a hot skewer inside the crack or should I proceed with caution? The Prophet said: Of course, you should be careful. Ali (a.s.) said: The wounded are neither men nor women. The Prophet (PBUH) said: Thanks be to God for removing this evil from us Ahl al-Bayt. (Al-Mizan/15/89) and (Tafsir Noor al-Saqlain/3/581)

Allameh Tabataba'i introduces two problems to the Shia narrative; One is that the verse of Afek indicates that a group spread the issue against the Messenger of God. While this narration only talks about Aisha. Secondly, this narration is related to the implementation of Hadi on Ayesha, while Hadi was not implemented on Ayesha. Except that it should be said that the verse of Hadd Qazf (verse 4 of Surah Noor) was revealed some time later (Al-Mizan/15/90) and for this reason it was not retroactive.

Sunni commentators believe that the Afak verses and the Hadd Qazf verse were revealed in honor of Ayesha, the wife of the Prophet (PBUH).

(Tafseer Rahnama/3/67) and (Jawama Al-Jamae/3/97) and (Rooz al-Jinnan and Ruh al-Jinnan in Tafsir al-Qur'an/14/195) and (Hajja al-Tafseer wa Balagh al-Aksir/8/5)

What is common in both narratives is that "punishments" were implemented some time later. Allameh Tabatabai believes that the reason for the delay in the implementation of Hadd by the Prophet (PBUH) is: We must say that the verses of Afq were revealed before the verse of Ghazf, and with the revelation of the verse of Afq, nothing has been legislated except for the acquittal of the Ghazf in the absence of witnesses and other than the sanctity of this act, that is, the limit of Ghazf has not been legislated in this verse. Because if the hadd of Qadzif had been legislated before Afek's story, there would have been no permission to delay the limit and wait for revelation from the Prophet (PBUH). If the verse of Afek was legislated, it should have been mentioned and at least the verses of Afek would have been connected to the verses of Qazf. While the verse "An al-Zin Jau Balafak" has no connection with its predecessor. (Al-Mizan/15/90) Therefore, it should be said that the verse of Qazf was revealed "after" the matter of Afq, and the reason why the Messenger of God (pbuh) stopped was that the verdict of this issue and similar cases had not been revealed in Islam, and the Prophet (pbuh) was waiting for the heavenly verdict. (Al-Mizan/15/90) and (Sab al-Nuzul/138)

According to the Sunni version of the Afek case, it should be accepted that the punishment of ghazf regarding the Afek case has been retroactive and the principle of legality of the punishment has been violated. This is clearly accepted in Sunni legal and jurisprudential sources. (Principles of Islamic penal system/195)

Of course, on the assumption of accepting this point of view, it should be said that retroversion has been done according to God's explicit order and only in one special and exceptional case. Something that exists in the legal systems of the world in our time. In revolutions, a wide range of criminal laws are usually retroactive. This also happened in the French Revolution

of 1789 AD. and in the Islamic Revolution of Iran in 1357 A.H. It has a history. From all the narrations about Afek, the hypocrites used to carry out their criminal activity in a wide and continuous manner. That is, it was not the case that they spoke about Afek and then remained silent or repented. Rather, their movement continued until the revelation of the Qazf verse. On the other hand, defamation and defamation are natural crimes. However, the verses of Afek established the crime of gazf, then the verse of gazf, determined its punishment. Therefore, there is no room for controversy regarding the legitimacy of criminalization.

According to the Shia version of the Afak case, considering that on the one hand the act committed before the revelation of the Qazf verse was criminalized, on the other hand, after the revelation of the Qazf verse, the prescribed punishment was not applied to the perpetrator of the act, but it became a basis for atiyah. Therefore, it must be said that the non-implementation of the qadzf limit on Ayesha - none of the Shia narrations state the implementation of the qadzf limit on Ayesha - indicates the Prophet's (pbuh) serious effort to observe legitimacy in punishment. In such a way that even in the case where the principle of the act has already been criminalized, but the Shariah has not determined a punishment for the act, even though there is a later law since the time of the crime, they have not retroactively applied the punishment. Based on this, Afek's case is not only a challenge or at least an exception to the necessity of legitimacy in criminalization and sentencing in the Islamic criminal law system, but also as a document and justification basis for the serious and accurate concern of the prophetic tradition to observe the principle of legitimacy in Punishment is considered.

