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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
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Fundamentals of Islamic jurisprudence in the criminals` reformation and treatment

Mohammad Ali Hajidehabadi¹

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Abstract

this regard, various measures have been taken by the different societies that have pursued specific objectives such as punishment, deterrence, compensation, etc. These measures include reforming, rehabilitating, and resocializing the criminals. This issue has a history of only more than two centuries in the Western world, but there are many propositions in Islamic texts. However, the basics of the reformation of criminals have been less comprehensively investigated, especially from the perspective of Islamic jurisprudence. This article aims to analyze the fundamentals of Islamic jurisprudence on reforming criminals with a descriptive-analytical method. The findings of the research show that, in addition to the numerous verses of the holy Qur'an, in the manner of the imams (S.A), especially the governmental life of the Prophet (S.A) and Imam Ali (S.A), attention to this matter is seen. In addition, the reformation of criminals is also subject to the proof of the “preventing of evil”. Even if these jurisprudential evidences are ignored, the need to avoid the harmful consequences of not reforming the criminals, demands that we put the expediency in accepting these measures.

Key words: rehabilitation, resocializing, jurisprudential evidences, preventing the evil.

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Introduction

Punishment has been an ancient concern of mankind against crime. The different measures have been taken by the different criminal systems that pursued specific goals such as deterrence, compensation, etc. Also, rehabilitating and resocializing criminals are some of the mentioned measures. Although the Western world's idea of rehabilitating criminals returns to the positivist school and modern social defense, it was reported that it could not flourish in the late 1970s. However, its believers did not give up the idea, and again it has been accepted in the realm of some crimes and for some groups of criminals.

Today, the rehabilitation of criminals still has the required validity and value, especially because it is in the direction of respecting human nature and dignity. For this reason, this idea is recommended by the United Nations and other international institutions. Now there is a question what is Islam's approach to the rehabilitation and treatment of criminals, and to what extent has this important issue been paid attention by the Islamic criminal jurisprudence?

This article aims to discuss the jurisprudential foundations of this issue. But first of all, it is necessary to analyze the nature of these measures, because on the one hand, finding arguments for the prescription of such measures, and their kinds of Islamic precepts i.e. obligatory, recommended, or just permissible, and identifying the responsible people for it, and on the other hand, the possibility of combining or replacing these measures with other punishments, depends on the understanding of the nature of these measures from a jurisprudential point of view.

Therefore, we will discuss the topics of this article in two parts: the nature of reformation and treatment measures (section one) and the jurisprudential proofs for these measures (section two).

Section one: The nature of reformation and treatment measures



A . Definition of reformation and treatment

The term “reform” is used in various social, economic, political, and legal fields. In the current discussion,“ reform” means “ improving” the individual's conditions, but this improvement does not mean only changing the individual's social behavior. Rather, " "reformation " implies a change in attitude, recognition of the badness of the action performed, and an honest decision to correct the future life" (Cottingham; 2014; pp. 162-163). Therefore, reformation requires a change in the criminal's moral attitude. Although there have been many controversies in realizing reformation in the sense above through punishment, many believe that punishment cannot achieve such an important goal. Reformation in the aforementioned sense may take place spontaneously and due to the increase in insight and awareness of the criminal, or for the reason of change in his social conditions and with his age. However, in the field of criminal law, reformation refers to those types of non-criminal measures and programs, mainly educational and treatment ones, which are said to be carried out in a planned manner by reformation and treatment institutions with social background, that lead to the reformation of the criminal. It is obvious that this meaning is less meaningful for criminals who commit crimes with benevolent and moral motives.

Some criticisms have been made in realizing reform in the previous sense, along with non-criminal programs and measures; because, on the one hand, the spirit governing the mentioned programs must be moral and have a benevolent intention, and on the other hand, the criminal must understand and accept those programs and participate in them voluntarily and actively (Cottingham; 2014, p. 163). Therefore, reform has a moral burden, and any forced and one-sided program is less able to achieve it. In addition, the reform implies the availability of organizational facilities and a lot of material resources. It should be noted that changing people's behaviors may

require entering the legal field of the individual, which is not compatible with human rights standards.

For this reason, while considering reform as a very valuable and ideal goal, some consider it a dream goal (Najafi Abrandabadi and Hashem Beigi 1377 p. 290). Perhaps, some authors downgraded reform to the mentioned ideal concept and considered it synonymous with "rehabilitation" in this matter. From the point of view of these authors, reform or rehabilitation is the idea that punishment can reduce the tendency to commit crime, provided that it is in a way that improves the behavior or individual characteristics of criminals and reduces the likelihood of their recidivism.

B: The difference between reformative measures and preventive and educational measures

Reformative measures are a part of protective, educational and therapeutic measures, and not all of them, which are aimed at creating a positive transformation in the personality and behavior of criminals to return to a healthy life;

It is obvious that not all protective, educational, and therapeutic measures have this type of orientation, and perhaps it is only a form of forced prevention of committing a crime, and includes measures such as house arrest, electronic monitoring, exile, and even prison.

But the characteristic of corrective measures is to create a kind of structural transformation in a person's personality and hence to correct his attitudes, insights, feelings, habits and behavior through education and special training, occupational therapy and vocational training, etc. So that a person, knowingly and willingly, stops committing crimes and sins and respects the laws and observes them.

Now the question is, what is the name of such measures, some of which are included in the protective and educational measures, in terms of Islamic jurisprudence? Can they be called punishment, in the sense that they are convicted and executed by a criminal judge? Or that the nature of these



actions is different from what is called punishment in Sharia law. Undoubtedly, as some researchers (Rohami 2011) have also noted, there is no specific title in jurisprudence books called “protective and educational measures” , or “corrective measures” ,and the criminal responses of Islam just have been mentioned under the headings of Hudud, Qisas, Diat, and Tazirat.

Even recently, titles such as deterrent or governmental punishments, specific Shari'a punishments, indefinite and non-specific punishments, punishments delegated to the judge or the ruler have been raised too , in which there is not clearly a discussion of reformatory or preventive and educational measures.

Yes, writers and jurists have always emphasized on the reformatory and educational aspects of Islamic punishments and considered the reformation and education of criminals as one of the functions of Islamic punishments. Abd al-Aziz Amer, an Egyptian researcher, writes about Ta'zirat: "Islamic law has legislated Ta'zirat to prevent the committing of crimes and to reform the criminals, so that by means of it, a righteous community can be created and corruption and vices can be prevented" (Amer 1375 p. 247).

Now, can correctional and educational measures be considered a form of Ta`zirat punishment?

Some jurists who consider ta'zir to include whipping, also consider such actions to be included in the title of ta'zir. But the problem is that if such actions are a form of ta'zir punishment, is it possible to combine them with specific Shariah punishments (such as Hudud and Qisas) where a person is sentenced to such punishments , in the assumption that a person remains alive after the execution of the punishment?

Some researchers believe that the same punishments specified by Shari'ah should be applied to the individual and other measures such as exile etc. cannot be used. Yes, assuming the existence of a "dangerous state", it should be under "permanent care" (Rahimi 2018).

Some jurists who are aware of Islamic penal jurisprudential issues, believe that "protective measures" are not penal regulations, but government regulations which are established on the basis of social expediency, and if they are among the criminal regulations, it is because of their similarity. And Mainly, it does not conflict with Islamic regulations, in any case, it is not a punishment, but it is a preventive measure, so there is no relationship between these [actions] and Ta'zeer" (Gorji, quoted by Rahami, ibid.)



Section two: Jurisprudential proofs regarding reformative and educational measures

In jurisprudential discussions, when examining the proof of a subject, they use the Qur'an, the Sunnah, and the traits of Imams (S.A.) as narrative proofs, and besides, they use the ruling of wisdom or rational reasons. The researchers who have researched protective and educational measures from a Sharia perspective have argued with the Qur'an and Sunnah and cited examples of such measures from the Qur'an and the manner of the Imams(S.A.) as proofs of the approval and prescription of the Sharia regarding such measures;

Such examples include: keeping adulterous women at home (Nisaa, verse 15), the requirement of the presence of believers during the implementation of punishment of adultery (Noor, verse 2), disqualification of the qadhef (a person who attributes adultery or sodomy to another) , in testifying (Noor, verse 4a), the exile of Hakam bin As (Har Ameli, 1388, vol. 14, p. 259)

And also the exile of effeminates by the Prophet (Tabarsi, 1408, vol. 5, p. 118; Ibn Hisham, 2012, vol. 4, p. 175 and Seyyed Mohammad Hossein Tabatabai, vol. 9, p. 424.)

And the exile of Mohareb (Har Ameli, 2008, vol. 4, p. 429) pointed out. it is clear that although such measures may have reformative and educational effects on criminals or people with a dangerous state, they are



mainly measures of a protective nature, but what is followed in this article is to find criteria and examples that its reformatory feature prevails.

Of course, researchers (Rahami pp. 153-154) in the discussion of precautionary measures and in other words protective and educational measures in Islam have benefited from the Quranic standards of commanding good and forbidding wrong, preventing corruption, reforming and educating, the need to protect the interests of the individual and society and establish Social justice, which will be used in the present discussion as needed.

Some researchers do not consider the basics of such measures to be different from punishments, as they have the same nature as punishments. And they consider matters such as the justice in the community, purifying, reforming, and educating souls, warding off corruption from individuals in the community, as the most important jurisprudential foundations of protective and educational measures.

In any case, in the following discussions, we will try to express the most important jurisprudential bases justifying the acceptance of reformation and treatment of criminals in Islamic penal jurisprudence. Obviously, this issue, like other cases, should be searched in the Qur'an, Sunnah and wisdom. This issue has not been examined from the point of view of the consensus of jurists.

A) The proof of the Qur'an

In the Holy Quran, there are explicit instructions regarding the reformation and education of criminals, some of them are mentioned here.

In the Holy Qur'an, God Almighty orders non-repressive actions, with a pleasant and good nature, as a policy in order to guide His servants in dealing with crimes and deviations. In Quranic literature, these measures are interpreted as "the best measures". The Quran says in this context:

“Good and bad are never the same; Repel evil with good, suddenly (you will see) the one who is an enemy between you and him, become warm and intimate friends.”(fosellat34)

“ [O Prophet] Repel the evil from the way that is better.”(moumenon 96)
When we place these verses next to verse 40 of Surah Shora, we can clearly infer the great desirability of non-criminal answers from the point of view of Sharia; “The answer to a bad action is an evil like it.”

Especially, in this verse, God has mentioned examples of these measures and says:

So whoever forgives and makes amends, then his reward is on God, indeed, He does not like wrongdoers.

In this verse, apart from forgiving the offender, God has also encouraged him to reform; Mentioning reformation next to forgiveness indicates that the two are different, although these two things are related to each other. Because the requirement of reformation can be ones forgiveness in the beginning;

In other words, although the features and consequences of forgiveness can be the reformation and education of the criminal, but in addition to that, reformative and educational measures should also be used to rebuild the character of the criminal;

In addition, God says at the end of the verse: "Truly, He does not love the wrongdoers"; Commentators have presented various possibilities in the interpretation of this part of the verse and how it is related to its previous forgiveness.

One of the interpretations is that the order to pardon and reform criminals does not mean that God loves the oppressors, but rather, the purpose of this order is to guide the misguided and strengthen social bonds.

among the other cases in which the Qur'an has clearly ordered the reformation and training of criminals is in Surah Aal Imran, where God says to the Prophet: So [O Prophet] forgive the wrongdoers and seek forgiveness from God for them.(159)



Explaining the method of forgiveness, as one of the methods of reforming and educating criminals, requires an independent research, but what needs to be briefly stated here is the effect that forgiveness has on rebuilding the character of criminals, and it is also mentioned in the words of the Holy Prophet (S.A).

It has been narrated: "A man complained about his servants to the Prophet (S.A) the Prophet (S.A) said: Forgive them so that you can correct them in this way." (Noori, 2012, vol. 9, p. 7)

In any case, from many verses of the Qur'an, the priority of adopting corrective and educational measures in response to deviations and crimes is inferred ; Especially, such responses have been interpreted as rehabilitative in the logic of the Qur'an. God says in the Holy Quran:

"For this reason, We have decreed on the children of Israel that whoever kills a human being without committing murder or corruption on earth, it is as if he killed all humans. And Whoever revives a human being, it is as if he has revived all people. " (Maidah 22)

In the interpretation of the last part of the verse, the commentators, referring to the hadiths, have considered the removal of humans from misguidance and the reference to guidance and the straight path as its clear examples.

Allameh Tabatabae writes: "What is meant by it [revival] is what it is considered as "revival" in the common sense; When a doctor cures a disease, or a diver saves a drowning person from drowning, or frees a captive from the hands of the enemy, the wise say: So-and-so saved such-and-such a person.

God has such interpretations in the Qur'an, for example, he called guidance to the truth, revival and said: "And the one who was dead (due to ignorance and misguidance), We revived him and gave him light (knowledge and religion) so that he walks brightly (exalted) among the people" (An'am 122)

So, according to this verse, the one who guides astray to faith has revived him". (Mohammed Hossein Tabatabai, Vol. 5, p.)

Therefore, from the Qur'anic logic, the reformation and treatment of criminals is considered as one of the important examples of the right to life, and rather the most significant example of it, and just as it is obligatory to preserve the biological life of humans, it is also obligatory to preserve their spiritual life.

In the book "Kafi" it is stated by Fazil bin Yasar that "I asked Imam Abi Ja'far (S.A.) what is the meaning of this word of God which says, "And who revives a person , so revives all people"? The Imam said: It means someone who saves a person from burning and drowning. I said, does it include someone who saves a person from going astray and guides him to the right path? The Imam said: This is the greatest interpretation for it. (Koulaini, 1361, vol. 2, p. 210-211; and Sheikh Mofid, vol. 1, p. 230)

Also, among other cases where God's command to reform and rebuild the character of criminals can be inferred, there are verses that refer to "mediation". God says: “ Correct your relations with each other (mediation) and obey Allah and His Messenger if you [correctly] believe.”(Anfal 1) It is obvious that the mediation is in crimes that have a specific victim.

Just as reconciliation can be achieved by ordering to pay the damages of the victim, rebuilding of the offender's character in such a way that he apologizes to the victim and agrees on compensation with him, is also considered to be a reform of the relationship between them.(mediation)

B: Imams' method in reforming and educating criminals

Among the proofs that indicate the permissibility and even the obligation of reforming and educating criminals , is the manner of religious leaders, whose words and actions are evidence for us.

The study of the life of the Prophet and the Ahl al-Bayt(S.A.) indicates that in various cases, they were interested in the correction and treatment of criminals and their training, and even if they punished a criminal, they did not neglect corrective measures towards him.



Of course, since, except for the Prophet and Imam Ali (S.A.), there was no opportunity for Islamic government in a short period of time, other imams(S.A.) have either advised on this issue (verbally) or in the field of personal relationships, only as a citizen, did such a thing. (social way); Extracting the governmental and social practices and speech of imams, regarding the reformation and education of criminals, is a task that requires an independent research, but in this field, it is enough to only include some of them to the extent that it proves the author's claim.

1- Imam's verbal manner:

Encouraging the reformation and education of criminals is one of the important recommendations of sinless leaders , and here we mention some of these recommendations.

Imam Sajjad (S.A.) says: It is the right of your fellow believers to seek health and comfort for them in your heart, and be kind to them, and deal gently with their bad deeds, and bring them closer to you and reform them. (Khasal, p. 570.)

Imam Sajjad (S.A.) , in this important speech, considers the reformation of wrongdoers as one of the rights of fellow human beings and considers it the duty of a person to observe this right.

Imam Ali says: It is appropriate for those who are far from sin, and have been blessed with the success of staying safe from sin, to be kind to sinners (and criminals) (so that they too can be led to abandon sin and wrongdoing). (Nahj al-Balagha, p. 428)

Showing mercy to those who are immersed in sin and rebellion is actually a form of providing an opportunity for reform and rehabilitation and not an approval of their behavior and actions. In fact, moving in the direction of removing the factors that caused them to fall into delinquency is to be kind and compassionate towards them;

It is obvious that this is not only a Shariah recommendation, but it is a rule of common sense, and according to Imam Sadiq's (S.A.) statement: One of

the most important solutions of common sense is to show mercy to ignorant people. (Ghourar al-Hekam, p. 303.)

In fact, one of the social principles of Islam is the “principle of friendship and tolerance” , which is not only a moral advice, and it has also been considered in the criminal policy of Islam and dealing with criminals.

The principle of friendship and tolerance has been emphasized a lot, and even against sinful, rebellious, wicked, ignorant and socially undisciplined people, which may be said it is true to reject such people, and have a negative and awkward attitude towards them.

But according to the teachings of Islam, these people should also be treated with the principle of friendship and tolerance, and none of God's creatures should be humiliated with inappropriate behavior or actions! Except for those whose practical wisdom requires something else" (Hakimi, 1409, v.9, p.609).

It is important to note that showing mercy to criminals does not mean equating them with the none wrongdoers or approving their behavior; Mercy means helping them and solving the problems that cause them to commit crimes, and not approving or praising their behavior and considering them equal to those who are not infected with sin.

Because such an equality - which, unfortunately, today is considered as human dignity and due to a misunderstanding of this important principle - is the cause of their further misguidance and deviation.

Imam Ali (S.A) says: (O` governor of Egypt) the virtuous people should not be the same in your eyes as evil and lazy ones, because this kind of behavior reduces the interest of good people in doing good deeds and encourages evil doers to continue doing bad deeds (Nahj al-balagha, letter 53).

2- Social practice:

The imams, not only verbally , but also in practice, have paid great attention to the reformation and education of criminals and deviants and have insisted on this matter, to such an extent that God Almighty in the



Holy Qur'an warned the Holy Prophet (S.A.) from putting himself to such a task and trouble.

3- Governmental manner of the Prophet (S.A) and Imam Ali (S.A.):

Among the imams, except for Imam Mahdi (God hastens his appearance), who the world is waiting for his blessed coming and his just rule, as well as the Holy Prophet and Imam Ali who found the opportunity to establish the Islamic government, unfortunately, there was no opportunity to govern. Therefore, we should only look for examples and evidence of the performance of the Prophet and Imam Ali (S.A.), which indicates their efforts to reform and educate criminals during their reign; Of course, this did not mean tolerance in adhering to divine limits in their government; The “principle of tolerance” in the government of the Prophet and Imam Ali, should be considered along with the “principle of certainty” in the implementation of divine decrees.

This is the reason why the Holy Prophet did not refrain from pardoning the criminal in cases where there was a possibility of pardoning the criminal and there was hope for his reformation. An example is "Safwan Ibn Umayyah", who was among the leaders of the polytheists of Mecca and the instigator of many wars against the Holy Prophet and Muslims, he even hanged a Muslim in Mecca in front of the people, that is why the Prophet made it permissible to shed his blood. Safwan fled to Jeddah in fear of punishment because he found out that his name was on the list of ten people whom the Prophet exempted from general amnesty and sentenced to death. `Amr b. Wahab, Safwan's cousin, asked the Prophet to pardon Safwan, and the Prophet accepted. Safwan did not believe that he had been forgiven, so he asked the Prophet to bring a sign of his pardon. The Prophet gave his turban or shirt as a sign.

Seeing this sign, Safwan returned to Makkah and when he saw the Prophet (S.A), he said: Give me two months to research about Islam. The Prophet said: I will give you four months to research about Islam and become a Muslim.

Safwan later said: No one can be this kind of soul unless he is a prophet and he said the testimonies and became a Muslim (Ibn Hisham 2012, vol. 4, p. 60; al-Maghazi, 1409, vol. 2, p. 853). It is also mentioned in the Prophet's biography that if someone committed a sin, he would discipline him in such a way that he would be careful forever (Tabatabai, Sunan al-Nabi, vol. 1, p. 2).

He always put a lot of emphasis on forgiveness and mediation, and in one word it was like what God said in the Qur'an describing his personality and behavior:

"Muhammad is the Messenger of God, and those who believe with him are hard on the disbelievers, and kind to themselves" (Fath: 29).

And in another place, he says: A prophet has come to you from among yourselves, who will find it difficult if you fall into suffering, he is greedy for your happiness, and he is compassionate and kind to the believers. (Tawba, 128)

And Imam Ali describes him as a doctor who knows exactly how to treat the patient and his type of illness:

And the truth is that criminals are patients who deserve treatment. In any case, there is no doubt that the Holy Prophet (S.A) had a reformative interaction when facing wrongdoers and deviants and paid attention to their training. Extracting the Prophet's educational and reforming manner about deviants and criminals is a work worthy of research, which unfortunately has not been done so far.

c) Social expediency and the necessity of reforming and educating criminals:

Social expediency is one of the basics of reforming and rehabilitating criminals. This strategy is vital and important. This issue can be analyzed and explained from various aspects.

Each member of the society is considered as one of the important assets of that society, which can play an important role in the economic, social and



cultural production and progress of the society; they also play an essential role in maintaining the social order and defending the society against the invasion of foreigners and enemies. Undoubtedly, only punishing the criminals, without any justification or persuasion from the government - where the criminals either do not accept their guilt or consider its origin to be the cultural, social, political, economic, etc. conditions governing the society , It has no fruit other than separating them from the body of society and government.

The result of such a thing is the loss of society's capital. Recommending tolerance for people's wrongs and deviations and trying hard to solve their behavioral problems is in fact in line with the preservation of this social capital. This is important in interpersonal relations as well as in the relations between the government and members of the society. pay attention to the recommendations of Imam Ali (S.A.):

“Those who cannot bear their friend's wrongs will be left alone.” (Amedi, 1410 p. 297.)

“Bear the fault of your people or your friend for the day of the enemy's attack.”

(Majlisi, 1403, J. 74, p. 166)

“Forgive your friend's wrongs for the day when your enemy attacks you.” (Kafi, 1361, Vol. 8, p. 24)

Therefore, the use of exclusionary or strict criminal responses and the lack of any attention to corrective and educational responses can result in the negative attitude of criminals and their families towards the government and little by little deprive the society of its social support capital.

It is in this case that the acceptability of the sovereignty is at risk and the ground for its vulnerability is provided from inside or outside - by the attacking and hostile governments.

On the other hand, the mere use of these types of responses - without paying attention to reformative, restorative, educational and rehabilitating measures - distorts the interpersonal relationships of social members,

especially in crimes involving victims, and instead of solving the problem, it makes it more critical;

Because the criminal does not consider himself deserving of punishment and at least expects mercy from the victim ,so with repressive responses, without any effort to solve the problem, he attributes his crime to the victim and his family.

especially in cases where the victim also plays a role in the crime (unfortunately, the law does not pay attention to this matter and it is only considered as a cause of judicial mitigating cases), this is because the conflicting relationship between the offender and the victim may be aggravated. and this gradually destroys social security, which is a prerequisite for many healthy social activities.

d- commanding good and forbidding wrong

Among the divine commands that are repeatedly recommended in the Qur'an and hadiths, is commanding what is good and forbidding what is wrong ; This issue has been the subject of various researches, however, in the field of criminal law and criminal policy, it still deserves discussion. In an independent article, the author has analyzed its place in the criminal policy of Islam. In the present discussion, the claim is that adopting corrective and educational measures towards criminals, de considered as examples and cases of enjoining good and prohibiting evil.

Explaining that commanding good and forbidding wrong has two broad and narrow meanings according to its audiences ; Sometimes it addresses both the government and the society, and sometimes it addresses is only the Islamic society; In any case, the application of the propositions of commanding good and forbidding wrong does not prevent the combination of these two, and each of these two has specific duties in commanding good and forbidding wrong.



But the important thing is the quality of registration of correctional and educational measures under the title of commanding good and forbidding bad.

