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Introduction

One of the elements of the Islamic civilization is the issue of the *sharia*, law and generally, Islamic jurisprudence or *fiqh*. This jurisprudence in contrast to some legal systems of the world which relied on natural, customary, rational or convectional laws, has a comprehensive outlook on the human being and the society, and utilizes an integrated method. While the Holy Quran and the prophet and his household's traditions (*a.s.*) are the main sources and foundations of the Islamic law, but this Law uses from reason, custom, social contracts, unwritten laws, ethics, conscience, human nature, public interests, etc., and pays attention to all of them. As a result, Muslim legal systems are not just a mere rational legal system or a pure conventional and contractual legal system, but they take a comprehensive look at all of them and make them operate in an integrated form.

This present journal welcomes the scientific papers of all the researchers in the field of jurisprudence, law, philosophy of *fiqh* and law, relation of *fiqh* with ethics, individual and social *fiqh* and the other related subjects, and emphasizing that the responsibility of content of the papers rests on their authors. The journal seeks to open up new areas of interdisciplinary discussions on the above topics to all the readers and researchers.

I ask Allah the Almighty, for the success of all researchers in this area.

Ayatollah Ahmad Abedi
Publisher

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The holy Quran and tradition`s moral principles for prevention of cyber crimes

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Abstract

Cyberspace has become prevalent in the lives of millions people, but as much as it has turned into a tool of entertainment, gathering knowledge and information, it has deviated from the moral principles. Islamic ethics consists of moral guidelines which shows the right path to human beings including the manner of using the information technology based on the human morality. There are various examples of these principles in the Qur'an and Sunnah, such as fulfilling the covenant, enjoining the good and forbidding the evil, or other cases, which in addition to their functions in preventing sin, can also be effective in preventing cybercrime as well. This study is based on a descriptive and analytical method, and its findings show that the principles of Islamic ethics in the Qur'an and Sunnah are appropriate for all nations and times and when applied, lead to the creation of a moral society and subsequent success in crime prevention.

Keywords: Islamic ethics, cyber ethics, Quran and Sunnah, cybercrime, preventio

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Introduction:

Cyberspace or information technology have been pervasive in the lives of millions people around the world and become a tool needed by all human beings for fun, gathering knowledge and information, etc. and turned into a new dimension in our lives. For this reason, the penetration rate of the Internet is increasing in the society, and therefore, naturally, the statistics of crime, victimization and damage to moral issues in cyberspace are increasing day by day. New and mass media, which are mainly based on electronic communications and cyberspace, are developing every day, therefore, many criticisms are raised about the lack of attention to Islamic ethics in cyberspace and its practical role in prevention of crime; because obscene and blatant information and content and cybercrime, which were initially limited in scope, have become a matter of national and international concern with the development of the Internet (Hilliard, Keith, 2007, xi).

In most countries, especially in Islamic countries, everyone wants to use cyberspace in which moral principles are observed, but these principles can be different in each country and culture and in some ways have similarities; for example, production and distribution of pornography in Islamic countries are generally forbidden and immoral in real and virtual space, but in many Western countries this will not be immoral if it is in line with the law, and the issue of copyright and the age of the doers are observed. Cyberspace is frequently illegally used around the world against its moral principles. The previously recognized and enshrined rights of cyberspace are being violated daily in the name of economic progress, political stability, religious interests, the fight against terrorism, or for personal interests. The violation of these rights has created new



problems in the social systems that govern society, as well as advances in cyberspace that sometimes violate ethical principles and issues, such as cybercrime, digital security, and security concerns regarding the prevention of these crimes.

Although our information systems have evolved from data processing and information systems, to artificial intelligence and institutionalized systems, but there has not been considerable advances in the ethical issues of these technologies and their function in preventing and controlling cybercrime (Lester, 2016, 3). Agbourne's theory of cultural backwardness shows that technology has progressed faster than the ethical infrastructure needed to control and support these achievements (Marshall, 1999, 81-82). For this reason, ethics is essential for investigating and preventing crimes and abuses related to cyberspace.

For example, if people who are entrusted with the information of others, abuse such information they have violated that information, and this act is a widespread violation of trustworthiness as one of the moral principles in Islam. Therefore, recognizing and understanding immoral behavior in cyberspace can help to explain the strategies to deal with these immoralities. Of course, there are new examples of the effects of cyber-immoral behaviors, including problems with software theft, virus development, illegal access, and fraud. Such unacceptable behavior imposes great costs on individuals every year (Gilbert, Stead, 2001, 76). It is generally believed that the advancement of science and the pervasiveness of cyberspace have also damaged the ethics of this space. In other words, the lack of attention and not using Islamic moral principles in Muslim societies and even in the whole world in parallel with the development of cyberspace, have



led to less attention to such issues to control and prevent these crimes.

Therefore, it is vital to pay attention to the laws and principles of Islamic ethics and the principles governing them in order to expand legal-ethical research to help bridge the gap between behavior and advances in information science.

Given the above, the main purpose of the present study is to combine Islamic ethics with the ethics governing cyberspace, in the sense that we should combine the moral principles of Islam with the ethical principles governing cyberspace and present the ethical principles governing cyberspace, which are based on the moral principles of Islam, so that ,in addition to the theories of prevention-based criminology that have been accepted in most of the world, we can also use Islamic ethical principles in the field of control and prevention of cybercrime. In addition, this article intends to look at the following:

1. Investigating a number of the concepts and principles of Islamic ethics and ethics related to cyberspace
2. Developing some ethical principles related to cyberspace in the form of identifying examples and its functions for cyberspace users, especially Muslims from an Islamic and public perspective in order to control and prevent cybercrime
3. Identifying legal-ethical challenges and obstacles in the field of combining Islamic ethics with cyber ethics and providing suggestions for overcoming obstacles.

In addition to the above, it should be noted that technology is a double-edged sword. A student can use it for academic work or spend time on inappropriate sites (Ahn, 2006, 91). Trying to control people and prevent them from abusing cyberspace can easily be neutralized by bringing up the



issue of individual privacy. Also, cyberspace users can often be abused accidentally by other users, leading to privacy violation, fraud, theft, and even child abuse by child abusers. Rarely do those who publish their address and other identifiable information in cyberspace, think that they have provided valuable ways and means to be abused by a kidnapper or swindler. It has been said that new media can disrupt the social foundation of a society, so there are good reasons to study the ethics of cyberspace and the function of Islamic ethics in controlling and preventing these crimes, which are mentioned below:

1. Islam forbids all kinds of immoral and criminal activities in any area of human life.

2. The general public is not familiar with the Islamic moral principles governing cyberspace and their function in preventing and controlling crime, as well as the harms of not paying attention to these principles (Maghaireh, 2008, 337-338).

3. Familiarity with Islamic ethical principles makes every user behave responsibly in cyberspace.

4. We must study Islamic ethics and its principles that govern cyberspace because they can teach us how not to fall into the trap of criminals and that we ourselves adhere to these principles and do not commit crimes.

5. The ethics of cyberspace (which will be explained in the following) and familiarity and adherence to it to avoid illegal and immoral use of this space is vital for users, which requires some independent discussion of ethical issues.

Background:

The concept of information ethics which was developed in the 1980s, seeks to demonstrate the importance and function of values and traditions in cyberspace. This concept can be



different for each society in addition to commonalities because the ethical principles governing different societies are different. This concept seeks to establish "a standard for judging the behavior of an individual or a member of society, as well as for classifying these matters as moral and immoral" (Anna, 2006, 92). Information ethics is a relatively new branch of study that includes several distinct yet related subfields, including intellectual property, privacy, freedom of expression, and social control of information (Patterson, 2002, 346-347).

The ethics branch of information technology is currently not organized in a coherent way in most of the world, especially in Islamic countries, but in some countries, there are groups that have developed ethical guidelines. One of the most well-known and common is the ACM (American Computer Machinery Association), which provides ethical guidelines and professional conduct that were enacted in 1992. ACM Principles of Ethics is the most comprehensive guide to bridging the gap between cyberspace and ethics, the content of which will be briefly reviewed in sections to analyze how to adjust it to Islamic ethics.

With the explanations provided, it has been shown that guidelines based on ethical principles can be more effective on individuals (Sims, Brickman, 2003, 243-244). Therefore, the principles of Islamic ethics can be expanded in accordance with cyberspace by creating a culture (Couger, 1989, 212). Raphael Capuro reminded us that morality is a self-reference thing, that is, it is morality that paves the way for moral and human communication (Froehlich, 2000, 278; Lourdu, 2012, 1). Therefore, examining the nature of cyber ethics and understanding these issues can lead to better programs to strengthen moral education and improve the moral behavior accepted by Islam in cyberspace, and then



we can look for a combination of Islamic ethics and cyber ethics to so that we can teach and apply Islamic moral principles in order to prevent crimes and even prevent casualties in cyberspace.

The concept of Islamic ethics and ethics of cyberspace:

The word Akhlagh (morality), which comes from creation, literally means nature, (Qayyumi, 1418, 96) and technically refers to mental and spiritual characteristics that cause human actions to arise from the soul (Amini; Sharif Zadeh, 2015, 153). One of the foreign thinker believes that the best definition for ethics is as follows: ethics and moral principles are the best way to study the behavior of human beings and each of these principles must pursue a goal that determines the way we should behave (Iacovino, 2002, 57).

In another definition, ethics has been defined as a set of principles that distinguish what is wrong from what is right (Wood, 1385, 53-52). By accepting this definition, we can say that ethics is a domain for what is the norm in a society, because it states that one should do or avoid doing something. Ethical principles are the moral and spiritual standards that guide behavior, action, and choice. Ethics is based on the concepts of responsibility (as a free moral agent, stating that individuals are responsible for the actions they take) and accountability (individuals and society must be accountable for the consequences of their actions). In most societies, a legal system adopts the most important norms and ethical principles and provides a mechanism for doing so and pursuing individuals, and even accountable governments (Iacovino, 2002, 63-64) in the country. We can also find some of these principles that have been approved in the form of laws based on Islamic sources and Islamic



ethics, such as being trustworthy, enjoining the good and forbidding the evil.

Feiz Kashani defines ethics as a set of a strong rules which facilitate doing various things. If such items are based on the wisdom and law, they are called ethical and if the actions are frowned upon by the society they are called unethical. (Feiz Kashani, 1980, 5/95). Allama Tabatabayi states that ethics can be defined as virtues which are not gained voluntarily but can be acquired through learning the basics. He is one of the individuals believing that virtues and moral acts can be gained through repetition (Tabatabayi, al-Mizan, 1417,1/351).

In the definition of ethics governing cyberspace, it is stated that the ethics of cyberspace means the philosophical study of ethics related to computers and cyberspace and includes the study of behaviors that the user must adhere to. In this regard, the studying of the effect of adherence and non-adherence to these behaviors is also emphasized (Kanali, 2010, 1-3). Therefore, it is clear that in a world where social networks and cyberspace are defined by the way people live and work and strongly influence Islamic culture and values, it is important for us to investigate the principles of Islamic ethics, social responsibility which is a difficult task due to the diversity of beliefs, groups, classes, languages, dialects and cultures that exist in our country.

Typology of Islamic Ethical Principles (used in the Holy Quran and Sunnah):

Islam is the last religion that God Almighty sent to the people through the great prophet of Islam, Muhammad (PBUH). God has stated in the Holy Qur'an: "On this day I have completed your religion for you, I have completed My mercy on you, and I have chosen Islam as your religion" (al-



Ma'ida, 3). The Holy Quran contains more than 6000 verses; with hundreds of verses focusing on the moral aspects. The sources of Islamic law consist of the Qur'an, Sunnah, reason and consensus, here we focus on the Qur'an and Sunnah, because we try to understand the basic moral principles of Islam in these two sources and integrate them with the ethics of cyberspace and examine their function in preventing crimes in cyberspace. According to Shiite jurists, the deeds, words and speeches of the infallible Imams and the Prophet of Islam all form a tradition in Islam (Khorramshad, 1390, 117).

In any case, the general understanding of morality in Islam can be known as "a set of moral principles and guidance that distinguishes right behavior from what is wrong or what should or should not be done." The Qur'an and Sunnah show that all aspects of Muslim life should be guided by Islamic ethics. God says: "Surely this Qur'an leads you to that which is right (or stable)" (al-Isra ': 9). In the Holy Qur'an, God uses the term morality or character to refer to moral principles. The importance of morality in Islam can be seen in other Qur'anic verses. Also, the Prophet Muhammad (PBUH) said: "Indeed, I have been sent to perfect moral virtues" (Majlisi, 1403, vol. 68, 382). Therefore, according to the above, it can be said that the Qur'an can be the main source for extracting the principles of morality in Islam.

The moral system of Islam is different from the secular moral system as well as from the moral law advocated by other religions. Throughout the history of civilization, these secular models have been transient and inherited moral laws because they were based on the values of their human founders, for example, the Epicurean philosophy (philosophy of luxury) or the pleasure of attaining Happiness (Dehghanzadeh; Ahmadian, 2016, 145-146). In



contrast, the moral guidelines embedded in Islamic ethics emphasize the relationship between man and his Creator and consider religious ethics as the ethics of love or affection for God (Khazaei, 1387, 91). Because God is fully aware of everything, Muslims have instructions that are neither timed nor distorted by human whims and desires, hence the instructions of Islamic ethics can be applied at all times and in all places. The Qur'an and Sunnah use a set of moral terms to describe the concept of good, such as: truth , goodness, wisdom mercy, justice and fairness, balance and perfection, enjoining the good and forbidding the evil (known and confirmed), trustworthiness (honesty), sincerity (sincerity of intention) and piety (fear of God). Benevolent acts are described as righteous and illegal and infidel acts are described as evil. Some of these terms are repeated in dozens of verses of the Qur'an as well as in the Sunnah. This table shows the results (frequency based on verses and hadiths) for the moral principles and examples used in the Qur'an and the confirmed sources of the Sunnah.

Table 1: Frequency of the principles of Islamic ethics in the Qur'an and Sunnah¹

Number of hadiths	Number of Quranic verses	Basics of Islamic ethics
66	65	Trustworthiness and honesty
145	595	Faith and piety
50	31	Fulfilling one's promises
142	235	Being grateful to God
124	227	Affection and kindness
34	23	Sincerity
29	66	Benevolence
100	202	Asking for forgiveness and

1. In relation to the frequency of hadiths in the field of Islamic ethics, It should be noted that the statistics in the table are the result of research by authors that have been collected by studying the authentic books of hadith.



		repentance
33	13	Enjoining the good and forbidding the evil
82	67	Guiding and correcting wrong behaviors
139	530	Knowledge and hard work
48	83	Contemplation
24	96	Human dignity
250	61	Being good tempered in relationships and business
62	23	Justice
64	108	Patience
31	129	wisdom
44	92	Honesty(truth)

This large number of verses and hadiths shows the support of the religion of Islam for people who observe good moral qualities, and on the other hand, warns, forbids or punishes those who do not observe these principles. Islam considers morality as an essential factor in the development or reconstruction of society based on the understanding of the Qur'an and Sunnah, which is a moral reconstruction in human behavior and can bring benefit, peace and prosperity to human beings.

According to the above, it is clear that the concept and application of these principles are close to the concept and application of various types of prevention, for example, faith and piety, enjoining the good and forbidding the evil, contemplation and patience, which are examples of Islamic ethics. In terms of function and sometimes concept, they have the ability to be adapted to situational prevention. Circumstances are related to the pre-crime situation of the person and lead the perpetrator to commit a criminal act (Pourshakibaei; Jahani, 2018, 38).



According to the previous explanations, this type of prevention and the mentioned ethical principles aim to prevent the occurrence of crime, by reducing the advantages of the crime and making individuals think about the actions before committing them. With the belief and commitment to these principles, a cyberspace user automatically refuses to do actions that violate these principles.

Another issue is the application of examples of Islamic moral principles with the principles of social prevention of crime such as poverty and unemployment so that criminal motives are taken away from criminals (Najafi Aberandabadi, 2003, 1208). A look at the ethical principles collected in the table makes it clear that ethical principles such as guidance and reform, science and effort, honesty, wisdom, justice and benevolence, and kindness, are all principles that can be applied in the direction of social prevention for Muslim users.

Staged prevention is another type of prevention that is divided into primary, secondary and tertiary prevention. In this study, we try to address its concept and function in the prevention of cybercrime and look at the principles of Islamic ethics which are compatible with this type of prevention.

The definition of primary prevention states: This type of prevention includes strategies that include social, economic, and other public policy areas which are used to influence crime situations and the root causes of the crime (Khosrowshahi, 2012, 12). Good manners in dealings, trustworthiness, honesty and sincerity are among the principles that can be generalized to examples of this type of prevention in terms of their function in preventing cybercrime. For example, we can mention the creation of videos and educational sites in which we have tried to





provide the necessary training to strengthen the nature of trustworthiness, honesty and sincerity and good manners in relationships and transactions through mosques, schools, books and other ways of transmitting these values, trying to apply primary prevention.

Another type of prevention is secondary prevention, which is a set of measures and actions related to groups and individuals who are more likely to be at risk of delinquency or deviant behaviors than other individuals. (Khosroshahi, 2009, 246), such as preventive measures for hackers or people who have the ability to infiltrate computer systems. Secondary prevention is prevention to neutralize dangerous situations, and in this type of prevention, the focus is on making changes in people, before they commit a crime which include anti-social or deviant behaviors such as wrongful and criminal activities on the Internet, creating immoral or criminal websites, and hacking sites (Ansari; Milani, 2016, 157-158).

Affection and kindness, knowledge and effort to enjoin what is good and forbid what is evil are among the moral principles of Islam that have the potential to be used as practical principles in relation to the secondary prevention of cybercrime.

Tertiary prevention, as the third type of step-by-step prevention, aims to monitor actions that prevent individuals from repeating the crime (Sarikhani; Soltani Bohlooli, 2016, 142). Clear aspects of Islamic ethics such as repentance, forgiveness and human dignity are among this type of prevention, so by adhering to these two cases cybercriminals, officials and law enforcement will pursue the goals of this type of prevention and the purpose of Islam in establishing these principles.

Generalization of Islamic ethics principles to cyber ethics:

In addition to the general reasons given in the previous pages for creating an ethical feature and method specific to cyberspace, there are other reasons for this, such as the prevalence of such things as cyber invisibility, inherent anonymity, and exceptional flexibility in cyberspace (the ability to become what we can imagine) has made us more aware of the need for an ethical policy to prevent delinquency and victimization in cyberspace. As a Muslim user of cyberspace, there are many moral and spiritual values to which one must be faithful. We are not only expected to have the highest degree of honesty and integrity, but also to act responsibly, ethically and legally when accessing electronic private information. We must commit to protecting data, personal information and identities from unauthorized access or disclosure, and to respecting the ownership of information in all its forms.

The guidelines, which are based on Islamic moral principles and are recommended to cyberspace users, especially Muslims, to prevent and control crime, should be divided into two parts:

a. Fundamentals of Islamic principles related to cyberspace:

This is a set of principles for all human beings that apply in the real world as well as in cyberspace, like users. By maintaining, adhering to and applying these beliefs and values, we can see positive and low-cost effects in reducing and controlling crimes in cyberspace, which can be conceptually generalized to various types of prevention, especially social prevention:

1. Performing one's duty is an act of worship: Users and cyberspace professionals should know that doing their duty is an act of worship and God rewards them for their good deeds and punishes them for their abuse. Now, if these



people, who each have a different work and moral duty, do their duty of reporting crimes, protecting the privacy of people by building and installing security programs, etc., they have done both their worship and they have prevented possible crimes by applying the moral principles of Islam. In the holy Qur'an, God says: "So whoever does a good deed as much as the weight of a particle will be rewarded, and whoever has done as bad as the weight of a particle will be punished" (al-Zalzal Sura, verses 7 and 8).

2. Understanding and following the principles of Islamic ethics: Users and IT professionals should understand the standard Islamic ethics (based on the Qur'an and Sunnah) and consider it as the highest standard in their life and work.

3. The effect of remembering the Day of Judgment in preventing crime: Users and cyberspace experts should know that doing good deeds and producing useful knowledge, in life and after death on the Day of Judgment, will be rewarded by God. Remembering this, these people will always be careful about their actions so that they do not commit crimes.

4. Honest management: Managers and leaders in the field of cyberspace should be committed to an ethical-Islamic approach in managing the development and maintenance of hardware and software. They must show honesty and fairness in doing their job, if managers and employees put honesty into their work and build software or hardware safely based on that honesty, they can prevent crime.

B. Professional principles governing the ethics of cyberspace:

These set of ethical principles, presented by the American Computing Association, are accepted and used in most of the world and are addressed to cyberspace experts, and of course, there is no obstacle to extending it to other users, so



these principles are also called International Ethical Principles Governing Cyberspace. Therefore, in the following, these principles and their definitions will be examined separately and we will try to examine the compatibility of these principles with the moral principles of Islam. And by combining the two, we come to a series of Islamic moral instructions that can be called the Islamic Moral Principles of Cyberspace, which have an effective function in preventing and controlling crimes in this space. The professional principles outlined by this association are as follows: (Bernbach, 2009, 77-78):

1. Seek understanding first and then consent: Develop your empathetic ability to understand and internalize the consequences of your actions that may affect others.
2. Fair presentation: Keep the promises you make, as you point out.
3. Do not abuse your privilege of access to private information: IT professionals have unprecedented access to private information that requires a higher level of self-discipline.
4. Make every effort to prevent the illegal disclosure of private information: Ensuring the legitimacy, authorized access, and security of data that has been properly accessed is a fundamental concern and should be taken very seriously.
- 5 Use existing technology to protect private information: promoting and using technology developed by our peers to protect the data and tools which transmit it and using technologies such as encryption is part of our daily lives.
6. Efforts to improve the protection of private information: Avoid publishing and distributing information that is defective, inaccurate, erroneous or inappropriate. If you are aware of incorrect private information, or find information





that is not properly managed or secure, it is your responsibility to correct any incorrect, unprotected, or improperly managed private information. Or let someone who can do it know.

7. Do not use the work of others in your own name without the permission of the author: regardless of copyright issues; in order to use the work of others for professional or personal gain, it is unacceptable to use the work of others without the exclusive permission of the author, owner or copyright holder.

8. Staying steadfast in the direction of public policy and changes in social theory: Moral values are universally shaped by the concepts of justice, rights, harm, welfare and organizational fairness. Expand your moral reasoning by taking the time to understand these concepts to improve future decisions about moral dilemmas and conflicts.

