Kurdish Studies
March 2023
Volume: 11, No: 1, pp. 483-494
ISSN: 2051-4883 (Print) | ISSN 2051-4891 (Online)
www.KurdishStudies.net

Received: January 2023 Accepted: February 2023
DOI: 10.53555/ks.v11i1.2939

Status of Principles of Criminalization in the Criminal Policy of Islam

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Abstract
As a unique and differential policy, the criminal policy of Islam underlies principles of law wherein principles of criminalization assume a special place. These principles were not existing in common laws up until the Renaissance, and they emerged following the reaction of the 18th century scholars and theorists to the inhumane measures of ecclesiastical courts; meanwhile, these principles were also influenced by Islamic culture and civilization. This is evidenced by rational and narrative arguments in the Islamic legal system. Among these principles, two principles of necessity and legality of criminalization have received much attention because they can better support the human dignity as the focus of every criminal policy. Since the protection of human dignity is highly emphasized by the Islamic criminal policy, it is essential to observe the principles to demonstrate the dignity-based criminal policy of Islam.

Keywords: principles of law, criminal policy of Islam, principle of legality, necessity of criminalization, common laws

Introduction

As the most perfect divine religion, Islam involves an immense set of value systems, including adopting a reasonable and a well-considered criminal policy. Principles of law that underly each legal system are well emphasized by the criminal policy of Islam. The legislative branch of a criminal policy plays a fundamental role in establishing a coherent criminal policy; hence, it is of high importance to observe principles of law in the stage of criminalization. When advocates of civilization were living in the era of ignorance, the legal system of Islam was emerging with a set of well-established rules and principles and characterized its criminal policy with such principles as "legal equality", "the presumption of innocence", "the individualization of penalties", "the principle of legality and shamefulness of punishment without declaration of law", "the principle of criminalization subordination", and dozens of principles and rules, remained unknown for centuries in Europe. Undoubtedly, the development of these principles in common laws largely owed to the Islamic culture and civilization.

The "principle of legality" underlies criminal law. This principle can also contribute to developing the model of each criminal policy. This means that the Legislative Power is rested with determining criminal titles and relevant punishments. This principle must be established before the crime is committed, and the criminal judge shall not, without a biding law or arbitrarily, determines an act to be a crime or foresees a punishment on it. This is a subject of interest in Islam's criminal policy and whose violation is a clear example of injustice. In the meantime, determining a [definite] obligation hinges on establishing it on the obliged person. In other words, by the term "declaration" in the rule "shamefulness of punishment without declaration" is the declaration of the [penalty] being established; i.e., the declaration of communication rather than issuance. With that said, the sphere of inclusion of this principle in the criminal policy of Islam is much broader than that in common law.

The Principle of Necessity of criminalization, also interpreted as the "principle of subordination", is a major criminal law principle in the stage of legislation. This principle is a key subject of interest in such domains as security, justice, observance of basic rights and freedom of citizens, etc. It is also a novel principle of criminal common laws. While being a novel principle in criminal common law, the principle of necessity in Sharia laws has a long-established history in conjunction with the rise of Islam. Because the protection of human dignity is the core concern of the criminal policy of Islam, it is natural for this principle to enjoy a special standing in Islam's policy, because this principle establishes penalties in dealing with malfeasances as the last resort. These arguments are demonstrated by narrative and rational evidence. This study aimed to reveal what man had seemingly achieved as human dignity in the form of principles of law while seeking the better administration of justice had already been

envisaged by the Wise Legislator, which were frequently noted and debated by traditions of apostles. For this, it is worthwhile to utilize Islamic rules to develop a unique local criminal policy that best matches Iranian society.

Criminal Policy

Just as human societies require economic, social, cultural, political and health policies, there is also a need for a criminal policy for dealing with criminal phenomena. No society can be seen without a criminal policy; in other words, all societies take measures to control criminal activities. These measures are referred to as criminal policy measures. Basically, criminal policy is not a law to fall within the constrained logic of time and place. Criminal policy observes an evolution that started following World War II and has continued since then. This evolution is a real and a material trend rather than one caused by imagination of one or two researchers. This evolution shows how criminal law has, over the past century, stepped aside to the benefit of other laws while trying to confine its sphere of activities to the extent it requires (Najafi Abrand-Abadi, 2003, p. 1068).