It may be said that "considering that the forbidding wrong occurs before the occurrence of it and not after that , it is possible to choose protective and educational measures from the obvious examples of the “forbidding wrong and preventing the occurrence of acts against the Sharia and in harmony with the generality of the proofs . Because all of them are measures that lead to repelling wrong and removing it, and this matter is definitely desirable and one of the examples of duties that have been emphasized by Islamic Sharia.

however, more precision in the nature of these actions and the type of meaning that is intended by commanding good and forbidding wrong, can reveal the dual nature of correctional and educational measures. on the one hand, in the broad sense of commanding good and forbidding wrong , includes speech and behavioral strategies whose main purpose is to lead people to good deeds and prevent them from evil and ugliness, deviations and crimes.

considering that the audience of correctional and educational measures are those who are suspected of committing crimes again and the so-called , criminologically, has a “ dangerous state” , such measures are the ones that prevent people from committing crimes again.

On the other hand, considering the positive nature of such measures - which are mainly from the kind of treatment, education, awareness, vocational training and religious education, that points to the roots of committing crime and creates a kind of positive and spiritual transformation in a person. Therefore, reformation and treatment of criminals are measures with the dual nature of forbidding wrong and commanding good.

But the more important point is, is it possible to expose a person to other measures in addition to suffering punishment, and does this not contradict his rights and freedoms?

The answer to this question is clear according to the nature of these measures; Because the punishment is based on the person's past actions, and although punishment is expected to reform the person and intimidate him from committing future crimes, there is not necessarily a guarantee for this;

Therefore, there is a need for measures that are therapeutic , empowering, raising awareness, increasing will power, etc. This is more justified if, for some reason, the punishment cannot be applied to the perpetrator .

for example, if the perpetrator lacks knowledge or has committed a crime due to duress, compulsion or emergency, according to the principles of Islamic criminal law, he is excluded from criminal responsibility , but depending on his individual situation, he can be exposed to correctional and educational measures.

Even with the exemption of the punishment due to factors such as amnesty, there is still the possibility of subjecting him to corrective measures in order to prevent from committing crimes in the future, in accordance with the rule of prohibition of wrong.

E- The necessity of avoiding the bad consequences of not reforming and treating the criminals

among the proofs that reveal the necessity of reforming and treating criminals are the bad consequences of not reforming and treating criminals; Some researchers warn in this regard that "sinners should not be thrown out of the group and social sphere , and look at them as contagious patients, or treat them inhumanely, and be looked as humble and small persons.

This kind of treatment is not Islamic. Sinners, in the name of treatable patients and captives of desires, can be sympathized with, and they should not be deprived of compassionate and paternal advice and human feelings, so that this deprivation becomes a ground for them to do more wrongdoing, rebellion and disobedience. Always, those rejected from family, group and society, when they feel alone in their environment and society, and have no



shelter, they turn to crime and join criminals, to get out of loneliness and rejection.

And this is where they despair of rebuilding themselves and returning to the right path.

Except for the few people who cannot be reformed, insist on being rebellious and arrogant, do not fear anyone and do not feel ashamed of people and society.

One should avoid such insolent people, and keep young people away from them.. and of course think and act in appropriate ways to save them" (Hakimi, 1409, vol. 9, p. 678).

It is clear that the consequence of not paying attention to the rehabilitation and reformation and treatment of criminals is not limited to their more delinquency and criminality, but this imposes huge costs on the society. In other words, the consequence of not paying attention to the correction and treatment of criminals is not only their more and more corruption and corruption, but this causes more damage and casualties to the society and huge expenses of the judicial and penal system;

In addition, a lot of money should be spent to prevent their crimes in the society. After all, these crimes and spending the society's facilities for non-criminal and criminal prevention of repeated crimes deprives the necessary opportunities for the progress and excellence of the society;

Now, even if we didn't have any Shariah text or tradition from our imams on the necessity of correction and treatment, wouldn't this rational reason be enough to prove this? Certainly, common sense dictates the necessity of reforming and treating criminals as the only way to prevent these expenses and corruptions. And it is natural that according to the principle of " conjunction of the ruling of reason and Sharia", adopting corrective and therapeutic measures is also a Sharia obligation.

The costs of punitive criminal responses, regardless of correctional and educational responses, are sometimes so high for the society that it is never in the interest of the society;

Especially in today's world, when the image of religion and the religious government is exposed to the most severe attacks, and even the emergence of violent groups such as ISIS or the Taliban, and the implementation of the penal punishments of Islam by them and the efforts to reflect them at the global level, while not explaining the exact conditions The implementation of Islamic rulings by jurists and the deep differences of opinion that exist in this field, on the one hand, and the promotion of the humanitarian face of Western criminal law and alternative punishments of prison and the elimination of execution and harsh punishments, on the other hand, cost a lot to Islamic societies as a result.

This proves the need for a serious revision of the penal system - in practical terms - and a precise understanding of Islamic penal rules - in theory - especially with the Shiite approach, which unfortunately has less aspect of governmental penal jurisprudence due to the lack of governmental experience of Shiites for many years.

In any case, there is no doubt for those who are familiar with the exact principles of Islamic penal rulings that firstly, "If the implementation of the hadd at a certain time or place has negative consequences for the individual or the society, it should be temporarily abandoned" (Muntazeri, 1429, p. 35).

In addition, the reformative, educational, and therapeutic aspects of alternative punishments are completely consistent with the Islamic penal code, apart from providing social expediency, it is also completely consistent with the goals of Islamic Sharia regarding punishment.

In particular, these goals, according to jurists and experts, are not something that cannot be inferred and understood. In any case, "Considering that the main purpose of legislating Qisas and Diyat and similar laws is to protect the lives, reputation, property and rights of individuals and society from the violation of criminals and to punish , reform and guide them, as well as to prevent the damage caused by them . The method of achieving such a goal will not be the same due to the ever-



increasing change and transformation of various human societies in cultural, economic and social dimensions.

Therefore, it is possible that some punishments cause skepticism towards the Shari'ah itself due to the lack of proper explanation of its goals or lack of proper implementation. In such an assumption, its implementation should be avoided, albeit temporarily, until the philosophy of the ruling is explained and the environment is prepared.

It is important to pay attention to the point that only the negative aspects of repressive criminal sentences have been considered in this argument, while what was presented under the heading of “social expediency” and “the necessity of correctional and educational responses”, and there were other cases such as : the corruptions of merely Islamic punitive criminal responses and the positive effects and consequences of correctional and educational punishments for society as an alternative punishment or possible action of criminal responses.

In any case, Islamic jurisprudence is based on expediency and corruption, and despite the many merits of corrective and educational responses and the corruption of punitive responses, there is no doubt about the temporary elimination of some criminal responses and the necessity of adopting corrective and educational penal responses which even their implementation as one of the government's responses can neutralize the effects and consequences of correctional and educational punishments.

Conclusion

reformation and treatment of criminals in Islamic thought means a deep and comprehensive change in the personality of the criminal, which is also interpreted as repentance.

Although one of the goals of punishments in Islam is to reform and treat criminals, the adoption of measures other than punishments in order to improve the criminal's personality has not been investigated as an independent jurisprudential issue despite strong proofs in Islamic sources.

According to the contents that were presented in this article, there are many proofs from the Quran , the Sunnah of the Imams(S.A.) that indicate the acceptance of these measures. Also, these measures can be an example of the prohibition of evil.

And finally, even if such proofs cannot be used, the social interests justify the acceptance of such measures, but the nature of this acceptance and the degree of its necessity, as well as its scope, require other discussions.



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- 3- Cottingham, John; (1384) "Philosophy of Punishment", jurisprudence and law; Translators: Ebrahim Bateni and Mohsen Burhani; No. 4, Spring, pp. 170-147.
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- 5- Ibn Hisham (2012), Al-Sirah al-Nabawiyah; Volume 4, Chapter 8, Beirut: Dar al-Marifah.
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Legislative Developments of the Consent of Mental Patients In Emergency Treatments; In Fiqh and Iranian Criminal Law

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Abstract

The right to health is one of the fundamental human rights, and the origin of the obligations of private individuals and governments lies in the domestic and international legal systems of human rights. Taking advantage of the right to health and public health helps to improve the level of health in the society. The description of the patient's awareness in expressing consent to medical interventions includes awareness of several elements: the nature of the medical decision, alternative treatment methods to the intervention method in progress, the risks and benefits of the proposed treatment, and the possible side effects of each treatment method. The way of legislation and regulation in the implementation of the principle of speed and dignity of the patient, in order to intervene in the crisis of the tense behavior of mental patients, is part of a set of challenges in the field of consent and innocence, which in terms of the evolution of the foundations of the civil and criminal responsibility of the doctor in the rights of some Other countries, by the method of theoretical analysis in Iranian jurisprudence and criminal law, have been discussed in this article, and suggestions have been made for reforming the criminal policy governing the "Executive Code of Keeping and Treating the Insane" (enacted in 2018) and related articles in some criminal laws. The content and form of Iran is presented.

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

Introduction

Establishing an effective relationship between the doctor and the patient often leads to an increase in the doctor's job satisfaction in addition to helping the patient's recovery. Basically, the relationship between the doctor and the patient in normal and non-emergency cases is formed when the patient consciously requests the doctor's services and the doctor also consciously accepts him as a patient. This mutual and satisfaction-based relationship is often described as a contractual relationship. The formation of this relationship means the imposition and obligation of a series of legal [and ethical and professional] duties and requirements, and therefore understanding the time of beginning and end of this relationship is very important. But in emergencies, the theoretical foundations of doctor and nurse interventions in the patient's body and the territory and conditions and indicators of legal permission of these interventions are different from the contractual interventions based on the patient's informed referral to the doctor, and special legal challenges in these are urgent interventions.

The importance of a proper therapeutic relationship between the doctor and the patient - even in cases of the patient's lack of awareness in emergency situations - can never be ignored. For example, helplessness can have different effects on nurses, patients as well as health systems. Among its effects, we can mention the drop in the quality of care, distrust of the public in the health system, and the abandonment of the profession by nurses.

¹ In the meantime, the drop in the quality of care that directly affects patients is of particular importance. Overcrowding of patients, high nursing workload, insufficient knowledge of the treatment staff about the rights of

1. Borhani F, Abbaszadeh A, Nakhaee N, Roshanzadeh M. The Relationship Between Moral Distress, Professional Stress, and Intent to Stay in The Nursing Profession. *J Med Ethics Hist Med* 2014; 7(4): p. 8.



patients, the existence of various educational groups and students and their lack of knowledge and sufficient attitude in the field of patient rights and lack of expertise and focus on emergency treatment measures in the framework of emergency medicine. And especially, the mental pressure of doctors and nurses has reduced their work quality, especially in emergencies where the patient's life is in severe danger and therapeutic interventions require very high mental concentration, and the length of the treatment period has increased. Also, medical errors increase. Meanwhile, patients not only do not achieve their health goals, but also distrust the health system.

In general, regardless of focusing on the specific legal status of the therapists' responsibility in medical emergencies, "famous jurists believe that the doctor is the guarantor of the damages caused by the treatment; Even if he is authorized to receive treatment and he is not at fault, and the only way to not guarantee the doctor is to be acquitted with no fault.¹ Against this famous fatwa, a minority of jurists believe that the doctor is not responsible with the above-mentioned conditions. Both groups cited reasons to prove their claims and also answered the other side's reasons.² The group that considers permission to be the patient's consent to the treatment by the doctor, which excludes criminal responsibility, but with the acquittal, the doctor absolves himself of the possible damage. Of course, in all cases where acquittal is obtained, it is subject to no fault, and in case of fault, the doctor is a guarantor even if he has been acquitted. If it is discovered that the permission to treat is also the permission to waste, the doctor is not responsible and there is no need to obtain acquittal. A non-

1. Elahimenes, M. Criminal law and medical malpractice. 6th edition, Tehran: Majd Publications, 2018. P. 109.

2. Hosseinpour, K., (et al). Doctor's guarantee from the perspective of Imami jurisprudence. Iranian and International Comparative Legal Research Quarterly, 2017, 10, (36), p. 99.

famous person who does not need to be acquitted also considers permission in the sense of permission to waste.

"The non-fault-based physician responsibility system that is being implemented in the Scandinavian countries is based on the pure responsibility of the health system for any harm caused to the patient during medical interventions. The analysis of fault-based and non-fault-based medical responsibility systems from the point of view of the principles and values of medical ethics, leads to the conclusion that the medical responsibility systems tend more and more towards the direction where the element of fault is weak in them. Moreover, they have a greater impact on creating an atmosphere of ethics and virtue in the medical community."¹ Such a change - the transition from "theory of fault" and "theory of error" to "theory of guarantee of right" in the Scandinavian legal system - has created a fundamental change in the subsets of this theory - including the concept of consent and acquittal - and the challenges of doubt in Acknowledgment of acquittal and satisfaction is generally left to the history of advanced Scandinavian law.

However, these challenges continue in most other legal systems, including Iran, and other challenges also continue; including the challenge of coercive and authoritative control of mental patients or their aggressive companions in emergency rooms and the issue of criteria and scope of deviation from consent and innocence in therapeutic intervention on psychiatric emergency patients and companions. Despite the many researches that have been done in the field of risk factors that cause aggressive situations, a limited number of researches have emphasized the effect of the effective results of psychiatric nurses following aggressive situations and their preventive measures in acute mental situations or They have presented a special tool in this case. Also, some studies indicate that

1. Bahmani, F. Assessment of Medical Liability Systems with More Emphasize on Ethical Challenges. *Ethics in Science and Technology*, 2015; 9 (4), p. 6.



investigating and predicting aggressive behavior is an essential factor in preventing violence. However, specific studies on the description of the optimal guidelines for the prevention of aggressive situations have not yet been published in Iranian research.

In addition to the above-mentioned necessity, the existence of guidelines for the prevention of aggressive situations - which is required by the medical staff in the country for highly nervous, emotionally disturbed, insane and dangerous emergency patients - in addition to the fact that it can be effective in preventing aggression. and help to standardize the management of physical violence crisis in emergency rooms, it will clear the ambiguities about the special regime of consent and acquittal of the therapists in controlling the possession of the eyes of aggressive patients and the subsequent therapeutic interventions in their body and mind or from ambiguities will be reduced; In particular, "in Iranian hospitals, despite the high incidence of aggressive situations and the constant concern of nurses about the impulsive behavior of patients and their families, especially in emergency departments and psychiatric hospitals, there is no criterion and There is no standard for predicting and effective nursing measures in preventing aggressive situations that disturb the health and safety of patients and the treatment staff and the peace of mind of emergency and psychiatric centers.¹ Despite the fact that studies show that "96.5% of nurses want to provide a training program to control violence in health and treatment centers",² there is still no documented program to raise awareness and empower the medical staff to control common aggressions in the emergency room. and other departments of medical centers do not exist.

1. Alipour, S. Physician's civil responsibility towards emergency patients, Tehran: Shahid Beheshti University of Medical Sciences Publications, 2016, p. 107.

2. Rahmani A , Bakhshian A, Dadashzadeh A, Namdar H, Akbari MA. Physical violence at work from the perspective of emergency medicine personnel in East Azerbaijan province. Iranian Journal of Nursing Research. 2009; 3(10-11): 31-39.

1- The Conceptual Evolution of Patient Consent from Simple Consent to Informed Consent

"Consent is necessarily related to awareness; because the validity of consent depends on the information that is available.¹ The doctor must provide the patient with the information he needs to make the right decision; Often, the phrase obtaining informed consent is used to express this legal duty, i.e. disclosure of information related to the nature, risks and possible benefits of treatment. Informed consent is the consent that is obtained as a result of providing a specific field of information about the type of treatment and its consequences to the patient, and "in medical law, this type of consent is effective. In other words, true satisfaction is achieved when the patient is fully aware of the desired procedure. On the contrary, consent that is based on ignorance and incomplete or wrong information will lack the necessary validity. The task of informing patients in legal writings and medical ethics has been emphasized under different headings such as information disclosure, disclosure, truth telling, etc., and what the study of these writings clearly reveals is in recent decades², in the field of medical ethics, the category of informing the patient has gained a special place and importance. This progress, with the motive of preserving the patient's right to autonomy in treatment matters, is due to a different view of the human being, as an independent being, having authority and ruling over his own destiny.

The term informed consent was used for the first time in the field of medical law, in 1957, by Judge Paul Gebhardt, in a case related to medical malpractice, and the ruling of this case expressed the fact that the patient should be aware of all the important matters in It is effective to obtain his

1. Larijani B, Abasi M. The rights of patients in Europe: a comparative study. (Translation). Leenen H, Gevers J, Pinrt G. 2nded. Tehran: Legal Publication, 2002, p. 9. 1 Informed Consent.

2. Abbasi, M.. Medical Penal Law, second edition, Tehran: Legal Publications, 2009. p. 28.



consent to be aware so that the expressed consent based on this awareness has a legal effect.¹

In the definition of the term awareness, it is said that the doctor gives information about the aspects of treatment to the patient so that the patient can decide whether he wants to consent to the treatment under such conditions or not. This process of understanding the risks and benefits of treatment is known as the awareness process, and the decision made based on this awareness is called informed consent. "Informed consent is the free agreement of a qualified person to participate in treatment decision-making after knowing the nature of the goal and its requirements, with the belief in the effect of this participation in choosing the most effective and useful treatment method."² Informed consent is a legal process to make sure that the patient or client is aware of all the risks and costs of the treatment.

In the common law system, from the doctor's point of view, the knowledge of the patient means that the doctor makes sure that the patient understands the purpose of the treatment, the benefits of the treatment, the risks of the treatment and other treatment options. Consciousness is a process that allows the patient to participate in his medical choices with an open view and to manage and direct what is going to happen to his body. For this reason, some institutions in some countries - including England - do social activities with the aim of supporting patients to complain due to dissatisfaction with the medical services provided.³ In this regard, the current methods currently emphasize on providing complete information (detailed knowledge) to the patient, and this has become a single standard.

1. Vohra H. Ledsham J. Vohra H. Issues Concerning Consent in Patients Undergoing Cardiac Surgery; The Need for Patient-directed Improvements: A UK Perspective, *Cardiovasc Surg*, Vol. 11 ,2003, p. 92.

2. Holmes R. Wills M. CE Improving Informed Consent: Insights from Behavioral Decision Research. *Med Care*. 40(9), 2002, p. 87.

3. Vahabi, Z. (2019). Liability of Physicians in the Light of English Criminal System. *Fares Law Research*, 2(3), p. 118.

In general, it is accepted in the legal systems that the definition of awareness includes the knowledge of the following elements: the nature of decision-making, alternative treatment methods to the proposed method, the risks and benefits of the proposed treatment, and the possible side effects of each treatment method. . Awareness requires the doctor to provide the patient with information related to the type of disease, its nature, proposed treatment method, available alternative methods, risks and benefits of the treatment process, duration of treatment, treatment costs and possible complications.

In the common law legal system, in medical practice, there is a difference between simple consent and informed consent, and informed consent is a more detailed process that must be carried out for high-risk medical procedures and procedures that result in side effects. All medical procedures require the patient's consent before starting. (or someone who is allowed to make decisions instead of the patient). In some medical procedures, the patient simply approves the doctor's plan by taking the prescribed prescription or by giving blood for periodic tests (checkup); This consent is called simple consent, and it is actually consent to a treatment that carries few risks for the patient; But often times when medical procedures carry many risks, such as surgery, a more detailed process called informed consent is required.

Apparently, in Iran, there is not much difference in medical practice between risky and safe practices; In high-risk procedures, which is a clear example of surgical procedures, the patient (or his representative), often, even without establishing direct contact with the surgeon and thus being informed about the procedures, is obliged to, before the surgery, in In the reception section, sign the consent and acquittal forms that are placed in front of him. This procedure shows the amount of value and position we attach to the patient's autonomy and in general the human authority in making decisions related to themselves.



Among other challenges of satisfaction and innocence in medical emergencies and emergency treatment cases is the use of artificial intelligence capabilities such as evolutionary calculations, fuzzy logic and neural networks, which go beyond "telemedicine", therapeutic interventions by It has provided artificial intelligence systems.¹ Just as "artificial intelligence in criminal sciences is busy with measuring the capacity to repeat crimes and repeat victims of crime and a wide range of criminal calculations" much more than criminal sciences², in medicine it is busy with therapeutic interventions on emergency patients and the challenges of satisfaction and He has been acquitted.

2- Jurisprudential Foundations of Doctor's Guarantee in Medical Emergencies

Ibn Fahd³, Shahid Thani⁴, Sahib Javaher⁵, Sahib Riaz⁶, Mohaghegh Thani⁷, as well as Mohaghegh Ardabili⁸ and Mohaghegh Sabzevari⁹

1. See: Sadoughi, F., & Sheikhtaheri, A. (2011). Applications of Artificial Intelligence in Clinical Decision Making: Opportunities and Challenges. *Health Information Management*, 8(3).

2. Sohrabi Asamrood, M. From mathematics to criminal statistics: an introduction to the role and place of criminal statistics in the management of the risk of crime and victimization, in: a group of researchers [by Maryam Abachi], "Encyclopedia of Mathematics and Criminal Sciences", first edition, Tehran: Mizan Publications , 2021. p. 298.

3. Al-Hali, A. Ibn Muhammad Ibn Fahd. Mahdab al-Bara' Vol. 4, the research of Sheikh Mojtaba al-Iraqi, Qom: Al-Nashar al-Islami Institute, 1412 AH. P. 295.

4. Shahid Thani, Zain al-Din bin Ali al-Amili. Description of the lick. Volume 7, Al-Sayyed Mohammad Kalantar's research, Qom: Dawoodi Publications, 1410 AH. P. 67.

5. Al-Najafi, M.. Jawaharlal Kalam Volume 38, Qom: Al Al-Bait Institute, 1412 AH. P. 150.

6. Tabatabai, S.. Riyad al-Masal Volume 2, Qom: Al-Bayt Institute, 1404 AH. p. 323.

7. Mohaghegh al-Kurki, Nuruddin Ali bin Hasan. Jame Al-Maqasid Volume 6, Qom: Al-Bayt Institute, 1410 AH. P. 97.

8. Moghaddis A., Ahmed bin Muhammad. Assembly of Al-Faidah and Al-Barhan. Volume 10, Qom: Al-Nashar al-Islami Institute, 1412 AH. P. 392.

9. Mohaghegh Sabzevari, Mohammad Baqer (Beta). Sufficient authority. Isfahan: Sadr Mahdavi School, stone print, p. 234.

have also emphasized the importance of saving the lives of people in danger. Jurisprudents such as Shahid Thani, Sahib Javaher and Sahib Riaz have made clear, repeated and explicit emphasis on this ruling. . However, the responsibility and status of leaving this duty is still unclear in most jurisprudence books, and they have not mentioned the criminal and civil liability of leaving. However, from the study and examination of various examples and theories, it appears that according to the opinions of Turkish "Imami jurisprudents", responsibility is created when the action is possible and there is a legal (Sharia) and customary duty in that context.¹

2-1- The Rule of Self-preservation

According to the legal rules, where the probability of loss increases, a lower loss should be chosen. Now, the doctor has to choose between saving the patient's life and obtaining consent, and it is his duty to save the patient's life. Therefore, in this case, he cannot be held responsible. What, the main purpose of religion is to support human life; To the extent that being disappointed in God's grace and mercy and choosing death is considered one of the great sins and deserves a fierce eagle. Although in jurisprudence, there is no rule under the title of self-preservation rule. But among the different chapters of jurisprudence, there is a lot of emphasis on respecting the right to human life.²

2-2- The Rule of Benevolence (EHSAN)

This rule is adapted from the verse of Karima "Ma Ali Al Mohsenin Man Sabil"; It means that there will be no blame on the one who does good deeds. At the same time, according to most jurists, the rule of benevolence does not apply in cases of waste. The jurisprudential rule of waste refers to

1. Ghaffari Farsani, B. Civil liability resulting from saving another's life. Tehran: Mizan Publications, 2007, p. 261.

2. Soltani, A.; Karachian Thani, F. jurisprudential and legal proof of the rule of "Necessity of self-preservation" in Islam, Jurisprudence Research Quarterly, 2012, 9(3), p. 85.



the guarantor of the waste and includes the benefactor and non-benefactor.¹ Although some groups believe that if there is a conflict between the rule of "waste" and "benevolence", the conflict can be removed; With the justification to say that someone who is benevolent may actually and creatively cause waste, but we should not regard him as a wasteful worshiper and we should consider kindness as a priority over waste.²

2-3- Government Order

Due to the existence of interests, the government has obliged doctors to take measures for emergency people. It is a clear ruling of the law that doctors are not responsible in emergency cases where it is not possible to obtain consent and acquittal from the patient. Therefore, if they are not at fault, they will not be held responsible. We can consider these cases because of the precedence of government rulings over other rulings.³ Most of the jurists do not hold the doctor responsible for the resulting damages in such cases, because they have considered the permission and above all the requirement of the legislator as governing the permission of the patient, and in such cases, the permission of the law actually replaces the permission of the patient. Because the preservation of society depends on such actions.