9. Only have access to the information you need to complete your task: In order to complete your task, you do not have to view all the information available, however, it is up to you to decide what information is required. With that in mind, it's your responsibility to make sure you only use what you need.

10. Do not try to access computers or networks that are not licensed: As an IT user, you understand the importance of computer and network security, so trying to access computers and networks which are limited for the public is considered an immoral act.

11. Do not try to obtain information for the purpose of identity theft: because users expect people who have access to their information to be trustworthy and they want their privacy to be protected. The only exception to this instruction is to perform it for legally permitted purposes in order to enforce the law.

Identifying the ethical problems and challenges of cyberspace:

Thanks to cyberspace, it is now possible to engage in ethical or immoral activities and e-business anywhere in the world. Now the questions that can be raised here are : is it appropriate to monitor users' activities, such as emails and chat messages, electronically? Do you have to allow users to use their desktop computers for their personal business or to make copies of the software on their non-personal computers for personal use? Is it ethical to sell customer information extracted from transaction processing systems to other companies? Here are some examples of controversial ethical decisions you may have to make. Therefore, we need to take a closer look at ethical considerations in cyberspace. Identifying ethical issues affects how cyberspace is used in the organization, individuality, working conditions, privacy, crime, health, and solutions to social problems. Some ethical issues are discussed in the following section:

Access: What information does a person or organization with a right or privilege obtain, under what conditions and with what guarantee? Accessibility is currently one of the major concerns for implementing IT ethics.

Computer monitoring:

One of the most controversial ethical issues regarding the quality of work is computer monitoring. Computer surveillance has been criticized as a violation of users' privacy, as in many cases they do not know that they are being monitored or do not know how this collected information is being used. Because computer surveillance increases the stress on users and employees who have to work under constant electronic surveillance. In fact,





computer monitoring creates an "electrical exploitation workshop" in which employees are forced to work in harsh and unsuitable conditions, and companies, marketers, and Internet service providers engage users in a variety of ways (Sabernejad; Hosseinpour, 2018, 117).

Computer adaptation:

The unauthorized or incorrect use of personal information in computer adaptation is another threat to privacy. Another threat is the unauthorized matching of computer information about you that is extracted from sales transaction processing system databases and sold to information brokers or other companies.

Cybercrime:

Cybercrime is a threat posed by malicious or irresponsible actions by cyberspace users who take advantage of computer networks in our society and are possible in three ways: One is when the computer is the subject of crime. The second is when the computer is a tool of crime and the third is pure cyber crimes that are specific to this space, such as theft or cyber fraud (Jahanshiri, Hosseini, Ebrahimi, 2016, 15). So, this is a major challenge for the ethical use of cyberspace. Cybercrime poses a serious threat to the integrity, security and quality of business information systems. As a result, the development of effective security practices is becoming a top priority. Cybercrime include theft of money, services, software and data, destruction of data and software especially by computer viruses; malicious access to or hacking of the Internet or other computer networks, as well as a violation of privacy and other criminal offenses.

Private Issues:

Information technology technically and economically enables the collection, storage, integration, exchange and retrieval of data and information quickly and easily. This feature has a positive effect on the performance and usefulness of computer-based information systems. However, the power of information technology to store and retrieve information can have a negative impact on everyone's right to privacy. For example, confidential emails sent by employees are monitored by many companies. Each time you visit a site on the Internet, personal information about people is collected. Unauthorized use of such information could seriously damage your privacy. Mistakes in such databases can seriously damage a person's reputation.

Data alteration or theft:

Illegal alterations or theft of information is another form of cybercrime. In which financial information or identity information of individuals is stolen or altered by cybercriminals, which may cause problems for the person (Potter, 2012, 492).

Computer virus:

A computer virus usually enters a computer system through illegal copying or borrowing of copied software, or through network links that connect computer systems. Therefore, a computer virus or worm can spread the destruction among a large number of users. Viruses often destroy the contents of memory, hard disks, and other storage devices. As an action that we, the end users, should take, we should avoid using suspicious resources that have not been detected and by antivirus software (Malekan; Salmani, 2012, 43-44).





Intellectual property:

It refers to intellectual innovations such as inventions, literary-artistic works, etc. (Mohammadzadeh, 2019, 66). As we know, unauthorized copying is illegal because the software has intellectual property that is protected by copyright law and user licensing agreement. Millions of dollars of software are illegally copied every year around the world. This phenomenon has a great impact on the software industry.

Pornography:

Pornography, which is considered an immoral crime in most societies, is considered a content-related crime and means images and content that are presented with the intention of arousing individuals sexually, and the number of Internet users is increasing day by day all over the world (Bai; Pourgharmani, 2009, 98).

Software plagiarism:

Computer programs and artistic or literary artifacts are valuable assets and are therefore intended to be used to steal computer systems. However, unauthorized copying of software or (literary) theft of software is also a major type of software theft and robbery (Momeni; Azizi, 2012, 45-46).

Health Issues:

Excessive use of cyberspace and computers can cause a variety of health problems. Excessive computer use has been associated with health problems such as job stress, arm and neck muscle injury, eye injury and fatigue, and exposure to radiation (Kakavand, 2009, 12-13). For example, monitoring employees' computers has been shown to be the main cause of job stress.

Conclusion

All human beings have a secondary life and identity, and that is their life and identity in cyberspace, which is expanding day by day. Major changes in the more advanced and diversified cyberspace cause many changes in social structures and our physical environments which are often unpredictable. Currently, the growing influence of cyberspace among the people, especially in Muslim countries, is quiet considerable. If we do not take seriously the fact that we are building a new environment in which future generations will live, we will have a problem. Although ethical and professional principles for IT users, including professionals, have been adopted by professional organizations and committees such as the American Computer Machinery Association as cited in the article, however, given the growing number of cybercrime cases, it turns out that IT users, including professionals, still face many ethical issues. Islamic sources (Holy Quran and Sunnah) provide high moral standards for individuals, communities and levels of the ummah (nation). Islamic ethics is stable, comprehensive, just and standard that is suitable for all nations and times; and when pursued, it leads to the creation of a moral community, followed by success in crime prevention. This article introduces the main steps of the roadmap as well as new principles for cyberspace users based on Islamic moral values. This effort can be useful in solving many issues related to the ethics of cyberspace users. This provides a good opportunity for IT users, especially Muslims, to understand and implement the standard and comprehensive moral values of their lives based on the moral principles of Islam, in order to succeed in preventing cybercrime.





Suggestions

- 1- Piety (fear of God) should be achieved as the main characteristic of a Muslim, so that he does not commit any crime that is harmful to others.
- 2- Tracking software can be installed to monitor and control the daily activities of IT users who use IT resources.
- 3- Different types of courses can be introduced based on Islamic ethics from elementary levels to higher education levels.
- 4- Understanding the fact that computer literacy and combining ethical issues with IT-related issues is a fundamental and essential skill in educational systems.
- 5- Creating a high level of awareness related to information security and issues related to cybercrime among home users, government and educational institutions, and in the private sector and among legal officers;
- 6- Increasing the exchange of information on information security and cybercrime at the regional and national levels;
- 7- Formation of policies and legal regulatory frameworks at the national level that are compatible with existing or developing legal instruments;
- 8- Establishing effective national and transnational mechanisms to prevent cybercrime and improve protection to identify and respond to cybercrime
- 9- Creating safe and secure environments for users, especially children and adolescents
- 10- Establishing effective mechanisms for identifying and responding to cybercrime at the national and regional

levels, including the creation of environments that help report cybercrime

- 11- Accepting and agreeing of the people with the instructions related to observing the ethical principles governing cyberspace
- 12- Promoting the power of people's understanding of the destructive nature of immoral issues in cyberspace and creating obstacles in the way of these issues

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Child Marriage in Islamic law

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Abstract

There is a consensus among *Imami* jurists about permitting marriage with a minor, provided that it is to his/her own benefit and there is no sin or corruption. However, there are some *fatwas* (legal opinion) about the permission or prohibition of pleasure from a minor wife in many recent books of Imamiyya jurisprudence which at first glance, indicate some non-conventional pleasures from an immature wife. By elaborating on the jurists' comments, the present paper rejects the above accusations, arguing that they stated the preliminary injunction and that they did not state the issue in a secondary injunction. The author then tries to prove that rulings which are in accordance with Imamiyya jurisprudence, have absolutely prohibited pleasures from a child, by providing details on the jurisprudence reasons and documents and by referring to the generalities of no loss principle.

Keywords: minor, marriage, pleasure (Istemta), no loss principle.



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1. Statement of the Problem

One of the undeniable needs of human beings is sexual instinct which if not controlled properly, it creates various problems for the individual and the society. Islam allows marriage with the opposite sex under certain conditions, to satisfy this important need. It does not place any age limits on the marriage and it assigns this decision to the man and woman (if they are mature), or their parents (if they are immature).

There is no doubt for the Imami jurists that parents can decide for the marriage of their immature children. (See Ibn Idris, 1410, vol. 2, pp. 560; Muhaqqiq Hilli, 1408, vol. 2, pp. 220; Allamah Hilli, 1420, vol. 3, pp. 433; Shahid Sani, 1413, vol. 7, pp. 116). The jurists' well-known opinion is that the condition for marrying minors is "lack of corruption"; the marriage which involves a corruption or sin is null and void. Fazil Naraqhi declared consensus in *Mustanad al-Shia*: "it is essential that parents observe lack of sin or corruption in their children's marriage. There is general consensus among Imamiyya jurists about this and application of no loss principle to this subject. If there would be corruption in the minor's marriage, it is null and void." (Naraqhi, 1415, vol. 16, pp. 167)

Also, there is consensus among jurists that if a minor gets married, it is prohibited to engage in sexual intercourse (specifically pleasure) with one's wife who is before 9 years old. Shahid Awwal in the book of *al-Lom'ah* states: "it is prohibited to engage in sexual intercourse with one's wife who is less than 9 years of age. If it is done and laceration of perineum (Ifza) occurs, one's wife would be eternally haram. (Shahid Awwal, 1410, pp. 174)



The author of Urwah notes: “It is not permitted to indulge in sexual intercourse with one’s wife before she is 9 years old--whether she is free or slave; whether in a permanent or in a temporary marriage.”

Muhaqqiq Khuyi in her marginal notes in *Urwat al-Wusqa* and Imam Khomeini in *Tahrir al-Wasilah* express similar comments. (Khuyi, 1418, vol. 32, pp. 124; Musawi Khomainsi, 1421, vol. 2, pp. 241)

Nevertheless, the open question is that if parents marry their children to someone provided that it is to their own expediency, are all the pleasures allowed except for sexual intercourse? The present paper aims to find an appropriate answer to this question by investigating the jurisprudential sources and reasons.

To explain this issue, it has to be noted initially that guardianship of children is essential, especially in nutritional, educational, financial, possessive, physical and sexual matters. Children without guardians and desirable supervision, are subject to abuse and jeopardy. Thus, Islam has always considered this issue seriously. According to Islamic teachings, parents are seen as the best guardians for their children, who can fulfill their needs in the best possible way.

Furthermore, it has to be noted that according to some narrations¹, it is indecent for parents to marry their immature daughters. It is uncommon in Islamic communities and such marriages have hardly been seen. Parents’ discretion is not meant for sexual abuse or so which has recently been put forward by Islam’s enemies and even by those who hold biased views against Sharia teachings;



1. In book of Kafi, there is a chapter titled: «باب أنّ الصغار إذا رُوجوا لم يأتلفوا» which emphasizes on the fact that prematurity marriage is better be avoided. (ref Khomeini, Kafi, vol5, pp398)

yet, it is meant to protect the child's benefits and make a good future for her.

As we will see, Islamic rules enjoy a comprehensive privilege in comparison with the other legal systems which do not provide any solutions and end in stalemate. There have been numerous shocking reports on child abuse. The following statistics reported by western sources are crimes against children which show the tip of the iceberg. For example, it is estimated that four million children and women are traded for sexual abuse, slavery, prostitution or forced marriage every year throughout the world. In addition, one million children mostly female, enter into the sinister trade of sexual abuse. Also 50,000 children and women are transferred every year from Asia, Eastern Europe, and South America to North America for prostitution and housework.

Every year, 10,000 girls from neighboring countries travel to Thailand for prostitution. Furthermore, 5000 to 7000 girls from Nepal are transferred every year to India to be sex slaves in Mumbai and New Delhi. (See Chilala, 1386, pp31).

In any way, Imami jurists' opinions in this respect are presented and the abovementioned question about the permission or prohibition of pleasure from a minor wife and its condition will be elaborated in detail.

2- Jurisprudents' Opinions

The jurists' opinions concerning on the child marriage are fallen into three categories: Some early jurists did not object this issue and kept silent on this. Some of them emphasized on preliminary injunction. It seems that contemporary jurists' well-known opinion is permission of sexual pleasure other than sexual



intercourse; still, this illusion will be dispelled upon contemplation on their opinions. And some jurists believe in secondary injunction. They prohibit any pleasure or any non-conventional pleasure by referring to secondary reasons.

2-1-No Objections

Many early jurists accept the marriage with a child provided that it is to her interests. They stated that it is not permitted to indulge in sexual intercourse with a minor wife, and stated rulings on the husband's violation in this matter. For instance, Sheikh Mofid says: If the husband engages in sexual intercourse with a minor wife who is less than 9 years old and cause harm on her, he has to pay the full blood money and he has to pay all her expenses until death (Mofid, 1413, pp747). The same fatwa is also issued by Salar Deilami (Marasim 1404, pp 241).

Ibn Joneyd issues a fatwa in this respect: If the husband engages in sexual intercourse with a minor wife who is less than 9 years old and cause harm on her, he is required not to divorce her and to pay all her expenses until death and pay the full blood money and dowry (Ibn Joneyd 1416, pp248).

Sheikh Tusi stated in Khilaf: If the husband engages in sexual intercourse with a minor wife and cause harm on her, if she is less than 9 years old, he has to pay the full blood money and dowry. Shafei issued the same fatwa. Our reason is the consensus about the narrations and sects (Tusi, 1407, vol. 5, pp. 257; also ibid 1400, pp453).

Ibn Idris believes: If the husband engages in sexual intercourse with a minor wife who is less than 9 years old, she will be eternally haram for him and there is a separation between them (Ibn Idris, ibid, vol. 2 pp. 531).



Muhaqqiq Hilli in *Nokt al-Nahaya* and Allamah Hilli in *Mukhtalaf al-Shia* made similar comments: If the husband engages in sexual intercourse with a minor wife who is less than 9 years old, there will be a separation between them and she will never be halal for him (Muhaqqiq Hilli, 1412, vol. 2, pp 292; Allamah Hilli, 1413, vol. 7, pp. 64).

Obviously, these jurists do not object such marriage, so they cannot be regarded as agreeing or disagreeing with the above issue.

2-2- Some jurists emphasized on preliminary injunction

It seems that the question has been recently reflexed in the fatwas of contemporary jurists. Although the injunction can also be observed in the early jurists fatwas (to be discussed later on), the first one who discussed the issue seems to be Sayyid Yazdi, author of *Urwat l-Wusqa* and contemporary jurists followed him. Therefore, his fatwa will be initially elaborated before other contemporary jurists. He states: It is not permitted to engage in sexual intercourse with one's wife before she is 9 years old, whether in a permanent or temporary marriage. However, he can take other pleasure such as looking, touching, cuddling, *Tafkhiz*, even when she is a child (Sayyid Yazdi, *Urwat l-Wusqa*, vol. 2, pp. 811).

Obviously his comments seem to permit other pleasure. At first glance, he seems to be permitting other pleasure of a minor wife, by the word "even"; yet on closer look, it becomes apparent that he was basically issuing a preliminary injunction and did not consider a secondary one and inflicting harm. Thus, it cannot be inferred that Sayyid's fatwa means child abuse.

Like Sayyid Yazdi, Muhaqqiq Khuyi issued a preliminary injunction in his notations on *Urwat al-Wusqa*, justifying



that other pleasures are not prohibited, considers a general pleasure from the wife (Khuyi, *ibid*, vol. 32, pp126).

Imam Khomeini has also issued the same fatwa as Sayyed Yazdi (Musawi Khomeini, *ibid*, vol. 2, pp. 241; also, *ibid*, 1422, pp 696).

Fazil Lankarani explained Imam's comments in *Tafsil al-Sharia: Permissibility principle applies to other pleasures from a minor wife and the fact that marrying a minor is allowed in Sharia gives permission for other pleasures, because otherwise it would be meaningless to allow such a marriage. Documented hadiths prohibit only sexual intercourse before 9 years of age If other pleasures are prohibited as sexual intercourse before 9 years of age, it would be necessary to prohibit the marriage itself too. According to narration, what is prohibited in Sharia is the sexual intercourse (Fazil Lankarani, 1421, pp. 24-25).*

The author of *Muhazzab al-Ahkam* confirms the above comment, justifying it with permissibility principle, reference to reasons, and consensus among Imamiyya jurists (Sabzevari, 1413, vol. 24, pp 73).

After quoting Sayyed Yazdi, Ishtihari in *Madarek al-Urwah* points to the generalities of pleasure reasons and sexual intercourse with a minor wife is removed from the injunction according to narrations and other pleasures remained in the injunction (Ishtihari, 1417, vol. 29, pp 165)

Asking a question, the author of *Fiqh al-Sadiq* (pbuh) permits other pleasure except for sexual intercourse with a minor wife, justifying it with Permissibility principle and the fact that there is no objection to this issue (Ruhani, 1412, vol. 21, pp. 88).

Marashi Najafi in *Menhaj al-Mumenin* (1406, vol. 2, pp. 208), Musawi Golpaygani in *Hedayat al-Ibad* (1413, vol. 2, pp. 305), Bohrani in *Sanad Urwat al-Wosqa* (1429, vol. 1,



pp. 124) and Safi Golpaygani in *Hedayat al-Ibad* (1416, vol. 2, pp. 396) are other contemporary jurists whose comments apparently suggest permission on other pleasures from a minor wife.

So far, the comments of the author of *Urwah* and his successive expounders were presented, since other jurists followed him. As already mentioned, this issue was raised briefly in some jurisprudential books, before the author of *Urwah* started to explain it.

For instance, a tenth century jurist, Fazil Meqdad (deceased in 826 AH) states: It is not permitted to engage in sexual intercourse with one's minor wife who is less than 9 years old. Only the sexual intercourse and no other pleasures is prohibited (Fazil Meqdad, 1404, vol. 3, pp 26).

The author of *Jawaher*, a thirteenth century AH jurist says: According to some jurists' fatwas and the apparent comments of others, the prohibition is restricted only to sexual intercourse and other pleasures are allowed due to permissibility principle which proposes no objection (Najafi, 1404, vol. 29, pp 425).

As discussed above, these jurists issued preliminary injunction and did not issue a secondary one which can be totally different from the preliminary one; as a result, biased claims from those who criticize Jafarite Fiqh, arguing that the above jurists' fatwas to other pleasures absolutely contradicts wisdom, which they call them very indecent. They claim that such pleasure might inflict irrecoverable harm on the minor wife. Nevertheless, the great jurists' opinions emphasize on the preliminary injunction and it can never be inferred from the meaning of their fatwas that other pleasures are permitted even if harm is inflicted. Because in this case, no loss principle is applied and jurists accept the rule of no loss principle over



preliminary reasons. Consequently, any pleasure which inflicts harm on one's wife will be prohibited.

2-3-Some jurists emphasized on secondary injunction.

Ayatollah Makarem Shirazi is one of the first jurists who stressed the secondary injunction, considering the fact that Islam's enemies may abuse early jurists' fatwas superficial meaning. In *al-Nekah*, which is an explanation of Imam's *Tahrir al-Vasilah*, under the title "Are all other pleasures (than sexual intercourse) of one's wife who is less than nine years old permitted?", he states: some old and contemporary jurists elaborated on the permission of other pleasures ...; however, to be honest, I cannot accept such a general injunction, because some pleasures from a minor wife is logically indecent such as *razia* (foster sister). Thus decency is the ruling element. Other pleasures from one's wife is limited to our own logic and do not include such behavior. (Makarem Shirazi, 1424, vol. 2, pp135)

Quoting Sayyed Yazdi in *urwat al-Wosqa*, Ayatollah Shobeiri Zanjani in *al-Nekah* stresses on the secondary injunction and prohibits pleasure which inflict harm on one's minor wife: "Other pleasures which do not inflict harm are permitted; yet, if they cause harm, they would also be prohibited." (Zanjani, 1419, vol. 5, pp. 1499)

Hossein Ali Montazeri is another contemporary jurist who objects such a fatwa, saying that: "It is not right to marry a minor who is unable to indulge in sexual intercourse, unless the age is set so that pleasure is possible, e.g. 10 years of age or more, provided that her parents see her interest in doing so. (Montazer, 1425, vol. 3, pp. 254)

Mostafa Khomeini, in *Mostanad Tahrir al-Vasilah* objects Imam's comments about permitting other pleasures, stating



that: It is learned from some comments of Imam Khomeini that he made other prohibition of subject to wife's physical ability (Mostafa Khomeini, vol. 2, pp. 344). On the marital intercourse and marriage, he states in Tahrir al-Vasilah (Imam Khomeini, ibid, vol. 2, pp. 277):

If a man marries a woman, her mother will become haram to him, either through an in-law or fosterage marriage, either the wife is minor or adult. Of course, in temporary marriage with a minor, caution has to be exercised that sexual pleasure other than sexual intercourse is possible. She has to be six years old or more or during marriage she grows to that age. Therefore, what is conventional is that one or two hours of temporary marriage with a female infant with the purpose of making her mother haram to the man is not prohibited.

Obviously, Imam does not permit the marriage with a female infant who lacks the physical ability for sexual pleasure, even pleasure other than sexual intercourse.

3- An Analysis of Reasons to Permit Other Pleasures

The author of the present paper believes that permission to other pleasures given the absolute rule of no loss theory in the present subject, lacks the legitimate justification and authority and after reviewing the reasons, the reader will be inclined to absolute prohibition of such pleasures. Therefore, the present article aims to prove the prohibition of any pleasure through a critical analysis and review of reasons.

There have been various reasons to justify the permission for pleasures other than sexual intercourse, which will be assessed against jurisprudence criteria below.