2- Ta'zirat

Regarding the need for the legitimacy of criminalization and punishment in the Islamic criminal law system, the main challenge is towards punishment. Because the fundamental characteristic of tazeer is "lack of appreciation". (Al-Hudud (Details of Shari'ah in Sharah Tahrir al-

Wasila)/7) Punishments are divided into two categories: Sharia punishments and governmental punishments.

1-2-Sharia sanctions (Ta'zirat)

In the scope of Shariah punishments, criminalization has already been done by the Shariah. Contrary to the opinions of some jurists, sanctity is not equivalent to being a crime. Rather, according to the general rule of law, it is a crime that carries both the legal prohibition (Sharia) and the punishment. Qur'anic texts, narrations and the consensus of Shia jurists do not imply the legitimacy of Ta'zir over the absolute prohibition of a forbidden act. (Jawahir al-Kalam/41/448) and (Tahrir al-Wosilah/2/477) and (Hosseini, "The relationship between the Shariah concept of sin and the legal concept of crime and the ratio of sanction and punishment"/647)

1-1-2-The principle of the legitimacy of the crime

In the view of Imamiyyah jurisprudence, the legitimacy of criminalization regarding Sharia punishments is not challenged. Of course, from the point of view of Sunnis and considering the acceptance of analogies, there is this challenge regarding the legitimacy of criminalization. While accepting this, the Sunni jurists have tried to find a suitable justification for it. Among others, they have said in the position of explanation; Sharia has given more development in taziri crimes. Because the public interest and the nature of Ta'zeer require this. Sometimes this development is based on crime. In some crimes that are characterized by certain characteristics, it is permissible not to specify the crime in such a way as to define it well. Rather, this amount is sufficient if it is specified with a general title.

Some have mentioned the lightness of the punishments, the tolerance of the Sharia on the observance of the principle of legitimacy in the crime. (Al-Tashri al-Jana'i/1/126) The baselessness of this argument is clear. Because the legitimacy of criminalization is considered as a basic rule of criminal law and includes all crimes. Also, sometimes the punishment of taziri is more severe than the punishment of hadd. Behnsi acknowledges the possibility of the judge citing analogies. (Al-Jaraim fi Fiqh al-Islami/246

and 247) The effect of analogy in punishment is so great that Sharif Basiuni believes that the same role that the Qur'an plays in the criminalization of limits, analogy plays in the criminalization of punishment crimes. In Besiyuni's view, the judge can find the punishable offense by analogy or by relying on the general principles of Sharia. Hence, he considers the use of legitimacy in penal crimes to be equivalent to the common law legal system. (International Criminal Law/1/82, 83)

Based on the view of Imamiyyah regarding the criminalization of punishment crimes, due to the monopoly of this matter in the primary sources of Islamic law, including the book and tradition, the legitimacy of criminalization has been taken care of and observed. However, according to the opinion of the Sunnis, due to the acceptance of the criminal analogy, it should be accepted that compliance with the legality of the crime is violated in the punishment crimes.

2-1-2-The principle of legitimacy of punishment

The basic issue regarding punishment is the legitimacy of punishment. In Taazi crimes, the judge has a wide discretion in determining the type of punishment and its amount. The severity of the punishment is chosen according to the situation of the crime and the criminal. In principle, the judge has the power to decide whether to implement it or not. (Al-Tashri al-Jana'i/1/127).

The existence of these characteristics has caused some jurists to place the Islamic penal system at a lower level than the common law system regarding the necessity of legitimacy in punishment. According to this view, the judge in Islamic law, unlike the common law system, is not even required to follow previous procedures and previous decisions. There is no mandatory rule that limits the judge. Rather, the judge is widely free to determine the form of any punishment he deems suitable for the criminal. The only guiding principle for a judge in Islamic Sharia in the field of punishment is that he must be accountable to God. (Wiechman, "Islamic Law"/4)

There is no doubt in the existence of the judge's power in punishing tazir, the reasons for this, the necessity of the nature and nature of tazir, the public interest and the treatment of the criminal have been stated. In this way, while keeping the affairs in order, to make the punishment proportional to the merit of the perpetrator. (Al-Tashri al-Jana'i/1/120 and 155).