The purpose of Article 497 of the Islamic Penal Code is to mention urgent cases, in fact, the law stipulates to put them in a state of necessity or emergency, in which delay in obtaining the consent of the patient or his guardian will cause irreparable harm. Therefore, it is wise to treat such people as soon as possible, otherwise the doctor's action is a crime and causes liability.

1. Mousavi Bojanvardi, S. The rules of jurisprudence. Tehran: SAMT Publishings, 2002. P. 228.

2. Lotfi, Asadullah. "Ehsan rule". Jurisprudence and Law Quarterly, No. 4, 2007, p. 5.

3. Al-Johari, M. Medical responsibility in the Penal Code. Cairo: Dar Al-Johari, 1970. P. 270.



3- The Challenge of Consent in The Forced Control of Attacks by Mental Patients in The Emergency

Consent and acquittal are not raised only when the patient arrives at the emergency room unconscious or is a minor or insane; Moreover, patients suffering from traumatic mental disorders who commit violence against the treatment staff are also the subject of the special challenge of satisfaction and acquittal from another perspective. The explanation that, "the high prevalence of aggressive situations and its negative results on the health and safety of employees and patients is one of the main concerns of the care and treatment staff of mental hospitals and emergency departments of normal hospitals"¹; This necessitates the need to strengthen and continue the education of emotion control and aggression through written training courses for everyone, especially the treatment staff.

The best preventive measure against violence is to predict aggressive situations, which can be reduced by effective nursing measures and social skills training and effective communication with the patient, if possible. . Therefore, strengthening the skill of predicting the violence of patients and their companions in the emergency room by the treatment staff, as well as countermeasures of the treatment staff in order to protect themselves and the patient, is a new field against the classic concept of consent and Creates innocence. Considering that the reduction of the conditions that can predict aggression, anger and finally aggression in psychiatric departments and in all emergency rooms and through curbing the critical phase of violence against the treatment staff, the amount and method of physical control of the patient or Perhaps, he explained the other aggressive people in line with their interest and the interest of the treatment staff and turned it into behavioral guidelines in the position of behavioral crisis management and became enforceable.

1. Forster JA, Petty MT, Schleiger C, Walters HC. Know Workplace Violence: Developing Programs for Managing the Risk of Aggression in The Health Care Setting. The Medical Journal of Australia. 2005;183 (7): p. 359.

In this connection, "Instructions for specific terms and conditions of rehabilitation and treatment centers for chronic patients (Non-governmental daily training and rehabilitation of chronic patients)" (approved in 2016) was issued by the country's welfare organization¹, part of which is under the title "Instructions for specific terms and conditions" Rehabilitation and Treatment Centers for Chronic Mental Patients (Non-Governmental Daily Educational and Rehabilitation Center for Chronic Mental Patients)", in 2016, with 9 articles for people with mental disorders, in which the chronic mental patient, the conditions of the place of residence, the method of admission, the location conditions; He has explained the duties of the treatment staff of these centers.

Among other laws that can include people with mental disorders due to the definition of disabled in that law; "The Law on the Protection of the Disabled" consists of ten chapters and 34 articles, which was approved on 12/20/2016.

The "Executive Regulations on the Maintenance and Treatment of the Insane", which was approved by the judiciary on April 2, 2018 with 12 articles, is also related to the maintenance of people with mental disorders in hospitals and medical centers. As seen in this regulation; There is a criminalistic view of these patients. Also, in articles 5 to 9 of this regulation, it is also about sending people with mental disorders to care and rehabilitation centers, which must be under the supervision of the prosecutor and under the responsibility of judicial officers, and "it cannot be said that a supportive approach has been considered for these patients; Rather, the criminalistic view attracts more attention."²

Finally, the non-comprehensive and flawed bill entitled "The Bill for the Protection of the Rights of People with Mental Disorders" with 38 articles,

1. <https://www.behzisti.ir/news/23951>

2. Khaghani Esfahani M, Bateni R. Necessity of Decriminal Labeling on Mental Patients and Family Facilitators, in the Criminal Policy Approach to "Social Emergency Service". Health Law Journal. 2023; 1 (1): p. 14.

which was prepared and approved by the government board with a criminalistic view, and was delivered to the Islamic Council in 2019, in which there are no measures for referral A person suffering from a mental disorder to the hospital in such a way that his human dignity is respected; It is not specified. In Article 4 of this bill, the same criminalistic view of people with mental disorders is evident. It is stated in this article: "The beginning of the necessary hospitalization process is done by one of the methods of referring a person by a psychiatrist or the order of a judicial authority or the method listed in Article 8 of this law." It means that people with mental disorders are referred to the hospital or self-referred when the patient is in a state where he voluntarily goes to the hospital and is hospitalized, and if the patient does not cooperate to go to the hospital during the recurrence of the disease; The mechanism of referring him to the hospital should be provided through the complaint of the patient's guardian and the judge's ruling.

This process is clearly stated in Article 6 of the aforementioned bill, and in Article 14 of it, criteria have been established regarding the discharge of the disease that is subject to Article 6. In articles 7 and 8 of the aforementioned bill, the hospitalization of a patient referred by the judicial authorities or self-referral is subject to the opinion of the hospital psychiatrist, and in article 9, the necessity of reporting the hospitalization of a patient whose parents' consent is not available; It is mentioned. Also, in Article 11, it is stated that the continuation of hospitalization of a person suffering from a mental disorder for more than two months in the hospital must be done with the opinion of the judicial authority and the confirmation of the forensic medicine.

Article 17 of this bill is about the discharge of homeless patients from the hospital, who must be introduced to the judicial authorities. As mentioned in Article 22 of this regulation, instead of creating the necessary mechanism to preserve the human dignity of these patients, the simultaneous presence of the police force along with the social emergency has been mentioned.



In its article 23, although sending welfare auxiliary forces to the place is considered; But since these forces do not act without permission; Sending them to the place will not be useful either. Articles 24 to 31 are also related to the complaints of these patients, who deal with legal authorities in all cases, and article 35 is about humiliation and insults to people suffering from mental disorders, while the mechanisms of transferring the patient to the hospital in this regulation are one It is one of the ways that the sick person or the family ridicules and stigmatizes him.

In the current situation, apart from medical and psychiatric guidelines, there are comprehensive regulations that include a mechanism for identifying, introducing, directing, treating people with mental disorders and protecting their rights against the guardians and the duties they have towards them and on the other hand. Determining the situation of the judicial authorities in facing them, it does not exist or they do not have the necessary comprehensiveness. This bill, if approved, will be a reflection of the legislator's intellectual and legislative evolution in supporting the rights of mental patients and the responsibilities of activists related to their care. In the explanatory introduction of this bill, issues such as the amount of people suffering from mental disorders in the society, social and economic costs, legal gap in the way to identify the sufferers, respecting their rights and comprehensive legislation to support this group are mentioned. "The effort of this bill is to protect the rights of people with mental disorders, as the title suggests, and it is expected that the legislator will deal with them with a protective and protective approach in order to protect the interests of the society and protect individual rights and freedoms. Slow down."¹

According to Article 5 of the "Executive Regulation on the Maintenance and Treatment of Insane Persons" (approved 1398), which was

1. Jafari, F., Saheb bayati, S. Legislator's criminal thought regarding patients with mental disorders on the new Bill of the protection of the rights of people with mental disorders. *Journal of Criminal Law and Criminology*, 2023; (2): p.3.

promulgated in the implementation of Note 1 of Article 202 of the Criminal Procedure Law (approved 1392), the sending of insane persons to maintenance and rehabilitation centers or treatment centers, as the case may be, and Care, in the implementation of the prosecutor's order, is the responsibility of the bailiffs. The judicial officers are obliged to reflect the status of their delivery to the mentioned centers by preparing the minutes of the assembly to be included in their judicial record to the investigating judicial authority and to submit a copy of it to the prosecutor. According to Article 9 of the aforementioned regulations, the objection to the implementation of the prosecutor's order regarding the maintenance, care and treatment of insane persons is subject to the provisions of Article 576 of the Islamic Penal Code (Penalties).

By examining the aforementioned articles of the aforementioned laws and regulations, the task of transferring dangerous mentally ill patients to care centers is the responsibility of the police officers, and assigning this duty by some of them to the social emergency personnel is a violation and even a crime as an example of Article 576 of the Islamic Penal Code. (Penalties) is; Because this delegation has no legal authority and it will be an example of preventing the implementation of state laws or the implementation of the orders or orders of judicial authorities or the orders of legal authorities. In addition, it creates risks for the health and safety of social emergency personnel. Of course, it is better for NAJA officers to perform this task in the presence of social emergency personnel, if possible, in order to prevent violent and traumatic behavior by the police against the mentally ill or vice versa. Regarding the fact that paragraph 1 of article 7 "Instructions for general terms and conditions of rehabilitation centers for the disabled, vocational training centers for the disabled, rehabilitation and care centers for the elderly, and rehabilitation and treatment centers for chronic mental patients" (approved by the Welfare Organization in 2016) defines psychosocial rehabilitation as Defines a set of measures that are carried out in order to adapt, return to society and reduce neuropsychological crises



complicated by disability in the affected person and his family, therefore, designing a detailed behavioral protocol for how to treat a dangerous mental patient by Naja officer and social emergency officer, it is necessary to adjust the clinical criminological considerations in the context of a well-considered criminal policy in this field in order to prevent the occurrence of violence between each of the two officers, the mental patient, the family and the surrounding people.

Ignoring the possible violence committed by the mentally ill is similar to ignoring the violence of the social emergency officer and the rescue officer towards the mentally ill. The convergence of authoritarianism in the criminal and medical realms aggravates the resulting crises of the two. The analysis of mutual abuse of criminal securitism and medical authoritarianism from each other, explains that the foundations of social control of crime, which is influenced by the dominant political ideologies, has a significant impact on the strategy of public health policy and providing legal support for health policies and determining the scope of individual freedoms and the territory of government interventions. "Medical authoritarianism, after preparing the support of criminal legal authoritarianism for itself, leads to the development of criminal interventions and the legalization of the government and the indiscriminate use of coercive tools with the claim of controlling social health."¹

"The process of transferring a person with a mental disorder to the hospital, through the simultaneous action of the judicial system, the law enforcement system, and the emergency department, creates the impression that the person with a mental disorder is a criminal."² Therefore, it is necessary to adopt criminal policy measures to eliminate the criminal view of people

1. Khaghani Esfahani M. Critics on the Co-Emergence of Medical Authoritarianism and Criminal Securityism in Health Policy-Making. *MLJ* 2023; 17 (58): p. 456.

2. Rostaie M, Abdollahzadeh Rafi M. The Differential Criminal Policy in Victim's Mental Disorder in Comparison with Offender's; Necessity and Challenges. *Medical Law Journal*, 2021; 15 (56): p. 817.

with mental disorders and to treat these patients like other normal patients. People with mental disorders are among the main groups that welfare should cover these people, who are often its clients, under social emergencies; But it has not done so and the referral of people with mental disorder who usually have high recalcitrance during the relapse of the disease; "In addition to calling the emergency, the police force should also be present at the place, and more importantly, the police force will enter the house only with a court order.

"The social emergency dispatching treatment group includes a nurse, a worker, two human resources to control the patient if necessary and an emergency service officer in uniform after the patient's family contacted the social emergency instead of sending an ambulance and an emergency vehicle at the same time with a court order. be sent to the place and transfer the person to the hospital in case of relapse of the disease, in addition to preserving the human dignity of the patient and his family, prevent the aggravation of the danger to the life of the patient and those around him in sensitive conditions of mental stress and physical bullying of the patient, and remove the stigma of neuroticism and criminality The patient and the family should be prevented. The reduction of administrative-treatment bureaucracy and the agility of the next judicial process chain are among other merits of this proposed solution-oriented hypothesis.¹

Conclusion

In the Islamic Punishment Law (2012), the legislator has accepted the theory of presumption of negligence and fault by avoiding the theory of risk. In the next step to support the therapists, obtaining the patient's consent is the responsibility of the therapist. In the third step, the knowledge of the nurse or the patient about the wrong treatment order is considered to be the reason of the doctor's responsibility; while in the law

1. Khaghani Esfahani M, Bateni R. Necessity of Decriminal Labeling on Mental Patients and Family Facilitators, in the Criminal Policy Approach to "Social Emergency Service". Health Law Journal. 2023; 1 (1): p. 2.



approved in 1990, this alone did not relieve the criminal and civil responsibility of the doctor. In Iranian law, the main source of the doctor's obligation to treat and save the lives of emergency patients should be considered as the single article of the Penal Law on Refusal to Help the Injured and Eliminate Life Risks approved by "1354". Although the legislator did not mention the authority of emergency diagnosis, but the results of the investigation show that this important diagnosis is the responsibility of the attending physician; Contrary to the laws of some other successful countries in setting up a medical law system, including England, which judicial practice and court rulings are the most important source of the doctor's obligation to treat and save emergency patients and the courts, which decide whether or not an act is urgent. They get the final one, although we see different judgements about this.

On the other hand, in addition to the diagnosis of urgency and non-urgency, the criminal and civil responsibility of the doctor in the medical misdiagnosis of the disease itself needs to be discussed. Explaining that "any incorrect diagnosis cannot be considered as negligence or responsibility of the doctor; That is, since many factors are involved in the correct diagnosis of the patient's disease, and all these cases are not under the doctor's control, he should not be held responsible just for making a wrong diagnosis; Therefore, it is necessary to distinguish between different aspects, and only if the circumstances of the case show that the incorrect diagnosis is not due to the difficulty of the nature of the disease or the presentation of incorrect information by the patient, but due to carelessness. The doctor and his failure to perform the assigned duties, the doctor was held civilly responsible.

Also, in Iranian law, among the conditions that a doctor is not required to comply with in an emergency, the legislator has explicitly mentioned only the condition of consent. Therefore, there may be an illusion that the doctor must comply with other conditions governing the justification of surgical

and medical procedures in an emergency, otherwise he will be held responsible.

In order to improve the legal system of criminal and civil liability of doctors in Iranian law, first, a clear, up-to-date, complete and comprehensive law should be established according to the existing conditions and developments. Secondly, patients or their families should be aware of their rights, and this awareness should not be limited to placing a patient's rights charter sign in medical centers. Thirdly, the owners of medical and related professions should be informed about their legal, ethical and customary duties regarding this category of patients and understand the sensitivities of the patient's family and society towards patients with serious condition. Fourthly, the need to establish specialized judicial authorities to deal quickly and fairly with medical crimes, especially emergency patients, should be considered. Fifthly, the need to hold mandatory team training programs related to the recognition of emergencies and crises by doctors and nurses in order to increase awareness and self-confidence and raise the level of awareness of emergency situations by using new methods such as simulation and training should be taken into consideration.



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The Civilizational Capacity of the Islamic Revolution from the Constitutional law

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Abstract

The victory of the Islamic revolution in Iran led by Imam Khomeini is a divine gift and of the type of movement of divine Prophets (S.A.). Explicating the Civilization capacity of the Islamic revolution is not only a necessity, but also a transcendental mission and goal; because, the Islamic culture is the Islamic revolution identity, a concordant model of fundamentalism and creativity, rationality and spirituality, excellence and holiness, morality and fiqh (jurisprudence), independence and dignity, freedom and knowledge. The civilization capacity of the Islamic revolution can be analyzed and proved considering the philosophy of history, the nature of Islamic revolution and the potential capabilities of the world of Islam. The Islamic movements in the recent century are the revelation of this magnificent feeling that has been objectified in the victory of the Islamic revolution. Paving the ground for the Islamic culture constituents (the system of values, leadership, unity, security, government, law and building a nation, in the light of the guidance of a conscious and committed leadership to Islam) and their stabilization in the constitution is among the achievements of the Islamic revolution. The flowering of the civilization capacities of the Islamic revolution rests on the efficiency of the constituents and the observance of conditions of revival of Islamic culture (a true return to Islam (the Quran and Sunnah), diligence to Islamic unity, re-reading the principles and goals of revolution and its pathology (identifying the causes of internal and external degeneration of the revolution)).

Keywords: Imam Khomeini, security, Islamic revolution, fiqh, the constitutional law.

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Introduction

The civilizational performance of Islam is one of the wonders of the cultural and civilizational history of the world. Although the civilization of Islam fell into descendance after several centuries of glorification due to some internal and external factors, the inspiring feeling of returning to Islam, in spite of practical divergence of the governments in terms of politics- has never been forgotten. The Islamic movements of the recent century, especially the victory of the Islamic revolution in Iran led by Imam Khomeini, is the tangible manifestation of the innate feeling of Muslims' return to Islam and Islamic culture. Before the Islamic revolution, in many countries including Muslim countries, freedom fighters and left-wing political parties entered the battle field; however, after the Islamic revolution, Islam has become the basis of the liberation movements and campaigns. The main subject of our study is the recognition of the civilization capacity of Islam and the Islamic revolution, affecting the destiny of the world of Islam. Because, at the age of opposition or cooperation of civilizations- according to differences in view- this is the Western liberalism which tugs the ideology of universalism with the presumption of seeking superiority. To put it into the Westerners have come to the battle field with all their might to put this idea into action. The role of modern Western manufacture and technology in the expansion of the Liberalism civilization and culture at the world level, especially the world of Islam was beyond the public imagination. In such an atmosphere, the civilization capacity of the Islamic revolution can be inspiring to the resistance of the Muslims and the deprived of the world against the Western cultural unilateralism.

1. Islamic Revolution

From the point of view of late Imam Khomeini, the Islamic revolution is a divinely gift which is totally different from other revolutions in terms of formation, goal, leadership and the quality of fight. (Imam Khomeini, 2008,

p. 10) since this revolution is of the kind of movement of divine prophets, resulting from “divinely self-consciousness” of “God-awareness”. This is a movement which has awoken the Islamic consciousness, provoked the society to seek for the Islamic values and return to them, attuned and mobilized several and possibly opposite society classes in a coordinated movement based on the common consciousness and effervescent and collective spirit of the society (Islam) (Motahari, 1993, p. 64). The leadership of this revolution was on the shoulders of a person who had not ignored his own responsibility towards Islam and Muslims at any position he was in. He is the character who is well known among ordinary and elite people by his name, his memories, his words, his warm and active soul, his iron will and determination, his resistance, his courage, his perceptiveness, his effervescent faith. (Motahari, 1993, p. 85)

Imam Khomeini’s Ijtihad¹, the founder of the revolution, was based in the method of two sects; so it practically filled the gap between the Shiite and Sunni laws in terms of political and governmental issues, it originated a movement in the world of Islam, and raised the level of expectations of Muslims about the future of Islamic nation. Muslims started a new lifestyle according to their new understanding of the entity, goals and the international mission of Islam. Islam has become the groundwork of the liberating movements and campaigns. (The Velayat (leadership) Hadith, 1997, p. 296). Planning the Islamic government based on the velayat (leadership) of a faqih² by Imam Khomeini created a novel distinctive and consistent motivation in the Islamic nation and opened an original way of fighting based on the doctrine of Islam which strengthened the efforts of committed Muslim fighters in different parts of the world. This revolution which became victorious by relying on the faith, unity, the firmness of the leader and the dedication of the nation, has become a new heading in the

1. Deduction of rules of Islam from the Quran and Hadiths
2. An expert in deriving the Islamic rules from the Quran and Hadiths



extensive popular revolutions in the world. The principles Imam Khomeini had presented during the fighting period in order to create and strengthen self-esteem in the Muslims and guide the world of Islam, have been approved in the form of principles of constitution after the victory of Islamic revolution. The establishment of a system based on the principles of the beliefs in Islam and deep-rooted beliefs of Iranians in the government of justice and the Quran (the Constitution, Article 1 & 2), denial of any hegemonism and being conquerable (Ibid, Articles 42, paragraphs 152, 153, 142), revival of the idea of nation (Ibid, Article 11), support for right-seeking fights (Ibid, Article 11), peaceful relations with non-warring governments (Ibid, Article 14), attention to the rights of the religious minorities (Ibid, Article 3, sections 14, 13, 26, 64, 67), are among the examples of the inspiring principles of the Islamic Republic (religious democracy), for which there has been no record in the last millennium in the history and is the first political system of its kind.

2. Civilization

The term “Tamaddon” is the translation for the word “civilization” in English and “Hazarah” in Arabic, which literally means urbanism, civility and accepting civic behaviors. (Jer, 2000, vol. 10, p. 653; Al-Zamakhshari, 1979, p. 130; Makki, 2004, p.15; Haiim, 1990, vol.1, p. 235; Moein, 1996, vol.1, p. 1139). There are differences of views on the idiomatic definition of civilization, considering the evolutionary nature of this word. civilization is the fruit of the genius of the innovative minority (Ba’albaki, 1980, vol. 3, p. 28), the manifestation of social order and cultural creativity (Will Durant, 1986, vol. 1, p. 3), the symbol of social evolution (Nabavi & Malayeri, 1994, p. 9) and various symbols of human life. (Lucas, 1987, vol. 1, p. 7; Imrani, 1990, p. 9; Mujir Sheibani, 1958, vol. 1, p. 5; Velayati, 2001, vol. 1, p. 29). Considering the views on civilization, establishment of a government, orderliness, establishment of governmental institutions, leaving the state of individual life and entering the urban life, the exaltation

of human virtues and habits such as science and art, are among the signs of social civilization. (Ibn Khaldun, 1983, p. 73)

3. Culture

Culture means “the harmonious formation of humans in a “reasonable life” along with just relations in promoting material and spiritual goals of humans at all positive aspects, that if it is documented on the original factors of human life and the dynamic component of life in its context, the culture will create civilization. (Jafari, 1981, p. 161). In this view, the relation between the civilization and the culture is like the relation between faith and action, that faith results in action and action adds to the faith; that is, culture results in civilization and civilization adds to the culture. of course, this interpretation does not cause the decrease in the centrality of the role of culture, as in the relationship between faith and action, the central role of faith is a protected role. (Samimi, 2008, p. 18). In regard to the definition of civilization and culture, they are different although they are used as synonyms in Persian language. Civilization has an objective aspect; however, the culture has an educational background. (Haiim, 1990, p. 330; Jafari, 1993, p. 50; Velayati, 2001, p. 33)

4. The Rise and Decline of Islamic Civilization

Islamic civilization has initiated with an invitation and become perfected with the Islamic art of architecture in a completely rational, regulated process, in accordance with the philosophy of history in a time period (the first to twelfth century AH). The invitation to Islam, the establishment of an Islamic government, the expansion of Islam to farthest parts of the world, positive interaction of Islamic civilization with ancient ones, the translation movement, the foundation of library and school, the flowering of Islamic civilization, a deep tie between culture and Gnosticism are among the processes of establishment and the rise of Islamic civilization. The invasion of Crusaders from the West for two centuries and of the Mongols from the East for three centuries to the world of Islam had



devastating effects on the body of the Islamic civilization. The symbols of Islamic culture were plundered in Egypt and the Fertile Crescent by the Crusaders and in Transoxiana, Iraq and Khorasan by the Mongols. These two Eastern and Western attacks made the foundations of civilization unstable and caused the decline of civilization in the Islamic world. The final defeat of Crusaders in Syria and Palestine by Salah al-din Ayyubi (1187 AD/583 AH) and the Mongols by the Mamluks of Egypt (1260 AD) created appropriate situations in the Levant, Rome, and North Africa that preserved many of the remaining scientific and cultural artifacts. With the transfer of the remnants of Islamic heritage in the scorched lands of the Islamic world, the Islamic civilization was reorganized. (Velayati, 2001, vol. 1, p. 92)

5. Essential Factors of Civilization in Islamic Revolution

The essential factors to produce civilization in Islamic revolution are as follows:

5-1. Establishing a System

Establishing a system is the main stone of civilization and its promotion. System is a metaphorical word to represent the government or the style of the government; a set of components which are tied together in a specific form and create a type of one whole; or it includes congregation of principles and rules related to one subject and to one another in a form that it creates a hypothesis or a school. (Bakhshi and Afshari Rad, 2007, p. 671). Any revolution that ponders over the revival and elevation of the mentioned civilization, should attain the establishment of a value system (the criterion for evaluation good and evil) at the first stage. (Sayyid Qutb, 1990, p. 123; Sobhani, 2000, p. 367). By systematization, we refer to following the example of the prophetic government, establishing a system based on the religion, reasoning, and proportioned to the conditions of time and place and avoiding the common Eastern and Western models of government.