3-1-Citation of Generalities and Ascription of Reasons

As already discussed, one of the reasons that jurisprudents cited was the generalities of reasons to permit pleasure. It was justified that sexual intercourse with one's minor wife is removed from the generalities of injunction according to narration and other pleasures generalities remain.

The narration they cited are found in valid Shiite narration books:

a) Ammar Sejestani quotes Imam Sadiq (pbuh) talking to his bondman:

Go to the judge and tell him the Prophet (pbuh) said: "the age limit for sexual intercourse with a minor wife is 9" (Koleini, 1407, vol.5, pp 398; Hor-e Ameli, 1409, vol. 20, pp101).

b) Halabi quotes Imam Sadiq (pbuh): When a man marries a minor girl, he may not engage in sexual intercourse with her before she is 9" (Koleini, ibid, vol. 5, pp 399; Hor-e Ameli, ibid, vol. 20, pp102).

c) Zarareh quotes Imam Baqir (pbuh): It is not permitted to indulge in sexual intercourse with one's wife before she is 9 or 10 (Koleini, ibid, vol. 5, pp 399; Hor-e Ameli, ibid, vol. 20, pp102; Sadouq Qomi, 1413, vol., pp. 221). Abu Basir quoted the same narration from Imam Baqir (pbuh) (Koleini, ibid; Hor-e Ameli, ibid)

However, it should be noted that although in the above narrations the age limit is set at 9 or 10, it cannot be inferred that since in narrations only sexual intercourse is limited to a certain age, other pleasures are permitted. As some jurisprudents like the author of Tafsil al-Sharia points to, inferring from narrations is only possible in the framework of title which is considered as the weakest conception by scholars of the Osul. (See Muzafar, 1381, vol. 1, pp. 107; Muhageqq Khorasani, 1409, vol. 2, pp 132).



Furthermore, in the above narration of Imam Sadeq (pbuh) in which he orders his bondman to go to the judge and tell him the age limit for sexual intercourse, it seems that the sexual pleasure is meant to be sexual intercourse (ref Allamah Hilli, 1414, vol. 9, pp 121; Najafi, ibid, vol. 30, pp 330); this narration is an answer to the question raised by the judge, which is not mentioned in the narration; thus, it seems that other narrations followed this narration and so they cannot be ascribed to. In fact, the reason for describing the prohibition of sexual intercourse and restricting it to a certain age level is the experience of the condition. So they it is not conceptually understood and such description is not considered as having authority by scholars of the Osul (see Muzafar, ibid, vol. 1, pp. 101)

It should be noted that even though the above justifications are incomplete, secondary principles like no loss principle requires that in this matter we prohibit any pleasure from one's minor wife. As jurists and scholars of the Osul stipulated secondary injunctions reject inflicting harm and are seen better than preliminary injunctions. (See Ansari, 1411, vol. 2, pp127; Sobhani, 1421, vol. 3, pp 94) preliminary reasons have generality and include all injunctions either harmful or non-harmful injunctions. No loss principle removes harm injunctions. Therefore, based on this definite principle in Islamic jurisprudence any preliminary injunction which may harm the people is rejected. (See Bojnurdi, 1401, vol. 1, pp. 263)

As already mentioned, jurists permit marriage with a minor on the condition of that it is to the minor's interest and there would be no corruption. It should be noted that interest is quite relative and depends on the person, time, or place and it changes by social norms. It might be proved that in the past minors' marriage was to their interest and it



was accepted by the community norms, so jurists acknowledged such a benefit due to social acceptance; however, it is quite difficult to prove it today. It is not surprising that today minors' marriage is often against their interests and the supposition that harm in a marriage decided by minor's parents is quite realistic. The parents, who replace their children's affections with their own intentions and make a decision instead to inextricably link their children's destiny to someone else, definitely deprived them from a significant and almost irreparable benefit. If the parents recognize their minor's interests, they have to prevent their minor children to get married in most situations.

Marriage depends on the age and maturity and the mentioned elements vary in different circumstances. As Ayatollah Makarem Shirazi said in the above issue, subject transfiguration occurred. To dispel this illusion that legal marriage is wrong and free affairs are right, it should be mentioned that the present paper investigates pleasures not the marriage itself. It does not entail that if such pleasure of one's minor wife is wrong, it necessarily means that free affairs are the right way, as there is no inherence. The authors of the present paper agree with Ayatollah Makarem Shirazi's opinion that pleasure of minor's wife is illegitimate, and in the same vein, disapprove free affairs.

Ayatollah Makarem Shirazi is one of the contemporary jurists who does not permit marrying a minor, justifying that nowadays guardianship on minor children has changed. He believes that there is no benefit to a minor getting married and it has to be delayed until physical and mental maturity: "there is no benefit to a minor getting married. Rulings did not change; however, guardianship of minors and the benefits and the corruption and sins therein



did change. It rarely happens that someone marries a minor. If this marriage takes place, the girl may object the marriage and if not so, there is always the fear that this objection or dispute might happen and it is a corruption that should be avoided. Therefore, we have to stop until she is mature enough; even it might not be right to marry a minor in her early maturity. She should be mentally mature to avoid any dispute in the future. So those who are nowadays in favor of minors' benefits should not allow this marriage to take place. The well-known opinion, which is the lack of any sins or corruption, points to prohibition of such a marriage. I should be noted that the rulings did not change but the subject changed and when this occurs its rulings change, too (Makarem Shirazi, *ibid*, vol. 2, pp 35).

He also stated in *Anvar al-Fiqhaha*:

As noted above, based on the minors' benefit or lack of sins or corruption, it is not wise nowadays for parents to marry their minors, since such marriage will lead to various corruptions later when she becomes mature. Girls choose men whom they like and they test for themselves, so parents should avoid marrying their minors (Makarem Shirazi, 1425, pp 300).

He also responded to a fatwa that if necessary, may Islamic government prevent parents or guardian to marry their minors "I believe that in our age and era it is absolutely prohibited to marry minors, because it is not to their own good." (Makarem Shirazi, 1428, pp144) Obviously, when basically such a marriage is prohibited, sexual pleasure in this marriage is also prohibited.

The author of *Tafsil al-Shari'a*, citing a few narrations considers one of the reasons for the prohibition of sexual pleasure from one's minor wife is the potential harm that may be inflicted on her (See Fazil Lankarani, *ibid*, pp24).



Now the question remains that if other pleasures are permitted, especially when some jurists allowed it, is there any harm caused on her? Can we adopt the same justification in our discussion? Should we basically consider only the physical harm? It seems that we should stop discussing strictly on physical harm and consider both physical and mental harm; in some circumstances mental harm is sometimes stronger and more dangerous than physical one.

In Kafi, a chapter entitled "bab anna al-sighar iz zowijun lam ya`talifu" in which there is

a hadith from Imam Sadiq or Imam Baqir (pb) emphasizing the fact that prematurity marriage should be avoided (see Kuleini, *ibid*, vol. 5, pp. 398).¹

It should be noted that according to jurists even though mujtahid's injunction is the reference, he is like a legally competent individual in understanding rulings. It is up to the legally competent individual to recognize the ruling and they have to consider social norms and practices (See Musawi Khomeini, 1424, vol. 1, pp27; Montazeri 1425, vol. 2, pp67).

In our discussions, what is quite clear is that according to the Prophet Muhammad (pb), there is no loss in Islam (la darara wa la dirara fi al-Islam) (see Kuleini, *ibid*, vol. 5, pp 293; Horr Ameli, *ibid*, vol. 25, pp 429). Rulings that cause harm are rejected in Islam. To decide if it causes harm, we should consider social norms and practices. It is obvious that in our society it is undoubtedly obnoxious to take sexual pleasure from a minor and it can cause irreparable harm on her. One of the most probable reasons why it is not



1. «قيل له (ع) انا نزوج صبيانا و هم صغار، قال فقال: إذا زوجوا و هم صغار، لم يكادوا أن يأنفوا»

stipulated in Ahl al-Bayt's (pbut) traditions is that it is quite obvious and its indecency is quite clear to all.

In order to avoid mixing up pleasure and touching, it should be explained that pleasure in jurisprudential terms means sexual pleasure and no jurists have ever used it with this meaning. Therefore, touching the minor is not forbidden but sexual pleasure like sensual touch are prohibited.

It might be claimed that marriage entails sexual pleasure and if anything contradicts the essence of marriage, no marriage would have taken place. Therefore, it is invalid to prohibit sexual pleasure in a marriage, which essentially makes the marriage void and null.

The answer is that this claim that marriage entails sexual pleasure is controversial and has to be discussed. Initially, it has to be said that although marriage is basically meant for sexual pleasure, there are two viewpoints (See Raqib Isfahani, 1412, pp 823; Tarihi 1416, vol. 2, pp421; Johari 1410, vol. 1, pp413). The jurists' well-known opinion is that the word nikah means marriage (Najafi, ibid, pp 7). In Holy Quran, it means marriage too, except for the verse Nur/3, which might mean sexual intercourse (Qoreshi, 1412, vol. 7, pp 108).¹

By examining jurists' comments, it is found out that although many believed that marriage entails sexual pleasure (Allamah Hilli, 1418, vol. 7, pp 314; Mir Fatah Maraqe'i, vol. 2, p 249), others believed that marriage entails pleasure other than sexual pleasure, justifying that some legitimate rulings or logical purposes are used for marriage. (Bojnurdi, 1401, vol. 2, pp 431). Imam Khomeini



seems that agrees with it (Musawi Khomeini, 1421, vol. 5, pp. 282).

To confirm the above viewpoint, we can discuss marriage with an impotent person. Such a marriage is recognized in jurisprudence, yet impotency only entitles the wife to get divorced. This right verifies marriage, since divorce is given where a marriage is recognized and if the wife waives this right, marriage will legally persist with all its effects.

In temporary marriage, it is of less controversy among jurists to set out the condition of no sexual intercourse, and hadiths were often cited (Tusi, 1378, vol. 2, pp. 383); for example, if a condition is laid down that the man cannot engage in sexual intercourse with the woman, he cannot do without her consent (Ibn Idris, 1410, vol. 2, pp. 617). It paves the way to accept the same conditions of temporary marriage (which is definitely marriage and sexual needs are considered) in permanent marriage.

Many Imamiyya jurists also do not see such conditions (of no sexual intercourse) in contrary either to marriage entailments nor legitimate rulings. Marriage contains various purposes and sexual intercourse is not its only purpose, and it will not become null and void by just laying down no sexual intercourse condition beforehand (Iravani, 1427, vol. 2, pp. 372).

3-2- Principle of Permissibility and Permission

As already mentioned, some jurists cited permissibility principle to permit other pleasure from a minor wife, justifying that such pleasure is permissible unless jurists prohibit it. As discussed in detail before, no loss principle governs permissibility principle and leaves no room for permissibility principle.



It may be questioned that no loss principle is used where pleasure entails harm; nonetheless, there are pleasures such as sensual touch which do not entail harm on the wife. Therefore, in our discussion, it is not appropriate to use the generalities of no loss principle and its dominance on permissibility principle.

Its answer is that first of all, non-harmful pleasure (if accepted at all) is negotiable when there are significant instances, but when there are few instances -if one supposes that most pleasures are harmful- permissibility principle cannot be used. Secondly, reduction of instances to physical harm is inappropriate and unlikely, because by harm we do not mean just physical harm which might be rejected in some instances in our discussion, but we mean all physical and mental harms. Consequently, how can mental harm be denied and the generalities of no loss principle be rejected, when a child who is now grown up understands her past? Will a child not be subject to numerous mental problems when she understands after she is grown up that she used to be a sexual object in her infancy while she did not have the slightest idea what sexual pleasure might be. Are the wife's corruptions and mental problems more than the benefits of the marriage? In particular, it is in line with a just religion which considers inherent decency and indecency of practices and assesses the injunctions frequently based on their benefits. So to be honest, no loss principle is quite appropriate in here and there remains no room for lack of generality of no loss principle in our discussion.

Another reason for inappropriateness of Permissibility principle in our discussion derives from the fact that some types of pleasure are abnormal in social norms and practice. Ayatollah Makarem Shirazi in his comments on `urwat al-Wosqa, quoting Sayyed Yazdi, states: Caution should be



exercised that one's minor wife has the sexual capability and the type of pleasure should be according to social norms. About female infant, it is prohibited as mentioned in the book, and it is forbidden to use permissibility principle or reasoning in this regard, since reasoning is for instances of conventional pleasures (Makarem Shirazi 1428, vol. 2, pp. 772).

In addition, it seems that the author of *Tafsil al-Sharia* justification on the permission for other pleasure is that the principle, suggesting that it is legitimate to marry a minor, permits other pleasure; otherwise there will be no use to permit that (Fazil Lankarani, 1421, p.24). Firstly, it is not constant and quite controversial to reduce the benefits of marriage to some pleasures, especially in the modern era when sociologists and psychologists proved the contrary, pointing to the fact that its mental benefits weigh more than the physical ones¹. Secondly, it is sometimes because of beneficiary intents, such as marrying an infant who lost her family in an accident and thus she has no guardians or to establish mahramiat (non- sexual relationship) between a man and a woman in family environments (given the traditional conditions) or those who work in the same place. In such circumstances, a woman's minor girl was married to a man to make her mother-in-law. Also, a father married her daughter to a great person to enjoy the resulting honor.

Therefore, there have been various reasons to permit marriage with a minor across the history. As discussed above, it is meaningless to claim that jurisprudents prohibiting marriage with a minor is useless when all pleasure are not permitted.



1. Hossein Ali Montazeri in "Women Rulings and Knowledge" (1427, pp 224-229) and Makarem Shirazi in "Al-Nikah" (ibid, vol. 1, pp 8-11) referred to some of these benefits.

3-3-Justification based on Consensus of Jurisprudents

There is a consensus among some jurisprudents, such as the author of *Muhazzab al-Ahkam*, about pleasures other than sexual intercourse; yet, it is not logical to refer to consensus in terms of both minor and major premises in the present discussion, because firstly, many early jurisprudents did not stipulate this issue and did not object it, and secondly, even if we accept the consensus, it is not sufficiently reliable due to potentially invalid documents. As scholars of the *ʿosul* science said, the validity of consensus derives from the Infallibles (pbut). The consensus documents are available to the jurisprudents and he can refer to them and issue a fatwa or reject them. The value of documented consensus is not more than its documents (See Sobhani, 1418, vol. 2, pp 56; Jazaeri, 1414, vol. 4, pp 386).

Marashi Najafi states: “the consensus derived from the Infallible (pbut) is scarce and close to nothing; especially when most consensuses are of documented type which point to jurisprudents’ agreement and not of religious consensus which is reliable. Therefore, we have to refer to legitimate documents. In this condition, consensus is a confirmatory reason and not a stand-alone one” (Marashi Najafi, 1415, vol. 1, pp 342).

In conclusion, the reasons justifying the permission for other pleasure suggest that the claims are too weak and a more sensible reason which is in accordance with legitimate and rational principles is to prohibit all the pleasures from a minor wife.

4-Legal Perspective

Legally, there are no articles clearly stipulating this issue in the case law, the only reference being in article 1041 of civil law regarding the age of marriage: “the marriage of a girl before 13 and a boy before 15 depends on the parents’



permission to their children's own good and the decision of the court of law" (Revised on June 22, 2002).

Article 1041 of civil law stipulates legal age of marriage of girls and boys. The content of this article has been revised several times since 1934 when the age limit for boys was set out at 18 and for girls 15, and marriage at less than these age limits had to be permitted by the proposition of attorney-general and the approval of court of law. In article 23 of family law passed in 1974, the content of article 1041 changed: "It is forbidden for a boy before 20 and a girl before 18 to get married. Nevertheless, in exceptional circumstances the age limit might be broken by the attorney general's proposition and the court of law approval, e.g. for a 15-year-old girl who is physically and mentally ready for marital life."

In post-revolution era with the transitional government, article 23 which was passed in 1974 was annulled and the legal age for marriage was reset at 18 for boys and 15 for girls.

However, since the criteria in jurisprudence is maturity or immaturity and the content of the above law contradicts with Sharia, in January 1983, article 1041 was revised with a note, as follows: "It is forbidden to get married before maturity". Note: "Prematurity marriage is allowed with parents' permission provided that it is to the minor's own benefits" (See Muhaqqiq Damad, 2007, pp47).

In May 1996, article 646 of Islamic penal code stipulated the enforcement of the above article: "It is forbidden to get married before maturity without parents' permission. If a man marries a girl who did not reach maturity and breaks the article 1041 of civil law and its note, he will be sentenced to imprisonment from 6 months to 2 years."



Given the fact that, the age of maturity varies across individuals and there were problems to match law with objective circumstances, the legislators once again set out the minimum age limit for marriage. In November 2000, Iranian Parliament revised article 1041, but it was sent to Expediency Council due to disagreement between Guardian Council and the Parliament on this article which was ultimately adopted in June 2002 as follows: “The marriage of a boy before 15 and a girl before 13 depends upon their parents’ permission and the approval of the court of law provided that it is to their own good.”

It should be noted that even in the above revised article, there is no clear statement on the permission for pleasure from immature married girls, it might be inferred that since legislators permitted the marriage of minors with certain conditions, it is also permitted to take pleasure from one’s minor wife.

Therefore, this article seems to be contrary to the consensus among Imamiyya jurisprudents; because all Imamiyya jurisprudents do not permit sexual intercourse with minors before they reach maturity. The controversy is over other pleasures. In contrary, the above article seems to permit all the pleasures.

Given the results of the present paper, the first suggestion is that the legislators clearly forbid marriage with minors before maturity in harmony with jurisprudents who consider marriage with minors as the very imprudence and contrary to common practice and benefits or at least clearly forbid all the pleasures from minor wife in the above article.

5-Conclusion

In spite of an extensive anti-Shia propaganda of giving permission for unconventional sexual pleasures and child



abuse, it was proved by the present paper that the jurists' fatwas on the permission for pleasures were on preliminary injunctions. It tried to refute the charges by proving that grand jurists basically did not consider secondary injunction. Considering the dominance of no loss principle, the Imam jurist principles require that any pleasure from one's minor wife be prohibited given the physical and particularly mental harm that might be inflicted on her.

6-Implications

Given the results of the present study, some implications about the benefits of minors and her physical and mental health are proposed.

- 1) Legislators follow jurists like Ayatollah Mustafa Khomeini to clearly forbid any unconventional pleasures from one's minor wife in the case law, if any law permitting marriage with minors is passed.
- 2) If not so, given the potential harm that may be caused on minor wife, it is recommended she undergo a medical test before engaging in sexual intercourse. If the doctor believes that she is not physically capable for marriage, the court of law prevents the marriage and no notary office can register this marriage. If marriage takes place without being registered at the notary office and the husband engages in intercourse in contrary to doctor's diagnosis and the wife is harmed, he has to pay fine. Obviously, it will come into effect when the associated laws are enacted and a penal system is established.
- 3) To overcome the difficulty to enforce the laws of minors' marriage according to Shiite jurisprudence, it is recommended that the meaning of benefit of minor girls



in the case law be explicitly defined. It is of great significant given the various factors in the modern society about the criteria of choosing spouse.

- 4) It should be stipulated if spouses have no consent to their marriage after maturity the legal order of annulment is issued. This is in accordance with some narrations² and is based on no loss principle, with this approximation that without consent to marriage, the requirement to pay alimony and dowry by the husband, and the requirement to be obedient and accept the dominance of husband by the wife causes harm on them, which is rejected in Islam.

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Legal and Jurisprudential Analysis of the Production of Transgenic Products

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Abstract

Criminal protection, through coercive prevention and punishment for crimes against water, is one of the factors preventing the aggravation of the agricultural crisis in Iran; A crisis that has increased the need to import agricultural products and food products with the decline of water resources and poor water management. The growth of imports of unsafe transgenics creates other crises with the unjustified preference for food security over the right to "healthy" food. The weakness of Iranian laws and legal procedures in protecting the rights of consumers of transgenic products necessitates a crime aimed at protecting food security in the face of the growing need for transgenics in the water crisis. From a jurisprudential point of view, the arguments in favor of the production of transgenic food products seem stronger, and support the alignment of criminal policy in not criminalizing these products. What has been suggested by the opponents of the production of food transgenics as a reason for opposition is more than a jurisprudential concern; Because conducting research on the genome (plant and animal, and consequently the human genome) may be accompanied by abuses that challenge human dignity. This article, in a descriptive-analytical manner, critiques the existing laws and regulations in the field of criminal protection of the two issues of water and biosafety in the consumption of food transgenics, a framework for criminalizing criminal behavior against the food supply chain with absolute responsibility. Or contains the presumption of criminal liability - provides. The purpose of this article is to critique the articles of the laws related to transgenic products and crimes against water, in order to hold the government and public and private legal entities responsible for enforcing and monitoring food safety laws, observing the "principle of minimum and limited intervention to the last resort".

Keywords: Transgenic legal system, biosafety offenses, duality of food security and food health.



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Introduction

Given the global average population growth, limited water and land resources, the response to most common strategies to increase food production, including improving yields and increasing productivity and improving the quality of agricultural land, food supply and access, and food security are of increasing importance. Will be on the list of fundamental human concerns and will become a complex challenge. Therefore, one of the appropriate measures against the growing need of the international community for food is the use of genetic engineering methods and the production of transgenic products. At the same time, concerns about their biosafety are growing. Transgenic products are plant or animal products that are produced through scientific techniques, including taking a gene from a plant or animal species and injecting it into other species to transmit a desired trait or feature. In fact, transgenic plants have been developed for quality production, superior yield, cost reduction and solving many of the problems of the agricultural sector.

Although the use of this technology has been a major step towards a genetic revolution, it has also brought with it challenges such as religious, cultural, moral, and health concerns, which have provoked protests from a wide range of NGOs and even some governments. And human rights activists, scientists, lawyers, ethics, medical sciences, etc. with these products. Water is the cause of appearance, persistence and efficiency. Insecurity arising from the lack of sustainable access to water resources for citizens can disrupt stability and security and challenge the legitimacy of the political system. Preventing water insecurity in hydropolitical relationships requires legal protection of water against water crimes and violations. The



implementation and guarantee of the right to food is impossible without the intervention of governments, and therefore international human rights instruments encourage and oblige governments to guarantee and respect the realization of the rights enshrined in the Universal Declaration of Human Rights (Busta & Kennedy, 2011: 91).