It seems that the Islamic Shari'a has defined a series of guidelines for the judge in determining the punishment. Including the fact that Ta'zir Shariah is awarded only on crimes that have prescribed titles. Therefore, criminalization is the responsibility of the Shariah, and the judge has no discretion in criminalization. Being haram, rather being extremely haram, is a condition for performing ta'zeer. (Jawahar al-Kalam/41/448) In terms of the amount and severity of the punishment, the maximum limit of the punishment has been determined and the judge has no right to exceed it. This matter is stated under the title of the rule of "Ta'azir without limits" in jurisprudential sources. (Jawahar al-Kalam/41/448).

But the most important rule governing punishments, which forms its main structure and at the same time is considered the most important challenge regarding the legitimacy of punishment, is: The rule of "Al-Tazir Bama Yarah Al-Wali" (Al-Imam). (Javaheral Kalam/41/445). If the governor or imam is considered the same judge; The judge can choose one of the multitude of social reactions, repressive or otherwise, and impose it on the criminal. This wide authority of the judge seriously challenges the necessity of observing legitimacy in the punishment. The essence of legitimacy in punishment is binding and limiting and clarifying the authority and performance of the criminal judge. The main audience, the legality of the punishment, is the judge. According to the legal system, the judge can apply any punishment to the criminal in a very wide range, even though this is expressed in the form of a law, it does not imply compliance with the legitimacy of the punishment. Rather, it is in conflict with the spirit and essence of legitimacy and the principle of legality of punishment. The essence of the principle of legality of the punishment is that the law and not

the judge determines the punishment of the crime. The criminal must know what kind of punishment such as; Life-threatening or freedom-limiting or financial punishment is waiting for him. If the punishment is deprivation of liberty, how long is its duration, although roughly? If it is decided otherwise and the legislator's duties are assigned to the judge, instead of respecting the legitimacy of the punishment, the rule of the judicial principle of the punishment should be mentioned. It should be accepted that the legal system of Islam, in its traditional and completely Shariah sense, has not accepted the principle of legality of punishment, in the modern sense, regarding punishments.

However, some late jurists (rules of jurisprudence/4/236) have made the rule of Ta'azir Bama Yarah Al-Wali (O Imam) exclusive to the person of the manager of the Islamic society and the government in order to create peace between legal systems, and this interpretation is with the state of judgment in our current society. (Iran) is also suitable. But the fact is that in traditional Islamic jurisprudence, every general judge has this authority, and the issue of imitating mujtahid is prohibited. (Shari'i al-Islam Fi al-Halal and Haraam/4/59) and (Isbah Shia Bam Masbah al-Shari'a/525) and (Al-Jamae Lal-Shari'a/521) and (Tahrir al-Ihakam Al-Shari'a Ali Madhhab Al-Umamiya/2/179) and (Effects of Benefits in the Description of Problems of Al-Qa'zae/ 4/294) and (Tanqeeh al-Mawhafir of the Khutsar al-Shari'a/4/230)

Basically, one of the fundamental differences between ta'zeer and hadd is that ta'zeer is not limited to a certain amount, but in terms of abundance, it should not reach the amount of hadd. (Al-Qawam and Al-Fawad/2/683).

2-2-Governmental penalties

Regarding government punishments, the basic challenge is the legitimacy of criminalization. In other words, how does a permissible act in the primary sources of Sharia find the ability to be criminalized?

Shia jurists believe that the Islamic government has the right that, in addition to the crimes and punishments prescribed in the Sharia, if

something causes harm to the Muslim community despite not having the title of sanctity, it can be criminalized. The punishment for this category of crimes is called government punishment. Other titles such as Soltanieh rulings and deterrent punishment are also used. Establishing order and discipline in the society and preventing chaos and encroachment on the rights of others is one of the duties of the Islamic government. The necessity of this is the prohibition of actions contrary to this goal and the determination of punishment for them. (Al-Qa'am al-Fiqh/221)

Shaykh Mufid in Al-Maqna, Harassment of Muslims (Al-Maqna, 795). Ibn Zahra in the Ghaniyah of the ugly act and the violation of an obligation for which no limit has been set by the Shariah, (Al-Jawama' al-Fiqhiyyah/624) Ibn Idris also in the al-Sara'er of disturbing the obligatory and everything that annoys and disturbs the Muslims, (Al-Sara'r al-Hawi for Tahrir al-Fatawi/3 /530 and 535) are considered to be criminalized by the Islamic government.