According to Islam, the basis of civilization is the belief in the itinerary of spiritual path and the excellence of human soul on the axis of

“monotheism”, the result of which is dynamism, hope, dignity, civilization, worldly and hereafter salvation. (Al-i Imran, 39; Al-Nisa, 41; Muhammad, 35; Munafiqun, 8; Yunus, 63) God-centeredness, knowing the truth, following the truth, spreading justice, governance of morality, human dignity, mercy and kindness, equality and compassion, friendliness and tolerance are among the characteristics of Islamic civilization (Sobhani, 2000, vol. 1, ps. 367-376), which other civilizations are somehow unfamiliar with or have paid little attention to. The advantage of Islamic civilization over other civilizations is the domain of sacred things. The more the spirit of monotheism is reflected in designing the cities, the more the sacred things and concepts are manifested in the construction of mosques and urban planning, in art and literature, the dignity of scientific categories and classes, and in short, in all aspects with special and hierarchical order. (Najafi, 2003, p. 21)

The fundamental characteristic of the Islamic Revolution is its scholastic and Islamic nature. The success of the Islamic Revolution in establishing a value system on the basis of the ideological principles of Islam is one of the contemporary wonders. According to the second Article of the Constitution, the Islamic system is based on believing:

1. The one God (there is no god but Allah) and the allocation of sovereignty and legislation to Him
and the necessity of submission toward His commands;
2. Divine revelation and its fundamental role in the expression of laws;
3. Resurrection and its constructive role in the evolutionary process of human toward God;
4. God’s justice in creation and legislation;
5. Constant Imamate and leadership and its role on the continuation of Islamic Revolution;
6. Generosity and high value of man and freedom along with his responsibility before God.



This system has no relation with the Western democracy. In this system, civilization has a divine and human origin. Religion and creative thought of human are counted as the two basic pillars of establishment and exaltation of a civilization. Of course, the civilizational role of religion is remarkable. Religion is the essence of every civilization and is like a soul to the body of the social institution. (Hejazi, 1973, p. 57-58). From the historical view, the direct impact of religion on creating a collective identity and the role of centers for rituals in the creation of the main core of early cities has been completely proven. (Mirja, 1996, p. 371) Just as the establishment of a value system based on the monotheism is the reason of creation and promotion of a civilization, the rule of a non-value system based on infidelity (Muhammad/ 8-11; Taghabon/5), the denial of God's signs (A'raf/96, 174, 177) and disobedience to the commands of religion (A;raf/72, 166; Talaq/7-9; Al-Dhariat/41-45) are the causes of the decline of a civilization.

5-2. Security

Civilization evolves when humans reside in cities (Navabi, 2002, p. 195). One of the components of urban life is security and relative solidarity. Security includes the advocacy of society of its members so that people can live in the society with assurance and peace of mind. (Hashemi, 2005, ps. 276, 290). Security is a necessary prerequisite for the formation of civilization and continuation of civility. As long as the conditions for a safe living are not provided, harmful anxieties and worries are not reduced and neither will be the society united, nor the civilization is created. (Will Durant, 1986, vol. 1, p. 3, 66; Ibn Khaldun, 1983, p. 75-76; Velayati, 2004, p. 20)

In the view of Islam, the procurement of security is the primary requisite of a healthy social life (Al-Baqarah/125; Ankabut/67; Al-i Imran, 97-154; Quraysh/3&4) and one of the goals of Islamic government. (Nahj al-Balaqah, Sermon 131) Ibrahim (S.A.)'s request for the security of Ka'bah from God (Ibrahim/35), construction of a security block by Dhu al-Qarnayn

(Kahf/92-98), the immigration of the Holy Prophet (S.A.) from Mecca to Medina, due to security issues (Ibn Athir, vol. 2, p. 101-108) and the prediction of the most severe punishments for the threateners of the security of the society (Makarem Shirazi, vol. 4, p. 358), all express the status of security in the value system of Islam.

The Holy Prophet (S.A.) took several actions to provide and develop security after his migration to Medinah. Establishment of an Islamic government, changing the name of Yathrib to Madinah, of al-Nabi, signing peace treaty with the neighbors, (Sobhani, 1984, p. 195), signing peaceful living treaty with the Jews living in Medinah, (Ibn Hesham, vol. 1, p. 503), signing a brotherhood contract between the two big tribes of Aws and Khazraj (Al-Jawzi, 1994, vol. 3, p. 63), concluding the Great Covenant of Muslim National Solidarity, (Abudawud, n.d., vol. 2, p. 129), organizing the jihadi forces and dispatching forces to borders were among the steps the Holy Prophet (S.A.) took in order to provide the security of the Islamic society.

The role of Islamic Revolution in culturizing the subject of security and its success in providing security is worthy of admiration. The legislator, in the position of stating the responsibilities of the Islamic Republic is truly concerned about security. (The Constitution, the Second Article) Asserting comprehensive security including dignity, life, property, rights, housing, and employment (the Constitution, Article 22), prohibition of inquiring beliefs (Article 23), prohibition of denigration and disparagement (Article 39), respecting the right of owning property (Article 46&47), fair distribution of resources and activities (Article 48), emphasizing the development and strengthening of Islamic brotherhood and public cooperation among all people (Article 3, paragraph 14), regulating the foreign policy of the country based on the standards of Islam, the fraternal commitment to all Muslims and the generous support of the oppressed in the world (Article 3, paragraph 15) represent the position of security in the



view of Islamic Revolution. Practically, the security of the Islamic Republic is a superior and exemplary model in the region and the world.

5-3. Government

By government, we refer to the institutions, facilities, and organizations which are established under the law to govern the country (Jafari Langarudi, 1999, vol. 3, p. 1755). Just as the existence of government is a necessary requisite for social order and civilization, sovereignty (authority) is the obligatory condition for the influence of governmental institutions in the emergence and exaltation of civilization. (Ibn Khaldun, 1984, p. 79). Because only a powerful government can remove the internal and external challenges of civilization and culture by creating opportunities for the creation of civilization.

From the viewpoint of Islam, the government does not arise from a position of a class or individual or group domination, rather it is the crystallization of a political ideal of a nation with the same beliefs and thoughts, which organizes itself to find its path to the final goal in the process of the intellectual and ideological transformation (the movement towards Allah) (the introduction of the Constitution). The first steps the Prophet of Islam (S.A.) took after migrating to Median, were establishing an Islamic government. He knew well that the goals of prophecy (education, the establishment of justice, prosperity and excellence of human, emergence and exaltation of the Islamic civilization) were not met without the establishment of a government. In the vast structure of the Islamic government of the Prophetic era, all the mechanisms needed for a powerful government were embedded. The mosque of the Prophet (S.A.) was the main base of the government and the center for the operational system. (Makarem Shirazi & Colleagues, 1995, vol. 10, p. 13). The mosque was considered as a center for education, a seat for the headquarter of Islam's troops, a place of justice, a center for collecting government treasury, a place for acceptance and dispatch of envoys for international contracts. In a nutshell, all the important domestic and international decisions of the

Islamic government were taken in the mosques. (Hamidollah, 1998, 147-271). During the caliphate of Imam Ali (a.s), a precise systematization and extensive arrangements were established in parallel with the progress of Islam, the principles of which were expressed in Imam Ali's decree to Malik Ashtar. (Dashti, 2000, p. 564-591).

The Islamic Revolution has also become successful in the realm of government and governance. At the zenith of the rule of secularist thought over the world, this revolution has boldly announced that the absolute sovereignty over the world and human beings belongs to Allah, and He is the one who has made human being to take control of his social fate (The Constitution, Article 56). The government or the ruling forces in the Islamic Republic of Iran are: the legislative branch, the executive branch and the judiciary branch, which act upon the principles of the Constitution independently under the absolute authority of the Imam of the Ummah. (The Constitution, Article 57). The duties of the legislative branch are carried out by the Islamic Consultative Assembly (ibid., Article 56), the duties of the executive branch are entrusted to the leader directly and carried out by the president and his ministers (ibid., Article 60) and the duties of the judiciary branch are carried out by the courts of justice (ibid., Article 61). The Constitution has explained the duties and qualifications of each branch and other political institutions in detail.

5-4. Leadership

The role of leader as the head of governmental institutions is very decisive. The existence of government is a necessary but not enough condition for social order and civilization. The community achieves order and desired civilization only if it benefits from an informed and committed leadership so that people can commence their evolutionary and civilization-building movement around him as the axis with cooperation and assistance (Ibn Khaldun, 1984, p. 79) as the Islamic civilization sprouted and reached prosperity and exaltation in the light of Islam and the wise leadership of the



Holy Prophet (S.A.). (Fath/29). The Prophet (S.A.) is a good model in all aspects and fields including building civilization (Ahzab/21).

The Islamic Revolution owes its achievement in the establishment of a system of values and procurement of security and emplacement of a mighty government and rulership to a faqih¹. At the time of absence of the twelfth Imam Sahib al-Zaman (S.A.), in the Islamic Republic of Iran, the and the imamate of the nation is on the shoulders of the just and pious jurist, who is aware of the time and is brave, tactful and a manager. (the Constitution, Article 5). In the system of the Islamic Republic, the leader is the highest official of the country (the Constitution, Article 57 & 113) who undertakes the guardianship of affairs and all the responsibilities arising from it. (ibid., Article 107). The leader of the system must have the following characteristics: the necessary scientific competence to give legal opinions in the various sections of jurisprudence, the necessary justice and piety to lead the Islamic Ummah, correct political and social visions, prudence, courage, management and enough power to lead (ibid., Article 109) so that he is able to take on the heavy duties of leadership in accordance with the Article 110 of the Constitution. Of course, by the of a faqih, we refer to the legislative and legal guardianship which is raised in relation to the administration of the society. (Mesbah Yazdi, 2002, p. 80)

5-5. Law

A good law is also one of the basic elements of establishment and promotion of a civilization. The role of law in society is like the function of blood in the body. In the absence of law, civilization is never created. (Will Durant, 1986, vol. 1, pp. 33-38). In the light of proper law and law-centeredness, not only is a stable society formed, but also a lasting civilization is established. Inclinations toward law in its general meaning refers to the observance of justice and non-discrimination among people. (Majlisi, 1983, p. 349)

¹ The expert in Islamic Law.

From the point of view of Islam, the existence of a proper law and its fair implementation is the key to the survival of the society. According to a prophetic hadith: “a society which enforces the law on the poor and leaves the potent, will fall. (Nouri, 1989, vol. 18, p. 17) Imam Ali (a.s) at the time of his successorship took basic measures in the direction of the rule of law-inclinations and always emphasized that: “the ruler should carry out the commands of Allah to all people of the far and near. (ibid., p. 254)

The letter 53 of Nahj al-Balaghah, the governmental decree of Imam Ali (a.s) to Malik Ashtar as the governor of Egypt, inspires good governance from the point of view of Islam, in which the following principles are advised: observance of justice and fairness, attraction of satisfaction of the public (the majority), having good suspicions about the people, removing the people’s suspicions, consulting with the scientists to manage cities, categorizing the jobs of society and expressing their rights, the qualifications of a judge, characteristics of the agents, giving priority to the development of lands over taxes, the requisites of scribes, kindness to merchants and artisans, careful care of the deprived of society, not assigning priority to the relatives and special people in properties of the treasury, peace with the enemy (if requested and if God is willing), fulfillment of the covenant and

From the blessings of the Islamic Republic, we can point to the approval of the Constitution of the Islamic Republic in which the type of the political system (the Constitution, Article 1), its structure (ibid., Article 57), the principles and goals (ibid., Article 2), conditions, responsibilities and the requisites of a leader, the three branches and other political institutions, the rights of the fundamental freedoms of the nation, the relationship between the government and the nation are legally mentioned.

5-6. Establishing a Nation (Ummah)

The notion of Ummah has a Quranic origin (Al-Anbia/92). Considering the undeniable role of the like-minded nation in the creation of civilization, the Holy Prophet (S.A.) pursued the ideological organization of the



community- even in small number. The plan of allegiance of Muslims to the Holy Prophet (S.A.) can be considered as a kind of organization of a group of believers in the form of multi-member groups (Ibn Hisham, 1989, vol. 2, p. 73; Hamidollah, 1998, p. 88) and several groups of ten people in Mecca (Ibn Athir, 2006, vol. 2, p. 95; Tabarsi, 1997, pp. 133-144) and the great treaty at the time of entering Medinna (Ibn Hisham, 1989, vol. 2, p. 150)

The achievement of the Holy Prophet (S.A.) in establishing a nation is one of the wonders of history. He organized racially, ethnically, and tribally heterogenous people in the shortest possible time and made the scattered Arab and non-Arab, black and white tribes into one nation (Baqarah/142, 213; Yunus/19; Anbiya/92). Psychologically, a nation is made of like-minded people. Race and geography have no role in it. Unlike the “tribe” which has a kind of relative and kinship relationship, the Ummah can be free of any kind of relative and kinship relationship. The Holy Prophet awakened the dormant natures with his tireless efforts, and created a self-sacrificing community out of monopolistic tribes (Al-Hashr/9). He established the Ummah based on culture and convergence (Nisa/146; Al-e Imran/103) by concluding the bond of brotherhood between believers (Hujarat/10) in such a way that creating dispersion among the Ummah was considered as leaving the circle of believers (Majlisi, 1982, vol. 72, p. 67) One of the goals of Islamic Revolution is to revive the idea of one nation in the world. Imam Khomeini was the reviver of this idea of one nation and paid especial attention to creating a nation in the evolutionary process of the revolution (both before and after the victory). He advised the Muslims to refrain from racism and emphasized that if the nations and governments strive to put the religious brotherhood into action with the approval of God the Almighty, they would witness that the greatest power in the world belongs to Muslims. (Mousavi Khomeini, 2008, p. 33). Imam’s concern in relation to building a nation is manifested in the Constitution as follows: “according to the holy verse: all the Muslims are one nation and I am your

Lord, thus worship me (Anbiya/92), all Muslims are one nation and the government of the Islamic Republic is obliged to base its general policy on the coalition and unity of the Islamic nations and continuously endeavor to put the political, economic and cultural unity in the world of Islam into realization” (the Constitution, Article 11). Among the duties of the Islamic Republic is the regulation of the foreign policy of the country in accordance with the standards of Islam, brotherly commitment to all Muslims at the world (the Constitution, Article 3, Section 16).

6. The Civilizational Impacts of the Islamic Revolution

The Islamic Revolution led by Imam Khomeini is the continuation of the revolution at the early ages of Islam. This capacity exists in the Islamic Revolution to revive the civilizational impacts of Islam once more. Islamic civilization, which was formed in the light of civilization-building teachings of the Quran, the prophetic tradition and the efforts of the Muslims at the early years of Islam, gradually developed and became global. As the religion of Muhammad (S.A.) is a rational, serious, pure and human-friendly religion. It is rational because it has never fallen into the madness of polytheism and did not associate any resemblance or partner to God and have not based its principles on the contradictory and far-from-reasoning secrets. It is serious, because it has forbidden gambling, alcoholic drinks, instruments of libidinous pleasure, and appointed five prayers at five times during the day instead. It is pure as it has limited the number of women who married the Asian kings to four. It is human-friendly as it has considered alms taxes and helping others more obligatory than Hajj trip, and these are the signs of the truth of Islam” (Voltaire, 1995, p. 87). According to the claims of another writer, “we do not know any other nation in the history who were influential on others as much as Arabs and Muslims, because all the nations who were in contact with them, accepted their civilization” (Lubon, 1995, p. 701). The wonderful development of Islam and the world’s acceptance of this emerging civilization was due to its truth, impacts and blessings that we refer to some of them below:



6-1. Freedom and Independence

Achieving freedom and independence is one of the inseparable slogans of the Islamic Revolution and their preservation is one of the duties of the government and individuals in the nation (the Constitution, Article 9). Today, independence meaning the exclusive competence of the government to run the affairs of the country is considered as the fundamental principle of the full existence of countries (Charter of the United Nations, Article 2, Section 4). As the initiative and creativity flourish in the light of freedom and independence, the exalted civilization guarantees freedom and independence of the society. The civilized society is both free and independent. The revival and promotion of the Islamic civilization is one of the expectations after the victory of the Islamic Revolution.

Islam seeks to ensure the full freedom and independence of the Islamic society, by freeing human beings from all kinds of captivity (Araf/157) based on the principle of denial of the path (of prevailing) (Al-Nisa/141) and the principle of neither East nor West (Tur/35). The Prophet of Islam (S.A.) endeavored to remove the burden of all kinds of chains of idolatry, wrong habits and customs, ignorance, class discrimination, false laws, and the domination of the rebels against God. (A'raf / 157), in such a way that all human beings obey only God and no one takes man as a god. (Al-Imran / 64). He raised the flag of freedom and independence by trusting in God in a situation where some believed that the continuation of political life, without trusting the great powers of that time such as "Rome" and "Iran" and without paying a ransom to them were considered impossible. However, the Prophet (S.A.) established the freedom and independence of the Islamic system. By sending ambassadors, he invited the great powers of that time to Islam. He even dominated them. Not only the political independence (Nisa / 141) but also the cultural independence (Maida / 48; An'am / 106; Baqara / 144) and the economic independence (Nouri, 1989,

vol. 13, p. 24) of the Muslims were ensured and Islamic civilization was established.

Imam Khomeini "led" the revolution and the Islamic system based on the principle of denial of the path (of prevailing) (Nisa / 141) and the principle of "neither East nor West" (Nour / 35) so that freedom and independence penetrated the layers of the revolution and the system, in such a way that ignoring it equals changing the revolution and the system. In Imam's works, the principle of "neither East nor West" has been repeated more than 300 times and the word independence more than 200 times. (Salimi, 2007, p. 111) Of course, the Imam meant to deny the domination of foreigners, not to cut ties with the countries that were in this blockade. Because he always insisted on maintaining mutual respect in relations with countries. (Mousavi Khomeini, 1989, vol. 13, p. 31).

Addressing the foreign ministers (present and future) in his divine political will, the Imam said: Avoid undoubtedly from any action that shows dependance in spite of all its benefits, and you should be aware that dependance may have deceitful appearance or benefits and advantages, but as a result it will destroy the roots of the country "(Mousavi Khomeini, 2008, p. 33) In the end, this strategic principle determined the foreign policy of the Islamic Republic of Iran (The Constitution, Article 152, 153, 43, section 8). Ensuring full independence as one of the lofty goals of the system (Constitution, Article 2) as well as the complete rejection of colonialism and prevention of foreign influence were considered the main duties of the government (ibid., Article 3, Section 5). Independence is the divine right of the people to determine their own social destiny. (Ibid., Article 56) The role of the people in determining the type of system (Constitution, Article 1), the administration of the country based on public opinion (ibid., Article 6) and the rights of the nation (ibid., Articles 27-27) express the place of freedom in the Islamic Republic derived from the Islamic Revolution.

6-2. Dignity



Since the Islamic Revolution has a monotheistic, rational, epistemological and moral origin, it can bring dignity with itself. Dignity means solidity, arduousness, a sense of duty and a state that makes human beings resilient and invincible. In the monotheistic approach, the only beloved is God Almighty (Fatir / 10). Dignity belongs to God and the Messenger of God and the believers (Munafiqoun / 8). According to dignity-creating promises of the Qur'an, the Messenger of God and the early Muslims did not hesitate for a moment in the most difficult circumstances of their spiritual and political lives and only surrounded to Allah. Before the hypocrites of Medina, the Quraysh leaders in Mecca also placed the Muslims under economic siege. Today, too, the colonial governments have threatened the Islamic system with all kinds of political, economic, and military sanctions. They are unaware that absolute glory belongs to God Almighty. One of the threatening factors of Islamic dignity is fear. Because fear takes the resistance from man. One who is afraid of losing one's life or is afraid of the difficult situation of life will not have the spirit to face the enemies and to endure the difficulties. The Holy Prophet (S.A.), believing that death and life (Ghafir / 68), honor and humiliation (Al-Imran / 26) are in the hands of God, resisted the demands and threats of the polytheists without being afraid of them. He said: "If I dip my hand in the dragon's mouth up to the elbow, it is more beloved to me than asking for something from a nouveau riche." (Majlisi, 1983, vol. 74, p. 60)

The Islamic movement is not an innovation of Muslims. Rather, it is a divine movement that was revealed by God to guide human beings and has become a good model with the efforts of the Holy Prophet of Islam. However, at a time when Muslims (especially the rulers of the Islamic world) got into negligence and deviation, the result was humiliation and compromise. The cross-sectional revolutionary movements did not succeed. due to the intervention of domestic and external factors. The miracle of the Islamic Revolution is that it drew the missing link between this divine mission and its policy the under the wise leadership of Imam

Khomeini in a way as to recover and revive the lost dignity of Muslims in the past centuries. The message of the Islamic Revolution is that God is All-mighty and the source of honor. (Fatir / 10) Islam is the religion of God and brings honor. (Al-Imran / 19) Dignity depends on jihad. (Nisa / 95) Establishment of the Islamic Republic based on the tenets of Islam in order to deny any oppression, suffering of tyranny, domination and being dominated, equity and justice and political, economic, social and cultural independence and national solidarity, are all the manifestation of this message. (Constitution, Article 1). Whenever the system of the Islamic Republic succeeds in fulfilling the 16 legal duties set forth in Article 2 of the Constitution, the lost dignity of Muslims in the past centuries will certainly be restored.

6-3. Spreading Knowledge

Man is a cultural being. His behavior is a reflection of his thought and awareness. The change in culture and civilization is not possible without influencing human thought. Islam emerged in a society where only 17 people were familiar with reading and writing. (Belazeri, 2019, p. 654) The Prophet of Islam (S.A.), with special attention to literacy and knowledge development, established the Islamic government based on a cultural revolution. During thirteen years in Mecca, he spread Islamic culture and beliefs and educated his companions in such a way that after emigrating to Medina, they became the main founders of the Islamic government, that is, the political and social revolution and the Islamic system based on the same cultural revolution was established.