The term *criminal policy* was first raised by German lawyer Anselm von Feuerbach in 1803, who defined criminal policy as "A set of oppressive techniques used by the governments to react to crime commission". The distinguishing feature of this definition was that criminal policy was still meant to be the penal policy; i.e., criminal policy was regarded as equivalent to the penal policy, or what was interpreted as a narrow criminal policy.

Following the rise of various schools such as Classic and Positivist Schools, Criminology, the Science of Prison Management, the International Union for Penal Laws and the like, criminal policy also developed and gave rise to the term *criminal policy*, which was proposed, this time around, by Mark Ansel, founder of the Social Defense School. He was the first scholar who introduced the concept of criminal policy. He argued that criminal policy is both the science of observation and an art or a technique.

His proposed criminal policy suggested a methodic strategy for reacting against crime or criminal, deviant or anti-social activities (Najafi Abrand-Abadi, 2003, p. 1064). So, the second basic development in the realm of criminal policy was raised by Mark Ansel. Meanwhile, Mark Ansel's definition still involved the concept of reactions and there was no debate about prevention up until this time and no concept of prevention could even be inferred. The most recent definition of criminal policy was provided by Mireille Delmas-Marty who argued: "Criminal policy refers to manners in which the community organizes various responses to the criminal phenomenon".

Thus, consistent with the concept of social control, criminal policy is said to both focus on "persuasive" and "obligatory and coercive" means. The concept of social control conveys two messages:

A) Using persuasive means for socializing people and persuading them to observe social norms through schools, families, mosques, churches, etc.

B) Using obligatory and coercive means falling under the criminal system. These tools are used if the persuasive means cannot be fulfilled. Thus, the criminal policy is the last mans to fight a criminal phenomenon (Najafi Abrabnd-Abadi, 2003, pp. 1065-1066).

Criminal Policy of Islam

Islam's criminal policy is a collaborative "popular-government" and an "internal-external" model. This model is by no means comparable to any other criminal policies, though exhibiting some similarities with them. For this, the criminal policy of Islam can be regarded as a unique policy. The criminal policy of Islam is a collaborative policy, which not only denotes a criminal and social response to a crime or deviancy but also serves as a universal supervisory body and an internal and external model for having such progressive components as bidding to good and forbidding from evil. This is a policy that relies on the element of "perfectionism" and aims to hinder man from any act that compels him to dignity and excellence. Investigating penalties and controlling behaviors are ways that help to fulfil the criminal policy of Islam. In the Islamic Penal Code, internal controls are attended to, in addition to material controls and punishments. Religious conducts such as prayers, fasting, etc. which are the key components of the criminal policy of Islam in crime prevention fall under internal controls. The belief in afterlife punishments could help strengthen self-control among the faithful and this causes the followers of Islam to not only refrain from material criminal conducts but to also prevent any evil obsessions. This is evidence of separating crime and sins (deviancy) within the criminal policy of Islam.

Crime and Deviancy

Crime defined

1. An illegal act for which someone can be punished by the government. Especially: a gross violation of law. 2. A grave offense especially against morality. Criminal is a popular term used for a person who has committed a crime or has been legally convicted of a crime. Criminal also means being connected with a crime.

The author of Majma' al-Bahrain writes of the criminal as: "Whoever turns from the truth to the evil; it is he who has sinned" (Tarihi, 2011, p. 68).

"A crime is any act contrary to human laws, which is not performed for the vindication of rights or doing assignments; it is an act for which penalties are envisaged" (Bahri, 2010).
"A crime is any act or omission prohibited by the legislator because of disturbing public order, and penalties are foreseen for the perpetrators" (Salimi, 2005, p. 53).
From a penal code, a crime refers to the commission of an ac or an omission for which the legislator has foreseen a retribution.
Crime is also defined as the infringement of any country's laws due to an externality, which is not prescribed by any rights and renders in penalties.
"Crime refers to an act punishable under the penal code for disturbing social order" (Ardabili, 2011, p. 22).
"Any act or omission that is punishable under the laws is a crime" (Islamic Penal Code, 2013, Article 2).
Garofalo divides crimes in to two categories:

A) Natural crimes: Natural crimes are those which violate two basic 'altruistic sentiments', pity (revulsion against the voluntary infliction of suffering on others) and probity (respect for the property rights of others), and
B) Contractual crimes: They refer to crimes that hurt evolved sentiments (2010, p. 57).