The contemporary jurist Sheikh Lutfullah Safi says in the Book of Al-Tazir; According to the Qur'anic verses, hadiths and narrations, the life of the Prophet (PBUH) and the Commander of the Faithful (PBUH) and the fatwas of the great jurists, it can be definitely accepted that the Islamic ruler has the right to criminalize actions that cause people's suffering, disruption of the system, abuse of dignity, corruption of affairs, Disruption of public security and people's trust in each other, and in general, acts that are dealt with under the authority of the ruler, and in cases that are expected to be dealt with by the guardian in case of violation of Sharia. But in cases where the permissibility of ta'zeer is not certain and is doubtful, it considers the principle of non-permissibility of criminalization. (Al-Tazeer/139) Therefore, the Islamic government has no right to criminalize as it wants. Rather, in determining crime and punishment, it is bound by the spirit of Sharia and its general rules.

The expanded view, on the other hand, places the principle on the comprehensiveness of the Islamic government. Therefore, the government

has precedence over all Sharia laws and its powers are beyond the framework of Islamic and absolute laws. So that the actions that are permissible and halal according to the basic rules. Such as the entry and exit of currency, goods, prohibition of hoarding in other cases, customs, taxes, high street sales, narcotics, arms carrying, environment, traffic. The basic criterion in this matter is the interests of the country and Islam.

In this view, even the violation of some rules and principles, for the sake of protecting the safety of the society and protecting the social system from dangerous persons, causes the adoption of any method. This point of view is based on the common rules of the Shari'ah, according to which specific harm is tolerated in order to prevent severe general harm. (Al-Tashri al-Jana'i/1/159)

It can be seen that the first point of view, if it is done with the previous announcement of criminalization, it does not face a serious challenge in terms of compliance with the legitimacy of criminalization and punishment. But according to the second point of view, the Islamic government is not required to follow the principles and rules regarding criminalization in necessary cases. Rather, by citing expediency and ensuring security, it can criminalize.

Regarding the comparison of the level of sovereignty and the necessity of legitimacy in criminalization and sentencing, sometimes some interpreters and defenders of Islamic criminal law have evaluated the principles of legality in government punishments as compared to Sharia punishments. (Al-Tashri al-Jana'i/1/160 and 120) while if the limited view is accepted, the opposite is established. This is to explain that government punishment does not face any problem in terms of legitimacy in terms of criminalization as long as it is not retroactive. Of course, if a person is suddenly punished for a permissible act or state without prior criminalization and public announcement, such as the case of Nasr bin Hajjaj, (Al-Aqooba/131). Undoubtedly, the principles of legality are violated. In government punishments, in terms of compliance with the legitimacy of the

punishment, if the Islamic government or guardian determines the minimum and maximum limits for the punishment, it will not be challenged. In terms of comparison between Sharia punishments and government punishments, it can be said that the latter type is more consistent with the principles of legality of crime and punishment. Because, on the one hand, the criminal title and on the other hand, the amount and type of punishment, even if it is minimum-maximum, are determined in advance by the government and are communicated to the people. The judge also has the power to choose within a certain range.