According to Islam, the philosophy of the creation of the world is the advancement of science (Talaq / 12) and the goal of delegation of prophecy is the teaching of wisdom. (Al-Baqarah / 151). Islam considers gaining knowledge as a necessary action (Tusi, 1994, p. 488)¹, a good deed, alms,

¹ Muhammad Ibn Al-Hassan Tusi, Al-Amal, Qom: Dar Al-Thaqafa, 1994, p. 488, Hadith 1069.



praising, and jihad (Saduq, 1983, p. 522)¹. Thus, the expansion of knowledge and the fight against ignorance are the brilliant manifestations of Islamic civilization. Negligence in this regard has been strongly condemned. (Tusi, 1994, p. 377; Makarem Shirazi, vol. 10, 1995, p. 286; Hindi, 1985, p. 147)

The mission of prophecy began by reading and writing (Alaq / 1-5), the Holy Quran swearing to the pen (Qalam / 1), honoring the scholars (Zumr / 9; Mujadaleh / 11), diligence to deep thinking (Baqarah / 219), reasoning (Noor / 61; Alaq / 3), recitation (Muzmal / 20; Alaq / 3), writing (Baqarah / 282), praising science (Al-Baqarah / 289), honoring scholars (Zumar / 9; Mujadalah / 11), obligation to Public education (Nouri, 1989, vol. 17, p. 249), advising to gains knowledge in favorable age conditions (Karajki, 1990, p. 147), the need to study science at any time (Haji Khalifa, 1982, p. 78) and in any circumstances (Saffar, 1984, p. 147), enduring the problems of learning science (Hor Ameli, vol. 18, p. 214), encouraging Muslims to seek wisdom from anyone (Ameli, 1989, p. 173), cursing and condemning those who conceal knowledge (Amini, 2008, vol. 8, p. 153; Siouti, 1981, vol. 2, p. 266), and the release of prisoners of war in return to teaching the literacy to Muslims (Zarrinkoob, 1990, p. 26) led to the scientific movement and the foundation of Islamic culture and civilization in the Islamic world. Learning science in various subjects (Velayati, 2001, pp. 398-318; Zarrinkoob, 1990, pp. 27-158; Mubarak, 1975, pp. 39-135; Price 1985, p. 8) is one of the blessings of this scientific movement and the manifestation of Islamic civilization.

During five centuries from (81 to 597 AH) equal to (700 to 1200 AD), Islam was the vanguard of the world in terms of power and order, expansion of government, refinement of morals and behavior, standards of living, the establishment of fair human laws, religious tolerance, knowledge, science

¹ Abu Ja'far Muhammad ibn Ali ibn al-Husayn ibn Babawiyah al-Qomi (Shaykh Saduq), Al-Khasal, Qom: Teachers' Association, 1983, p. 522.

of medicine and philosophy" (Will Durant, 1992, vol. 4, p. 432). (Wat, 1387, p. 10). Historians acknowledge the influence of Islam in the spread of science and civilization is a sign of this fact. (Lahorie, n.d., pp. 149-150) One of the reasons that Islam accepted everyone is its serious support for human rights. (Khosrow Shahi, 1972, p. 28)

The Islamic Revolution is basically a scholastic and Islamic revolution. The active presence of the militant clergy in the forefront of the revolutionary movement, the new movement of committed intellectuals, the enlightenment of the conscious and responsible community in the trenches of mosques, seminaries and universities inspired by Islam and the wise leadership of the Imam have played a key role in raising public awareness. Creating a favorable environment for the growth of moral virtues based on faith and piety and fighting against all manifestations of corruption and destruction, raising public awareness in all areas through the proper use of the press and mass media and other media, free physical education and training for all at all levels and the facilitation and generalization of higher education, strengthening the spirit of inquiry, follow-up and initiative in all scientific, technical, cultural and Islamic fields through the establishment of research centers and encouraging researchers are one of the basic duties of the Government of the Islamic Republic. (Constitution, Article 3)

7. The Islamic Revolution and the Conditions for the Revival of Islamic Civilization

The success of the Islamic Revolution in reviving Islamic civilization depends on observing the basic conditions and components of civilization, which are:

7-1. True Return to Islam

True return to Islam is the first condition for the revival of Islamic civilization. Islam must be known from its clear source, the Qur'an and Sunnah. According to the Holy Qur'an, Islam is a complete, chosen and lasting religion (Al-Imran / 19; 85; Saf / 8 & 9) and regulates human life in



such a way that the divine will in all matters such as politics, economics, social, intellectual, moral, artistic affairs and other manifestations of civilization are relevant, the will of God who is the ruler and mastermind of the world (Yusuf / 21; Qasas / 48; Baqara / 117)

According to Wagler, Professor of Arabic Literature and History of Islamic Civilization at the University of Naples, Italy, "In this book (the Qur'an) we see reservoirs of science that are beyond the capacity and talent of the most intelligent people, the greatest philosophers, and the strongest men of law and politics." We are amazed by a religion that not only pursues a theory that is compatible with human needs, but also creates a law that is composed of the highest laws and that man can live under its protection. It goes even beyond these limits and offers the philosophy of life ... and Shari'a¹, which is considered as Islamic law, is not only formed from customs and rituals, but also all manifestations of social and personal life follow its rules." (Wagler, 1965, p. 53)

After the Qur'an, the tradition of the Holy Prophet (S.A.) is a good example for understanding Islam. (Ahzab / 21) Muslims should always follow his deeds. (Tabatabai, 2005, vol., p. 146) Following the conduct of the Messenger of God in behavior and speech (Al-Imran / 159) and the method of invitation (Nahl / 125), is the path to return to true Islam and revive Islamic civilization. "The story of the Arabs and the story of how they developed rapidly in Asia, Europe and Africa and created a great and gigantic culture and civilization is one of the wonders of human history, a new force and thought that awakened the Arabs and overfilled them with confidence and power was Islam." (Nehru, 1987, vol. 1, p. 290)

The Prophet of Islam astonished the world by sending a message to the Roman and Persian empires and making them aware of this great event.

"By sending these messages, one can imagine how tremendously confident Muhammad was in himself and his mission. He was able to create the same

¹ Islam's legislative system

trust and confidence in the people of his country and inspire them so that those nomadic men could easily dominate half of the known world at that time "(Nehru, 1987, p. 293)

Explaining the fact that the decline of civilization of Muslims is due to them keeping aloof from Islam and their distance from the Qur'an hinders the progress of Islam and the promotion of Islamic civilization. (Qutb, 1995, p. 216) is one of the missions of the awakeners of the countries of the same qibla today. As Seyyed Jamal al-Din also recognized the solution to the pains of the Islamic world in returning to the first Islam (Qur'an and Sunnah) and emphasized on removing the superstitions and mechanisms that have joined Islam throughout history. (Motahari, 1993, p. 21).

Imam Khomeini created and strengthened the belief in Muslims that true dignity (Al-Munafiqun / 8) can be achieved only in the light of Islam because "Islam and Islamic government is a divine phenomenon that using it ensures the happiness of this world and the hereafter at the highest level. It has the power to eliminate the oppression, plunder, corruption and aggression, and to bring human beings to their desired perfection. It is a school which unlike other non-monotheistic schools intervenes and monitors individual, social, material, spiritual, cultural, political, military and economic aspects and has not neglected any point, even a very tiny one, that plays a role in the education of human beings and society and in material and spiritual development; it has pointed out the obstacles to evolution in society and the individual and has tried to remove them "(Mousavi Khomeini, 2008, p. 10)

After introducing Islam, he expressed his expectation as follows: I strongly urge the Muslim nations to follow the pure Imams and the political, social, economic and military culture of these great leaders of the human world in a worthy manner and with their souls, hearts and dedication of their loved ones. Among them, they do not deviate from the traditional jurisprudence, which expresses the school of prophecy and Imamate and guarantees the growth and greatness of nations, whether with their primary or secondary



rules, which are both schools of Islamic jurisprudence, and do not listen to the obsession of scholars opposed to truth and religion. They should know that a deviant step is the prelude to the fall of the religion and the rules of Islam and the rule of divine justice." (Mousavi Khomeini, 2008, p. 99)

They also wrote about the wide scope of Seyyed Jamal's action: "Why did he have all this power of influence? What made this one's call penetrate into the depths of hearts and to the ends of the earth? Except that the Muslim nations heard this call as the call of an acquaintance, they felt that this voice came from the depths of the spirit of culture and history replete with their own pride, life and epic. These voices are one of the reflections of the same call that was resounded in Hara, in Mecca, in Medina, in Uhud, in Qadisiyah, in Jerusalem, in the Strait of Tariq, in the Crusades; It is the life-giving voice of jihad, dignity and power that resonates in the ears of history replete with the epic of Islam." (Motahari, 1993, pp. 83-84)

Imam Khomeini's divine call is also a reflection of those inspiring invitations of history that have blown the spark of hope in the Islamic world. The welcome of Muslims, especially the young generation in the world, to revolutionary Islam is in fact a response to the call of God-given nature. The call of the Imam and the voice of Seyyed Jamal have a universal resonance because it rises from the depths of the spirit of the culture and civilization of the original Islam.

7-2. Endeavors for Unity (Islamic Fraternity or Brotherhood)

Maintaining unity and avoiding divisions is one of the components of Islamic civilization. Considering the role of unity (Islamic brotherhood) in the creation and promotion of civilization, the Holy Quran while reminding Muslims of the disagreements and their negative consequences, admonishes the effect of unity in building culture and civilization, (Al-Imran / 103) according to which Muslims of all races, colors and languages around the world should feel a deep sense of brotherhood. (Hujrat / 10). The success of the Prophet in establishing a united society can be the inspiration of the Islamic Revolution. "... Muhammad, a simple Arab,

transformed the scattered small, naked, and hungry tribes of his country into a compact and disciplined society, and introduced them among the nations on earth with new qualities and morals, and in less than thirty years, this method defeated the emperor of Constantinople, and overthrew the sultans of Iran, conquered Syria, Egypt and Mesopotamia, and extended its conquests from the ocean to the Caspian coast and to the river Sihon." (John Dion Perth, 1956, p. 77)

Despite the presented discussions about the miraculous effect of unity on the advancement of social goals and the pride of communities, its true effect is yet unknown. Today, huge dams have been constructed in different parts of the world, which are the source of production of the largest industrial forces and have covered large areas under its irrigation and lighting. If we ponder correctly, we understand this huge power is nothing but the power of a few as the result of joining each other, then we realize the importance of unity and collective efforts of human beings. (Makarem Shirazi, vol. 3, p. 45)

8. Factors of the Decline of the Islamic Revolution and Civilization

In the process of civilization, identifying the internal and external inquiries of the Islamic Revolution requires serious care and insight. Because maintaining the Islamic Revolution is far from its essence. One of the ways to protect and continue the Islamic Revolution is to re-read the principles and goals of the revolution. The experience of the Islamic Revolution of the beginning of Islam, the insight of the Holy Prophet (S.A.), the obedience of the companions, the sacrifice of the emigrants and the Ansar (the friends) in the face of the harms of the revolution, in the emergence and development of Islamic civilization, is rare in history. After the decease of the Holy Prophet (S.A.), the negligence of Muslims from re-reading the principles of the revolution, led to the decline of Islamic civilization.

The continuation of the revolutionary process of the Islamic Revolution is due to the insight and obedience of the ummah to the leadership. It is expected from the lovers of the Islamic Revolution to identify and fight the



causes of the domestic and external degeneration of the revolution with insight. Earlier, Seyyed Jamal al-Din Asadabadi, "the autocracy of the rulers, negligence and unawareness of the groups of Muslims, their backwardness from the caravan of science and civilization, the influence of superstitious ideas in the minds of Muslims and their distance from the early Islam, the separation and division between Muslims with religious and non-religious topics, the influence of Western colonialism," are among the causes of the decline of Muslims. (Motahari, 1993, p. 20)." According to this view, the factors of the decline of the Islamic revolution and civilization can be divided into two categories: domestic and external factors:

8-1. Domestic Factors

Domestic factors of the decline of the Islamic Revolution and civilization are: tyranny, bad government, mismanagement, social unrest, public discontent, discord, discrimination, racism, heresy, superstition, secularism, self-loathing, the influence of enemies, misinterpretation of some Islamic concepts and ... (Velayati, pp. 137-149; Karimi, n.d., pp. 301-377; Ghorbani, 1993, pp. 412-431). By attributing these corruptions to Muslims, Westerners consider all ugliness and depravity to be the result of belief in destiny and providence, and say that if Muslims remain in this belief for a while longer, they will be in deep trouble and they will be beyond help. According to Seyyed Jamal al-Din, if the morale of the people becomes unfavorable and impure, the pure beliefs will change according to their morale and it increases their misery and misguidance, and it will become a force that makes them do more ugly deeds. Pulled. (Motahari, 1998, pp. 377-378).

8-2. External Factors

The influence of Western colonialism in the form of military, political, and cultural aggression is the most important external factor in the decline of Islamic culture and civilization. In the meantime, the risk of cultural invasion is much greater and more difficult to deal with. Because on the

cultural front, the enemy, the tools, the purpose and the method of work are somewhat unknown. The enemy moves so far on this front that some consider the enemy as a friend and his mysterious activities as a humanitarian activity. (Suwaf, n.d., p. 269; Ghorbani, 1993, pp. 430- 472) As the result of domestic and external factors, Muslims have become weaker than Western nations at a period of time: moral corruption, lying, hatred and deceit, division and enmity, ignorance of the world situation, blindness to good and evil, contentment with subsistent livelihood, recklessness in prompting and repelling the enemy, the influence of Western colonialism, all made Muslims thankful for every event and for every humiliation. They rest in the corner of a comfortable house and leave the treasure of wealth and independence to strangers. (Motahari, 1998, pp. 377-378)

Forgetting the principles and goals of the Islamic Revolution paves the way for the growth of degenerative factors such as worldliness, false pride, disagreement, discrimination, self-defeating, trust in Westerners and the influence of colonialism in the revolution. If these factors are not properly monitored and measures are not taken to fight them, there are no consequence other than turning opportunities into threats and demolishing civilization. A suitable solution to deal with the causes of degeneration is re-reading the principles and goals of the Islamic Revolution and empowering Muslims against the enemies and providing any kind of weapons, facilities, means and methods of propaganda and ... deterrents that cause fear of enemies (Anfal / 60) and make the cunning enemies be in awe of the Revolution (Nisa / 76), as in the early days of Islam, relying on God and following the pleasure of God, resulted in achieving victories. (Al-Imran / 173-174).

Research Results

The Islamic Revolution is a divine gift that is completely different from other revolutions in terms of formation, purpose, leadership, principles and quality of struggle. This revolution is of the type of the movement of the



divine prophets, arising from "divine self-awareness" or "God-awareness". This is the revolution that awakened the Islamic conscience in all parts of the world, and motivated Muslims once again to seek Islamic values and return to true Islam. Under no circumstances did the leadership of this revolution forget its commitment to Islam and Muslims.

Islamic civilization which was based on monotheism and rationality began in the first AH century in a logical process and completely compatible with the philosophy of history and reached its peak in the twelfth century AH. Although Islamic civilization degenerated due to domestic and external factors, the feeling of returning to Islam among Muslims has always kept hope alive in the body of Islamic society. The Islamic movements of the last hundred years, especially the Islamic Revolution led by Imam Khomeini, are among the works of this valuable and transcendent feeling. Considering the philosophy of history, the nature of the Islamic Revolution, the innate feeling of returning to Islam and the hidden ability in the Islamic world, the revival of Islamic civilization are part of the expectations of the Muslim Ummah from the Islamic Revolution. Especially that the components of Islamic civilization such as "value system, leadership, security, government, law, nation building, sovereign rule, etc." have been cultured in the evolution of the Islamic Revolution and are fully embedded in the Constitution. In the meantime, the role of guardianship of a faqih and a leadership aware of and committed to the principles of the Islamic Revolution is very prominent.

The civilizational capacity of the Islamic Revolution, due to its similarity to the Islamic Revolution at the beginning of Islam, can be analyzed and proven in terms of principles, goals, principles and components of civilization. The Islamic Revolution is able to take effective steps towards the revival and promotion of Islamic civilization by observing the conditions. True return to Islam (Quran and Sunnah) and striving for solidarity with the Islamic world, re-reading the principles and goals of the revolution and pathology (identifying the causes of internal and external

degeneration of the revolution) are the conditions for the revival of Islamic civilization. The result of the civilizational capacity of the Islamic Revolution is a civilization that can be a harmonious symbol of fundamentalism and creativity, rationality and spirituality, excellence and holiness, morality and power, independence and dignity, freedom and knowledge.



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An introduction to analyzing criminal behavior and responsibility from point of view of the Islamic anthropology

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Abstract

Every theory of criminology is based on an intellectual framework including theoretical ideas about ontology, anthropology and epistemology. In a certain theory, anthropology plays the main role, because the subject of human sciences is about man and his capabilities. However, non-Islamic schools of criminology are still confused in understanding man and his existential dimensions due to the lack of revelation and narrative teachings.

In this article, in the light of the Holy Qur'an and Shia traditions, the existential dimensions of man have been investigated, which has an important impact on the explanation of crime and criminal responsibility. In this regard, this research has found Allameh Tabatabai's theory as a reference theory. With the recent considerations, the result of this article is that according to Islamic anthropology, man is a free-willed being whose will is the main cause of criminal behavior. However, individual or environmental factors (both material and transcendental) have an incomplete causal effect. Adherence to this theory under Islamic anthropology will leave rays in the explanation and manner of criminal responsibility, punishment, assistance and participation in the crime and exculpatory factors of the accused.

Keywords: Anthropology, Human action , crime , volition, responsibility

Introduction

Every thought comes from a diverse set of cognitions, knowledges and beliefs and relies on them . Many of these of ideas form principles and preconceptions, which researches are based on them. These principles play an important role in the formation of schools of thought and existing ways in various scientific fields and understanding about the phenomena and issues. (Salimi, ۲۰۱۱ ,p .8) This theoretical perspective consists of a set of basic preconceptions about ontology, epistemology, anthropology and methodology. Obviously, these preconceptions must be answered before theorizing in any field of knowledge. (Kafi, ۲۰۱۴, p.25)

Thus, the presuppositions of knowledge, has its own place of importance in criminology as well . Criminologists, as theorists , must derive the rules governing human behavior and produce a theory accordingly. In deed the main reason of different theories in criminology is different fundamental antological preconceptions .

the analysis of Islam from man is a profound one. Man is the caliph and successor of God on earth and the divine spirit has been breathed into him. However, in none of the paradigms of social science in the West is there such an approach to human beings. In Western systems, human and his existential realities are examined only on the orbit of his physical body. While in the Islamic system, regardless of the importance of the physical dimension of man, the metaphysical dimensions of man are effective and involved in explaining his behavior, including deviance and crimes .

This article examines Islamic anthropological principals and its reflections in the realm of criminology and criminal law. The basic question that made the author to do this anthropological research is what explanation Islam provides for the formation of criminal behavior. And another question that will follow will be how the adoption of such an approach will be effective in the field of criminal law and criminal liability?



In this regard, the contents of this article will be presented in three parts. In the first part, anthropology, its types, and the dimensions of human existence have been introduced. In the second part, relying on Allameh Tabatabai's theory of "Etebariat" (ie , reconstructive reality preceptions) , a general explanation of voluntary human behavior is provided. And then, under this theory, a comprehensive and innovative explanation regarding the cause of committing all sins and crimes has been presented. And finally, in the final part of this article, the influence of this approach in the field of criminal law and criminal responsibility has been discussed.

Section one: Anthropology and the fundamental components of human

Anthropology is a word that, despite its widespread use in scientific societies, there is still no clear view about the ways of its involvement in humanities. Researchers in this field have used this branch of science in fields such as biological sciences and anatomy, theology, ethnology, ethics and philosophy. As anthropology experts believe, in the early 16th century, this term was used for the first time in Middle Europe to refer to human anatomy and physiology and in the direction of physical or biological anthropology. In the 17th and 18th centuries, European theologians used it to refer to human characteristics similar to God. At the end of the 18th century and the beginning of the 19th century, some authors and scholars of ethnology use the term anthropology to describe ethnic traits and to study the cultural differences and common humanity of the people of the world. This term is used in the English-speaking parts of the world with the interpretation of social anthropology. Moral anthropology is another type of anthropology that does not have much history and has seemed to be a vague concept from the very beginning. Kant used this term for the first time in the book *Metaphysics of Ethics* to define the philosophy of practical ethics as the opposite of the empirical approach to ethics. (Mousavi and Hasani, 2015, pp. 159-163)

Philosophical anthropology is another type of anthropology. This anthropology has examined the general human being based on its rational nature. Because the essence of philosophical knowledge is general concepts. This anthropology is a field related to questions about metaphysics and human phenomenology and interpersonal relationships. In other words, philosophy does not study a specific person or a person in a specific place and time, but it pays attention to the nature and truth of the essence of the soul and the ability of the human essence. This type of anthropology examines the dimensions of human existence through the attention of rational analysis and not through experience and experiment (Wiki Fig).

It is Islamic anthropology that claims to present a comprehensive knowledge in accordance with reality, or at least to introduce and analyze various human characteristics that other approaches are unable to do. (Rajabi ,2001, pp. 27-32) In this field, Islamic anthropology does not have the many shortcomings experienced by the theories and experimental schools of contemporary anthropology. Because full and complete knowledge of man is possible only from God, who is his creator. And as a result, it is not possible to express the truth of man except from his area . God has revealed this truth in the form of the verses of the Holy Qur'an or from the words of Imams and prophets (S.A)

God has paid attention to this exclusive feature in the Holy Quran:

“ And when your Lord said to the angels: I will appoint a caliph in the land, they said: Will you appoint in the land those who commit corruption and shed blood, while we glorify and sanctify you? God said: I know something (of the secrets of human creation) that you do not know.” (Bagharah ,30)

In this regard, this research has tried to identify and introduce the foundations of Islamic anthropology by referring to first-class Islamic sources, verses and traditions, and select from among these sources those that have the most important place in explaining human behavior, including crime. and take away the sin. These characteristics are examined below.



1-Wisdom (Reasoning)

By cogitating within ourselves, without intermediaries we realize that one of the human abilities and aptitudes is the power of measurement and choice. (Mesbah , 1985,p .64) This power of measurement and the human ability is called reasoning.

in authentic dictionaries, the words discernment, repulsion, and imprisonment are used to mean intellect (aghl) . Imprisonment is when a person measures and evaluates that, for example, some word or action is not appropriate based on some situation and circumstances.

Repulsing is also when a person evaluates and then on this evaluation, human's intellect prevents him from doing what he wants to do Also, in explaining the word imprisonment, we must keep in mind that when a person has made a comparison by which evaluated everything and then has reached the distinction between goodness and corruption, indeed he has imprisoned and suppressed his will to corrupt.

Therefore, the principle of the meaning of intellect is the power of measurement and evaluation and the meanings of discretion, repulsion, and imprisonment which is mentioned in authentic dictionaries are its requisites.

It is narrated from Imam Sadiq (S.A.);

“The intellect (Aql) is the thing by which the Beneficent God is worshiped and garden is attained.” (Kulaini, 1407 Ah, p.11)

Such an intellect is the power of distinguishing and measuring right and wrong according to Islamic teaching , and it is a criterion for evaluating human beings on their words and actions, and it's like a bright light in the path of human life to discern the right way.