Despite the lack of explicit text in the WTO agreements on the right to adequate food, UN members are implicitly committed to enforcing safety and risk assessment principles to protect the lives and health of consumers when exchanging and trading food products (Razmkhah, 2004: 52). Pursuant to Articles 55 and 56 of the Charter of the United Nations and the general interpretation of the first paragraph of Article 2, Articles 11 and 23 of the International Covenant on Civil and Political Rights, States must play a fundamental role in international participation in the process of realizing the right to food. Adequately recognize and accept their commitments to participate in international actions and activities that lead to the full realization of this right. One of the appropriate measures for the realization of the rights enshrined in the Covenant at the national level by governments is legislation. States Parties are required to provide the necessary legislation to ensure that those within their jurisdiction are entitled to a healthy diet.

Numerous conventions and protocols have been ratified in the field of recognizing and establishing legal obligations of the right to food, and numerous declarations and resolutions have mentioned this important issue, and even food security, the right of access to food. Ensuring the liberation of humanity from hunger is one of the most important priorities that have always been emphasized by policymakers of governments and the international

community "(Foroughinia et al., 2014: 133). States Parties have a duty to ensure the attainment of the right to healthy food security for all human beings by enacting and enforcing comprehensive laws, including criminal law, in the light of the "principle of the highest possible quality" and not the "principle of the minimum acceptable".

The introduction of transgenic food products, the effects of feeding on these products, along with the extensive control of private companies over the process of scientific research to investigate their potential side effects, has raised serious concerns among human rights activists. Pursuant to the third paragraph of Article 15 of the International Covenant on Economic, Social and Cultural Rights, these companies consider any kind of interference and supervision of the public sector in the investigation process as contrary to the fundamental principles of human rights and disclosure of scientific results. They also refuse in the laboratories under their control and always claim that transgenic foods are no different from ordinary foods; This issue not only violates the "right to adequate food", but also contradicts some principles of "bioethics", including the "principle of non-harm" (Abbasi et al., 2014: 131). This concern is exacerbated when we consider that "the dominance of business logic has led to research and development, often in the pursuit of greater business interests rather than in identifying and addressing food needs; Thus, although new technologies have increased food production capacity by 31 percent, large manufacturing companies that benefit from intellectual property rights have not yet taken action that benefits farmers in poor areas of developing countries, and on the contrary, are strongly financial and intellectual supporters of the focus of research and production on "marketable products" instead of "nutritious products".



Food production requires water, and water is a precondition for food and, apart from it, one of the most vital human needs. But the "vacuum and failure" of "water governance" in Iran is a historical weakness that continued with greater intensity. "The water crisis in Iran is the product of a variety of causes of ignorance and inability, and this diversity is the result of the breadth and complexity of the set of infrastructures, institutions, organizations, actors and practices that have formed around the category of water." (Ahmadipour and Ahmadi, 2019: 110) In this regard, "the weakness of the enforcement of criminal liability rights and the inadequacy of administrative measures, reinforces the need to ensure the right to food security of citizens, which is the responsibility of governments."; This depends on strengthening and preventing the prevention of crimes against water and punishing these crimes.

From the Islamic jurisprudential point of view, in the field of jurisprudence, due to the lack of a valid reason for transgenic sanctions. However, some jurisprudential scholars have commented that "given the climatic conditions of Iran and the emerging agricultural challenges, the use of biotechnology and the production of transgenic crops to prevent foreign domination is essential. The chapter on the obligatory introduction becomes obligatory (Ghanizadeh and Tabatabai, 2017: 267), but this article also rejects the reason for the domination of foreigners.

Regarding the importance of the discussion and the need to examine the background of legal action against transgenic products in the light of the right to food security, the theoretical foundations of the strategy to strengthen criminal protection of water security and the capacity of existing laws and regulations to provide adequate protection of water

and water resources and facilities. The water supply network noted that future human wars and social violence would result from a lack of water, food and forest resources. Countries - regardless of their level of development - are highly dependent on renewable resources and will face tough disputes over them. So water scarcity will challenge and will further challenge national and international security. With the spread of the dangerous phenomenon of water scarcity, more than 26 countries with a population of more than 300 million are now facing a water crisis. If the current trend continues until 2050, this figure will reach 66 countries with a population of about two-thirds of the world's population (De Schutter, 2011: 108). According to UN reports, in the last half century, there have been more than 1830 cases of water disputes in the world, 37 of which have caused war or the explosion of dams (Afshar and Dehshiri, 2018: 101). The issue of water crisis in the Middle East and the location of the geopolitical region of the Persian Gulf in this geographical area, shows the important role of water resources of these countries. Most Middle Eastern countries are very poor in fresh water. Therefore, all capacities should be used to support the security of existing freshwater. Legal protection is one of these areas of protection. Under this realm, criminal protection in the form of criminalization and punishment of perpetrators of water crimes is one of the strongest and most deterrent forms of protection of water security to delay the intensification of the need for transgenic food products.

On the other hand, explaining the theoretical foundations of the responsibility of governments for the right to food and confrontation with transgenic products, the importance of research in the etymological criminology of crimes related to transgenic food products and the need for criminal



protection of water in crimes against water To reduce dependence on transgenic crops doubles. "Criminological approaches - especially green criminology - in justifying the importance of the environment and biosafety facilitate the process of proving the preference for the right to healthy food' over the right to food security (Walters , 2007: 217) and make a significant contribution to the drafting of non-standard transgenic import criminal justice bills - which are still unregulated and dangerous legal silence and indifference persists.

The weakness of Iran's laws and legal procedures, both in protecting water and in protecting the rights of consumers of transgenic crops, necessitates a criminalization aimed at protecting food security in the face of the growing need for transgenics in the water crisis. . Thus, the analysis of Iran's criminal policy position on the success of criminal protection of water - as the most important variable affecting the country's need to import transgenic food following the weakening of traditional organic agriculture based on traditional irrigation methods (especially Method of water immersion) - is important; This issue will be critically reviewed later in the article. Previous related research has either focused on criminal protection of water and water crimes, or has focused on the criminal liability for violating the rights of consumers in the process of producing or importing transgenic products. But no research has linked criminal water security policy to the right to a healthy life against threats from transgenic crops, and this is one of the distinguishing features of the present article; Which is declared innovative. The present article also critiques the criminalization of similar behaviors in different laws from a new perspective; Some of which are: the uncertainty of the scope of examples of similar legal articles



and differences of interpretation in this regard, the obligation and prohibition of certain behaviors without providing punishment in cases of violations, disregard for unintentional crimes, guarantee of disproportionate performances and others. The deterrent is the failure to specify, at least for some penalties, some shortcomings in criminal law on water protection, which exacerbate the water crisis and exacerbate the need to import transgenic food products. The article also explains the capacity of criminal law to protect the "right to food security" (pro-transgenic approach). Balanced criminal protection of the right to healthy food (anti-transgenic approach) requires threatening physical access to food and creating barriers. In the development of nutrition science, be considered a crime.

3- Increasing the need for transgenic food products; Dimensions of human rights and criminal aspects

All new technologies, such as genetic engineering and nanotechnology, are accompanied by numerous, troubling and challenging advantages. This is an inherent feature of any technology, and no new technology really has absolute safety. "When a new technology can solve a problem of human problems and does not pose a particular problem compared to other technologies, it will obviously be ethical to use it, and vice versa, irrational and unscientific arguments to oppose it. A new technology is just as immoral. What is certain is that food production should increase in the future and transgenic products are not mentioned as the only solution, but are considered as an important factor in solving these problems "(Nayeri and Tohidfar, 2016: 42).

Given the importance of water and the problem of water scarcity crisis, the harm of committing certain behaviors for



society (acts such as pollution and illegal use and seizure of water resources, encroachment on the bed and privacy of water) and the weakness of deterrence of other guarantees, criminal law intervention And criminalization of these behaviors is necessary (Bahrehmand & Rostami, 2015: 236), but the principle of minimum criminal law should not be violated and punishment should be determined for any harmless behavior.

Numerous laws have been enacted regarding crimes against water. These laws include the Law on Water and its Nationalization (approved in 1347), the Law on Hunting (approved in 1346), the Law on Fair Distribution of Water (approved in 1361), the Law on Environmental Protection (approved in 1353), the Law on Conservation From the sea and border rivers due to oil pollution (approved in 1975), the Law on Maritime Areas of the Islamic Republic of Iran (approved in 1372), the fifth book of the Islamic Penal Code (approved in 1375), the law on waste disposal (approved in 1383) and the law on well assignment آب Water without a license (approved in 2009). It is impossible to mention the shortcomings of these laws in terms of the principles and requirements of criminal protection of water in this article. The results of the review of these laws show that the legislator has been in an unstable situation regarding the issue of water - especially the criminalization of certain acts and the imposition of punishment for them in various laws - and has not shown a specific approach in this regard; This has caused the goals of intervention and criminal protection of water to not be well met, and in addition, this intervention and protection has the problem of weak deterrence and efficiency.

Criminal law in support of collective living norms, with the help of other scientific forces (economics, management,



public policy, environmental engineering, etc.) and objective tools to protect water security to reduce the water crisis and speed up Severe need to import transgenic products or reduce the need for accelerated and possibly harmful production for the health of the Iranian nation. In addition to the legal basis for the need for criminal protection of water security - for a variety of purposes, including preventing the unreasonable intensification of the need to import transgenic products to maintain food security - the Islamic jurisprudential basis of this important issue should also be mentioned.

The most important principles of law for the prevention of water crimes are the mission of law to protect the common public interest under the title of human rights and in a more detailed view of civil rights, which has a special place in jurisprudence with the "protection of commonalities". These principles can justify the existing criminal policy and even formulate a more measured and complete criminal policy (Moradi et al., 2018: 19). Therefore, utilizing the principles of human rights, criminal law and international law related to the subject, provides the ground for the transition from the existing criminal policy to the desired criminal policy in terms of intellectual foundations.

4- Iran's legislative shortcomings in supporting food security; In the light of the water crisis and the need for transgenics

The legislature should not wait for a criminal response to offenders who have targeted biosafety to commit a crime in the outside world, but an appropriate criminal response requires that the perpetrator commit acts or omissions that violate one. It is a requirement of biosafety, it is criminalized and faces a criminal response. However, according to Article 6 of the Biosafety Law, the criminal



response is deferred to damages and the legislator has prescribed biosafety offenses in a restrictive manner. Unfortunately, the legislator has completely ignored the preventive effect of criminology and has made it possible to adopt and apply any criminal response only on the assumption that damage has been done. (Samavati Piruz, 2009: 154). Another part of Article 6 of this law has another objection from the perspective of criminology; Explain that committing behavior that violates the rules and standards governing the field of biosafety in this article in the first place has no criminal description and it is surprising that the same behavior or the same elements in the second time, considered a crime. The legislator in the biosafety law has even limited this late criminal response (in the second instance) to a fine; Which is very weak and non-deterrent and disproportionate to the severity and danger and severe and old consequences of this crime. According to one study, "one of the weaknesses of environmental law is the indiscriminate use of imprisonment and fines." Today, environmental crimes are often committed by legal entities. Therefore, it seems more appropriate to use the guarantee of negative executions of salaries and professional punishments instead of imprisonment "(Khaleghi and Rashnavadi, 2013: 136). As some scholars have confidently stated: "Certainly this weakness of the law will lead to repeated abuses and, as a result, the multiplicity and repetition of the crime. "Therefore, it is necessary to determine and apply an appropriate criminal response, including the main and complementary punishments for biotechnological crimes." (Vatankhah et al., 2017: 186)

The Iranian Biosafety Act is a unilateral concern for biotechnologists who seek to ship transgenic products to the country on an industrial scale and in large numbers; Has



poor control tools; The oversight role of the Environment Agency in this law is really insignificant; And Article 5 of the law stipulates the punishment for those part of the government employees who cause disruption in biotechnology activities, not weak punishment but non-determination of punishment, and obliges those who harm the biosafety of the people to pay only a maximum of three times the damage. . This punishment is not only deterrent, but also encourages the commission of a crime. Moreover, according to Article 6 of the Biosafety Law, the determination of punishment is subject to the infliction of damages, and the legislature has criminalized crimes against biosafety as binding offenses with damaging consequences.

Another critique of the biosafety law from the perspective of evaluating the criminal protection of the right to healthy food in the face of transgenic is related to Article 7 of this law. However, by determining the conditions of packaging and labeling, it has determined the constituent elements of the biosafety crime, which has no criminal jurisdiction, neither in terms of its jurisdiction and position, nor in terms of the composition of the council members. On the other hand, in a situation where the legislator, without explaining the oversight system of the National Biosafety Council, has only briefly mentioned oversight as one of the duties of the council, the abandonment of oversight subject to Article 3 of the said law was predictable; which unfortunately also happened.

Another criticism is that the Biosafety Law does not guarantee the implementation of non-submission of correct information to the relevant body (as the case may be by the Ministry of Health, Jihad or the Environmental Protection Agency) by the applicant for an export license for genetically modified live animals. On the other hand, he has



not been careful enough in criminalizing and compiling violations. The legislature has criminalized behaviors so hastily that basically such behaviors have not yet been investigated in society by criminologists and sociologists. Criminalizing a behavior is the legislator's last resort to confront and destroy behavior in society. The Biosafety Law, which for the first time addresses the licensing and development of risk assessment documents, has committed crimes in the field of modern biotechnology without sociological and behavioral studies (Kazemi Najafabadi and Eskandarian, 2003: 146). Instead of criminalization, it was appropriate to suffice with criminalization, and the investigation of this type of violation, which is completely technical and specialized, was referred to the apparatus of investigative bodies. The judiciary lacks specialized human resources and lacks differentiated processes for dealing with violations and crimes of the biosafety law.

Research shows that from the perspective of criminal protection of food security, "responding to the threat of physical access to food at the household and individual levels and threats to other aspects of access such as cultural, social and to some extent economic, and component "New issues in the field of food security, especially nutritional knowledge and the responsibility and accountability of government bodies and authorities for sustainable food security, have received less attention and are among the weaknesses of non-criminal government responses in Iran. Despite numerous misdemeanors and violations in various laws and regulations in the field of fisheries, import and export of food products, guilds, and various conditions and obstacles of licenses, the vacancy of criminalization and misconduct of administrative behaviors - Discipline that drastically reduces consumers' purchasing power through

inflation, rising commodity prices and finished product prices, as well as government decisions leading to improper imports of food products, requires a vacuum and policy-making. Law is one of the benefits of using the capacity of criminal law. The current state of food security and ways to enhance this security and the criminalized and infringed threats against the right to food security - which results in the right to biosecurity - and the criminal liability system of competent natural and legal persons in the realization or stabilization of food security is fraught with many ambiguities, contradictions, and omissions.

With the repeal of the Executive Regulation of the Biosafety Law, there are no regulations to assess the safety of transgenic products, and it is not clear how the safety of these products was assessed. Whereas in the previous regulation, the provisions of the food code, including the use of the "identity" method and the "animal model" method, were used to assess the safety of transgenics. "After the repeal of the Executive Regulations of the Biosafety Law, attention to the consumer's right to safety of transgenic products in the Biosafety Law remained only to the extent of assessing the potential risks of transgenic products to human health and the environment, and other regulations regarding There is no specialized information on transgenic safety assessments, information on the potential hazards of transgenic products, and even the information required to license transgenic products into the country to provide a consumer safety right and a guide to assessing and assessing the risks of products. Be transgenic (Pouresmaili et al., 2017: 107). This crisis, in a situation of regulatory vacuum in the implementation of biosafety law, becomes very dangerous and threatening when we consider that the water crisis and the lack of criminal protection of water in the



country, greatly weaken agriculture and greatly increase the need to import transgenic products. Intensifies; This is due to the legal policy towards the import of transgenics, which is basically lacking in regulations.

Iran's legislative criminal policy in support of biosafety for transgenic crops - whose imports are growing at a time of water crisis in the country - is also problematic in terms of determining the criminal liability of those involved. By adapting the elements of the perpetrators' behavior with the elements of the criminal titles mentioned in the relevant legal articles, only five criminal titles (five legal articles) have been identified in the current Iranian criminal law (see: Hosseini et al., 2020: 13) Violators of the biosafety of the people can be considered criminal and punishable only in these five narrow, confined, limited and obscure forms: 1- Corruption on earth (Article 286 of the Islamic Penal Code), 2- Action against health in the field of materials Food, beverage, cosmetics (Article 1 of the Law on Food, Beverage, Cosmetics), 3- Guilty murder (Article 616 of the Islamic Penal Code - Punishments), 4- Causing pollution leading to violation of public health (Article 688 of the Islamic Penal Code) - Punishments), 5- Production or supply of products without a legal license (Article 31 of the Law on Governmental Punishments for Health and Medical Affairs). Expanding the realm of criminal behavior on the one hand and diversifying criminal response by emphasizing restrictive social rights penalties for delinquent legal entities in this area would be appropriate and deterrent.

5- An Islamic Jurisprudential reflection on the increasing importance and necessity of producing transgenic food products to protect the food security of the people

No jurist believes in the sanctity of all changes in creation, otherwise the requirement of such a thing is that digging



wells, establishing tunnels in the mountains and many other things such as pruning trees, etc. are also forbidden (Khoei, 1417 AH: 258) , Which is definitely not the case. This corrupt consequence itself shows that the Qur'anic phrase (Surah An-Nisa ' / verse 119) is not in a position to express the sanctity of all kinds of changes, and proof of this requires a separate reason.

Due to the novelty of genetic sciences and especially the knowledge of producing transgenic food products, and the lack of specific legal rules for the consumption of these products, few studies (see: Ehsani et al., 2021; Ghanizadeh and Tabatabai, 2018) have tried to study the jurisprudential ruling of the Shiite authority in relation to the consumption of these products. In order to obtain the ruling of unauthorized or absolute permission or conditional permission to consume these products, one can refer to the jurisprudential documents "rule of no harm", "rule of repelling probable harm", "rule of ugliness of speechless eagle", "principle of immorality", Cited the "principle of innocence" and the "rule of hardship" (Ehsani et al., 2020: 122). The fatwa of the great jurists expresses the ruling of abaha as the primary ruling of transgenic food products, which will change with the propositions of the secondary title of harm (Ghanizadeh and Tabatabai, 2017: 273). As a result, it can be said that in his view, the no-harm rule, as the main basis of the no-harm condition, can be considered as one of the jurisprudential rules governing the prohibition of the production of transgenic products. Therefore, it is necessary to discuss this rule in this regard.

For the consumer who prepares his food from the Muslim market and on the other hand does not have the means to identify transgenic consumer goods, the rule of ablution is valid and resorting to other rules will be effective when the



consumer's rights in knowing and choosing , Be observed with labeling. When there is the power of discernment and choice, the rule of no harm and the rule of repulsion of possible harm in the direction of impermissibility, and the rules of immorality, innocence and ugliness of the eagle without expression and hardship in the license of consumption were examined. The no-harm rule cannot be invoked for two reasons: 1- The inevitability of the harm of these products, 2- The existence of benefits in addition to the disadvantages. Moreover, in the case of other rules, it is necessary to see which one dominates the other and is assigned to them. Although the consumption of transgenic products is permissible, the rule of repelling possible harm dominates them and rationally, a precautionary ruling is issued in the current consumption. Also, in the case of hardship and embarrassment, just as the use of forbidden food becomes obligatory, the rule of repelling possible harm also becomes ineffective, and the rule of negation of hardship and embarrassment prevails. Thus, the belief of some researchers that "the use of these products should be in such a way that the conditions of their use are not preferable to the observance of precautionary conditions; That is, in the use of these products, special restrictions should be considered so that there is no difference between the license to use transgenic products to provide sufficient food for the people and the observance of precautionary conditions to ensure the right to human life "(Rezaei-Junid and Ghanbarpour, 2020: 83) Excessive caution seems extreme.

In general, the descriptive-analytical study of the reasons for the permission and non-jurisprudential permission of consuming transgenic food products has shown that for the consumer if he is not aware of the type of product, the principle of negligence causes the permission to consume



these food products and if he is aware, the loss rule Probably, it would have been unauthorized if the current crisis of low food production and the crisis of water and the crisis of food security and the preservation of the people and the system had not been raised. Therefore, in the current situation - the current situation - the rule of possible loss is also ineffective.

Conclusion

Iran's legislative criminal policy toward bioterrorism, the import and production of raw and processed transgenic agricultural products, and a wide range of crimes against food security for political, social, and economic purposes are ambiguous. A comprehensive plan to prevent and punish crimes against food security - which criminalizes conduct that violates the right to food security and acts that violate the right to health and healthy nutrition - has not yet been developed. Current criminal titles in Iranian criminal law are largely limited to hasty criminalization arising from specific situations such as imposed war and hoarding of basic goods or the fight against bioterrorism. The criminalization of similar behaviors in different laws, the uncertainty of the scope of instances of similar legal articles and interpretive disagreements in this regard, the obligation and prohibition of certain behaviors without providing punishment in cases of violations, disregard for unintentional crimes, guarantee of disproportionate performances And non-deterrent is the failure to specify, at least for some penalties, some shortcomings in criminal law on water protection, which exacerbate the water crisis and exacerbate the need to import transgenic food products. In



terms of the capacity of criminal law to protect the "right to food security" (pro-transgenic approach) in a balanced way with criminal protection of the right to healthy food (anti-transgenic approach), criminalization of acts leading to The threat of physical access to food and the criminalization of crackdowns that hinder the development of nutritional knowledge, as well as the accountability of government bodies and authorities to sustainable food security, have been proposed to reform Iran's legislative criminal policy; Because in the current situation, none of the mentioned laws has explicitly criminalized issues related to the production or supply of unauthorized transgenics, and in order to identify the criminal responsibility of producers and suppliers of unauthorized transgenic products, it is necessary to comply with other titles related to health protection.

From the Islamic jurisprudential point of view, the reasons of the proponents, in spite of their differences, have a stronger position, and what has been put forward as a reason for opposition by genetic opponents to the cause is more of a jurisprudential concern than a reason; Because conducting research in the field of plant, animal and human genomes can be associated with abuses that undermine human dignity. Moreover, the necessity of following the jurisprudential arguments has shifted the view of the majority of jurists to another side, which can, while ensuring and protecting human dignity, also prevent possible abuses. The result is that from a jurisprudential as well as rational point of view, despite the differences of opinion of experts, rational preferences should be followed.