Professor Hisham Ramadan, one of the Muslim jurists, considers "knowledge of prohibition" to be a necessary condition for punishment. (The principle of Legality in International and Comparative Criminal Law/52)

Here, the observance of the rule of "obligation to declare the ignorant fima yaati" is of fundamental importance. According to the rule of "obligation to declare", when someone gives a dangerous matter to another, it is obligatory to declare the danger to the ignorant recipient. This rule is especially related to the place where the dominant usufruct is prohibited. In such a way that the party usually has knowledge that the addressee will be in haram if he does not announce it. Sheikh Ansari does not consider this rule specific to exchanges. Various narrations indicating the sanctity of misleading the ignorant about the ruling and subject matter of prohibitions confirm this rule. (Ma'e al-Faqhiyyah/299). When an action is criminalized by the legislator, since this action involves punishment, it is dangerous for the audience, that is, the general public. On the one hand, before the announcement, people are not aware of the intention and performance of the legislator. Since crime is related to social affairs, people deal with those behaviors as they may engage in them. As a result, based on the rule of mandatory declaration and other rules and principles, knowledge of the prohibition is a necessary condition of punishment and the requirements of the principle of legality of punishment. The Islamic government cannot

impose punishment on individuals without prior notice. As a result, the broad view of government punishments is faced with a fundamental problem. Because it is not possible to violate the individual rights and public rights of the people under the pretext of security or expediency and other issues that have many conceptual and practical ambiguities. Some people have considered this approach to be justifiable in Shari'ah, citing the case of Nasr bin Hajjaj during the time of the second Caliph. Although they have acknowledged its contradiction with the principles of Sharia. The only justification for it is to bear a specific loss, to avoid a severe general loss. (Al-Tashree al-Jana'i/1/160) The art of the legislator is to create peace and reconciliation between the foundations of social life, including public security, expediency, and individual and public rights of the people.

Therefore, if the Islamic government takes criminal action against individuals without criminalization and prior notification, this will clearly violate the principles of legality of crimes and punishments and lack legitimacy.

3- Retribution

Qisas in the word means tracing and tracking, sameness and similarity, and Qawd. (Qisas (Tafsil al-Sharia in the description of Tahrir al-Wasila)/9). Retribution is a punishment that is imposed on the perpetrator of intentional murder or intentional amputation of a limb or intentional injury. (Hadud, Tazirat and Qisas/119). Crimes requiring retribution are specifically criminalized in the sources of Islamic law. Mohammad Awwah believes that the need for legitimacy in criminalization and punishment for all crimes requiring retribution has been observed in Islamic Sharia. (Principles of Islam's penal system/27) According to Abdul Qadir Oudeh, Islam has applied the aforementioned principles in a precise manner in the matter of retribution. Crimes that require retribution and their punishments are firm and definite. So the judge has no freedom in choosing the type or amount of punishment. The main duty of the judge, in case of proving the crime and authenticating the identity of a person, is to execute the

punishment that is determined in Sharia. He compares the judge's authority on retribution to his authority on the limits. With the difference that if the judge declares the forgiveness of the victim, he will apply ta'zir punishment to the perpetrator.

Gallant, the American lawyer, also accepts the observance of legality in criminalization and punishment in the matter of retribution, because the substantive conditions and punishment are already defined. (The principle of Legality in International and Comparative Criminal Law/52)

Sub-crime and retribution punishment have always been determined without exception. (Encyclopaedia of ISLAMIC LAW,Criminal Law/8/357) against the theory of strict observance of legitimacy in criminalization and punishment regarding retribution, Sharif Basiuni has proposed the theory of relative observance in this regard. According to him, revenge crimes are mentioned in the Quran. But for various types of physical injuries and their compensation, analogy is allowed to some extent. For this reason, he considers the application of the principles of legality of crimes and punishments in this chapter to be similar to the view of the common law legal system. (International Criminal Law/1/82)

It seems that Basiuni has not made a difference between the two chapters of retribution and deposit, and in a general and brief review, he has concluded that the principles of legality are not observed in the scope of retribution. While analogy in the scope of retribution is basically not possible. Apparently, the issue of "governance" regarding the diet, in which the judge, of course, by referring the matter to an expert, determines the method of compensation, has led Basiuni to this opinion. But even if this is the case, it is still necessary to differentiate between qisas and diya. As this is not related to the issue of revenge. Therefore, since the Shariah has determined a similar punishment in crimes that require retribution and this matter has already been known to the people, and the judge performs his duties only in the position of adapting the external matter to the text of the law. On the other hand, the causes of retribution are fully defined and the

scope of the crime is limited. As a result, the first point of view, i.e. the theory of strict observance of the principles of legality of crimes and punishments regarding retribution, is acceptable. Qasamah is fulfilled both in the case of the soul and in the case of the members despite the lot. (Jawahar al-Kalam/42/227) and (Hudud, Tazirat wa Qisas/173). Does Qassama conflict with legitimacy in sentencing? Some researchers have considered Qassama as one of the illogical and irrational elements in Islamic law and an old Arab tradition. They consider it a kind of collective responsibility. So, when the body of a victim is found in a place and the perpetrator is unknown, by resorting to Qassama, the collective responsibility of the people is provided. (The Introduction to Islamic Law/203)