2-Volition and power to change

One of the philosophical dimensions in Islam is the discussion of determinism and voluntarism. Proponents of the idea of determinism consider human behavior as subjugated and inevitable natural phenomena of internal and external causes affecting him. In contrast, there is the idea

of free will, which promotes the theme of free will, that is, a will that is not subject to the law of causality.(Motahari,1988,p.45)Therefore, two viewpoints have emerged regarding the relationship between human will and factors beyond his control and the extent of its influence on human will.

By now most philosophers consider causal necessity to be compatible with free will. They are called compatibilists. (Khazaei and Tamaddon ,2012 p. 23) In this approach, based on the definition of free will, even if the will and action are determined by the cause, still the person is free in relation to them, and the determination of one side does not harm the optionality of the action and will.

Some other philosophers believe in the incompatibility of causal necessity and free will. This group is called incompatibility. A group of incompatibility do not consider free will to be explainable in any way and deny it, they are called hard determinists. On the opposite side, a group of incompatibility emphasize human agency. They are called libertarians.

In Western criminal law, this debate is referred to as moral luck. In moral luck, we also talk about the influence of internal and external factors in the formation of behavior, and the debate is whether it is possible to still believe in maintaining free will despite the serious influence of such factors(Elham et al, ٢٠٢١), p. 13)

In the Islamic tradition most philosophers analyze human behavior in a comparative way. For example Mulla Sadra has tried to combine determination and free will and explain the deep free will or the optionality of the will. Although, in the end, the argument comes to the conclusion that the action and will of man are forced because they are based on a will outside of his soul, but what is really optional is the fact that the action is based on God, who is pure sovereign. From this point of view, human action is both voluntary and non-voluntary, but free will belongs only to God. (Hosseinzadeh ,2013)



Such consequences, which require the interpretation of discretion without accepting alternative possibilities, have caused Allameh Tabatabai to present an interpretation of discretion that requires the possibility of alternatives. Contrary to Mulla Sadra, who sees discretion as merely issuing an act based on awareness and its compatibility with the human nature, he emphasizes that such a thing is not really discretion due to the lack of an alternative possibility.

3 -Instinct (fit rah)

Instinct (Fitrat) is not only the characteristic of man, but all beings are able to achieve a degree of intuitive and innate cognition based on the nature in which they are formed. Therefore, all beings, including human beings, have innate and intuitive cognitions. But man manages it by relying on revelatory knowledge and rational reasoning. If this cognition is not managed by revelation, the probability of deviation of innate cognitions increases. Instinctive cognitions in other beings do not need guidance, and they act on the basis of this common and fixed guidance. But due to the power of authority and conquest in man, there is a possibility that he will deviate from the path of guidance. Thus, innate cognitions or tendencies can lead man to an unrealistic path that is considered a deviation. (Iman,2015, pp542,543)

Instinct should be considered as a device and organism in the human body that is automatic and works without the need for choice or other force and moves humans. Instinct is not something imposed on humans, but it is placed in their essence and it is not changeable and cannot be eliminated by imposition and pressure. In addition, it is all-encompassing and universal, and every human being has it. (Javadi Amoli,1991, p.26)

There are different instincts in the human essence. Human nature has tendencies, some of which tend to be good or evil and many of which have no orientation towards good or evil. Thus, the natural elements will be actualized as potential forces in the human personality. In each person, depending on the extent to which the divine and revelatory dimensions are

strengthened, innate inclinations are guided in a direct way. And in case of strengthening the carnal and animal aspects, the negative aspects of natural tendencies will be strengthened. (salimi,Ibid,p.23)

Tendencies like right-seeking, truth-seeking, justice-seeking and benevolence, and on the other hand in some other, there are tendencies such as selfishness, benefit-seeking, ambition-seeking, wealth-seeking and fame-seeking, benefit-seeking and fame seeking (Sobhani,2004, p. 26) also the traits of being slothful and hedonist, greediness (Payandeh, 2003, p.219) are of such intuitive tendencies.

Therefore, it is possible that many of the innate tendencies that have been pledged for the perfection of man in his nature, due to deviating from the path of revelation, provides the ground for committing abnormal and criminal behaviors. An example of an innate tendency that can be mentioned is the desire to acquire and accumulate wealth in human beings, which if one pays too much attention to this innate desire and on the other hand does not follow the teachings of revelation and sharia, this desire will lead to deviation.

4- Character (Shakeleh)

The subject of character in human beings is one of the most important topics in the field of anthropology and the basis of Islamic education and training .(Semnon ,2017 ,p.98) Therefore, it is necessary to express the structure and consequences of different interpretations of it.

There is a very basic question in the discussion of Shakeleh or character , whether it is an inherent or a developmental thing? At this point, it should be acknowledged that according to Islamic anthropology, human personality is affected by both inherent factors and acquired factors. By examining the collection of Qur'anic and narrative texts, the factors of character formation in humans can be divided into two categories: optional factors and optional factors.

Involuntary factors are those that affect the human personality in the primary nature and in a forced way. The primary nature is the one that man



carries with him from the beginning of creation. Hereditary-genetic, physiological, geographical, historical and cultural characteristics in which he was born lead to the creation of a creation in which a person has no role or will.

Allameh Tabatabai has considered the connection between innate characteristics and human actions as empirical and scientific assertions. Explaining the issue, he says :

“ some temperaments get angry very quickly and the sense of revenge ignites in them or the erotic instinct of some erupts quickly. Therefore, physical strength and temperament, moral traits that are the builders of human personality all have an effect on human actions and human beings act according to their personality.” (Tabatabia,1995 ,p.190)

Other factors such as the geographical environment ,the historical period in which man lives and the society in which man was born are also very influential in his personality. Some philosophical or sociological schools of thought believe that these factors play a key role in creating a person's personality in a way that they consider human beings to be the product of the history , society or the environment. While the truth is that regardless of the effectiveness of the aforementioned factors in human destiny and personality, the only final factor in human actions is the element of his will and choice, and the aforementioned factors are effective only as preliminary and incomplete causes in human destiny.

But the most important point regarding the place of personality and its determination in criminal intent is the influence of optional factors. In a way, it can be seen from experience and also according to the texts of the Qur'an that a person who, due to optional factors, strengthens negative behavior or form Either the sinner takes action in himself, his power of free will and choice is greatly reduced or it is basically eliminated.

As the name implies, these are the contexts in the creation of personality that the individual has voluntarily created, tried and acted upon. Researchers have named this dimension of personality, which is caused by

voluntary factors, secondary nature. Secondary nature is nature that is formed as a result of habit or method and way of life and based on the type of motivations and intentions to do something, and this nature is the result of human voluntary behavior. in several verses of the Holy Qur'an, the important fact is mentioned that action is effective in human personality.

Every soul depends on the action it has stored.(Toor ,21)

Every soul is hostage to what it has earned(Mudathir ,38)

The use of recent verses is that every human being is accompanied by his action and is imprisoned by him, in other words, through his action he creates conditions in which he is imprisoned and imprisoned in such a way that there is no separation between him and his good and bad deeds.(Makarem Shirazi,1421 a.h, p.170)

Section two : Analysis of committing crime based on the process of behavior in Islamic anthropology

Now that the fundamental characteristics of humans have been examined, this important issue must be addressed: how does sin or criminal behavior occur by humans? The answer to this anthropological question first requires examining the formation of behavior in a general way (both criminal and non-criminal behavior)

In this part of the research, the formation of behavior in humans is first examined and from the existing approaches , one is selected according to the principles of islamic practical wisdom. Then, in accordance with this choice, the factors that are directly effective in committing a crime are examined. The important point here is that the factors under study are novel in relation to the factors of crime in Western schools and no history of it , is observed in criminological works.

It seems that in order to show the position of anthropology in Islamic humanities, the most important step is to refer to the works of Allameh Mohammad Hossein Tabatabaee. he aims to explain human behaviors and relationships in the material world in an anthropological way by "Etebariat"



or “reconstructive reality preceptions” theory. ¹(Mousavi, Hasani, ibid., p. 160)

A) Explanation of the formation of behavior in human

Anthropologists often compare their actions with other types of actions in nature to understand and explain the mechanism of human action. And they try to find out the degree of similarity and difference between them. There are two common classifications among the philosophers of the past and present. Based on this classification, actions are divided into natural actions and voluntary actions. The first is a purely physical action and has no cognitive component, and the second has a cognitive component. This division and separation is agreed upon by Islamic and Western philosophers. In a general classification, the views related to cognitive and non-cognitive actions can be limited to three approaches. (Kiashemashaki, 2017, pp. 108-111)

The reductionist viewpoint is one according to which cognitive actions such as human`s actions ultimately have no intrinsic and inter - cognitive difference with physical actions and chemical changes. Theories of positivist criminology in the field of deviation and criminal phenomenon are clear examples of this view. In this approach, human beings act based on external and objective causes. In such a way that the same causes leave similar effects in him. In this approach, a mechanical model of man and his behaviors is presented. (Iman,Ibid ,p.84)

It is in contrast non-reductionist approaches. In this view, human actions are fundamentally different from natural and physical actions, and they

1 . In some of his works, such as the book "human before the world, in the world, and after the world" and Tafsir al-Mizan, he has discussed rational and narrative issues about the nature of man. These topics are basically in the category of philosophical anthropology topics and philosophical methods are used in them. The theory of “Etebariat ” is examined in the sixth article of the book “Principles of Philosophy and Method of Realism”

cannot be described or explained based on the laws governing non-human actions. (Kiashemshaki,Ibid)

This point of view, while defending free will, believes that human consciousness has a greater impact compared to other social factors. In this view, human being with the power of will and creativity has the ability to make changes . Although man is in material, cultural and economic bottlenecks, it is possible for him to get rid of the limitations. (Iman,Ibid. p. 89)

Among these, we can point to the third approach, which is the view of Islam regarding the explanation of human actions. Muslim scholars in the field of “ action” have referred to this approach as the "hierarchal view" according to which human cognitive actions are an improved form of natural and objective actions. Thus, cognitive actions are not exactly the same as Psycho -chemical actions, nor are they completely different, separate, or unrelated to the physical relationships . (Kyashemshaki Ibid ,pp.110 &111)

In addition, the emphasis on the hierarchal nature of the process of behavior , means that human behaviors, regardless of the underlying objective causes of those behaviors, are in fact related to the factors of the unseen worlds and hidden layers of existence, and are affected by them. By examining the works related to the field of philosophy of action in Shiite wisdom, it is possible to see in the works of Allameh Tabatabai an explanation of the manner of human behavior, which is completely consistent with this view.

Allameh believes that every voluntary action in man is based on this proces , and in such a way that individual and social life is impossible without it. The spirit of his theory is the transformation of the possibility of a behavior into determination, and such a transformation is present in every human action . It should be said that determination of the will is based on the end and goal of that behavior. And in fact, behavior is a means to achieve that goal. Acknowledging the benefit and the desire to achieve it



will make a conscious subject to be in the position of subjectivity. (Divani, 2015, p. 26)

But how human turns the possibilities of action into the necessity of action is a matter that requires many studies in different branches of epistemology, psychology, neuroscience and other related fields. Nevertheless, from a phenomenological philosophy point of view, some of the components influencing the creation of voluntary necessities can be understood. (Kiashemshaki, Ibid, p. 114) Below, from the existing works of Allameh Tabatabai, the principles and stages of how voluntary necessity is formed are explained:

Man has various sources of cognition, such as imagination, illusion and intellect, which can be used to obtain very diverse and wide-ranging ideas and affirmations. But man chooses from among these multitudes of perceptions, and this is based on his attention to a particular subject or situation out of countless subjects.

We can refer to this feature as the "principle of attention" along with the principle of practical necessity. In other words, the degree of attention of the human agent in terms of intensity and weakness in the formation of the necessity of action and causes more or less concern in voluntary action. (Tabatabaee, 1983, pp174-175)

Today, the principle of attention has a special place in issues related to education, learning and philosophy of practice. What makes a person pay attention to the necessity of doing something can be a natural need, such as a person's need for property and food, or the needs of a sexual instinct that draws his attention to the opposite sex. It can also be based on his education and social environment. Such as human attention to many values, customs and laws related to social relations.

Among these, another factor or principle can be expressed in a more accurate explanation of human behavior. The "ease of a behavior principle" by which the person who willed a necessity choose among the behaviors one that bring the him closer to his goal. When a person is faced

with two actions that are similar in terms of type, but one is more difficult and painful than the other, he prefers the easy action. Based on the principle that man constantly wants to make more profit with less capital and do more hard work with less effort (Diwani, Ibid, p. ٧٦)

Studies show that after drawing human attention to action in a situation, if the actor feels satisfied, he shows a tendency to repeat the aforementioned action. The tendency to repeat the behavior is a function of his satisfaction in achieving the goals . This is how the “structure of behavior” is formed as a result of the process of intensifying attention, satisfaction and repetition of action . This in itself causes the actor to pay more attention to the aforementioned behavior and, as a result, to achieve greater satisfaction, it leads to the process of intensifying attention and repeating the action. (Tabatabaiee, ibid., P.181-187).

B) Analysis of the factors of committing crime

In this section, the etiology of the crime has been investigated by emphasizing and reflecting on the dimensions of the human essence and the process of formation of his choice and action . Relying on the anthropology of Allameh Tabatabai, the author has explained the factors of committing crime and sin from a novel perspective, which is rare in academic criminology literature.

Today, despite the progress of science and awareness of people and the possibility of reaching them as much as possible, deviations and crimes in different societies, still is in a high rate . This is while many efforts have been made to promote moral values at different levels. This is despite the fact that many crimes have a long history and people will find out that it is criminal based on their conscience, intellect and nature .So one of the questions that have occupied the minds of moral philosophers and criminologists is why does a person, despite knowing the good and bad and the consequences of actions, sometimes act against his natural and intellectual knowledge and does not stick to his knowledge?



In this research, focusing on the spiritual characteristics of man, the author is trying to find a central theory to apply it somehow to all crimes and sins, regardless of the crime, criminal or the victim, and use it as a general explanation about the reason for the deviation and crime.

Reflecting on Allameh's words, it should be said that he considers violation of natural, self-evident or rational knowledge as a result of a kind of voluntary ignorance:

“ A person who is aware of the evil of sin but commits an ugly act with the motivation of the ego and the invitation of lust and anger. In truth, the attack of lust and anger closes the eyes of reason, which was the discriminator between good and bad. An ignorant person knows that doing something is ugly and forbidden, but his desires overcome him and lead him to sin, and he does not allow himself to be exposed to this opposition and rebellion and its dire consequences, and as a result, he commits forbidden acts.” (Tabatabaei , 1995 ,p.529)

This willful ignorance can be seen as the reason of gap between knowledge and practice. By accepting this fact, we can somehow consider the starting point of all sins and crimes as the result of this willful ignorance. In the following, levels of delinquency based on the works of Allameh Tabatabai, have been drawn . Under each level, it has discussed how the delinquent commits or re-commits the crime. These levels will include a range of random criminals, habitual criminals, repeat offenders and leaders of criminal gangs.

First level:

Human actions are affected by his attention and is also affected by his biological and psychological needs. When a person is faced with a need (intellectual, lust, anger), the active forces motivate a person to perform an appropriate action and fulfill the need. it gives him, material , physical or intellectual pleasures . These pleasures adorn the action and the accessories of the action in his eyes. (Ibid , p. 168)

Sometimes a person loves something that is his real perfection and sometimes he loves something according to the power of lust or anger and imagines that it is his perfection. so material person who sees his existence in the distance between death and birth does not see happiness for himself except material happiness and a goal other than achieving material benefits and pleasures limited to material things. The logic of these people is feeling, as a result, wherever there was a material interest in the middle. And the material man felt that the fire of desire was burning in his heart and he was motivated and forced towards that action.

But the logic of a believer is the logic of his intellect, he is motivated towards an action that he sees the truth in, whether it has material benefits or not, because he believes that what is with God is better and more lasting. (Ibid, p. 177)

On the other hand , Excessive attention and desire for some needs and abilities causes lack of attention or disregard for other needs and abilities and takes a person out of a state of personality balance. A phenomenon that can cause personality deviation.

One of the signs of this ignorance in this level, is that when the fire of lust or anger is extinguished, or there is an obstacle that prevents him from doing that ugly act, or due to the weakening of his physical powers and temperament, he notices it. The ugly deeds of the past will disappear and he will become enlightened, that is, he will return to his original knowledge, and the result of becoming enlightened is that he will regret what he did or intended to do. (Ibid, pp378-380)

Second level :

Another important factor is the presence of transcendental variables in human relationships and the causal link between them is the devil. It can be said that by choosing the pleasures of lust and anger and when the eyes of reason, nature and conscience are closed on man, obsessions and satanic seductions come , weak man and subordinates his will.



In this regard, we can take the example of verse 82 of Surah saad ¹, which refers to the existence of a kind of such a relationship and interaction , referring to Satan's promise to mislead human beings, by his invitation to them and their response to this invitation:

“He said, ‘By Your might, I will surely pervert them....”

According to the verses of the Holy Qur'an, Satan has explicitly declared that: “ I am in ambush” and it is very important for man to believe that there is a dangerous, deceitful and skilled bandit on his way. Therefore, he must suppress and reject him with caution and awareness. So there are significant epistemological points in explaining how evil temptations work in criminological analysis, which the Western moral and social systems lack. The devil and his soldiers, in order to mislead man from the path of guidance, always enter man through illusory perception and deceive man by it.

In short, the commission of many crimes and sins is the result of the wrongfully matching the illusions of man in the realm of worldly possessions with the general truths of eternal bliss. As a result of Satan's successive misguidance and temptations, man suffers a great error and destruction, which considers happiness as only worldly and material happiness, and denies any eternal and otherworldly happiness. (Khani ,2016 ,pp. 267-270)

Third level:

In examining the anthropological dimensions of Islam, it became clear that the personality structure is a truth that is formed from the repetition of human perceptions and actions, although it is affected by a group of external and internal factors, and its causality is incomplete . As stated, human action is based on his character. And on the other hand, his character

¹ -Verse 22 of Surah Ibrahim, verse 5 of Surah Yusuf, verse 64 of Surah Isra, verse 21 of Surah Noor also refer to devil relationship with human

is mostly the product of human action. The same is true in the matter of committing a crime.

Actions, when repeated, become habitual in the human soul. These spritual attributes , occur and penetrate in a person as a result of man's insistence and repetition on an action. Because it was stated that the shape before repeating the action and intention is a potential thing that has the capacity of any form, but by repeating the actions, it acquires a quality according to which the subsequent actions are performed and it does not violate it.(Semnon,Ibid,p.109)

After the formation of personality although changing is possible, but is so rare . It decreases and sometimes reaches zero. In this regard, there are narrations that consider the possibility of human change after forty years unlikely. This confirms the view that with the formation of personality, the possibility of changing and leaving some behaviors becomes difficult or impossible.

Accordingly, in finding the cause of committing crimes, especially in repetitive crimes and habitually through the lens of Islamic explanations of crime, it can be said that a person who commits a crime , in fact displays the dimensions of his existence that have been formed during his life. In other words , the criminal act of a person represents the structure established in his soul. In analyzing the cause of crime,it can be said the perpetrator, as a result of committing many voilations, sins, and in general moraly forbidden acts, ultimately behaves in the form of a crime, which in many cases has a higher obscenity than some sins and perversions.

Forth level :

Among Allameh's statements, one can find detailed explanations about the behavior and etiology of habitual criminals, repeat criminals, and crime leaders. Allamah says: There is another type of sin that is caused by obstinacy with the truth, not ignorance. that is, the reason for issuing an ugly act is as a result of rebellion, and obstinacy with the divine truth that sets a seal on the heart. It is true that in the stage of moral ignorance, the



devil tempts and seduces a person and calls him a helper in sins, but here the devil is his friend.

He has come out of the rule of God and has been placed under the rule of the devil, so the devil has influence in all the sciences and actions of such a person. And whatever he be explained to him, he does not understand and thinks that he is right and does not understand that he is going the wrong way. This is the state that God has sealed on the heart of such a person and blinds his heart. (Tabatabaei ,Ibid , p. 151-152)

Regardless of the gap between knowledge and practice, which is the most common reason for delinquency and sin, it is impossible to deny the limitations and obstacles that may hinder the way to achieve worldly and hereafter happiness. Islamic teachings have considered man as a creature with two different and independent realms of existence. These two realms, while being independent of each other, have a strong and close relationship with each other. The material realm is the field of activity of the spiritual realm (Jafari, 1983, pp. 186-189)Therefore , the spiritual development of man can not be achieved except by satisfying physical needs.

On the other hand , in the social system of Islam, man is a creature that even the way he eats and drinks can be effective in his behavior. One of the factors that definitely affects the issue of committing a crime is forbidden food. There are many examples in verses and hadiths that emphasize this undeniable fact.(Mirkhalili,2018 ,p.67)

Holy Quran says: “ O prophets, eat clean and pure food and do righteous deeds, for I am aware of what you do.” (Surah MO Menon,51)

In the narrations, the forbidden foods increases man's tendency to sin and idolatry.(Majlesi,1403 AH ,vol 93, p.321)¹

1 . A clear example of this doctrine of Islamic criminology is the day of Ashura, when Imam Hussein told the followers of Yazid that the reason why my advice does not affect you is that your bellies are full of haram

Despite the impact of the environment , economic and social factors on the crime , in the eyes of Islam, human beings have high capabilities in changing conditions. There is a belief that man has authority in his behavior, and while he can determine his own destiny, he can also be influential in the world around him and conquer it. (Salimi ,Ibid,p.17) The power of human influence and intervention in the environment is so great that he can change the history and society. It is stated in a verse of the Holy Quran:

God will not change any nation until the people themselves change their condition (Raad,11)

The human can affect not only the material system but also the superior and metaphysical worlds and cause changes in it, and this is the highest form of human domination over destiny and the environment around him. In explaining this matter, it should be said that according to Shiite teachings, one of the dimensions of determining human destiny is paying attention to uncertain degrees and the possibility of changing destiny . The human will and action can affect such destiny within the framework of the same principle of causality, and thus shake the metaphysical world and the commands in it. (Motahari, Ibid, pp. 55-67)

One of the factors with such power , is prayer. God says in verse 62 of naml surah :

“ Who is the one who responds to the helpless when he calls on him and removes the affliction and makes you the successors of the earth?”

Another example that can be mentioned in the possibility of human influence on the environment and conditions around him is the effect of human faith as a voluntary matter on the descent of divine blessings and openness in material life. In the verses of Holy Quran, it has been repeatedly observed that the scarcity of livelihood and the unfavorable economic and social environment, is due to human infidelity and unbelief. In verses 10 to 12 of Surah Noah, God has mentioned this voluntary possibility for human beings to change their living conditions:



So I said, "Ask forgiveness of your Lord, for He is the Most Forgiving, the Most Merciful. He sends down the sky for you." And He will help you with your wealth and your children, and will set up gardens for you, and will make streams flow for you."

This point has been considered by Muslim thinkers. Motahhari, says in this regard:

“ From the point of view of the divine worldview, which does not limit reality in the context of body , its qualities, and bodily interactions, the world of events has more and more complex structures, and the factors involved in the occurrence of events are much greater. From the material point of view, the effective factors in time and sustenance, health, happiness are exclusively material ... but from the point of view of the divine worldview, other factors called spiritual sustenance are also involved in material factors”(Motahari,Ibid,p.77-78)

Section 3 : The effects of Islamic anthropology on criminal law and the realm of criminal responsibility

Now, after the steps that have been taken in explaining the dimensions of man and the stages of his voluntary actions, the time has come to analyze Islamic anthropological foundations in the realm and dimensions of criminal law.It is clear that this impact can have wide dimensions. A few cases of this influence are mentioned below.