Concept of Crime in the Qur'an

The concept of crime in the holy book is much broader than that in criminal law. The Quran usually uses the criminal against the believer as in *"Whoever comes to his Lord laden with guilt, for him shall be hell, where he will neither live nor die, and whoever comes to Him a believer (and) he has done good deeds indeed, these it is who shall have the high ranks"* (Surah Taha: 74-75).
Also, the Qur'an calls the criminal as a liar as in "*So who is a greater wrongdoer than him who fabricates a lie against Allah, or denies His signs? Indeed, the guilty will not be felicitous"* (Surah Yunus: 17).
In other cases, the criminal has been labeled as a one who is disdainful as in *"Indeed, those who deny Our signs and are disdainful of them—the gates of the heaven will not be opened for them, nor shall they enter paradise until the camel passes through the needle's eye, and thus do We requite the guilty"* (A'raf: 40).
"…. Those who were wrongdoers pursued that in which they had been granted affluence, and they were a guilty lot" (Surah Houd: 116).
Therefore, to the Qur'an, the concept of crime differs from that in criminal law and criminology. Crime is not used in the Qur'an the way it is commonly recognized, as the holy book has used such terms as guilt, sin, evil conduct, corruption, wrongdoing, oppression, etc. to refer to crime.
The Qur'an does not use the terms *crime* and *criminal* about any guilts; rather, it has used them in only some specific cases. With that said, there is a general and peculiar relationship in some respects between the widely recognized term *crime* and the term *crime* used in the Qur'an. The reason for this is that criminal law refers to some guilts as crimes, while the Qur'an does not refer to them as crimes, such as robbery and adultery. On the other hand, the Qur'an labels some of the guilts as crimes, though they are not commonly regarded as crimes, such as blasphemy and disdain (Dehghan, 1997, p. 114).

Deviancy

Deviancy from social norms and values is one of the major topics of sociology and criminology. Apart from some reasons for deviancy, some deviancies, which have threatened basic values in society, are criminalized, while no such sanctions have been established for types of deviancies. A deviancy refers to conducts distancing away from social norms; for this, a deviancy is a kind of disharmony or disconformity from medium social norms and non-compliance with social norms lacks any legal sanctions (Najafi Abrand-Abadi, 2003, p. 1174).
Needless to say, the sphere of criminalized deviancies is much narrower than those without legal sanctions. The separation or equality of these two categories in global legal systems has led to the discovery of well-established models of criminal policies across the world, as proposed by Mireille Delmas-Marty. According to the criminal policy of Islam, this is evidenced by the difference between crime and guilt.

Criminalization

Criminalizing a phenomenon, although based on social interests, could engender a series of adverse outcomes, including rising crimes and rising costs of criminal justice systems, etc. These outcomes may start by criminalizing conducts and continue until the prosecution of the charged personal criminal conviction, serving punishment and even after that.
The basis of necessity is the first and foremost basis against conduct criminalization. By this, it is meant conducts lacking a criminal title, unless where a conduct is required to be regarded as a crime (principle of authorization); in fact, criminal law should be the last solution to be used as a tool for some conducts. Legal systems have used various bases for crimination conducts, including the principle of harm, legal moralism, and legal patriarchy.

Principle of Subordination (Necessity) of Criminalization in Islam's Criminal Policy

The principle of subordination, also interpreted as the necessity of criminalization, is a principle of criminal law in the legislation stage. This principle is a critical topic that concerns with security, justice, freedom, observance of basic rights and freedoms, etc. This principle is also a novel principle of common law principles. Simply put, it suggests: Since criminal law restricts people freedom, they are different from other branches of the laws; therefore, if the mentioned restrictions cannot be fully justified, the foreseen penalties will then infringe human rights.

This principle is indicative of the fact that criminalization is the last option in dealing with social deviancies. Originally, this principle states that punishments by themselves entail a violent encounter, and thus selecting punishments always requires sufficient justification because retribution is essentially evil and violent (Nobahar, 2010, p. 93).

This principle assumes a special standing in law-abiding and value-adhering systems; however, the way various schools approach the concept of freedom may differ from the way humans approach it.

Hence, restricting people's freedom in any forms, including criminalization, requires sufficient justification. To Roxin, criminal law is not the only proportionate means to protect justified values and interests; criminal law is used once other methods such as civil lawsuits, administrative solutions and non-criminal sanctions fail to have efficiency (Nobahar, 2011, p. 4).