Ravandi, the author of Al-Qur'an jurisprudence, based on a narration of Imam Sadiq (a.s.) considers Qassamah to be one of the founding rules of Islam, which was used by the Prophet (pbuh) in the case of the personal murder of Ansari, who was a Jewish person, who was introduced as the accused. In terms of legal procedure, other rights have been considered bowing down. (Jurisprudence of the Qur'an in sources of jurisprudence /1/237). Regardless of this, it should be accepted, since the nature of the oath is faced with many possibilities, so that the oath may not be established, the claimant can swear or deny it to the other party. On the other hand, it is not clear whether Qassameh's statement matches reality. Because the swearers were not witnesses, and otherwise there would be no need for an oath. The existence of these possibilities creates a kind of contradiction with the requirements of legitimacy in punishment.

4- Diya

There are several definitions of Diyeh. The Hanafis consider diya as money, which is a substitute for the soul, or it is obligatory against the soul and members of a crime. Malikiyyah considers it as money that becomes obligatory as a result of killing or injuring a free person, and it is determined by Sharia, not by ijtihad. Shafiyyah considers money as money that

becomes obligatory on a free person or less as a result of a crime. Hanabalah considers it as money that is paid to a victim or his guardian due to a crime. (The rulings of al-Diyyah in Islamic law and its applications in the Kingdom of Arabia and Saudi Arabia / 51) Shafi'i does not use the word "diya" about the crime against Abd. The jurists of the Imamiyyah have regarded the money as money, which is paid against the crime committed against the soul or body parts. (Jawahar al-Kalam/42/2) and (Takmela al-Manhaj/2/186).

The owner of the jewel considers both the determination and non-determination of the amount by the Shariah to be considered as payment. The legitimacy of Diyah relies on the Qur'an, Sunnah and consensus, and other sources do not play an important role in it. (Dieh/115). But some people have also considered the intellect as one of the sources of Islamic law. (The rulings of al-Diyyah in Islamic law and its application in the Kingdom of Arabia and Saudi Arabia/52). Regarding the observance of legitimacy in the criminalization and punishment of money, two general views can be proposed. The first view; The absolute rule of legal principles. The second view; Absence of legal principles. Muslim jurists mainly belong to the first category and most non-Muslim jurists have adopted the second opinion. Dr. Faleh al-Sagher, a contemporary Saudi jurist, says; Islamic Shari'ah has clearly explained the rulings of diya for the people. In a way that is completely clear and unambiguous and Muslims have practiced it since the time of the Prophet (peace be upon him) until now. (The rulings of al-Diyyah in Islamic law and its applications in the Kingdom of Arabia and Saudi Arabia /13) Abdul Qadir Raouda also believes that Islam has applied the principles of legality in a precise manner in crimes requiring money, because in all cases Sharia texts have been entered and the judge has no power or discretion. (Al-Tashri al-Jana'i/1/116)

Believers in the second view say; In the case of debt, the criminal liability is not clear and it is not based on clear rules, including criminal liability.