If, despite the differences of opinion, there is no (preferred) point of advantage for a comment (which, of course, is not assumed here), the opinions of both groups of experts will be invalidated and referred to matters such as practical principles. Paying attention to the mentioned preferences in the subject of discussion will lead to the selection of expert opinions indicating the health of transgenic products.

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The Jurisprudential-Legal Nature of Custom and Its Reflection in the Substantive Criminal Laws of Iran

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Abstract

Many early, late and contemporary jurists, including Imam Khomeini, have paid special attention to the importance of the role of custom. The place of custom and its dynamics in jurisprudential and legal issues is evident according to the element of time and place. The main question is what is the place of custom in substantive criminal matters? With the hypothesis that the special concept of custom in substantive criminal matters has drawn a special and distinct position for it from other fields of law. The aim is to analyze the concept of custom in the jurisprudential and legal aspects and to explain its validity in the realm of substantive criminal law - especially with regard to criminal responsibility and the determination of punishments. The research method is descriptive-analytical. The results indicate that although custom in criminal matters cannot be used as a jurisprudential or legal source of criminal law to document criminal prosecution or conviction, it is able to play a significant role in the three positions of creating legal rules, the position of interpretation and also the implementation of legal rules.

Key words: custom, criminal law, substance, jurisprudence, law.

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1- Introduction

Knowledge of jurisprudence and law has long been effected by the phenomenon of custom. Customs are gradually being collected, and some have been codified in laws and judicial decisions. Ancient laws such as Hammurabi, Judaism, Manichaeism, ancient India, and Athens referred to custom. Thus, custom takes precedence over other legal sources. Most of the jurisprudential and legal issues contain customary meanings. Many jurists, including Imam Khomeini, have paid special attention to this important issue.

The formation of legal systems in the realm of custom has caused the role and position of custom to remain prominent despite the historical evolution of ideas. In countries with customary law systems, custom is the primary source of law, and in countries with written law, custom is after the law. The legal system of our country is close to the Roman-German legal system (Islami Panah, 1396, 199). The Iranian constitution does not specify custom, but in ordinary law, the word custom and its synonymous words are used repeatedly, which is the reason why custom is common in Iranian law.

The situation of custom in Iranian criminal law seems different from civil law. Acceptance of the principles of legality of crime and punishment has reduced the importance of customary independence in the penal system, and the punishment of individuals based on custom is rejected; But this fact does not mean blocking the effectiveness of customary understanding and the concepts based on it in the field of criminal law. The effectiveness of customary rules in the formation of the three elements of



crime is evident, and this justifies the need to pay attention to it.

Sometimes the legislature, by using specific words such as typically and habitually, as well as words such as public decency, immorality, recklessness, carelessness, has explicitly assigned to the judge the recognition of the judicial nature of a criminal act based on custom. Such as: Article 638 of the Islamic Penal Code approved in 1996. The criterion for recognizing the act of injuring public decency is custom.

Also, in paragraph b of Article 290 of the same law, the court issues a verdict in order to diagnose and establish "typically" deadly behavior, in the position of applying and assessing the crime, referring to custom, such as obtaining expert opinion.

So far, no comprehensive independent research has been done on the subject. This research is an attempt to explain the nature of custom and distinguish its position and function in the Iranian criminal law system and as an answer to the question: First - how can custom as a An independent source along with other sources of jurisprudence and criminal law? Secondly, to what extent and in what fields does custom affect the criminal jurisprudence and substantive criminal laws of Iran?

Custom at the stage of criminal legislation is not very important in written law; Because it is not possible to directly refer to custom in criminalizing the behavior of individuals and document it as criminal prosecution or criminal conviction of individuals.



2- Recognition of custom in legal and jurisprudential dimensions

To analyze the concept of custom in the legal and jurisprudential structure, it is necessary to study its definition.

2-1- Literary and idiomatic definition of custom

The custom of the Arabic word meaning knowledge is well known and good. "Custom is a mystic and is known in a sense and anti-negro, and it is anything that the human soul knows well, gets used to and finds peace" (Ibn Manzur, 1405, 239). The wise men of the society recognize it as a tradition and a good practice among them (Tabatabai, 2009, 397). Custom is defined as the habit of all or most people of a nation in a certain speech or behavior (Jafari Langroudi, 2005, 447). Custom is a rule that has gradually and spontaneously become common among all people or part of them as a binding rule (Katouzian, 1375, 178); (Ziaee Bigdeli, 1987, 47). Most customary interpretations and definitions are external examples, not interpretations of its true meaning or purpose. More importantly, the original originator of custom is the same known and rationally favored thing. Regarding custom, terms such as "the way of the legislator", "the way of the wise", "the centers of the law", "habits and customs" and "tradition of narration" have been mentioned. The building of reason has similarities with custom. But the difference between the two is in the perpetual affirmation of reason. Custom is a repetition of something that is common among people without its validity necessarily being confirmed by reason.

From the international dimension, custom is the first source of public international law and is the basis of judicial decisions in resolving international disputes (Ki Nia 1340,



175), (Rebecca Wallace, 1387,13), (George Schwarzenberger, 1957,26),

(International Law Association, 2006,43), (Ian Brownline, 1998, 19) (Brian D. Le Park, 2010,37),.

Accordingly, according to paragraph 2 of Article 38 of the Statute of the International Court of Justice, custom is the general procedure of states that have been accepted as a rule of law, which may be global or regional or bilateral in relations between the two countries. Repetition of something with their tacit consent (Erfani, 1373, 43).

It seems that from all the definitions, we can consider the common elements, prevalence, nature of an action and behavior, rationality, acceptability and binding of all definitions as certain.

2-2- Types of custom

Types of custom are: general custom and specific custom, correct custom and corrupt custom, practical custom and verbal custom.

In the general custom, where the general aspect is predominant, but in the specific custom, there are special groups of companies that have a special factor or motives, such as special time or special jobs and industries and professions, have brought them together in a round set (Mohammadi, 1996 , 252). Including the specific custom of the union such as lawyers and doctors, the specific custom of time or place, the custom of the legislator and the custom of the legislator.

From the point of view of jurists and fundamentalists, if a certain behavior takes place among the people without considering the divine law and without the intervention of temporal, spatial and racial characteristics, it is called "common custom" or the way of the wise. But if the limits



of divine law are observed in it, it is called "special custom". (Muzaffar, 1370, 174). Another type of custom that is common in Islamic society and among the religious people is called "Sharia law".

Practice is a legal rule that is created by the repetition of an action and the adherence of everyone to it. Such as cash payment of goods at the time of transaction (Jafari Langroudi, 1362, 108). The use of the word without asymmetry in the word and in an absolute way that its customary meaning comes to everyone's mind, is a verbal custom. This connection between word and meaning is called customary connection, and this real relationship between word and meaning is called "customary truth". For example, in our society, the word "rial" traditionally refers to the Iranian currency. For this reason, Article 224 BC. Poems: "The words of contracts are predicated on customary meanings."

Judicial custom implies the equal performance of judges in relation to something that is repeated over the years and, under certain conditions, is a source of law. (David 1364, 146). Another is the custom of jurisprudence, known as the "doctrine", which follows general principles and rules and is the basis for the views of jurists.

2-3- Pillars of custom

Custom has two material and spiritual pillars. The material element or type means the continuous repetition of an action by all. (Del Wakyo, 1388, 303). But repetition is the source of the work when it is accompanied by a sense of obligation to the general public (spiritual or mental element). The criterion for distinguishing the two pillars of custom is a theoretical criterion. But in objectivity, the moment of the



transformation of the material element into the spiritual element is not exactly known.

2-4- Explaining custom from the perspective of Quran and jurisprudence

The Holy Qur'an says to the Prophet (PBUH): "Take forgiveness and command with knowledge and extend it to the ignorant." Most Sunni jurists believe that this is the custom and tradition that the wise have used among themselves to maintain survival and order. Tabarsi says in the following verse: That is, it is famous and everything is liked and known "(Tabarsi, 1415, 512). The same interpretation can be seen in Shiites.

"Custom is one of the good and beautiful traditions and manners that is common among the wise" (Tabatabai, 1363, 397).

There is no consensus among Sunnis on custom. Hanafis and Malikis have considered custom as one of the valid and important sources of jurisprudence. (Arif Ali Khan, 2006,1)

Imami jurists have considered custom in many issues and considered it as a known issue and have paid less attention to its detailed issues. In this regard, any subject that has not been clearly defined in the expression of the Shari'a, has left its recognition to custom (Walidi, 1389, 174). Sheikh Ansari in the discussion of "the permission of the union of command and prohibition in a single thing" considers custom as a level and a kind of reason and never sees any opposition between the two (Sheikh Ansari, 1404 AH, 151). Therefore, one of the functions of custom is to use it in perceiving and discovering the meanings of words. The first martyr also says: "Sometimes we prioritize custom over the narrated narration of the Infallible (AS)" (Feyz 1387, 105).



Regarding the beliefs of Shiite jurists and Sunni sects, some of the uses of custom can be divided as follows:

- The custom of the Shari'a and the special biography of the Shari'a in presenting facts and rulings;
- The custom of linguists to have a specific language;
- Separating the custom of the religious into two parts: the general custom of the religious without adhering to a particular religion and the custom of the religious to Islam.

2- 5- The authority of custom and the conditions of its validity

The authority of custom determines the scope of application of custom in deriving jurisprudential rules. Various methods have been proposed to prove the authenticity of custom, especially by Sunni jurists. The authority of custom is disputed by the Imams and the public. Some Sunnis, especially the Hanafis, have accepted custom as an independent source in deriving the rules of Sharia, to the extent that in the event of a conflict between custom and analogy, they prioritize custom.

While the Imami jurists do not consider the authority to prove the rulings as proof and do not consider the custom as a proof to prove the obligatory ruling, unless it is proved that it was common in the time of the Infallibles (AS) and it was not forbidden (Boroujerdi, 1412 AH, 141) can be Its cases were limited to the following forms:

- Identify the issue; Such as identifying the poor and the face of God in the use of zakat.
- Interpretation of the will of the parties at the time of concluding the contract.
- Recognize concepts and their limitations, such as alimony, bill, privacy.



By reflecting on the jurisprudential and legal definitions, the following conditions can be considered as criteria for the validation of custom:

Attitude and frequency: The action or speech is repeated by the general public and used by all people in the face of a particular event. This feature is called the "material pillar of custom".

- Action or speech should be done voluntarily, voluntarily and by understanding and intellect, not by instinct or instinct. (Jafari Langroudi, 1397, 87)

- The date of the behavior or speech: If it has been done in a limited time, it is not a custom. With this condition, custom distances itself from customs. (Najafi Javaherkalam, 1362, 31)

Custom must be contemporaneous, not sequential: A custom that governs an event must have occurred before that event. If a custom arises after filing a lawsuit that may take a long time, that custom can not be invoked at the time of sentencing (Bahri, 2002, 110). Accordingly, the conditions stated in the endowments and wills must be interpreted according to the usual custom at the time of writing.

- Do not oppose custom with the specification of the Shari'a or its contractors: If there is a definite rule or text of the Shari'a, it is not possible to act against them according to custom and habit. In general, whenever the practice of custom causes the closure of the religious text, custom becomes invalid (Mohammadi, 1375, 260). According to the rule of "the well-known is customary, the conditionally conditioned" (Mohaghegh Damad, 64, 1406), the customary understanding of a subject and its belongings is among the conditions of association; Therefore, its validity is as long as



the parties have not specified otherwise or the religious reason is not contrary to it.

2-6- Judicial custom and procedure

Customary law and jurisprudence are both sources of law, both are formed over time and in written law need the protection of law (Madani, 1383, 89). The law can destroy jurisprudence, just as it can remove custom from the obligation. The sources of law can be divided into two categories: law and custom. In this case, custom includes legal sources other than law. As a result, judicial procedure is considered part of custom. Just as custom is made by the people and they are made obligatory, so the judicial procedure is created by the judges. Judicial procedure is the custom of judges.

In fact, in judicial decisions, judges use the rules of interpretation and make decisions using law and custom, and these decisions are the agent of judicial procedure over time. Judicial practice is therefore the fruit of the judges' scientific endeavor. Customary law and practice are both the basis of the law. Some laws, such as the single article approved on 3/4/72, may be the subject of lawsuits regarding personal status; They have been basically the same as the previous custom and judicial procedure that the legislator has approved in the form of law.

3- Reflection of custom in substantive criminal laws

Prior to constitutionalism, Iranian criminal law was subject to the orders of governors and kings, sometimes to religious rules and decrees of religious rulers and unwritten customs that prevailed among social, political, and especially judicial institutions. After the constitution, as a result of adapting the law of European countries, it has benefited from various



sources such as the law of France and Belgium, as well as Islamic jurisprudence and local and national customs. (Okhot, 2010, 526) The main basis of Iranian criminal law, Every other legal system is more or less influenced by custom. In the following, we will mention the reflection of obvious manifestations of custom in the substantive criminal laws.

3-1- The manifestation of custom in recognizing the legal element of crime

In order for an act to be considered a crime, it is necessary: First, it must be prescribed by law as a crime and a punishment must be prescribed for it. (Legal pillar of crime). Second, criminal behavior including the act and omission of the act has occurred. It is not enough just to have an idea and a will that has not materialized (material element of crime). Third, it has been done with criminal intent or criminal guilt (spiritual pillar) (Jalaian Saleh et al., 1399). Therefore, the law is the most important element in the development of crime; Because before the official announcement of the law, any kind of behavior is considered permissible and punishment of individuals with any reason is not allowed. The principle of legality is recognized as the foundation of criminal law, and jurists have no hesitation in accepting it. (Jalaian Saleh and Mo'meni, 1400, 237).

Adherence to the principle of legality in criminal law has two general consequences: narrow interpretation and non-retroactivity of criminal law. Observance of this principle means the legislator's obligation to use clear, explicit and unambiguous expressions in drafting criminal laws. But sometimes the violation of this obligation and the use of propositions with complexities in the concept, leads to



doubts in the meaning of the text of the laws and the true meaning of the rulings in the position of jurisprudence. This makes it difficult to understand the true meaning of the words and intentions of the legislator, and ultimately makes it difficult to make a correct judgment and to make the judge have to interpret. Hence, jurists consider the interpretation of laws to be unimpeded in two cases; The first is that the meaning of the law is not clear and the second is when there is doubt in its meaning. (Mansourabadi, 1398, 32) Reference to custom in understanding the subject and belongings of criminal texts and relying on customary understandings in inferring from these texts, is a solution that is used in the framework of criminal law.

In some cases, the meaning of the words in the text of the law has the necessary clarity; But in the position of applying the concept to its external instances, doubts arise. For example, in Articles 651 and 652 of the Penal Code, carrying a weapon by a thief during robbery is one of the aggravated qualities of punishment. Here the weapon is ambiguous in concept; But in the inclusion of some external examples under this concept, especially cold steel, doubts arise that its customary refutation will lead to the emergence of dubious examples. From this point of view, it seems appropriate to consider the examples of cold steel as an honest tool whose first purpose in making it is traditionally used as a weapon. Judicial practice has accepted this approach; As in Manhanfieh, the rulings of the Supreme Court of the country have mainly rejected the external determination of weapons in tools such as sticks and sticks. (Borhani, 1392, 153).

Sometimes the customary understanding of the audience of the law narrows the conceptual scope of the words and does



not accept the unconditional implication of all the people below it. For example, Article 669 of the Penal Code states: "If anyone threatens to kill or injure another in any way ... he shall be sentenced to two years' imprisonment." Here, based on the customary perception of the threat, disabled people who are unable to implement the provisions of the alleged threat due to weakness should be considered as an exception to the ruling mentioned in this article. Accordingly, although the appearance of matter seems absolute and includes all perpetrators of this behavior; But such an application is limited to the conventional view, only to cases where the person has the power to carry out the provisions of the threat.

The words mentioned in the legal texts must be unambiguous and clear. This feature is one of the requirements of the principle of legality. In this regard, the use of allegorical expressions in criminal law is wrong; But it seems that assuming the use of allegorical sentences in the law, the interpretation in recognizing the example should be assumed to be a function of custom, and in fact it is custom that by refining it, various instances determine the meaning of the legislator.

3-2- The role of custom in determining the amount of punishment

Regarding the effect of custom on determining the amount of punishment, the role of custom in the two categories of mitigation and aggravation of punishment is examined separately.



3-2-1- Intensification of punishment in the light of customary criteria

In Iranian law, the intensification of punishment is mentioned in the issue of regulations related to the multiplicity and repetition of crimes. The history of the case was mentioned in Articles 31 and 32 regarding the multiplicity of crimes and Articles 24 to 26 of the General Penal Code approved in 1973 regarding the repetition of crimes. After the revolution, these cases were approved in Articles 24 and 25, respectively, regarding the multiplicity of crimes and Article 19, regarding the repetition of crimes in the Law on Islamic Punishment in 1982. Finally, evidence of the placement of these two concepts can be seen in Articles 131, 132 and 136 of the Islamic Penal Code adopted in 1392.

Regarding the aggravation of punishment for several crimes of the same type, the legislator of 1370, contrary to the Penal Code of 1352, did not provide any solution and only mentioned the phrase "multiple crimes can be one of the causes of aggravation of punishment." However, in 2013, Article 124 was again legislated for the amount of punishment. In compiling the regulations related to material multiplicity and recidivism, the law of 1304 has followed the laws of France and Switzerland. (Okhot, 1389, 526) This is while the legislator of the years 61, 70 and 92 in relation to the determination of punishment, especially in the material multiplicity of crimes, has paid special attention to the texts of jurisprudence.

There are several things to consider in this section in connection with the creation of judicial custom:

First: After the adoption of the Law on Islamic Punishment in 1982 and the creation of a legal vacuum regarding the aggravation of the punishment for committing crimes of one



type, criminal judges acted in accordance with the previous procedure in accordance with Article 32 of the former General Penal Code. However, in case of committing up to three crimes, they applied the maximum punishment and in case of more than three crimes, the offender was sentenced to the maximum punishment plus half (Jalaian Saleh, 2016, 141). For example, in the case of issuing four misplaced checks, the defendant was sentenced to three years imprisonment and a fine equal to the amount of the check with a larger amount, while the maximum imprisonment, according to Article 6 of the Check Issuance Law, was two years imprisonment. . In fact, although a new law has been enacted; Despite the gap in the new law, the courts, following the previous procedure, typically established a judicial custom.

This situation continued until finally the General Assembly of the Supreme Court proceeded to break the custom, as stipulated in Resolution No. 608: By not specifying the law to go beyond the maximum punishment, the court can not exceed the maximum number of crimes.

Second: Regarding the issuance of irrevocable checks in the form of multiple complaints and complaints of private plaintiffs, the practice of some courts was to convict the accused in the form of fraud. Arguing that the offender deceived the plaintiffs into fictitious matters such as having too much cash in a bank account. The courts ruled on the basis of this jurisprudence, until the Supreme Court ruled: "Assigning the title of fraud to issuers of unsecured checks, which is subject to a special law, has no legal justification in various circumstances."

Thirdly, regarding the moral multiplicity of crimes, the subject of Article 31 of the General Penal Code 1304 and Article 131 of the Islamic Penal Code adopted in 1392 and



the unanimous decision of procedure No. 34 stated: "They are paid. Leaving the alimony of the wife and children on the part of the husband in such a case is considered a single act and requires the observance of Article 31 of the General Penal Code."

It can be seen that in this verdict, a severe punishment is considered for a person who tries to leave alimony for his family and children. The use of the word "usually" indicates the consideration of the General Assembly of the Supreme Court to the custom of society, and for this reason the issue is known to be subject to spiritual pluralism.

Fourth: In the case of offenses related to driving offenses, which are considered as offenses, it is apparently against the rule of determining a punishment; For example, if a person has committed two offenses (passing a red light), according to Theory No. 4395/7 of the General Legal Department of the Judiciary, the said punishment will be added together. In other words, this jurisprudence is contrary to Article 47 of the Islamic Penal Code of 1991, which states that the provisions of paragraph 32 of the General Penal Code of 1352 stipulate that the provisions on multiple offenses are not applicable in criminal cases and only criminal offenses together with misdemeanor punishments. O and criminal gather; It has remained in force, which indicates the existence of an executive custom that was applied contrary to the provisions of the law.

3-2-2- Reduction of punishment in the light of customary criteria

Mitigation of punishment The subject of Article 22 of the Islamic Penal Code of 1991 is divided into two types of laws that require the judge to apply mitigation and the judiciary that indicates the judge's authority in mitigation.



Also in judicial relief subject to Article 37 of the same law; If there is one or more reasons for mitigation, the court can reduce or change the ta'zir punishment in a way that is more appropriate for the accused. Of course, the reduction of punishment means that in crimes where the minimum and maximum punishment is determined, the reduction must be less than the minimum. The General Legal Department of the Judiciary in a Theory of Mitigation; Referred to custom.

He also stated in a theory: "In terms of mitigation of punishment and conversion of Islamic punishment, for example, conversion of imprisonment, flogging or fine according to the provisions of Article 22 of the law approved in 1370, the court should consider the physical condition and other characteristics of individuals and customs. "Habit to determine what punishment is more favorable to the accused and fear." (Mehrpour, 1372, 156) It can be seen that in this case, too, the basis for making a decision is custom.

Article 38 of the Islamic Penal Code of 1392 has been established in relation to the qualities of abbreviations, which include cases related to custom:

First: In paragraph b of the mentioned article, the effective cooperation of the accused in identifying partners or deputies, studying evidence or discovering property and objects resulting from the crime or ... is mentioned as one of the aspects of mitigation. In this sense, the measurement of the word "effectiveness" in practice is left to the courts and the judiciary.

Second; In paragraph c, the circumstances affecting the commission of the crime, such as the victim's provocative behavior or speech, as well as the honor motive of the offender, are considered mitigating circumstances. The custom of the community and the custom of the judiciary



are the solution to measuring the provocativeness of a speech or behavior, as well as to identify what attributes can be considered an honorable motive.

Third: In paragraph e, the good record and special condition of the accused, such as old age or illness; Expressed as discount directions. What matters is a good record, determined by the judge and using the custom of the community.

3-3- Application of custom in determining instances of participation and assistance in crime

Criminal behavior is sometimes perpetrated by a single person, and sometimes with the cooperation of other persons, the latter form creates the characteristics of aiding and abetting in a crime. The legislator did not define the deputy, but its examples in Article 126 of the Islamic Penal Code adopted in 1392 in three paragraphs: By means of - c) facilitating the occurrence of crime; Enumerated.