1- Anthropology and justification of punishment

Although the issue of imposing punishment is considered normal in different eras of mankind and we are so used to it that we have no doubt about the validity of punishing offenders and criminals, but it must be said that punishment is at least due to the intentional infliction of pain and suffering on a person. that needs justification. (Palmer, 2019,p.164)

The selection and application of punishment theories, including the justification of punishment, conditions and how to implement it, are dependent on anthropological components. Among other things, the

anthropological issue of free will has the most important position regarding the justification of punishment. (Hosseinzadeh p. 36)

The different interpretations that were expressed regarding the authority and the way criminal behavior is formed, have formed two major theories of criminal law regarding the justification of punishment. The theory of retributivism and utilitarianism.

In the theory of retributivism, the imposition of punishment is based on the concept of blameworthiness. That is, the punishment is justified because the criminal deserves it. With a retrospective view, retributivism considers the main purpose of punishment for a mistake committed in the past, not the benefits and fruits of punishment. In this view, even if the punishment has negative consequences, it should be applied. On the other hand, according to the theory of utilitarianism, punishment is not based on past mistakes, but rather on the future, and those who witness the punishment should avoid committing it. (Cottingham ,1997, p.181-0-18)As Betham said, it is the punishment of evil and it is justified only if its results can justify the resulting suffering. (Capleton ,١٣٠٠٩ p. 30)

In explaining how anthropological considerations affect punishment, it is stated that the legal theory of retributivism, should be considered as the reflection of the compatibilist interpretation of free will, and it is only by referring to this explanation of free will that we can adopt a punitive and regressive approach in the application of punishment. The blameworthiness , as the essence of the theory of retributivism , is based on the ability to praise and blame, and the ability to praise and blame is also based on discretion.

In other words, the entitlement of punishment requires that the subject has the ability to perform each of the two sides of the action and can act in a different way. (alternative possibility) because it is not reasonable to blame and deserve punishment in cases where a person does not have more than one possibility for realization. (Hosseinizadeh,Ibid, p. 38)

in the tradition of Islamic philosophy, many compatibilist philosophers do not discuss free will according to their basis for punishment, because



according to their philosophical explanations, they present a compatibilist interpretation of human behavior, in which no alternative possibility is imagined, but the debates about the punishment of merit and praise and Human responsibility and guilt have been presented in such a way that the ability to choose one of the two possibilities is its default (Ibid, p. 45).

This is while according to the libertarian view of Allameh Tabatabai, criminal behavior is one that, has an alternative possibility, and therefore, a person who is blameworthy is considered a criminal. But on the other hand, it is based on the grounds that have influenced him, his blameworthiness will change.

2- Anthropology and the criminal responsibility of being an accomplice in a crime and responsibility for omission

Most of the time, the crime is committed by the intervention of two or more people. Apart from the principal, who in fact directly realized the actus reus of the crime and result, other people may have indirectly intervened in the realization of the actus reus (Haji Dehabadi, 2019, p. 108)

In the criminal laws of some countries, including Iran, the responsibility of non-principal, is of the accessorial responsibility. This is despite the fact that in most of the western criminal law systems, especially common law, the principal responsibility is applied to all the people who have intervened in the actus reus in any way. This kind of responsibility is the result of a new theory, called “complicity”.

Regardless of how criminal law systems deal with the intervention of several people in committing a crime, lawyers have faced the problem of justifying the accomplices responsibility. From the perspective of the philosophy of criminal law and moral issues, there is always room for the question, what is the basis of the responsibility and punishment for the act of the other?

Lawyers and moral philosophers have given different answers to this problem. However, among the set of theories, two main approaches can be observed regarding the basis of the responsibility for the act of others. 1-

Causal approach and 2-ethical approach. According to the causative approach, the criminal responsibility of a person who has only indirectly intervened in the actus reus is due to the causal and effectual role he played in the realization of the crime. And the opposite approach has placed the point of relying on the criminal liability resulting from a wrongful act on the moral blameworthiness and mens rea of the person at the moment of committing the crime.

In fact, in this approach, instead of emphasizing the causality in the realm of actus reus, attention is paid to the attribution. The causality is different from the attribution. The attribution itself is based on a concept such as blameworthiness. Attribution means that a crime label can be applied to the act, and the label of criminal can be applied to the person who committed it. This judgment is done by common sense. (Ibid., pp. 114 and 132)

One of the bases that can be presented in the final solution is the degree of freedom and authority of man in his actions and accepting the results from it. In this way, if a researcher has chosen the compatibilist basis in the analysis of human behavior, he will also accept the basis of material causation in justifying the responsibility for another's act. Because one of the essentials of compatibilism is the acceptance and harmony between human will and the material determinism that the natural world imposes on him.

With a little attention, the reader will find out the invalidity of the causality point of view in justifying the responsibility for another action. Because assuming the complete will and authority of the principal in the realization of actus reus, talking about the influence of the accomplice in the form of material causation has a clear contradiction.

In defence of this view, it has been said: "libertarianism is in contradiction with the institutions of criminal law. The contradiction of this point of view with being an accomplice in a crime, if we accept that the criminal act is a product of the brain interactions of the perpetrator or the complete disability of the perpetrator himself, then the concept of accessory is



nullified. Because According to the supposition, the deputy will not have any causal effect on the perpetrator of the crime (Nobahar ,Khat Shab,2016 p. 105)

At the same time, by adopting the libertarian approach in justifying the accomplice responsibility , due to the non- adherence to natural causation, it is possible to achieve more justice by developing the criminal responsibility for all people who intervene in the crime. It is noteworthy that even in the field of criminal responsibility caused by omission, this theory will have significant effects.

3-Anthropology and mitigating or diminishing factors of criminal responsibility

The acceptance of human free will means the ability to blame and punish people who have a will completely free from internal and external coercion. The criminal law considers only those who have done actus reus along with the necessary mens rea at the moment of committing the crime . Therefore, if a person has committed actus as a result of external coercion , such as necessity , he will not be held criminally liable due to the impossibility to blame and assign the crime to him. Also, if the person has committed actus reus while his will is under external and internal pressures and he does not have free will in choosing the act at the moment of the crime, his blameworthy will decrease or destroy.

Criminal law has considered these cases under the cases of exemption from criminal responsibility. According to the principle of free will , the burden of proof in these cases is on the defendan.

The basis of exemption or diminishing in criminal responsibility is the principle of libertarianism in philosophical anthropology. While some accept the opposite opinion and consider only the approach of compatibilism, which believes in the influence of determinism on human will, and know it in accordance with justice and the principles of criminal law:

“Based on this way of reasoning, duress loses its function in crime as well. Because when we remove the human factor from the field of cause and effect relationships, it is as if no one can force another to commit a crime against their will.” (Ibid, p. 105)

Conclusion:

In this research, anthropological approaches in the intellectual system of Islam were investigated. The most important results of this research, which can be considered in criminology and criminal law from the point of view of Islam, are as follows:

In the Islamic worldview, human dimensions are different from all other scientific systems. This approach is free from the defects of western theories due to relying on real ontological foundations and divine metaphysics. In Islamic anthropology, man is a being that has deep dimensions such as intellect, instincts, personality and free will.

In Islamic anthropology, the main element in the formation of behavior, sin and crime is the will. Although volition is the main cause of criminal behavior, imperfect causes and other underlying factors cannot be neglected. In this view, man is not only limited to the body, but his divine soul is connected with the hidden and metaphysical layers of existence, so a number of invisible and metaphysical factors affecting human behavior such as committing sins, forbidden food, angels and devils, prayer and worship, that it cannot be neglected in the analysis of criminal behavior in Islamic society. In such a way that in investigating the environmental factors of crime, supernatural cases are of double importance compared to material factors. Finally, this research has found the influence of anthropological foundations in determining the scope of criminal liability and punishment very deep.



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

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Abstract

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

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

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

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Introduction

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

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

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

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

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

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

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

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



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

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

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

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

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

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



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

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

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

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

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

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

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

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



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

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

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

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

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

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

2- Ta'zirat

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



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

1-2-Sharia sanctions (Ta'zirat)

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

2-2-Governmental penalties

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

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



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

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

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

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

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

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

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

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



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

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

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

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

3- Retribution

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



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

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

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

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

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

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

4- Diya

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



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

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

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

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

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



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

5-Conclusion

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

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

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

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

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

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

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



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Jurisprudential analysis of Kohlberg's view on the position of the *wlad zina* in *Imami Shiism*

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Abstract

The offspring of illegitimate intercourse is called the *walad zina* (or illicit child) by the *Imami* law, however, since he is a human being, he has the very rights of a Muslim. It means that there is no difference between legitimate child's rights or illicit one; consequently, to be an illicit child is not a criminal offence, but his parents' fornication is a determined (*hodud*) crime, and so in accordance with principle of personalizing penalties, he must not be punished for the crime of his parents. However, the claim of Dr. Kohlberg is that based upon the *Imami* traditions and jurisprudence, the such a child should be deprived of the Shiite rights, since he is not known as an *Imami* individual, but he is an infidel. In this paper, we will show that the most of traditions and jurisprudential theories which have been cited by Etan Kohlberg has been rejected by well-known *Imami* jurists, including Imam Khomeini. Therefore, if the author had not relied on the invalid sources, he could have transmitted the true data to the Western readers for all these years.

Keywords: The *walad zina*, *Imamiyyah*, jurisprudence, Kohlberg, *Foqaha*.



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1-Introduction

According to the *Imami* jurists (*foqaha*), any person whether the illicit (*walid zina*) or legitimate, has the same rights as other Muslims. In contrast, one of the western contemporary Islamologist named Etan Kohlberg¹ believes that the *Imamis* differentiate between the rights and duties of the *walid zina* and others. In his paper titled "The position of the *walad zina* in *Imami Shiism*",² he (hereinafter, he is named the author) has said that based on some *Imami* hadiths and jurisprudential opinions, the person of illicit relationship (the *w.z.*) is deprived of a Muslim's rights. Therefore, in spite of an illicit offspring is the result of the natural parents' illegal relationship, but the jurists have regarded the very parents' crime as the cause of their child's *najāsa* (impurity) and his infidelity (*kofr*). Therefore, this is his parents who deprive the *w.z* of his rights (Kohlberg, 1985, p. 237-238).

Therefore, an important question arises here: What are Kohlberg's arguments regarding the position of the *walad zina* in *Imami* jurisprudence (*fiqh*)? This is the first research that with a descriptive-analytical method, will try to answer this question. Summarily, it can be said that according to Imam Khomeini (*Imām Khomeinī*, 2000, p. 84-85) and the majority of *Imami foqaha* (Sheikh Anṣārī, 1994, v.5, p.155; M'arifāt, p.304; Fāḍil Lankarānī, 2004, p.509) and Iranian Islamic Punishment Code 2013, art. 552, the cited sources of the author are invalid and they are regarded as inconsistent with the human free will and justice.

This research will focus on three important topics of the author's work: concept of the *w.z.*, the related hadiths, some jurists' opinions. We

¹ - He was born in 1943 in Tel Aviv, graduated of Oxford University in 1971, professor at Hebrew University until 1991, head of the Institute of Asian-African Studies in Israel, fluent in Arabic and English, specialized of jurisprudence and *Shiism*. His works are about the jurisprudence and belief of *Imamiyya*, some of which were translated into Arabic, Persian and Turkish; see: www.emetprize.org/english/Product.aspx?Product=90.

² - *Bulletin of the School of Oriental and African Studies*, 48. London, 1985: p. 237- 236: <https://www.jstor.org/stable/617543>.

first bring the very statements of the author, and then, analyze them according to the jurisprudential opinions.

2- Concept of the *walid zina*

2-1- The author`s opinion

The term *zinā* applies to all varieties of illicit sexual intercourse between a man and a woman, and the word *walad* is equivalent to both male and female offspring, thus the *walad zinā* covers the offspring of both adultery and fornication (Kohlberg, Ibid, p.237).

2-2- The *Imami* jurists` viewpoint

The author has defined *zina* as "all varieties of illicit sexual intercourse ". Firstly, he has not mentioned any jurisprudential source for this definition, and secondly, this concept is not consistent with its definition in the *Imami* jurisprudence, because *Imami* jurists regard fourteen conditions as necessary for the realization of *zina* whether adultery or fornication, and define it as: whenever a man who is mature and sane with consent and free will, without a permanent or temporary marriage, or conductive marriage (*i.e. al-nikāḥ al-mu`āḥātī*), without doubt, and also with knowledge of prohibition of *zinā* shall penetrate into sexual organ (vagina or anus) of a mature and sane woman with her consent and free will, both of them have committed *zinā* and their child is illicit (Imām Khumeinī, 2000, v.1, p.267; Mūsawī Gulpāyegānī, 1993, v.1, p.30).

It is notable that the Islamic punishment code 2013 has followed the mentioned jurisprudential definition, but, at least, added these eight more stipulations to it: without unconsciousness, sleep and drunkenness, without force and duress, without deception and seduction, without abduction and threat (Civil code of Iran, arts. 884 and 1167; Islamic punishment code 2013, arts. 224, 247,552-553).

Accordingly, with the absence of even one of these 24 conditions, there will be no the *walad zina*. Definitely, it is only with all these 24 conditions that it is possible to prove and confirm that a child is the *walad zina*. As a result, in the *Shiite* societies, it will be too difficult that being



the *walad zina* is proven, and it is almost impossible (Seyyed Murtaḍā, 1994, p.545; Najafī, 1984, v.43, p.35). But with definition of fornication given by Kohlberg, anyone can easily be called *the walid zina*.

Therefore, what the author has drawn in his mind about the concept of the *w.z.* in the *Imamiyyah*, is completely contrary to the *Imami* jurists' theory. In fact, if the author had seen at least one source of *Imami* jurisprudence, he would not have attributed this arbitrary definition to the *Imamis*. In other words, the person whom the author calls the *walad zina* in his work, may not be basically the *walad zina* according to the *Imami* jurists and the Islamic Punishment Code

.3- The *w.z.* in the *hadiths*

3-1-The author's approach

The following *Imami* traditions emphasize that the *w.z.* is ritually impure and he possesses despicable qualities (Kohlberg, Ibid, p.238-242):

1- Muhammad al-Bāqir says: "The *w.z.* is a joint product of the *zāni* and the devil, both of whom participate in the sexual act".

2- Al-Bāqir has declared: "There was nothing good in the *w.z.*: neither in his skin, nor in his hair, flesh, blood, or any other of part of him;" and in his another *hadith*: "After all, even the dog and the pig, normally considered impure animals, were carried on board Noah's ark, but not the *w.z.*"

3- (Imam al-Ṣādiq said:) "The *w.z.* is coupled with Sindis, Zinjis, Khuzistanis, Kurds, Berbers and Razis, all of whom share the dubious distinction of not having the sweetness of belief enter their hearts."

4- The prophet has announced: "The *w.z.* is the worst of the three (*sharr al-thalātha*)" that the trio in question were the *w.z.* and his parents; he has also declared:

w.z., the hypocrite, and he who was conceived during his mother's menstrual period. "Ja'far al-Ṣādiq is said to have mentioned four characteristics of the *w.z.*: hatred of the *ahl al-bayt*, a tendency to commit

zinā himself, making light of the performance of religious duties, and making himself unpleasant company by speaking ill of others.

6- According to al- Bāqir: "God determined that in every case where a prophet or a son of a prophet - or the Imams- would be killed, his murderers would be a w.z."

7-Al- Bāqir, addressing his disciple Abū Ḥamza al-Thumālī, is said to have expressed this bluntly: "All people are offspring of fornicatrices (*awlād baghāyā*) with the exception of our *Shi'a*."

3-2- Analysis of the traditions

As to these hadiths, it is necessary to mention a general point that in the *Imami* jurisprudence, the traditions report the speeches or conducts of the innocent (*ma'ṣūm* A.S.), whether the prophet or Imams (A.S.) about the religious orders; hence, *Imami foqaha* regard a tradition as valid that is reliable from the point of its document and text. The validity of a document is proved with reliability of its transmitters. However, as to authenticity of a text, it should be shown with the rules of the *hadith* sciences; as a result, If there is a tradition in a hadith work, it does not mean that it should be considered authentic.

Given to this crucial point, the hadiths cited by the author will be examined based on the works of jurisprudence.

3-2-1- The first narration

Due to several Quranic and intellectual reasons, the textual implication of this tradition cannot be accepted (Ibn Bābwayh, 1986, p.263), even if we assume that the document of this tradition is valid. These reasons can be listed as follows: First, the demonization of the human substance does not devote to the w.z., since, about the offspring` birth of legitimate intercourse, the devil tries to participate, and according to some other *hadiths*, it will sometimes succeed too (Shaikh Ṭūsī, 1987, v.7, p. 407; *Qomī*, 1994, v.4, p.433). Secondly, if a child born by whether the legitimate and illegitimate intercourse, does not grow under the religious moralities, the devil takes its share of the offspring, as the participation in *al-āyah*



(verse) 64, *al-asrā`* (chapter): *Shārik hom fī al-amwāl wa al-awlād* - (Oh! Satan) partake with them in their riches and children- means that the devil is taking its share of the people's property and offspring ('Allāma Ṭabāṭabāyī, 1995, v.13, p.201). Thirdly, if the concept of the tradition is that there is no way for the *w.z.* to get rid of his fate, such a meaning is in contradiction to the four jurisprudential evidences (*adilla arba`ah*) of the holy Quran, the Prophet or Imam's *sunnah* (tradition), the human reason and the jurists' *ijmā`* (consensus) connecting to the human free will (Ḥuseinī Ḥā`irī, 1994, p.408). Fourthly, the *w.z.* is the product of the parents' sin and their child should not carry punishment of their act, otherwise it will be contrary to the divine justice and *al-āyah 164, al-an`ām* : *wa lā taziro wāziratōn wizra ukhrā* (and no bearer of burden shall bear the burden of another). For these reasons, without considering at least, text of the tradition, the author should not have cited the *hadith* and interpreted it as impurity or moral deviation of all the *w.zs.* Nevertheless, he even refers it to seventeen narrative and interpretive sources. It is likely that when the unfamiliar reader looks at these number of its sources, they will logically believe in reliability of the text and its meaning, and regard the *w.z.*'s position in *Imamiyya* as author wants, while as it was shown above, the tradition does not include all the *w.zs.* Eventually, it is possible that it was quoted by Imam Baqir (s) about a specific individual.

3-2-2- The second tradition

The document of this tradition (Shaikh Ḥurr `Āmilī, 1989, v.20, p.442) is reliable, but in the view point of the famous jurists, its generality is not acceptable; because it is against the divine justice, the human reason, the human rights and integrity (Shaikh Anṣārī, 1994, v.5, p.155; Mūsawī Bujnūrdī, 1995, v.5, p.383; Mūsawī Ardibīlī, 2002, v.1, p.60). Consequently, it may be attributed to a special case.

3-2-3- The third *hadith*

This tradition (Ibn Bābwayh, 1983, v.2, p.352) is called as the *marfū`ah*; it means that its one or more transmitters are definitely deleted

from its document, hence it is not reliable; of course, it is possible that when this tradition was quoted by Imam al-Ṣādiq (s), the most of people of the mentioned areas have been the unbeliever, pagan, or devious (Jaʿfarī, 2003, v.2, p.23; *Fehrī Zanjānī*, c1984, v.1, p.181). Similarly, this tradition does not indicate the position of all the w.zs in the *Imamiyya*, but it is likely that it can be related to a particular individuals in a specific period.

3-2-4- The forth *hadith*

Both traditions (al-Majlisī, 1983, v.30, p.181; Burūjirdī, 2007, v.30, p.434) have issued judgments against him that he has essentially not played any role on his own position; so they are also inconsistent with the justice. Similarly, as it was said before, both of them are contradictory to the holy Quran, *al-āyah 164, al-an ʿām*. For this reason, it should not rely on these such traditions and it is quoted as they have been interpreted connecting a particular person called *Abū Ghorra* that was slandering the holy prophet (s.a) (Ibn Abī Jumhūr, 1985, v.3, p.534).

3-2-5- The fifth *hadith*

This type of *hadiths* (Ibn Bābvayh, 1993, v.4, p.418) is not reliable; the w.z.'s love or hate should be shown in practice, rather than attaching hate of an innocent Imam (s) to him only because of his parents' sin. Such a way is definitely the sense of oppression to him that is rejected by some verses such as *al-āyah 26, al-naba` : jazā`an wifāqā* (a recompense fitting), or *al-āyah 82, al-tawba: jazā`an fī mā kānū yakdhibūn* (a recompense for what they used to earn) (Mūsawī Bujnūrdī, *Ibid*, p.380).

Even, on the assumption of reliability of these traditions, they should be interpreted in pointing to some specific individuals, as the author himself has referred to the same one too (Kohlberg, *Ibid*, p.239). This typical is related to the man who came up to Imam ʿAlī (s); Imām al-Bāqir has reported it as follows: A man stood up and kindly said to ʿAlī I love the ahl al-bayt (the Prophet's household); some of the companions praised him but ʿAlī told you are lying; hermaphrodite, pimp, w.z., and monstrous



child did not love us, the man was subsequently killed at Şiffīn while fighting on Mo'āwiyah's army (Nūrī, 1988, v.2, p.19).

Nevertheless, because of the contradiction of these kinds of traditions with the rational and narrative reasons, if the famous Imami faqihs can not interpret them, they reject them (Shaykh Anṣārī, Ibid; Mūsawī Bujnūrdī, Ibid).

3-2-6- The sixth *hadith*

This is contrary to the human reason if the text of the tradition (Rāvandī, 1989, p.220) is interpreted as a general conception. The Quran, *al- āyah 30, al-mā`ida* has explicitly introduced Cain as the murderer of Abel that both are descendants of the prophet Adam (a.s). Additionally, it is quoted by al- Jābir al-Anṣārī that training program of child is a significant factor even in connection with the w.z. (al-Majlisī, 1986, v.8, p.644).

3-2-7- The seventh tradition

Al-Majlisī *has described the document and textual implication of this tradition* (Shaikh Ḥurr `Āmilī, Ibid, v.16, p.37) *as weak and unreliable* (al-Majlisī, 1986, v.8, p.644): *since firstly, based on the Imami faqihs` approach, the criterion of the offspring`s illegitimacy in any society is valid according to the legal standard of the same people, not the Imami law* (Sayyed Murtaḍā, 1985, v.4, p.108); *secondly, the Imams of the Shi`a (a.s) were accepting the legitimacy of the marriage of other societies, as certainly, at least, the mothers of the seven Imams were the new Muslim women* (al-Shubbar, 2003, v.1, p.177).

Finally, as it was explained, the *faqihs`* opinion is that all the above traditions cited by the author, are weak and unacceptable in terms of their documents or textual implications. However, the author has tried to infer the position of the w.z. from these rejected *hadiths*. This very different method of the author proves that he has not applied the requisite rules of *hadith* sciences to these traditions.



4- The w.z. in the Imami jurisprudence

The author has expressed in the second section of his paper that many of the notions of the traditions about the w.z. are also evident in the realm of fiqh (Kohlberg, Ibid, p.243-256). As it was shown above, the traditions were invalid and unreliable; now the w.z.'s position will be studied in Imami legal literature according to the author's opinion. The author's analysis about the subject is as follows:

4-1- Ritual ablution (ṭahārah)

4-1-1- The author's approach

The sū`r (some additional water used for washing or drinking) of the w.z. is regarded by some authorities as impure, and in some others' opinion is reprehensible. Similarly, it is not permitted to use the sū`r of the Jews, Christian and the w.z. for ablution and major ablution or ghusl (Ibid, p.243).