Rather, it is based on a quasi-crime (Tort). Because ; Just causing damage is enough. There is no need to blame the perpetrator. It is not effective if the action is intentional or due to tolerance. As a result, insane persons and children are also financially responsible for any damage they cause. (Crime and Punishment in Islamic Law/19) It seems that this view is fundamentally problematic. Because there is no distinction between the two concepts of civil liability caused by waste and corruption and crimes requiring the payment of ransom. It is worth noting that; It is a non-predestined payment, throne and government. The jurists believe that the throne is determined by the imam. (Al-Nahiyeh in the Sources of Al-Fiqhiyyah/1/127). There are two opinions regarding the synonymy or difference between the meaning of throne and government. Some, like the owner of the jewel, have seen both as the same thing. (Jawahar al-Kalam/42/2). Some people have made a distinction between Arsh and government. The amount that the judge determines relatively accurately based on the blood price of the member is called Arsh. Such as determining a third of the dues of a member whose dues are half of the full dues. However, where it is not possible to determine the amount with such clarity and ease, such as causing a two-centimeter-long and two-millimeter-wide wound in the human body, it is necessary to determine the desired amount by referring the matter to an expert. Then the judge issues a verdict based on the expert's opinion. (Diyat/136). With this separation, what is important in the present discussion is the government. In case of any loss or injury for which the Shariah has not determined a payment or an arsh, the current government is in effect. The basic rule in this case is that the government should be less than the Diyah or Arsh Moin Shari'i. (Diya/224)

The question that can be raised is whether the "government" violates the necessity of observing legitimacy in punishment? Regarding the principle of legality of the punishment, in the first opinion it may be said; Because the determination is the responsibility of the judge, it is contrary to the aforementioned principle. But because of the punishment, it has been

specified. Its total and maximum amount is also known. So that the judge should not exceed a specific maximum. Also, the impossibility of determining all the amounts due to the impossibility of enumerating all the instances of non-quantifiable injuries and the limitation of the judge within the framework of the Diyat's rules and the necessity of issuing a verdict based on the opinion of two fair experts (Dieh/227). The government should not be considered as violating the principle of the legality of the punishment. Paying attention to the juridical and juridical nature of diat, that it is not a mere punishment and that it has the aspect of compensating damages, (Diyat/51) strengthens this point of view.

5-Conclusion

Imami criminal jurisprudence has accepted the legitimacy of criminalization and punishment. Imami jurisprudence is concerned about the legitimacy of criminalization more than the legitimacy of punishment. In the case of Moharebeh, the legality of criminalization has been observed with a special style and context. Because the certainty of the action of the perpetrators, as an "inherent crime", its criminality has been established as a "mandatory customary rule" among all societies. In cases where the act of committing a natural crime and as a customary rule, the principle of its prohibition is established, it should not be considered a fundamental problem in terms of observing the legitimacy of criminalization. Even today, if we take a look at the set of criminal laws of countries. They do not define natural crimes. Rather, they only deal with its constituent elements. It is deduced from Islamic sources that the perpetrator's brief knowledge is enough to be punished. So that it is not necessary for the perpetrator to know exactly the type and amount of punishment.

The case of Afek shows the serious concern of the Prophet (PBUH) on observing legitimacy in punishment. Even in the case where the principle of the act has already been criminalized, but the Shariah has not determined a punishment for the act, despite the fact that the law was later than the time of the crime, the punishment has not been applied retroactively. Based on

this, Afek's case is not only a challenge or at least an exception to the necessity of legitimacy in criminalization and sentencing in the Islamic criminal law system, but also as a document and justification basis for the serious and accurate concern of the prophetic tradition to observe the principle of legitimacy in Punishment is considered.

In the view of Imamiyyah jurisprudence, the legitimacy of criminalization regarding Sharia punishments is not challenged. Imamiyyah jurisprudence regarding the criminalization of punishment crimes due to the monopoly of this matter in the primary sources of Islamic law, including the book and tradition, the legitimacy of criminalization has been paid attention to and observed. . It should be accepted that the legal system of Islam, in its traditional and completely Shariah sense, has not accepted the principle of legality of punishment, in the modern sense, regarding punishments.

Documented by the rule of mandatory declaration and other rules and foundations, knowledge of the prohibition is a necessary condition of punishment and the requirements of the principle of legality of punishment. The Islamic government cannot impose punishment on individuals without prior notice.

There are possibilities in Qasamah, including; The possibility of rejecting the oath from the other party and the fact that the oath is not certain creates a kind of contradiction with the requirements of legitimacy in the punishment.

In the matter of diet, the government should not be considered as violating the principle of legality of punishment. Because the judge should not exceed a specific maximum. Paying attention to the juridical and juridical nature of money, that it is not a mere punishment and that it has the aspect of compensating damages, strengthens this point of view.

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