In recognizing and removing the ambiguity of the key words that the legislator has used to introduce the examples of the deputy of crime and participation in the text of the law, the custom of the society and then the judicial procedure is always a beacon for the judges. As;

First, stimulation is synonymous with persuasion and literally means to move. It is important to establish the causal relationship between the stimulus and the stimulus. In practice, the determination of what is considered incitement and was able to force the accused to commit a crime is based on judicial custom and depends on the opinion of the judge.

Second: In the case of threats, in each case, the judge assesses the threat and its impact, taking into account the customs and circumstances surrounding the occurrence of



the crime. According to this, for example, if a sick or elderly person threatens to kill the threatened person if he does not commit a crime, he cannot be considered a deputy if he commits a crime. But if the same patient has authority outside (such as a spiritual steward), in such a way that the possibility of being threatened by another seems strong; The deputy can be investigated in the crime. As a result, the threat is considered customary, which the judge must establish.

Second: Bait is the concept of greed and is usually done objectively. like the; To make someone else willing to commit a crime by making a financial promise. It is customary to identify instances.

Thirdly; Conspiracy is a form of deception without explicitly inciting the perpetrator to commit a crime. The psychological element of the conspiracy, unlike other cases of ignorance, has been deceived. Determining whether the deputy's actions were conspiracy or deception, as well as establishing a causal link between the deception and the criminal act, is customary with the judge.

Fourth: Facilitating the occurrence of a crime means that the deputy commits a current act or omission that facilitates the commission of the crime by the steward. Branch 11 of the Tabriz General Court in Letter No. 2839; He has sentenced two of the bodyguards of the victim to prison, which led to his strangulation by the killer (Sabri, 2002, 86). Accordingly, detaining a person for intentional bodily harm or murder is considered to facilitate the commission of a crime and aiding and abetting. In fact, the above verdict lays the groundwork for a kind of judicial custom.

Sometimes a person interferes with other people with a clear intention, in committing a material act or abandoning a criminal act in such a way that he can be recognized as an



accomplice of a crime in its customary sense (Nurbha, 1389, 214). According to the meaning of Article 125 of the Islamic Penal Code adopted in 1392, participation in the material element is a crime. The fundamental issue is the citation of crime to behavior. The word citation is a customary concept and has been referred to in several cases by the Islamic Penal Code. In other words, according to the custom of the society, the custom of the judiciary, the legal doctrine and finally the custom of the expert, the act has been committed by all the partners. This is the chapter on distinguishing between the concepts of vice and company. As a result, the driver who brought the thief to the scene or drove him away is the deputy. In connection with the ability to rely on and assess the extent of the partner's intervention in criminal behavior, which is the basis for sentencing, it is necessary to examine the contents of the case and the mental and physical condition of the partners.

3-4- Impact of barriers to criminal liability from custom

In the Islamic Penal Code adopted in 1392, the justifiable causes of the crime and the factors eliminating liability are collectively referred to as "obstacles to criminal responsibility". Among these, Articles 146 to 155 are related to the factors that remove criminal responsibility, and Articles 152, 156 to 159 under these factors, including: urgency; Legitimate defense; Rule of law and law enforcement Ohm; Legal order; Conventional punishment of minors and inmates, legal and religious sports operations; Legitimate surgery or medical with consent; Apparently, according to the doctrine of criminal law, they are among the justifiable causes of crime. According to the doctrine, the issues of justifiable causes and factors that eliminate





criminal responsibility are separated and discussed in the next two paragraphs, and we examine the effects of custom on them.

3-4-1- Explaining the factors that eliminate criminal responsibility in the standard of custom

The meaning of factors that eliminate criminal responsibility; It is the circumstances and characteristics of the person who commits the crime that prevent the criminal behavior from being attributed to him and lead to his criminal irresponsibility and punishment.

First: Childhood is one of the factors that remove criminal responsibility. How to determine puberty is sometimes a matter of controversy. In Article 146 of the Islamic Penal Code, the legislator considers the child innocent and emphasizes the non-criminal responsibility of minors (boys under 15 lunar years and girls under 15 lunar years). In determining the age of the child, first the identity card is considered and in case of doubt about the age, the opinion of a forensic doctor (as a special custom) is asked to determine the age of certainty. Judges of the Supreme Court, citing the same (expert custom), while rejecting the age of the person in the identity card, despite the quality of its issuance in the official document; By doubting the maturity of the accused at the time of the crime, they have violated the verdict of the courts of first instance.

Second: Regarding insanity, the history of jurisprudence has gone through various stages in determining the instances of insanity as a factor in removing criminal responsibility in Iranian criminal law. According to the theories of the legal department, the opinion of a forensic doctor about insanity is valid if it is not contrary to the circumstances of the case. In this regard, Article 150 of the Islamic Penal Code of

1392, in line with this belief, emphasizes the theory of forensic medicine. In distinguishing healthy people from free ones, it is the custom of the expert who has always been the basis of the judicial custom. In this regard, we can refer to the issue of mental retardation or epilepsy, which, despite not being mentioned in the law; According to the jurisprudence, by acquiring the theory of forensic medicine, it can be one of the examples of eliminating criminal responsibility.

Third: about coercion and reluctance; According to the provisions of Article 151 of the Islamic Penal Code of 1392, coercion is conditional on "being irresistible." This description is explained by the phrase "intolerable reluctance" which is mentioned in Article 202 of the Civil Code. Regarding the habitual intolerance of a matter, given that the legislator has not specified its cases precisely, and even in the civil law, the cases mentioned, such as age, etc., have an allegorical aspect; It seems that the judge should refer to custom and should find out whether coercion or reluctance has become common; Has it been traditionally intolerable or not?

Fourth: Urgency and necessity, which means compulsion, are considered as one of the eliminating causes under certain conditions. According to Article 152 of the Islamic Penal Code of 1392, anyone in the event of a current or imminent danger such as fire, flood, storm, earthquake or disease in order to protect his life or property or another commits a crime that is considered a crime under the law; It is not punishable, provided that it does not create a danger intentionally and that the act is commensurate with the existing danger and necessary to avert it. It should be noted that the phrase "such" in this article is an implicit reference to custom. It is also up to the judge to determine the



appropriateness of the act committed with the danger mentioned in the article, and it is formed according to customary and personal criteria. For example, when you can break into a house to put out a fire, demolishing the wall of the house seems inappropriate.

3-4-2- Explaining the justified causes of the crime in the customary measure

The meaning of justified causes of crime is objective and external variables that eliminate the crime by damaging the legal element. In this case, both material and spiritual elements have been realized, but the legislator for some reason does not recognize the issue as a crime and removes punishment from such actions (Jalaian Saleh, 2016, 184). We examine the relationship between custom and justified causes in five sections:

First: the rule of law and the recognition of the law oh; In some cases, the legislature does not consider the perpetrator to be punishable by omitting the anti-social character of a criminal act. For example, according to Article 648 of the Islamic Penal Code, persons who keep secrets on the occasion of their profession will be punished if they attempt to divulge a secret. Accordingly, disclosure of professional secrets is a crime. Now, if a doctor reports a contagious disease for the protection of members of the community or by order of a judicial official, this act is not punishable by law. Here, as the legislature has not given any definition of professional secrecy, it determines its jurisprudence and custom.

Also, according to paragraph b of Article 158 of the Islamic Penal Code of 1392, committing a criminal act to enforce the law is not considered a crime. The word "ohm" has been added, which has added to the inadequacy of the



law. It is not clear what the legislator means by ohm? In the legislative hierarchy, the constitution is the most important of the ordinary laws. But in ordinary laws, the most important law is not explained and its determination is left to the perpetrator and the court.

Second: According to paragraph 3 of Article 158 of the Islamic Penal Code of 1392, if the conduct of behavior is a legal matter of the competent authority and is not contrary to Sharia, that act is not considered a crime. In determining who is the legal director, it is necessary to pay attention to administrative custom. If the order is legal but it is illegal, if the order is carried out, according to Article 159 of the Islamic Penal Code, which states that whenever one of the official officials commits a crime, the order and the officer will be sentenced to punishment. The cause of the mistake is acceptable and, assuming it is lawful, has not been punished. What is acceptable depends on the judicial procedure. In other words, it is a judicial custom that, recognizing the mental state of the accused and considering his amount of information and knowledge of the law, decides whether the matter is acceptable or not.

Third: Regarding the discipline of the child by parents and legal guardians; According to paragraph 15 of Article 158 of the Islamic Penal Code of 1392, their actions must be in accordance with the law within the normal limits and within the limits of Sharia. In this regard, according to Article 1179 of the Civil Code, parents have the right to punish their child, but based on this right, they can not punish their child outside the limits of discipline. With regard to these legal articles, the amount and manner of discipline is left to custom. Of course, this custom is constantly influenced by the culture of societies and is different at different times and places.



Fourth: In the case of accidents caused by sports operations, according to paragraph c of Article 158 of the Islamic Penal Code of 1392, if the cause of these accidents is a violation of the rules related to that sport that is not contrary to Islamic law, the criminal description will not be punished. According to this, for example, local sports such as wrestling with chukkeh, which is common in some northeastern cities of the country, are customary. These rules are inaccurate and only experts are aware of them. Therefore, in case of occurrence, judicial authorities can use the local expert as an expert. This move of the judge is considered as a reference to a specific custom in a sport.

Fifth: Legitimate defense is another justifiable cause that is provided in Articles 156 and 157 of the Islamic Penal Code of 1392.

Conclusion

The results of the research indicate that custom as a source of rights is an unwritten, general, permanent and at the same time evolving rule that arises directly from the will of the people and the government has less role in creating it. Custom is a set of rules that is created as a result of constant repetition (material element) and adherence to it (spiritual element) and penetrates into the minds of people to a degree that they are convinced, its observance is necessary and non-observance is ugly and guaranteeing. The conclusion that can be drawn from the definitions provided in order to provide a definition of custom in the term is that none of them is comprehensive and expedient in terms of being comprehensive. Types of custom divisions into general and specific, verbal and practical, correct and corrupt were expressed. Considering all the definitions, conditions such as antiquity, voluntariness and voluntariness, order and



frequency, non-contradiction with the stipulation of the Shari'a and its successors, rationality, acceptability and binding, can be presented as criteria for validating custom and certain value of all definitions.

The authority of custom is disputed by the Imams and Sunnis. From the expressions and application of custom and habit in the words of the jurists, it became clear that Sunni scholars, especially the Hanafis, consider custom as a proof and consider it as a practical field. In contrast, Imami jurists often limit the authority of custom to such things as expressing the will of the parties to the transaction and interpreting the subject, recognizing the concept and discovering the Shari'a ruling, and do not give authority to custom in proving the rulings. In other words, they do not consider practical custom as one of the reasons for inferring obligatory rulings; Unless it is proved that what is now practiced by custom has been common since the time of the Infallibles (AS) and has not been forbidden by the Shari'ah. Although the role of custom has been rejected as the source and basis of validity of laws and rules and the only source of trust is the will of the shari'a, There is no doubt that he has been satisfied with the customary understanding and its principles in recognizing and implementing his rules and speeches. Therefore, the role of custom in jurisprudence and law is evaluated both in the position of inferring rulings and in the position of applying and enforcing significant rules. Custom affects laws in two stages, first in the stage of drafting criminal laws, and second in the stage of law enforcement. After the law has been approved by the legislature and public information has been issued, there are sometimes cases in which it is possible to define and identify its examples with the help of custom. Like what behaviors are against public decency or what kind of actions



are typically deadly. Also explain the relative and customary concepts such as fraud, fiduciary duty, urgency, negligence, public morality, vagrancy. Thus, the reflection of custom in the various components of the material element of a wide range of crimes is clear. Custom also plays an important role in individualizing punishment by using legal permits such as mitigation and aggravation of punishment. The criminal court uses the capacities provided by law and individualizes the punishments in accordance with the custom of the society. Judicial custom and procedure also play an important role in recognizing and deburring the keywords used by the legislator in introducing examples of crime and complicity, defining the quantity and quality of justifiable causes of crime and factors eliminating criminal responsibility in the text of the law.

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The position of non-Imami Muslims in Imami jurists' opinion and Kohlberg's viewpoint

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Abstract

In Shiite jurisprudence, non-Imami Muslims have the same rules as Shiites in different ways, but according to Dr. Kohlberg, a contemporary Shialogist, the sharia rules concerning the Imami and non-Imami Muslims are different in Imami jurisprudence. The importance of the issue led the author to make a comparative study of his views and the viewpoints of Imami jurists, especially contemporary ones. In this research, based on the analytical-descriptive method, it is obtained that the Dr. Kohlberg only relied on the opinions of some past jurists and in his study, no trace of the fatwas of contemporary jurists can be seen. Secondly, he means non-Imami Muslims, only members of the Nasabi sect, and he has generalized their specific rules to all Muslims. While the issue of Muslim homogeneity in the apparent rulings of Islam is the consensus of Shiite jurists and all of the Muslim sects; but the sect of Nasibi departs from this Muslim commonality in rulings on the basis of text-based allocation. Hence, this scholar's view is not based on credible Shiite sources.

KeyWords: jurisprudence, Imamiyya, non-Imamiyya, Nasabi sect, Kohlberg.



Introduction

In Shiite jurisprudence, the non-Imami Muslims are common to all the rules of Islam except in special cases, and the reason for the common rules is the testimony, which leads to the unity of Islamic rules among all Muslims. But this is not the case with Dr. Ethan Kohlberg¹, a contemporary Shialogist. He has raised some issues in this regard, due to doubts and problems in the book of belief and law in the Imami Shiism (Kohlberg, 1985, pp.99-105). He (hereinafter referred to as the author) believes that Imami jurists distinguish between Imami and non-Imami in many jurisprudential issues such as "purity, prayer, burial rites, alms – tax (zakat), marriage" and the like. Hence, the important question arises as to whether he has expressed this opinion based on reliable Imami sources of jurisprudence or not.

This research tries to clarify the nature of the author's point of view through the narrative-rational method. For this purpose, with a comparative study, we will first quote the author's point of view from pages 99 to 105 of his work and then examine it.

1=Non-Imami Muslims` purity

1-1 Author`s opinion

The Nasiba are often judged in harsher term than the other ahl al-khilaf: some Imami jurists hold that non-Nasiba ahl

1. Born in 1943 in Tel Aviv, he graduated from Oxford University in 1971, is a professor at Hebron University until 1991, and is the director of the Institute for Asian-African Studies in Israel; He is fluent in Arabic, Persian, English, and is introduced as a specialist in *Shiite Imami* jurisprudence and theology.



al-khilaf are entitled to be treated in this world as Muslims, even if in God's eyes they are unbelievers.

The author goes on to write: " Furthermore, while there is little disagreement as to the impurity (najasa) of the Nasiba, there are conflicting views as to the position of the rest of the ahl al-khilaf, with many jurists maintaining that they are not impure (Ibid, p.99-100).

1-2 Imami jurisprudents' opinion

The Imami well-known jurists, and especially contemporary jurists, have a consensus that the apparent rules of Islamic law, such as purity, are applicable to all the Muslims; for example, the contemporary jurisprudent, Ayatollah Khuyi, says: "All the Muslims are considered as pure." (Gharavi, 1370: 9/93). Other Islamic sects i.e. Sunnis are Muslims and have the ruling of purity, and all Islamic rules and their effects are on them. Also, Mohaqqiq Ardabili also agrees with that (Ardabili, n.d. 1/172).

A Muslim who believes in the principles of religion will be included by the rules of Islam, and this is the case about a Muslim as long as he does not deny the necessities of the religion and Shari'a or does not commit an act that causes him to leave the religion. From these statements, the identity of the likes of Nasiba becomes clear, because they are condemned to depart from the faith and Islam by "insulting" and denying those whose purity are explicitly stated in the Qur'an; This is because the Holy Qur'an explicitly denies those who accept some verses of the Qur'an and deny the others (surat al-nisa,150). And this is one of the undeniable necessities for the jurists of the five Muslim sects.



Therefore, in opposite of the author's view, which had claimed that according to the Shiite jurisprudence, the Sunnis are infidels, purity of all the Muslims is a necessity of the religion among the Shiite jurists (faqihs) especially between contemporary ones. What is more, the definite tradition of the Shiites in all times and places has been on the purity of the Sunnis "(Najafi, 2014: 6/56; Ansari, 1995: 1/128), and impurity of Nasiba is an exception.

Finally, it is very surprising that the author has tried to write the statements in a kind that make the European readers consider the Shiite people claims (p.99): "The position of the ahl al-khilaf in general and the Nasiba in particular comes to the fore in discussions of the following topics", but the author's first topic i.e. ritual ablution (p.100), has no connection to the all non – Imami Muslims, because we considered in the above that they are pure, and consequently, all the water that is used for washing or drinking by them is pure. Therefore, the title of purity is only connected to the Nasibi people and is not related to all the Muslims,

2- Prayer

2-1 Author's opinion

Hence prayer is forbidden not only behind someone who is a Nasiba Imam, but also behind an Imam who professes allegiance to `Ali but does not dissociate himself from his enemies, or a Shii who has committed crimes or belongs to a sect other than Twelvers.¹ In case of danger (al-taqiyyah wa l-khawf), however, it is permitted to pray in a congregation led by a Nasiba Imam (ibid, p.100).

1. Abbreviation (peace be upon him) .



2-2 View point of Imami jurisprudents

In response, it should be said that according to the common doctrinal principles and consensus of Imami jurists on the purity of non-Imam Muslims, the unity of Muslims is an obligatory injunction. Accordingly, the well-known contemporary jurisprudents and jurists of the past era consider it permissible and all of them believe that prayer of congregation behind to Sunni imams is permitted, and even some jurists like Gharavi Isfahani regarding true following in congregational prayers with Sunnis, writes: "And in fairness, the appearance of this news in the conclusion of the congregation is true, but it is not necessary to deny it ..." (Gharavi Isfahani, 1989: 215).

Ayatollah Khuyi also writes: "In some of our hadiths, there is no acceptance of the dispute in its meaning on the parts, and this is as if the heart of the one who prayed with them in the first row was the one who prayed behind the Messenger of God (PBUH)" (Khuyi, 1418: 4/290). Therefore, he considers it sufficient and goes on to say that when the prayer behind them is compared to the prayer behind the Prophet (PBUH), can we not consider it sufficient?!

Some other jurists considered the presence in the Sunni community to be recommended and virtuous (Sheikh Saduq, 1997: 1/382). Also, some other jurists have considered participating in the Sunni congregational prayers as absolutely - although there is no taqiyyah at all - as *mustahab* (recommended) or *wajib* (obligatory): What we mention in the great reward is the acceptance of prayer and its obligation" (Bahrani, 1984: 11/78). And many jurists and narrators also recommended the presence in their congregation as a manifestation of unity and expression of unity among the Muslims and the international community,



and encouraged them to be at the forefront (Horr Ameli, 1993: 8/299, and Muhaddith Nuri, 1988: 6/458).

What is more, Imam Khomeini also emphasizes participating in the group of opponents and following their group outside the days of Hajj as a true and recommended follow-up: "There are special hadiths (narrations) about meditating on the validity of prayer with people and encouraging them to be present in the mosques and to follow them and to believe in them" (Khomeini, 1999: 2 / 198-199).

In addition, Shiite jurists considered it permissible to offer congregational prayers behind Wahhabi scholars in order to achieve unity and the like, and due to its importance, we mention the fatwas of some Shiite jurists:

Imam Khomeini: Participation in Sunni congregational prayers during Hajj is obligatory (Khomeini, 1420: 63).

Ayatollah Khamenei's fatwa is: It is permissible to follow the Sunnis - the dream of Hajj - in order to observe unity, and praying with them is correct and separate (Explanation of Matters, 2007: Issue 603). According to Khuyi and Tabrizi, it is permissible and correct to participate in Sunni mosques and perform prayers with Sunnis (Ibid., Issue 599). Ayatollah Musawi Ardebili (RA): praying behind Sunnis is correct. (Musawi Ardebili, 1998). Ayatollah Javadi Amoli says: it can be followed (Javadi Amoli, 2013). Ayatollah Makarem Shirazi: There is no obstacle to participating in the Sunni congregational prayers for the purpose of unity, provided that they have no enmity with the Shiites, and this prayer will not be repeated.

Therefore, it should be distinguished between Nasiba imam and the others; while the prayer behind the former is haram, behind the Sunni or the Shii imams other than the twelvers is permissible or even recommended.



3-Burial rites

3-1 Viewpoint of the author

Imami jurists agree that an Imami may not wash the body of a deceased Nasiba. Some jurists extend this rule to all non-Imami Muslims arguing inter alia that since washing takes place after the moment of death, the deceased must be treated according to his position in the next world, which is that of an unbeliever. Others permit washing in the case of taqiyyah, but stress that it should be performed in accordance with the dead person's madhhab (religion) (p. 100).

3-2 Opinion of Imami jurists

According to Shiite and Sunni jurists, burial rites of a Muslim dead – including ghusl (washing the body), prayer and burial - are obligatory on all of Muslims; It means that if some people try to equip the corpse, the task of others will be revoked. But if no one does it, it becomes obligatory on everyone, and if they leave, they will perpetrate the sin.

Therefore, equipping the Muslim corpse is an obligatory injunction for all Muslims, regardless of the Muslim dead's madhhab or sect.

Similarly, all Muslim jurists agree on that the rulings on the affairs of the Muslim dead are based on the apparent rulings of the Shari'a, and as it was mentioned in the previous section, all the Muslim sects are considered as real Muslim, even after the death of their followers. Consequently, ghusl and other rulings of a Muslim corpse are observed in accordance with their jurisprudence; then the claim of the fulfilment of the rulings of the corpses according to their positions in the hereafter is false and baseless.



4-Alms tax (zakat)

4-1 Author`s Opinion

Both zakat on property and zakat al-fitra may only be distributed among Imamis, and are invalid when given to non-Imamis. To the question whether. In the absence of Imami recipients, zakat al-fitra may be distributed among mustaḍ'afun, opposing answer was given (p.101).