4--1-2- The jurisprudents' opinion

Firstly, according to the majority's opinion (fatwā) of Imami jurisprudents, the w.z. is pure and Muslim, so ablution and ghusl with the sū`r of the w.z. is permissible (‘Allāma Ḥillī, 1993, v.1, p.231; Muḥaqqiq Sabzewārī, 2002, v.1, p.60; Sheikh Anṣārī, Ibid, p.155; Najafī - ṣāhib al-jawāhir - , 1984, v.43, p.36; Mūsawī Bujnūrdī, Ibid, p.376; Mūsawī Ardībīlī, Ibid, p.58; Najafī ‘Arāqī, 1961, p.349; Ṭabāṭabāyī Ḥakīm, 1995, v.1, p.385);¹ secondly, about the ṭahārah, the author should have explained the jurisprudential theories of the topic, while he has only mentioned two hadiths that it is not suitable for this section, because the nature of hadith is not regarded as fiqh; thirdly, his predominant sources are six books of hadith and two jurisprudential works: nevertheless, it is very surprising that his two latter sources i.e. al-mukhtalaf (‘Allāma Ḥillī, ibid)² and jawāhir al-kalām (Najafī, Ibid)³ have made his reasoning invalid, because these books

¹ - *al-mashḥūru bayna aṣḥābinā ṭahāratu waladī zinā wa Islāmuhu.*

² - *Bāqī ‘ulamā’ inā ḥakamū bi Islāmīhi (w.z.) wa huwa al-ḥaqqu ‘indi.*

³ - *Annahā (al-nuṣūṣ: traditions) jamī‘uhā ḍa‘īfah.*

emphasize that not only these two traditions, but also all of the hadiths in the previous section are unreliable and weak.

In this way, despite the fact that a minority of the Imami jurists believe that the w.z. is impure, such as Ibn Bābwayh, Ibn Idrīs, and Sayyed Murtaḍā, but unfortunately, the author has introduced their theory as the majority of the faqīhs' opinion (Sabziwārī, Ibid).¹

Based on the majority's theory, the Iranian legislative has described the w.z. as pure and Muslim/Imami, provided that at least, one of the zina parties is Muslim; By this reason, in accordance with Islamic Punishment code 2013, art. 552, a w.z.'s *dīyah* (blood money) is as much as a regular Muslim.²

4-2-Prayer

4-2-1- The author's claim

The generally held opinion is that a w.z. cannot lead the prayers as imam. This view was adopted even by those who admitted his testimony. According to al- Sharif al- Murtaḍā, however, the Imami position is that it is merely reprehensible to pray behind a w.z., not prohibited (Ibid, p.243-245).

4-2-2- The jurists' opinion

Connecting the conditions and qualities of the prayer Imam, the jurists have emphasized the quality of his *ṭahārat al-mawlid* (legitimacy of birth), while the author has not referred to it at all (Shahīd Thānī, 1993, v.13, p.327). According to the faqīhs' theory, the criterion of *ṭahārat al-mawlid* is simplified in this way: where the follower (*ma`mūm*) does not know that the Imam prayer is the w.z, the Imam's *ṭahārat al-mawlid* is established. (Muḥaqqiq Thānī, 1994, v.2, p.372; Mūsawī 'Āmilī, 1991, v.4, p.69; Seyyed Murtaḍā, 1995, p.544).³ However, if the *ma`mūm*

¹ - *Walad al-zinā najis 'inda ba'd al-aṣḥāb wa al-ashhar al-aqwā ṭahāratuhu* .

² - Islamic punishment code. art. 552: The w.z. in the face of both parties of illegitimate intercourse or one of them is to be Muslim, his *dīyah* ordinances are similar to a Muslim.

3. *Wa ammā ṭahārat al-mawlid , wa al- murād bihā an lā yu 'lam kawnuhu walada zinā*

is aware of that the Imam prayer is the w.z., only he cannot prayer behind him, but he has no right or duty to disclose it to the others; because, disclosure of a Muslim` previous secret or private sin or deviation itself is a mortal sin which is called as `ishā`at al-fāḥisha (disclosing the obscene act), īdhā`at al-sirr (disclosure of the human secret feature), or `izā` al-mū`min (inconveniencing him) by the holy Quran, the hadiths, and the scholars` consensus (Qomi, 1984, v.2, p.100; Ṭabarsī, 1993, v.7, p. 208; Shahīd Thānī, c1987, p.306; Shaikh Anṣārī, 1995, v.1, p.328; Shaikh Arākī, 1993, p.199; Imām Khumeinī, 1995, v.1, p.445; Makārim Shīrāzī, 1997, p.153).

Therefore, the author seems to have conceived that the ma`mūm can simply declare to the others that the prayer Imam is the w.z., and then he is deprived of being as the prayer Imam! As we considered in the above sources, such a conception is essentially null and void, because the features of any Muslim is located in the realm of his privacy; logically a prayer Imam, even if he might have been a w.z., is a Muslim and has his own privacy rights. In addition to it, if the ma`mūm declares that the Imam is the w.z., he should be subjected to a penalty of Islamic ḥudūd (prescribed) punishments such as qadhif (false accusation of unlawful intercourse), slander, or accusation and so on, since as it was explained as to the conceptualization of w.z., its burden of proof is too hard and near to be impossible.

4-3- Marriage

4-3-1-The author`s analysis

The three main issues are: permissibility for others to marrying a w.z., for a natural parent to marry his or her w.z., and for anyone to marry a prostitute or a fornicatrix. Based on a hadith of Ja`far al-Ṣādiq, in principle, it is permissible for a man to marry a female w.z. and he can seek to have children by her. However, by reason of the w.z.`s unbelief, for Ibn Idris, such a marriage is forbidden. But connecting possibility of marriage between a natural parent and his or her w.z., the prevalent opinion among



Imami scholars is that the physical connection of them to each other, legally precludes such a marriage. Al-Ṭūsi, al-Ḥillī and Muḥammad Jawād Mughnīyya have adopted the above prevalent theory because, the w.z. is the natural child of the parents as the language and customary practice categorize a w.z. as their child (Ibid, p.244-247).

4-3-2- The Imamis` jurisprudential and legal analysis

The first problem of the author is that the main heading requires to be discussed about the w.z. in the jurisprudence not in the *hadith*, but again, the author has forgotten to refer to the jurisprudential sources. In regard with the second one, three or more ancient jurisprudential theories are regarded by him as the representatives of all the *Imami* jurists, while it is suitable for this title and also for our period, to explain the modern jurisprudential theories, because during the centuries, most of the ancient jurists` theories have been developed, rejected or informed. Therefore, this methodological trouble of the author has prevented him to raise the new problems about any issue. Consequently, the author`s research about admissibility for a w.z. to marry the others is merely an evidence *i.e.* one *hadith*, and this shows that the author does not know there is difference between a *hadith* and jurisprudence. In this regard, the *faqih*s have additionally referred to other evidence that the author has not pointed to them at all: generality of validity of marriage, and legitimate intercourse for all of persons, and evidence of being famous of this theory among the Imamis (Bahrānī Āle `Uṣfūr, 1985, v.19, p.418).

Connecting second issue, all the Imami scholars have applied the prohibition of the w.z.`s marriage to the three kinds of parents: natural parents, parents in law, and wet - nurse and her husband (Muhaqqiq Ṭhānī, 1994, v.12, p.190; Imam Khomeini, 1984, p.199; Bahjat Fūmanī, 2005, v.3, p 537; *Makārim Shīrāzī*, 2004, v.2, p.116).



4-4- Slander (qadhf)

4-4-1-The author`s viewpoint

The *Quranic hadd punishment for qadhf* is carried out against someone who falsely accuses another of *zina* or brands him as a *w.z.* In the latter case, the person`s parents have been accused of *zina* and thereby, the punishment is done for them not the *w.z.* For this reason, when someone slanders the person`s mother as *zina*, the slanderer is given eighty lashes for defaming her (Ibid, p.254-255).

4-4-2- Analysis of the author`s view

In *Imami* law, falsely accusing someone of fornication and sodomy or denying a child's legitimacy cause to punishment for *qadhf*, but the author only considers the first one to be the cause of this punishment without mentioning its conditions including *Iḥṣān* (chastity) at all. In addition, here, it was appropriate to ask: is accusing the *w.z.* of fornication or buggery considered as slander? According to the *Imami* scholars` consensus, the *w.z.* is a Muslim and pure, and he who has chastity, and does not carry out fornication and sodomy, he is entitled right of *qadhf* (Fakhr al- Muḥaqqīn Ḥillī, 1967, v.4,p.503) , but the author has not enter into the case.

Another fundamental question is: if someone call someone as the *w.z.*, it is his parents' *qadhf*, even if they are punished with the legal penalty, for they may have repented of what have done. Similarly: if a adulterer tells his illegitimate child that you are not my child, according to the *Imami* jurisprudents, this is the mother`s qadf, not child, and he will be punished with the *qadhf* penalty for the mother, and for beating the child, he will be punished with *ta`zir* (Muḥaqqīn Ḥillī, 1987, v.4, p.149) provided that the mother would have repented (Allāma Ḥillī, 1992, v.8, p.28).

4-5- Retaliation (qiṣāṣ)

4-5-1-The author`s theory

Al-Baqir says: a mother who secretly kills illegitimate child is to be flogged one hundred lashes for killing him and then stoned for adultery if

she is married; but if she is not, she is flogged an additional one hundred lashes for fornication, because as a general rule, a parent (*wālid*) is not executed for killing the child. However, based on another contradicted utterance, the punishment of a mother who deliberately kills her legitimate child is death (Ibid, p.255).

4-5-2- The jurisprudential and legal analysis

Regarding jurisprudential rules of *qiṣāṣ* of a *w.z.*, there are many data that can be derived from the *Imami* legal sources. The author, however, quotes a weak utterance (al-Majlisī, 1984, vol. 23, p. 405) of Imam Bāqir (a.s.) in *al-Kāfī* (Kulaynī, vol. 7, p. 261) and prescribes the punishment of one hundred lashes for the mother of the *w.z.* if she kills her illegitimate child that no *Imami* jurist has issued such a fatwa for her. If the author were familiar with the method of jurisprudential reasoning and inference of *Imami* faqihs, he would not have deprived the readers of necessary information. In any way, it seems that the following issues in relation to *qisas* and *diya* of a *w.z.* are appropriate: will legitimate person murders an illicit one, the murderer is killed as the *qiṣāṣ* punishment? Do they differ in the amount of blood money? The answer is that according to the famous saying of the *Imamiyya* jurists, the *w.z.* is considered as pure and Muslim, even if before his puberty; accordingly, they are the same in the precepts of *qiṣāṣ* and *dīya* (Jawād Tabrīzī, nd, v.1, p.432; Islamic punishment code 2013, art. 552).

5-Conclusion

Dr. Ethan Kahlberg made a lot of efforts to explain an important issue such as the position of the *walad zina* in *Imami Shiism*, and for this reason, we can appreciate him. However, some results can be drawn from his research as follows:

1- Contrary to Kohlberg's point of view, the famous *Imami* jurists including Imam Khomeini have regarded the *walad zina* as a pure and Muslim person, provided that he or she is born of a Muslim father or mother, like any other person.

2- The traditions that based on them, the author have declared the *walad zina* as infidel, impure and the like, are invalid according to famous *Imami* Jurisprudents.

3- The jurisprudential principle is that the *walad zina* should be assumed as pure and Muslim, unless it is proven otherwise, and since all the hadiths which have been cited by the author, were unreliable, hence, there is no evidence to the contrary of the principle of the inherent purity of the *walad zina*, and the Islamic Penal Code also follows this principle.

4- This 360-degree disagreement of the author with the jurists does not seem as natural, and is really worthy of reflection. Perhaps in the most optimistic state, unavailability the *Imamiyyah* sources has probably made Kohlberg unable to reach the depth of the subject matter, and has led him and the western readers be astray in this issue for all these many years.

6-Suggestion

Three points are suggested to who seek to understand the *Imami Shiism*:

1- In order to know this school, one should directly refer to its specialists, i.e. *Imamiyyah* jurists, and not rely only on the works of Western scholars. Because by looking at the above critique of Kohlberg's theory, it became clear that a famous scholar like Ethan Kohlberg, in spite of his many experiences and works in the field of Shia studies, understood a simple issue such as 'the position of illicit child in *Imami Shiism*' in an upside-down form, and because of this very inverted comprehension, he was even awarded a million dollars by *the Zionist regime*.

2- In the works of such as Encyclopedia of Islam, as well as the European or American journals, no opportunity is given to the *Imamis* to defend their ideas against the critics. For example, who has seen an article from an Iranian *faqih* in EI yet? Or about four years ago, against Kohlberg's article published in the Bulletin of the School of Oriental and African Studies, I sent a review of his theory to the same Bulletin, but it quickly responded: "We do not publish reviews of Iranian jurists". This was despite



the fact that they had published Kohlberg's article against Shia, but they could not tolerate a critical response to it, and this severe media censorship and presenting upside down images of the Shia school is an important obstacle for those who interested in understanding the beliefs of this school.

3- Therefore, the establishment of the Western centers for Shia studies was mainly aimed at showing the shortcomings of the Shia school, and the research goals were not the basis of their establishment, Therefore, resorting to such institutions to know the Shiite ideas seems futile.

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مبانی فقهی اصلاح و تربیت مجرمان

محمدعلی حاجی ده آبادی^۱

چکیده

پاسخدهی به جرم از دغدغه های دیرین بشر بوده و هست. در این راستا در جوامع مختلف تدابیر گوناگونی بروز و ظهور یافته است که هر یک اهداف خاصی را دنبال می کند اهدافی همچون سزادهی بازدارندگی جبران خسارت و... از جمله این تدابیر و اقدامات تدابیری است که با هدف اصلاح و بازپروری و بازاجتماعی کردن بزهکاران انجام می شود هرچند این مساله در جهان غرب قدمتی بیش از دو قرن دارد اما با وجود گزاره های فراوانی که در متون دینی وجود دارد اما کمتر به صورت جامع خاصه از منظر فقهی مورد بررسی قرار گرفته است این مقاله می کوشد تا با روش توصیفی تحلیلی مبانی فقهی اصلاح و تربیت بزهکاران را مورد واکاوی قرار دهد یافته های تحقیق نشان می دهد افزون بر ادله متعدد قرآنی در سیره معصومان به ویژه سیره حکومتی پیامبرص و امام علی ع اهتمام به این مهم دیده می شود. افزون بر این بازپروری بزهکاران مشمول ادله نهی از منکر است. حتی اگر این ادله نیز صرف نظر شود ضرورت اجتناب از پیامدهای آسیب زای ناشی از کنار گذاشتن اصلاح مجرمان اقتضا می کند که مصلحت را در پذیرش این تدابیر ببینیم.

کلید واژگان: بازپروری بزهکار، اصلاح و تربیت مجرم، احیای بزهکار، اصلاح

ذات البین

تحولات تقنینی حصول رضایت بیماران روانی در درمان‌های اورژانسی؛ در فقه و حقوق کیفری ایران

مهدی خاقانی اصفهانی^۱

چکیده

حق بر سلامت، یکی از حقوق بنیادین بشری است و منشأ تکالیف اشخاص خصوصی و دولت‌ها در نظام‌های حقوقی داخلی و بین‌المللی حقوق بشر قرار دارد. بهره‌گیری از حق بهداشت و سلامت عمومی به ارتقای سطح سلامت در جامعه و در نتیجه، ارتقاء شاخص توسعه کمک خواهد کرد. در نظام‌های حقوقی پذیرفته شده است که وصف آگاهی شامل علم به عناصر ذیل است: ماهیت تصمیم‌گیری، روش‌های درمانی جایگزین روش پیشنهادی، خطرات و مزایای درمان پیشنهادی و عوارض احتمالی هر یک از روش‌های درمانی. آگاهی مستلزم آن است که پزشک به بیمار اطلاعاتی در رابطه با نوع بیماری، ماهیت، روش درمان پیشنهادی، روش‌های جایگزین موجود، خطرات و مزایای فرایند درمان، طول مدت درمان، هزینه‌های درمان و عوارض احتمالی آن به بیمار ارائه کند. در فوریت‌های پزشکی، امکان آگاه‌سازی بیماری و یا شاید نماینده قانونی بیمار (همراه وی، اولیای وی) از تمام یا بعضی از این موارد جزئی مصداق آگاهی بایسته وجود نداشته باشد؛ که در این صورت باید استانداردهای قانونی برای مداخلات پزشکی اورژانسی در نظام حقوق سلامت ایران طراحی شود؛ امری که به‌ویژه در مورد بیماران روانی تاکنون مفقود بوده است. این مقاله، جستاری در راستای حل چالش‌هایی در حوزه رضایت و برائت بیماران، خصوصاً با لحاظ پیچیدگی‌های کسب رضایت و برائت از مضمولان «آیین‌نامه اجرایی نحوه نگهداری و درمان مجانین» (مصوب ۱۳۹۸) است.

واژگان کلیدی: حقوق پزشکی، رضایت، برائت، مداخلات اورژانسی، درمان بیماران روانی

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ظرفیت تمدنی انقلاب اسلامی از منظر قانون اساسی

عبدالحکیم سلیمی^۱

چکیده

پیروزی انقلاب اسلامی در ایران به رهبری امام خمینی «ره» یک تحفه الهی و از سنخ نهضت انبیای الهی است. تبیین ظرفیت تمدنی این انقلاب نه فقط ضرورت که یک هدف متعالی است. چون تمدن اسلامی نماد هماهنگ اصول‌گرایی و خلاقیت، عقلانیت و معنویت، تعالی و قداست، اخلاق و قدرت، استقلال و عزت، آزادی و معرفت و در یک کلام هویت انقلاب اسلامی است. ظرفیت انقلاب اسلامی در تمدن‌سازی با عنایت به فلسفه تاریخ، ماهیت انقلاب اسلامی، توانایی‌های بالقوه جهان اسلام و احساس فطری بازگشت به قرآن و سنت، قابل تحلیل است. چرا که اعتلا و انحطاط تمدن اسلامی، هماهنگ با فلسفه تاریخ، از روند کاملاً منطقی، پیروی می‌کند و احساس شکوهمند بازگشت به اسلام، به مثابه شرط اساسی احیای تمدن اسلامی، همواره در جهان اسلام جریان دارد. نهضت‌های اسلامی صد ساله اخیر از تجلیات این احساس متعالی است. تجلی عینی آن را در پیروزی انقلاب اسلامی می‌توان دید.

واژگان کلیدی: امام خمینی، انقلاب اسلامی، فقه، قانون اساسی

درآمدی بر تحلیل رفتار مجرمانه و مسئولیت کیفری از دیدگاه انسان شناسی

اسلامی

زهرا ساریخانی^۱

چکیده

هر نظریه جرم شناسی مبتنی بر یک چارچوب فکری شامل ایده های نظری در مورد هستی شناسی، انسان شناسی و معرفت شناسی است. در یک نظریه خاص، انسان شناسی نقش اصلی را ایفا می کند، زیرا موضوع علوم انسانی درباره انسان و توانایی های او است. اما هنوز مکاتب جرم شناسی غیراسلامی در شناخت انسان و ابعاد وجودی او به دلیل فقدان آموزه های وحیانی و روایی دچار سردرگمی هستند.

در این مقاله با توجه به قرآن کریم و روایات شیعه به بررسی ابعاد وجودی انسان پرداخته شده است که تأثیر مهمی در تبیین جرم و مسئولیت کیفری دارد. در این راستا، این پژوهش نظریه علامه طباطبایی را به عنوان نظریه مرجع یافته است. با ملاحظات اخیر، نتیجه این مقاله این است که از نظر انسان شناسی اسلامی، انسان موجودی مختار است که اراده او عامل اصلی رفتار مجرمانه است. با این حال، عوامل فردی یا محیطی (اعم از مادی و ماورایی) دارای تاثیرات علی ناقصه هستند. التزام به این نظریه در انسان شناسی اسلامی، در تبیین و نحوه مسئولیت کیفری، مجازات، معاونت و مشارکت در جرم و عوامل معاف کننده از مجازات تاثیر به جای خواهد گذاشت.

واژگان کلیدی: انسان شناسی، کنش انسانی، جرم، اراده، مسئولیت.

۱. دانش آموخته دکتری حقوق جزا و جرم شناسی دانشگاه قم

دیدگاه فقه امامیه در خصوص مشروعیت در جرم انگاری و کیفرگذاری جرایم و مجازاتهای اسلامی

مهدی مومنی^۱

چکیده

"مشروعیت" در اینجا دارا بودن حقانیت و وجاهت قانونی و حقوقی است. تا زمانی که رفتاری توسط قاعده معتبر حقوقی منع و برای آن مجازات، تعیین نشده باشد، تعقیب و مجازات فاعل آن، مشروعیت و وجاهت حقوقی (حقانیت) ندارد.

مشروعیت در جرم انگاری و کیفرگذاری، از اصول کلی حقوقی مشترك در نظام های حقوقی جهان است. روش تحقیق؛ تحلیلی - توصیفی است. نتایج تحقیق نشان می دهد؛ اسلام (فقه امامیه) نیز، این اصول را مورد پذیرش و تاکید قرار داده است. "مفهوم" مشروعیت، همواره مفهوم واحدی است هر چند ممکن است نظام های حقوقی در "مصادق" متفاوت باشند. مصادق آن می تواند در یک نظام حقوقی، قرآن و در نظام حقوقی دیگر، قانون موضوعه یا عرف باشد. اهتمام فقه امامیه در خصوص مشروعیت جرم، از استحکام بیشتری نسبت به مجازات برخوردار است. جوهره مشروعیت در مجازات، شفاف سازی اختیار و عملکرد قاضی کیفری است.

کلید واژه ها: مشروعیت، جرم، مجازات، فقه امامیه.

تحلیل فقهی دیدگاه کلبرگ درباره جایگاه ولد زنا در امامیه

محمد رضا ظفری^۱

چکیده

فرزند ناشی از آمیزش نامشروع در حقوق امامیه ولاد زنا نامیده می شود، ولی چون او نیز انسان است، پس از همان حقوق یک مسلمان هم برخوردار می شود. این بدین معناست که هیچ تفاوتی بین حقوق فرزند مشروع و فرزند نامشروع وجود ندارد. در نتیجه، فرزند نامشروع بودن جرم نیست، اما زنا والدین او به طور قطع، جرم است و بنابر اصل شخصی بودن مجازات‌ها، فرزند ناشی از زنا، نباید به جرم والدینش مجازات شود. اما ادعای دکتر کلبرگ این است که بر اساس روایات و فقه امامیه، چنین فرزندی باید از حقوق شیعیان محروم شود، زیرا او فردی امامی شناخته نمی شود، بلکه کافر است. در این مقاله نشان خواهیم داد که اکثر روایات و نظریات فقهی مورد استناد اتان کولبرگ توسط فقهای مشهور امامیه از جمله امام خمینی (ره) رد شده است. بنابراین، اگر نویسندگان به منابع نامعتبر استناد نمی کرد، می توانست اطلاعات واقعی را در تمام این سال ها به خوانندگان غربی منتقل کند.

کلیدواژه ها: ولد زنا، امامیه، فقه، کلبرگ، فقها.

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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



موسسه فرهنگی هنری طلاب سروقامت تعالی

قم - مدرسه علمیه ابوالفضل

سال اول - شماره ۲ - بهار ۱۴۰۳

صاحب امتیاز: آیت الله دکتر احمد عابدی

مدیر مسئول: محمدرضا ظفری

سردبیر: عادل ساریخانی

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طراحی و صفحه آرایی: موسی امیری

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- مسئولیت مطالب هر مقاله برعهده نویسنده آن است و لزوماً دیدگاه فصلنامه نیست.
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 - نقل مطالب فصلنامه با ذکر مأخذ مجاز است.

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

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