4-2 Viewpoint of Imami jurists

Duty of paying zakat in general is one of the necessities of religion and the establishment of economic justice, and poverty alleviation of the Muslim community depends on the practice of this duty (Mustafavi, 1390: 275). And the jurists of Islam do not differ much about the use of zakat; because the guilds entitled to spend zakat are explicitly stated in the Holy Quran: " The charities are only for the poor and the needy, and those employed to collect them, and those whose hearts are to be reconciled, and for [the freedom of] the slaves and the debtors, and in the way of Allah, and for the traveller " (Tawbah, 60). The meaning of this verse and the application of other verses as well as narrations, - because the words "poor and needy and ..." are used without any restrictions - that the payment of obligatory zakat and zakat al-fitra, to every poor and needy And ..., from whatever sect they are, it is correct and causes the duty to be observed, and this ruling - the need to pay zakat to the poor Muslim - has also been specified by Sunni scholars (Al-Hanafi, 1412: 2/385). Shiite jurists also believe that it is permissible if a Muslim is not a Nasibi (Khamenei, Istifta ', p. 548723).

Therefore, paying zakat al-fitra and atonement (kaffara), and the like, to any poor Muslim other than a Nasibi is the fulfilment of the duty.



5-Pilgrimage (Hajj)

5-1 Author Opinion

An Imami may not perform the pilgrimage on behalf of a Nasibi or a Nasibi on behalf of an Imami, the only exception to this rule obtains when the Imami's own father is a Nasibi (p.101).

5-2 Imami jurists' opinion

Shiite jurists have stated conditions for representation in Hajj, and these conditions are notorious but also agreed upon them; For example, Muhaqqiq writes: "It is conditioned on the deputy, the perfection of the intellect and Islam,..." (Sabzevari, n.d 1/286).

The use of the arguments and conditions mentioned in the words of the jurists is that the representation of an Imami from a non-Imami and vice versa is correct. As for Nasabi, different hadiths have been included and the sayings have been different. And it seems that the common denominator between the hadiths is that representation in the obligatory Hajj between an Imami and a non-Imami is not correct, but according to the meaning of some narrations, there is nothing wrong with a donation and a recommended representation (Horr Ameli, 1413: 11/197).

6-Holly war (jihad)

6-1 Author Opinion

To the rules described elsewhere, the following may be added: Imimis are allowed to sell weapon to Sunnis if these weapons are to be used against a common enemy, such as the Byzantines. But such a sale is prohibited when a conflict between Imamis and Sunnis breaks out (p.102).



6-2 Imami jurists` opinion

Imami jurisprudents agree that the jurisprudential principle is to allow the sale of weapons to others, unless the buyer is an armed infidel or a non-armed infidel is fighting Muslims, or we know that a country or a group that buy the weapons will give them at the disposal of the enemies fighting Muslims or Imamis. The criterion for using the above things in the case of not allowing the sale of weapons to others is that the sold weapon be used directly or indirectly against the religion or security of the people in the world. And whenever this possibility is habitually existing, it is in accordance with precaution and the intellect, to stop selling weapons to such a buyer.

7- Marriage

7-1 Author`s Opinion

Imami men may not marry women who belong to the Nasiba. Khariji and Murji`i are included in this category. ... Imami men may however, marry Sunni women who are not Nasibat. In particular, it is permitted to marry women who are ignorant or uncertain of their faith, or or who are simple – minded, the assumption being that such women will follow their husband`s customs and beliefs. The rules pertaining Imami women are more stringent: they may marry only Imamis, and may not be given in marriage to shukkak and mustad`afun. This latter restriction applies in particular to `arifāt (ie, Imami women who have been initiated into secrets of the religion) (p.102).



7-2 Imami jurists` opinion

In response, we say that the popular opinion of the jurists is that it is permissible for men and women of different Islamic sects to marry each other, except for the deviant sects such as Nasibi that we have previously argued. Therefore, marriage with followers of other Islamic religions is not forbidden; because the principle is based on the permission and correctness of the action. By this reason, it is not permissible for an Imami woman to marry Jewish or Christian men, either permanently or temporarily. As for the marriage of Muslim men to Jewish and Christian women, it is temporarily correct but permanently is disputable. Just as the fatwa of the Imami jurists on marrying men and women who are shocked, naive and ideologically and intellectually weak, the verdict is true; although they don have the same belief and religion. What is more, Imami jurists have issued fatwas authorizing the release of Muslim slaves, even deviant sects - with the atonement of fasting and the like (Gharavi, 1370: 2/85; Ibn Idris, 1410: 345).

8- Testimony**8-1 Author`s opinion**

The testimony of a non-Imami Muslim is invalid, because he is considered to be evil and unjust (p.103).



8-2 Imami jurists' opinion

The need for justice of witness is a matter for Shiite and Sunni jurists. Malik has cited the testimony of Omar as the testimony of force (or qawl al-zur i.e. the invalid witness which is prohibited in the Holy Quran- surat al-hajj, 30) and Shafi'i rejects the unjust testimony of a person who has committed a sin and has not observed morality (quoted by Sayyed Ali, 2014). Ayatollah Khuyi also writes that there is a consensus claim that the promise of a wicked witness is not accepted.

Islam and faith are among the conditions of witness that most Shiite and Sunni jurists considered them as necessary. Of course, regarding the condition of faith, some Shiite jurists, who are not few in number, consider faith as the condition of accepting testimony, and its meaning here is to be as a Shiite.

On the other hand, some jurists did not consider faith and perhaps Islam as a condition for accepting testimony and being righteous and just; because they rely on a hadith (narration) that indicates the acceptance of the testimony of the Sunnis (Feyz Kashani, 1406,: 16: 426; Horr Ameli, 1413).

This narration, regardless of what is meant by Nasibi, is considerable. Of course, other possibilities can be raised, including the fact that the questioner in this narration is a non-Imami Muslim and the Prophet considered the witness of the Nasibis to be valid according to their jurisprudence. Or that in the absence of a witness within the religion - for example, the Imamiyya witness - the testimony of a non-Imami is valid and so on.



9- Expiation (kaffara)**9-1 Author`s opinion**

One of the method of expiating for non – fulfilment of an oath (kaffarat al-yamin) consists in feeding ten poor people. These people have to be believers; If no believers (or their offspring) are found, the mustaḍ`afun may be fed instead. But it is forbidden to give food to a Nasibi needy.

9-2 Imami jurists` opinion

It should be noted that Nasabi in the words of Shiite jurists is a deviant sect and disobedient to the Ahl al-Bayt of the Prophet (PBUH). As for the oppressed people or mustaḍ`afun, whether they are financially weak, ideologically weak, or weak in the religion in question, it certainly includes the weak of non-Imamis - Sunnis -, and feeding them will cause the task to be observed.

10-Su`r (half eaten non-Imami)**10-1 Author`s opinion**

The use of the su`r of all unbelievers, and especially of the Nasiba, who are worse than bastards and more despicable than dogs.

10-2 Imami jurists` opinion

The sum of the hadiths included in the narration sources is used in such a way that the su`r (the half-eaten) ruling of food is the same between Nasabi and the followers of other religions - Jews, Christians and Zoroastrian - and that abstinence is obligatory in terms of conventional ruling, not as an obligatory rule, because doing it does not lead to reprimand and punishment; rather, the half-eaten of the mentioned groups will bring some mental and physical losses on the individuals` soul as natural effects. For the same reason, the meat of the forbidden animals are



forbidden like infidels. Therefore, the prohibition in this matter is a guiding injunction; In addition, the prohibition of half-eaten Nasabi does not preclude the permission of eating the su`r of other non-Imami Muslims.

11- Wet-nurse

11-1 Author`s opinion

A Christian or Jewish wet – nurse is preferable to a Nasibi midwife.

11-2 Imami jurists` opinion

Although the authority of the midwife for the child in our time is almost abandoned or very limited, but this issue is still raised in matters of jurisprudence and law. A noteworthy point in the midwife's possession is to pay attention to the honor and chastity of the midwife, and this has been discussed among the Arabs in general and the other people in particular, because the midwife's milk has a considerable effect on the soul and psyche of child.

Accordingly, choosing a Jewish or Christian midwife for a Muslim child is not permissible, that is, as long as a midwife can be obtained from a Muslim woman, it is not permissible for a non-Muslim to choose, for the same reason mentioned above. But the important point of distinguishing the midwife of Nasabiyah from Judaism and Christianity and the reason for the preference of Judaism and Christianity over the Nasibi midwife is that the midwife of Judaism and Christianity was only opposed to Islam and they did not accept it. In contrast, a Nasibi wet –nurse does not have a religion too, but in addition to being opposed to the Shiite school, she has hatred and enmity towards the elders of their religion, Therefore, it is obvious that the



choice of a Nasibi nanny is forbidden by reason of the intellect and the Shari'a, and a Jewish or Christian midwife is preferable to a Nasibi wet -nurse.

12-Conclusion

At least, four results can be inferred from the author's research as follows:

1- The text of the research is not adaptable to the chapter's topic, because the title includes all the non Imami – Muslims, both of the Sunnis and Nasibis, but the text is mostly connected to a nasibi's position in Imami fiqh.

2- Since the followers of Nasibiyya insult the household of the prophet (a.s), they are not regarded as the Muslims even by the very Sunnis, however, the author has not mentioned it at all.

3- The author has incompletely attributed the jurisprudential rulings of a nasibi to some ancient Imami scholars which the contemporary Imami jurisprudents have different viewpoints, but the author has not expressed any of them.

4- All the sources of the author for studying a nasibi position in Imami fiqh are nearly ten books which two of them are considered as the jurisprudential sources i.e. jawahir al- kalam and al-tanqih, the rest of them are the books of hadith like al-kafi, thadhib and the like.

Therefore, the sources of the author's research are invalid and cannot be regarded as the reliable and acceptable.

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Relation of intellect to criminal law in Imamiyya

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Abstract

In any fair criminal system, the rational rules are precisely expressed in the form of legal materials, but Islamic punishment code 2013 consists of the *Imami* jurisprudential rules which are based on the *hadiths* and the divine revelation. Accordingly, how much does the human intellect play a role in it? In this research, with a descriptive -analytical method, firstly, it will be tried to show that a relation of causation between the intellect and the criminal law should present in two domains: legislation and interpretation; and the *Imamiyye* criminal system has both of them according to the pure intellectual arguments. Secondly, the validity of *Imami* criminal sources is also proved with the pure rational arguments, and hence, in comparison with the Western criminal law, the *Imami* system is located in a higher level of perfection.

Key Words: intellect, punishment, jurisprudence and the Western law.



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1-Introduction

According to the type of the criminal politics of any country, a special connection may exist between intellect and criminal law. In the Western legal systems, the origins of the human affairs including the sources of the criminal law consist of the scientific and rational findings. But the Muslim countries have generally inclined to a mixture of Islamic – Western laws because of adopting a combined criminal politics. This priority and precedence of intellect on law in the criminal systems of the secular Western countries and semi – secular Muslim states are based upon the idea of rationalism.

However, in the Imami criminal politics, the existence of relationship between intellect and criminal law are defined in the framework of Imamate jurisprudence or fiqh. It means that for example, penal code should be developed in the scope of Imami legal sources. In other words, although the Imami criminal politics is relied on the divine revelation, but it is not contrary to the intellect, because the creator of the wisdom i.e. God which is the very source of intellect, has sent down the Islamic precepts according to the intellectual rules. Accordingly, it is not strange that those who are the wise, are addressed by the holy Quran in order to think about the qisas crimes or retaliation (Baqara, 17); and similarly, Islam proclaimed that the legislative origins of the criminal offences such as murder, fornication and eating orphan`s property are based on the wisdom or hikma (Asra, 39). As a result, the holy Quran has considered the Islamic punishments as the indicators of the intellectual rules, otherwise, they were not addressed the wise, and the wisdom was not declared as the source of their legislation.



Probably, for the same intellect, the legislature has enacted the Islamic punishments as the rational – jurisprudential findings in the Islamic punishments code 2013. Based upon this justification, since the human intellect has a kind of perfection and priority over the criminal law, it can extract the rational rules as the potential laws from the jurisprudential sources, and change them to the form of a collection of criminal statutes. So apparently, although the Imami legal system is based upon the sharia sources, but it eventually is nothing unless expression of the rational rules.

Although the above argument seems to be justified, but it is vague at least from this point that it does not make clear how much the intellect influences on the appearance and emergence of the Imami criminal system; because this basic question also arises: what is the share of intellect about that? In particular, the nature of Islamic punishment code 2013 is attained with legalizing the rules of the criminal jurisprudence, though the section of ta'zirat punishments uses from certain rational and scientific maxims of the criminal sciences.

In a brief answer, it can be said that the intellect plays an important role in the Imami criminal system, because the intellect displays the legislator's mental attitude to the life with the language of the criminal statutes. This attitude exists in his mind which regarded as the internal or mental existence by the Muslim philosophers; this very mental existence is reflected with the external existence i.e. the criminal statutes. In this manner, the intellect from the beginning to the end, maintains its effective relation with the Imami criminal law.

In the other word, if the intellect logically moves from the legislator's mind to the criminal statute or the text, the process of law making has come to a result. However, the



main question is that how can the intellect manage wayfaring from the mind to the legal text? Similarly, in the opposite direction which is called interpretation, how can wayfaring from the text to the legislator's mind be resulted?

In this research, for the first time, it will be tried to reply these such questions and based on a descriptive -analytical method, express the causative relation between the intellect and the penal code or criminal text according to the Imami doctrine of law. Therefore, at the first stage, the terms of the research title including intellect, criminal law and relation will be defined and later on, aspects of influencing the intellect on the criminal law will be analyzed.

2- Concepts

2-1- Intellect

2-1-1- Definition

The intellect denotes the Arabic word of 'aql; also reason and wisdom are its synonyms. In the Arabic dictionaries, 'Aqql is generally used in the sense of thinking and understanding (Farahidi, 1989, vol. 1, p.159). These same concepts of intellect have been used by the holy Quran with forty nine repetitions (Tabarsi, 1994, v.1, p.284; Hoseini Shirazi, 2002, p. 413). God says in His Book: wa mā ya'qiluhā 'illā al-'ālimūn (i.e. and no one understand it unless the scholars); here ya'qilu means understand (ch. 2, v.75; ch.29, v.43).

According to the Imami hadiths (sayings), there is a faculty which is bestowed on the human being for understanding the good and evil and distinguishing them from each other. That power which call on us to choose the good and avoid from the evil is described as the intellect or 'aql in the Islamic traditions. (Majlisi Isfahani, 1984, vol. 1, pp.25-27).

But in law, it has several concepts. The Constitution in a brief passage has considered the effects of the intellect as



“the human advanced sciences, technologies and experiences”, and also named it as one of the four sources of Islamic law and jurisprudence (Constitution, article. 2, paragraph. 6); because the rational and scientific achievements are not confined to the special people, and those such achievements including foreign criminal law can be utilized in any territory provided that they are appropriate and fair.

However, under Imamiyya jurisprudence (Tabatabayi Hairi, vol. 2, p.512) and Islamic punishment code 2013, art. 140, the intellect is considered as one of the several conditions for proving the mens rea of a crime and criminal liability, and of course, even a person of unsound mind also has such an intellect (Muhacqiq Damad, 2006, vol.1, p. 67). Under art.149 of I.p.c 2013, the purpose of this intellect is absence of mental abnormality and having the will and power of discretion in such a way that when one of these conditions does not exist, the accused is not criminally responsible.

2-1-2- Nature

Although, the definitions which are mentioned above did not made clear the essence of intellect, they have merely stated its various functions in the different scientific branches. For understanding its nature, it should be studied from philosophical view point.

In Islamic philosophy, the intellect, for the first time, was divided into two parts of theoretical and practical intellects in the words of the Muslim grate philosopher Mulla Hadi Sabzewari (۱۷۹۸-۱۸۷۲) (Sabzewari, 2005, p.383). The first part is subject matter of the study for philosophy, mathematics and physics, and the second one is considered in the knowledge like jurisprudence, law and linguistics.



Under this division, Sabzewari showed that the essence of the intellect is the same in all the sciences.

In the other words, for studying the nature of the intellect, in the first step, the human soul is required to be realized and known, because as our philosophers have precisely expressed, while the soul has various faculties such as intellect and emotion, but it is united with them (Hassan Zade Amuli, 2001, p.115). when the intellect is one of the soul's faculties, so the intellect's nature is the very essence of the soul and, that is, the intellect has all of the soul's characteristics. For example, the intellect like the soul, while being unit essence, has tashkiki levels. Levels of Tashkik or gradations of intellect mean that the intellect has the different levels from deficient degree to perfect level; the criterion of perfection and deficiency of the intellect is the intellect itself. Therefore, the intellect's essence in the weak and strong levels, or in the perfect and deficient levels is the same, but the gradation of intellect is completely different in any level.

These different levels can be inferred from this holy verse: *wa man yarghabu an millate Ibrahim illa man safiha nafsahu?* i.e. who will abandon Abraham's religion except who makes himself silly?

Based on this Quranic verse, the highest level of the intellect is the spiritual light and insight which can distinguish right from wrong, and causes to follow the divine religion; and the lowest level of the intellect makes a man forsake the right path.

2-2- Criminal law

A collection of statutes or legal provisions concerning crimes and punishments, and principles of criminal procedure are called as criminal law. Criminal law is regarded as the legislator's act i.e. his written language. The



character and nature of verbal and lingual acts is obedience of the intellect (Abdollahi, 2006, p.102); so the legislative materials which are results and fruits of the verbal acts, shall convey the intellectual maxims to the addressed persons with the legal language.

In other words, the human intellect transfers his knowledge and concepts to the others with the verbal and written language. Accordingly, relation of language with intellect is the very relation of effect with cause, and since the criminal law is the written language of the legislator, then his statute in fact, is effect of the intellect and the intellect is also the cause of it. As the Muslim philosophers say, the cause ('illa) must more completely have all of the existential levels of the effect (ma'lūl) in order to create the effect (Ashtiani, 2003, p.460). As a result, the intellect must imagine all the exact legal maxims in the mind, approve their interests and utilities based on the aims of the Islamic society, and then in the second step, legalize the mentioned rules in the form of the appropriate penal code and the like.

It is probably better to say that since the criminal maxims are originated from the intellect, they follow the intellectual rules, and reflect them with the language of the law; because, existence of criminal law in the stage of intellect is the very existence of it in the level of the criminal statutes, and when the rational rules are applied to the criminal law, in fact, the intellectual rules have been made in the form of criminal statutes.

Therefore, criminal statutes are the external form of what exist in the legislator's mind, and show his mental imagine in the external existence i.e. the criminal statutes. Logically, the external existence of the law is the very mental picture which is available before the intellect and vice versa. In any way, the essence of the mental and external existence of the



objects will unite, but the former is located inside of mind and intellect, and the latter is placed outside of them (Sabzewari, 2001, v.2, p.122; Motahhari, 2009, v.9, p. 2009, p. 213). This is the case about the relationship between the criminal law and intellect, or jurisprudence and intellect, and vice versa.

2-3- Relation

In this research, relation refers to the type of the effect of the intellect on criminal law and their relevance and connection on each other. As it was mentioned before, since the intellect has the levels of defect and perfect, the legal systems have no the equal ability for application of intellectual maxims. Accordingly, it seems clear that the connection between intellect and criminal law in any system is not resulted in the same intellectual rules. For this reason, this relation between them in the Imami criminal law differs from the other systems. In the Imami doctrine, the legislator should transform his intellectual achievements or the people`s desires into the criminal Acts based on the framework of the four jurisprudential evidences or *adilla arba`ah* (the holy Quran, tradition, consensus and intellect), but the other systems have no such limitations.

It should be noted that both of the theoretical and practical intellects shall influence on the criminal legislation and, interpretation of legal text; in this manner, the intellect will have four kinds of relation with criminal law. In the following, the interaction between them will be considered according to the Imami School of law.

3- Relation of theoretical intellect with criminal law

As we said above, the connection between theoretical intellect and criminal law will be in two stages: making law and interpretation; these two levels are analyzed as follows:



3-1- Criminal law making

In the democratic systems, the legislators usually make the social values and the people's beliefs in the form of criminal materials, both of substantive and procedural criminal statutes. In this stage, the theoretical intellect and philosophical arguments play a basic role in order to prove these values as the foundations of criminal law. This realm of criminal law is recognized as the criminal schools of thought; because the first problem for any law maker is that under what criminal doctrine, the criminal law making should be based. Although this question may not directly arise for a legislator, but it plays an active part in legislator's mind for making the laws and it limits his selection.

At least, there are five criminal theories which are regarded as the foundations of the contemporary criminal systems; this includes: legal theory of Abrahamic religions, natural legal theory, ethical theory, theory of social contract and theory of positivism (Zafari, 2020, p.69). When one of these theories is accepted by the legislators in accordance with the arguments of the theoretical intellect, the legality and binding of the criminal Acts will be convincing based on the selected demonstration.

This is the case in the Imami law too; e.g. someone may be faced to this question: why have hudud (fixed penalties in the Imami jurisprudence) or qisas (retaliation) been provided by the Imami jurisprudence and Islamic punishment code 2013? The answers to this question will be possible only by the theoretical intellect. Here it can be replied that: Since God has created the human being, and He precisely knows his characteristics and needs, then, the Creator of man will provide the most appropriate and best laws for him. This is the first reasoning, and the second is:



God is creator of all the human beings, and for this reason, the absolute sovereignty is only for God not for His weakened creatures including the human governors. Based on these persuasive arguments, all the human beings have the equal rights and have no sovereignty on another. As a result, the human-secular legal systems have no the legality and binding of law, because forming a government or making law is only for the creator of man or with His permission.

This is called as monotheistic attitude that strongly proves the foundations of Imami criminal justice system, and makes any human – secular criminal system with the challenge of injustice and inequality. Because the human being does not know his real needs, so he cannot provide the adaptable criminal statutes to the real needs. As the result, it will be natural that the human legal system shall be faced to the permanently changeable laws and provisions, and cannot solve oppress and discrimination in the society. Accordingly, by proving the basis of the monotheistic – Imami criminal theory, and rejection of the human doctrines such as positivist law, it can be said that criminalization and determining the Imami punishments against the committing the crimes are adaptable to the justice and social and individual interest.

Therefore, the legislators based on their theoretical intellect's arguments, will choose their viewpoints concerning the world, society and human being, select an appropriate criminal school of thought, and enact the criminal statutes in accordance to the mentioned school. For this reason, any justification for the necessity and legitimacy of the Imami criminal statutes is based on the theoretical intellect` argument.



3-2-Interpretation of legal text

As the Imami legislator makes the people's beliefs and viewpoints concerning the social and individual life in the form of the criminal statutes, the judges or the prosecutors as the formal interpreters of the legal texts must understand the criminal texts in accordance with the same monotheistic viewpoint, otherwise they are not able to understand exactly the legal texts, or their interpretations will be contrary to the purposes of the legislators or meanings of the legal materials. In the other word, the legislator makes apparent his desires and purposes in the form of the criminal texts; accordingly, if an interpreter (like a judge) can understand the meaning of the criminal text, in fact, he will be able to achieve its purposed meaning or the desire of the legislator in a reverse method. So, while the process of the interpretation is in a reverse route of legislation, but the foundations of them are the same, and need to be proved by the theoretical intellect.

Unfortunately, some authors who are even elite, have not paid attention to the effect of the monotheistic perspective on understanding the Imami criminal text. Accordingly, they could not realize depth of their words and unintentionally rejected the Quranic text of the retaliation on relying somebody's belief like Mahatma Gaund'i (Gholami, 2017, p. 11). This is nothing but preference of a materialistic viewpoint to the monotheistic, and as we analyzed before, it is in the end of the weakness.

Certainly, the monotheistic worldview concerning legislation and interpretation of the criminal texts will cause the Imami legislators to choose the especial sources for criminal law making. Thus, in this system, the rational foundation and legality of the legislations are connected to the independent argument and reasoning of theoretical



intellect. As we mentioned them before, from this respect, the Imami law will be in the highest degrees of intellectual perfection in comparison of other human criminal systems.

The important point is that the Imami criminal system has mainly provided the substantive justice in the form of hudud, qisas, diyat and ta`zir crimes according to the Imamiyya jurisprudence, but enacted some contemporary criminal institutions concerning the procedural justice and the substantive justice in the code of criminal procedure 2013 and the Islamic punishment code 2013 based on the Western law: the jurisdiction of the criminal courts, powers of the public prosecution office, competence of the criminal courts, and of the public prosecution office are instances of the former, and mitigating and aggravating factors, the various types of postponement and suspension of punishments, systems of semi – discharge and conditional discharge are examples of the latter. Thus, although these institutions are the products of the independent theoretical intellect, the Imami criminal system has accepted them along with the sharia punishments.

4- Practical intellect`s relation to criminal law

The practical intellect also relates to the criminal legislation and interpretation; both of them will be considered as follows:

4-1- Criminal legislation

When we speak of practical intellect`s effect on criminal substantive and procedural statutes, in fact, we have entered into the realm of the sciences of criminal law or criminal jurisprudence of Imamiyya. The subject matter of these scientific branches is inference of criminal statutes and practical precepts from legal or jurisprudential sources.



Given that all the human affairs are dependent upon the mankind's world view, it is not surprising that criminal law and the Imami jurisprudence are strongly under influence of the theoretical intellect; and as a result, in accordance of legislator's viewpoint concerning the criminal schools of thought, the legal sources are selected (Allama Tabatabayi, 2000, p.156). By this reason, the Imami scholars have expressed that the sharia sources should be preferred over the other resources in the process of lawmaking.

The criminal sources suitable to the monotheistic criminal theory are as follows: the holy Quran, the innocents' tradition, the jurisprudents' consensus, and the intellect. These are the permanent sources of the legislations in Imami criminal system (Motahhari, 2009, vol. 3, p.178), and from aspect of the rank, they are the same, that is, the Imami jurisprudents can infer and realize a suitable precept from one of the mentioned sources of law without especial order among them; because there is no a hierarchy among the four Imami legal sources, and any of them has no priority on another, while there is an especial hierarchy between the Sunni legal sources, and the intellect's position is in the end of them (Awda, 1983, vol. 1, p.164).

Consequently, when the Imami legislator regards the Almighty as the sole lawmaker, he will not reject the Imami criminal sources, and will criminalize the criminal acts which are based on the Imami legal sources, such as the hudud (determined), qisas (retribution), diyat (blood money) and ta'zir (discretionary) crimes, because the monotheistic theory prevents him to deviate from the path.

However, act of criminalization is not always and easily resulted in a desired consequence. Because sometimes a new behavior should be criminalized that probably, it has no a precedent in the written jurisprudential evidences i.e. the



Quran or Sunna. Therefore, there is only based on an intellectual arguments such as social order, or expediency of society, human experiences of the other societies and the like that an act can be criminalized, provided that with observance of the justice and interest of the society, it is not to be beyond the sharia`s aims or at least, not to be contrary to these four evidences.

The 4th principle of the Constitution calls this condition as the title of “Islamic criteria” (mawāzīn). Thus, in the appropriate conditions, the legislator can even make a criminal offence such as consuming an intoxicating substance subject to the hudūd punishment of drinking wine (Islamic punishment code 2011, art. 264 -266). He can also stop the execution of an hudūd punishment, or suspend it to a special period; e.g. right now, the stoning punishment (rajm) in the adultery crime has been stopped or changed its executing conditions (Islamic punishment code 2013, art. 225). With criminalizing some acts such as abduction, organized crimes, trafficking women and children, etc. the legislator can also create new concepts in the Imami criminal system (Islamic punishment code 2013, paragraph b and c of art.47).

It is clear that such new legal concepts and institutions are mainly prescribed as the criminal rules in the Islamic punishment code 2013, while most of them have been effected on the findings of criminal sciences or borrowed from the European law. However, the legitimacy of all of them is uphold by the Guardian Council of the Constitution. These show the function of the practical intellect in the field of the legislation.



4-2- Criminal interpretation

In the stage of the interpretation, an interpreter or a judge should try to understand precisely the meanings of the legal texts, both of the substantive and procedural statutes. Firstly, interpretation of the substantive criminal law will be considered.

4-2-1- Interpretation of substantive criminal law

The legislator will transmit his thought to the judge through the legal text, thus, the judge should achieve the legislator's opinion from the text of the statute. In fact, the text is the effect of the author, and hence, the text is the best source of achieving the desired meaning of the legislator. If a judge carefully move the opposite direction of the legislation i.e. from the text of law to the mind of the legislator, he will understand the legal rules of the texts with the rational maxims. In this case, when the judge imagines the desired meanings of the statute's words, his interpretive activity will end.

It is evident that the stage of the criminal interpretation is also under control of the practical intellect. However, the criterion of the selecting criminal text's meaning is not the same in the most of the criminal systems of the world. Because there are at least three criminal interpretive sources: the legislator's intention, the purpose of a legal text, and the judge's intention. Under any intention, three theories seem to be apparent: the author's intention theory, the interpreter's intention theory, and the legal text's purpose theory. Given that both of the process of the criminal interpretation and legislation always follow up the same criminal theory, in Imami system, the interpreter similar to the legislator will select the monotheistic criminal theory based on the theoretical intellect, and according to the practical intellect, he will choose the legislator's



intention theory; because this theory is adaptable to the monotheistic opinion. Accordingly, as penal code or code of criminal procedure should derived from the four jurisprudential sources, the interpretation of both of them has not to be contrary to the sharia. It means that the judge has no right to infer a conflicting meaning to the criminal text based on his own criterion.

4-2-1-Interpretation of procedural criminal law

Until now, our discussion was mostly concentrated on the substantive criminal law; right now, we should continue the argument about the law of criminal procedure.

Concerning the texts of the procedural criminal law, with induction of the sharia ordinances, the intellect will find that the sharia enacts the precepts under the people's expediencies and corruptions, or their utilities and harms. Of course, sometimes the intellect is independently able to discover and understand these such expediencies and corruptions too. For instance, in one hand, about the criminal institutions such as the public prosecutor's office, the intellect not only denies their harmfulness, but also discovers their utility and usefulness for the society, and emphasizes on the necessity of them. In the other hand, since there is no the sharia's command or prohibition contrary to them, they are not considered as contradictory to the general principle and spirit of sharia, and justice and fairness too. Accordingly, the legislator (or the jurist i.e. Mujtahid) can enact any injunction based on the discovered expediencies, and make the system of the public prosecutor's office or the method of the executing the sharia's penalties in the framework of the Imami sources. It is clear that all these activities are dominated by the practical intellect.



This argument complies with the concept of *mentaqt al-faragh* (Martyr Sadr, 1996, p.689) and it includes some cases in which the sharia does not issue any injunction about compulsory of an act or omission, but the leader of the Omma (Islamic society) is permissible to command, forbid or permit any behavior. However, if there is a definite precept for a behavior i.e. the sharia expresses the necessary or prohibition of a thing, the intellect has no right to recourse to a probable expediency, and it does not issue a contradictory judgment against it. In the Imami jurisprudence, this is the so called *Ijtihad* (intellectual independent reasoning) in the face of *nass* (the legal text), and issuing such a precept is contradictory to the Islamic *mawazin* (criteria) (Sobhani, 1425, vol.2, p.85) and the Imami principles and jurisprudence (the Constitution, art. 72).¹

In any way, since adopting an especial procedure of criminal law is not conflicting to the principles of the Imami criminal law, the practical intellect approves its necessary, and it can be even called as the Islamic criminal procedure too.

5- Conclusion

There are two results that can be inferred from the Imami law about the relation of the intellect to the criminal law as follows:

1-In any criminal system, whether human or divine, the intellect deeply influences on the criminal law in both of theoretical and practical aspects. From the first aspect, with a firm demonstration, the intellect proves the legislator and

1. The Islamic Consultative Assembly cannot enact laws contrary to the official religion of the country or to the Constitution. It is the duty of the Guardian Council to determine whether a violation has occurred, in accordance with Article 96.



the judge's desired values which are in fact, their criminal theory. The materialistic criminal theories such as theory of social contract and positive theory do not have philosophically the required strong arguments for their criminal systems. But in the Imami criminal law, the intellect's firm argument for the monotheistic theory, theoretically place the penal code in the highest level of its perfection. Accordingly, it should not be considered the Islamic characteristic of the Islamic punishment code 2013 as the meaning of lack of the intellect's relation to this criminal law.

2- In the criminal law, the practical intellect as one of the four jurisprudential evidences, has an equal function alongside to the other sharia's reasons. It means that if this intellect is based on the definite evidence not a suspected reason, it will be able to restrict, limit or stop the execution of the sharia` punishments as some of them are mentioned in this paper.

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رابطه عقل با حقوق جزا در مکتب امامیه

محمد رضا ظنفری¹

چکیده

در نظام‌های کیفری عادلانه، قواعد عقلی دقیقاً در قالب مواد قانونی بیان می‌شوند، اما قانون مجازات اسلامی ۱۳۹۲ مبین قواعد فقهی امامیه بوده، بر احادیث و وحی الهی استوار است. بر این اساس، عقل انسان چقدر در آن نقش دارد؟ در این تحقیق با روش توصیفی - تحلیلی، ابتدا سعی خواهد شد تا ثابت شود که رابطه علیت بین عقل و حقوق کیفری باید در دو حوزه تشریح و تفسیر وجود داشته باشد و نظام کیفری امامیه طبق ادله عقلی هر دو را دارد. ثانیاً اعتبار منابع کیفری امامیه نیز با ادله عقلی محض اثبات می‌شود و از این رو، در مقایسه با حقوق جزای غربی که بر اساس ادله عقلی محض نقصان آن مبرهن است، نظام امامیه در مرتبه بالاتری از کمال قرار دارد.

کلیدواژه: عقل، مجازات، فقه و حقوق غرب.



جایگاه مسلمانان غیر امامی از نگاه فقیهان امامیه و اتان کلبرگ

حسین ردایی^۱

چکیده

در فقه شیعه، مسلمانان غیر امامی از جهات مختلف احکامی مشابه شیعیان دارند، اما به گفته دکتر اتان کلبرگ، شیعه شناس معاصر، احکام شرعی مربوط به مسلمانان امامی و غیر امامی در فقه امامیه متفاوت است. اهمیت موضوع اینجانب را بر آن داشت تا به بررسی تطبیقی آرای ایشان و فقهای امامیه به ویژه فقهای معاصر پردازم. در این تحقیق بر اساس روش عقلی- نقلی به دست می‌آید که دکتر کلبرگ تنها به نظرات برخی از فقهای گذشته تکیه کرده و در تحقیق خود اثری از فتاوی فقهای معاصر دیده نمی‌شود. ثانیاً عنوان تحقیق شامل همه مسلمانان غیر امامیه است ولی نویسنده فقط احکام فرقه ناصبی را بیان داشته، احکام خاص آنها را به همه مسلمانان تعمیم داده است. ثالثاً فرقه ناصبیه به دلیل سب اهل بیت پیامبر(ص) به اجماع فقهای شیعه و همه فرقه های مسلمان از احکام مسلمان خارج می‌شوند. از این رو، داده‌های فقهی نویسنده، بر منابع معتبر شیعه استوار نبوده و فاقد ارزش علمی است.

کلیدواژه‌ها: فقه، امامیه، غیر امامیه، فرقه ناصبی، کلبرگ.



ماهیت فقهی - حقوقی عرف و انعکاس آن در قوانین کیفری ماهوی ایران

مهدی مؤمنی^۱

یاور جلائیان صالح^۲

چکیده

بسیاری از فقهای متقدم، متأخر و معاصر از جمله امام خمینی (ره) به اهمیت نقش عرف توجه ویژه نموده‌اند. جایگاه عرف و پویایی آن در مباحث فقهی و حقوقی با توجه به عنصر زمان و مکان، هویدا می‌شود. سؤال اصلی اینست که؛ عرف در امور کیفری ماهوی از چه جایگاهی برخوردار است؟ با این فرضیه که؛ مفهوم خاص عرف در امور کیفری ماهوی، جایگاه ویژه و متمایز از سایر رشته‌های حقوقی برای آن ترسیم کرده است. هدف؛ واکاوی مفهوم عرف در ابعاد فقهی و حقوقی و تبیین اعتبارسنجی آن در قلمرو حقوق کیفری ماهوی به ویژه در خصوص مسئولیت کیفری و تعیین مجازات‌ها است. روش تحقیق توصیفی- تحلیلی است. نتایج حاصل بیانگر آن است که اگرچه عرف در مسائل کیفری نمی‌تواند به عنوان منبع فقهی یا قانونی حقوق جزا مستند تعقیب کیفری و یا محکومیت قرار گیرد؛ اما قادر است در سه مقام ایجاد قواعد حقوقی، مقام تفسیر و نیز تطبیق قواعد حقوقی، نقش بسزایی ایفا کند.

کلید واژه‌ها: عرف، قوانین کیفری، ماهوی، فقه، حقوق.

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تحلیل حقوقی و فقهی تولید محصولات تراریخته

مهدی خاقانی اصفهانی^۱

چکیده

حمایت کیفری، از طریق پیشگیری قهرآمیز و کیفرگذاری برای جرایم علیه آب، یکی از عوامل بازدارنده از تشدید و خامت بحران کشاورزی در ایران است؛ بحرانی که با افت منابع آبی و مدیریت نابهینه‌ی آب، نیاز به واردات محصولات کشاورزی و فراورده‌های غذایی را افزایش داده است. رشد واردات تراریخته‌های ناپایمن، با ترجیح ناموجه حفظ امنیت غذایی بر حق غذای «سالم»، بحران‌های دیگری می‌زاید. ضعف قوانین و رویه‌های حقوقی ایران هم در حمایت از حقوق مصرف‌کنندگان محصولات تراریخته، جرم‌انگاری معطوف به حمایت از امنیت غذایی در وضعیت فزاینده‌ی نیاز به تراریخته‌ها در بحران آب را لازم می‌نماید. از منظر فقهی نیز ادله موافقان تولید محصولات غذایی تراریخته، قوی‌تری به نظر می‌رسد و پشتوانه همسویی سیاست جنایی در عدم جرم‌انگاری این محصولات است. آنچه به عنوان دلیل مخالفت از سوی مخالفان تولید تراریخته‌های خوراکی مطرح شده، بیش از آنکه یک دلیل محسوب شود، حاکی از نگرانی فقهی است؛ چرا که انجام تحقیقات در زمینه ژنوم (گیاهی و حیوانی، و تبعاً سپس ژنوم انسانی) ممکن است با سوءاستفاده‌هایی همراه شود که کرامت انسانی را به چالش بيفکند. این مقاله، به روش توصیفی-تحلیلی، با طرح نقدهایی بر قوانین و مقررات موجود در حوزه حمایت کیفری از دو موضوع آب و ایمنی زیستی در مصرف تراریخته‌های خوراکی، چارچوبی برای جرم‌انگاری رفتارهای مجرمانه علیه زنجیره تأمین غذا با مسئولیت مطلق - یا حاوی فرض مسئولیت کیفری - ارائه می‌کند. نقد مواد قوانین مربوط به محصولات تراریخته و جرایم علیه آب، جهت مسئول شناختن دولت و اشخاص حقوقی عمومی و خصوصی مسئول در اجرا و پایش قوانین امنیت غذایی، با رعایت «اصل مداخله کمینه و محدود کیفر به آخرین حربه» مورد هدف این نوشتار است.

واژگان کلیدی: نظام حقوقی تراریخته‌ها، فقه جرایم علیه ایمنی زیستی، دوگانه‌ی امنیت غذایی و سلامت غذایی.



ازدواج کودک در حقوق اسلامی

جواد حبیبی تبار^۱

چکیده

در مورد جواز ازدواج با صغیر بین فقهای امامیه اتفاق نظر وجود دارد به شرطی که به نفع خود او باشد و گناه و مفسده نداشته باشد، اما در بسیاری از کتب متأخر فقهی امامیه، فتوایی درباره جواز یا نهی از لذت از زوجه صغیر وجود دارد که در نگاه اول حاکی از برخی لذت‌های غیر متعارف از زوجه نابالغ است. نوشتار حاضر با تشریح اظهارات فقیهان، اتهامات فوق را رد می‌کند، با این استدلال که آنان حکم اوایه را بیان کرده‌اند و در حکم ثانویه موضوع را بیان نکرده‌اند. نویسنده سپس با ارائه جزئیات دلایل و مستندات فقهی و با استناد به کلیات اصل لاضرر، می‌کوشد تا ثابت کند که فقه امامیه، التذاذ از کودک را به طور مطلق ممنوع کرده است.

واژه‌های کلیدی: صغیر، ازدواج، لذت (استمتا)، اصل عدم ضرر.



اصول اخلاقی قرآن و سنت برای پیشگیری از جرایم سایبری

محمدعلی عامری^۱

جواد انصاری^۲

مصطفی مرادی^۳

چکیده

فضای مجازی در زندگی میلیون‌ها انسان رواج یافته است، اما به همان اندازه که به ابزاری برای سرگرمی، جمع‌آوری دانش و اطلاعات تبدیل شده، از اصول اخلاقی دور شده است. اخلاق اسلامی مشتمل بر رهنمودهای اخلاقی است که راه درست را به انسان نشان می‌دهد از جمله نحوه استفاده از فناوری اطلاعات مبتنی بر اخلاق انسانی. مصادیق مختلفی از این اصول در قرآن و سنت وجود دارد، مانند وفای به عهد، امر به معروف و نهی از منکر و یا موارد دیگر که علاوه بر کارکردی که در پیشگیری از گناه دارد، می‌تواند در پیشگیری از جرایم اینترنتی نیز مؤثر باشد. این پژوهش مبتنی بر روش توصیفی و تحلیلی است و یافته‌های آن نشان می‌دهد که اصول اخلاق اسلامی در قرآن و سنت مناسب همه ملت‌ها و زمان‌ها بوده و در صورت اعمال، موجب ایجاد جامعه‌ای اخلاقی و موفقیت‌های بعدی در پیشگیری از جرم می‌شود.

واژه‌های کلیدی: اخلاق اسلامی، اخلاق سایبری، قرآن و سنت، جرایم سایبری، پیشگیری.

Abstract

۱. استادیار و عضو هیأت علمی پژوهشگاه علوم انتظامی و مطالعات اجتماعی ناجا، (نویسنده مسئول)، رایانامه:

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درآمد

یکی از ارکان تمدن اسلامی، مسئله شرع، قانون و به طور کلی فقه یا فقه اسلامی است. این فقه بر خلاف برخی از نظام‌های حقوقی دنیا که بر قوانین طبیعی، عرفی، عقلی یا قراردادی تکیه دارند، نگاهی جامع به انسان و جامعه دارد و از روشی تلفیقی بهره می‌برد. در حالی که قرآن کریم و سیره پیامبر و اهل بیت (ع) منابع و مبانی اصلی شریعت اسلام است، اما این قانون از عقل، عرف، قراردادهای اجتماعی، قوانین نانوشته، اخلاق، وجدان، فطرت انسانی، عمومی استفاده می‌کند. علایق و غیره و به همه آنها توجه دارد. در نتیجه، نظام‌های حقوقی مسلمانان صرفاً یک نظام حقوقی عقلایی صرف یا یک نظام حقوقی قراردادی و قراردادی ناب نیستند، بلکه به همه آنها نگاهی جامع دارند و آنها را به شکل یکپارچه عمل می‌کنند.

این نشریه ضمن استقبال از مقالات علمی تمامی پژوهشگران در زمینه فقه، حقوق، فلسفه فقه و حقوق، رابطه فقه با اخلاق، فقه فردی و اجتماعی و سایر موضوعات مرتبط، بر مسئولیت محتوایی مقالات بر عهده نویسندگانشان است. این مجله به دنبال گشودن زمینه‌های جدیدی از بحث‌های بین رشته‌ای در مورد موضوعات فوق برای همه خوانندگان و محققان است.

از خداوند متعال توفیق تمامی محققین این عرصه را مسئلت دارم.

آیت‌الله احمد عابدی



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مدیر مسئول: محمدرضا ظفری
سردبیر: عادل ساریخانی

هیأت تحریریه:

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- دکتر محمد ابراهیمی شمس ناتری (دانشیار حقوق جزا دانشگاه تهران)
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مدیر اجرایی: دکتر حسین رضا مهدوی راد

ویراستار انگلیسی: دکتر محمدرضا ظفری

طراحی و صفحه آرایی: موسی امیری

- مسئولیت مطالب هر مقاله برعهده نویسنده آن است و لزوماً دیدگاه فصلنامه نیست.
- فصلنامه در تلخیص، ویرایش و اصلاح مقالات آزاد است.
- نقل مطالب فصلنامه با ذکر مأخذ مجاز است.

نشانی: قم، زنبیل آباد، خیابان ابوالفضل، مدرسه علمیه ابوالفضل، طبقه ۴

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