Criminologists have also debated the subject of criminalization subordination under two relevant principles of "criminal law subordination" and "multi-segmented criminal law". As per the former, the principle should not be postulated as using the tools of criminalization and means of punishment when facing with social deviancy, while as per the latter, interests and values should not be criminally protected in an integrated manner. For instance, not all economic disturbances can be regarded as crimes; for this, not all values should be subjected to criminal protection (Mahmoudi-Janaki, 2003, p. 212). Even, freedom, despite its significance and value, cannot be criminally protected entirely or have all examples of its violation criminalized. To Grischin, there is no single or reliable rule to tell us where the government should restrict its citizens' freedom [through criminalization). Each case should be investigated separately and decided by the principle of balance between principles of individual freedom and those that prohibit from harmful conducts against certain people or society as a whole (Nobahar, 2011, p. 94).

Justification of the Principle of Necessity of Criminalization

In order to justify this principle, some reasons are cited, which are as follows:

Some authors have mentioned six reasons for criminalization, which also explain the principle of minimum application of criminal law (Nobahar, 2011, p. 5).

Principle of Criminal Value

As per this principle, for an act to be criminalized, it should be sufficiently blameworthy (Nobahar, 2011, p. 5). In other words, the authority of criminal law should not be disintegrated by insignificant behavior, or engage the criminal justice system, which is tasked with protecting and safeguarding the fundamental values of society, in trivial matters that could otherwise be eliminated through non-criminal manners. This may hinder it from its main and inherent duties.

Principle of Need

Criminalization is only justified when there is a need (Nobahar, 2011, p. 5). This means that criminalization is applied only when an urgent and necessary condition arises so that the need is met. This rule indirectly refers to the criminalization of necessary cases and decriminalization of unnecessary cases so that legal criminal law remains dynamic and meet the needs of society.

Principle of Moderation

This principle asserts that going to extremes is undesirable and rationally rejected, while moderation is desirable and acceptable, especially concerning criminalization where going to extremes restricts citizen freedom and undermines basic values in society.

Reasoning over Inefficiency

If criminalization does not meet with public approval, it could produce no efficiency for society. On the one hand, criminalizing some conducts is practically futile because it makes proving the elements of crime in judicial proceedings difficult and sometimes impossible. Following its occurrence, each crime requires a reason that demonstrates its commission; i.e., a reason that makes the presence of the crime necessary for maintaining public peace and order. Now, if there is a legislation that criminalizes a conduct but that is not welcomed by the public that legislation won't be effective and it is futile, because the laws are available for the public to be enforced but are not accepted by the public. So, what is the sanction of this disobedience? The mission of criminal law and the imposition of punishments always depend on criminalization, and it is through different stages of legislative criminal law where this is achieved. If the process of criminalization and criminalizing human conducts are made within a reasonable framework of laws and in alignment with values upheld by human society, the functioning of

criminal policies in enacting criminalization laws can be evaluated as successful. This suggests that the criminal law protection of the values accepted by society will be decent and desirable protection (Mohammad Nejad, 2018, p. 2).

Focus on Criminalization Costs

Naturally, costs pertaining to criminalization could result in doing away with it. However, theoretically, the focus on criminalization costs could be both for and against criminalization (Nobahar, 2011, p. 7).

Unlimited criminalization may put cumbersome responsibility on the body of the criminal justice system, as rising crime costs may incur a cumbersome responsibility for recruiting judges, clerks, police, etc. Setting up prisons and larger buildings also incur other costs. Most importantly, the issue of large number of prisoners is what appears to be a crisis and incurs much costs.

The honorable chief of the Judiciary Power, who is a member of the judicial system, has well recognized this crisis and issued a variety of instructions to reduce the criminal population of prisons. In this connection, Islam's criminal policy has strongly stressed the principle of subordination of criminalization. As stated in the criminal policy of Islam, crime prevention both focuses on external and internal control means. Therefore, Islam's focus on protecting the spiritual system may not correspond to discretionary punishment and penalties for any unlawful act; rather the focus is on correcting people and inviting them towards God and providing them with admonishment and wisdom. This is evidenced by the words of some scholars who, upon discussing conditions and qualities of discretionary punishment, suggested that no retribution would be deemed proper if the misdemeanor was alleviated with admonishment and advice. Discretionary punishment is when the perpetrator is strong and is punished by the punishment (Terablos, 2015, p. 596). Discretionary [punishment] is obligatory when the doer does not cease committing the crime by forbidding nor by reprimand, which otherwise requires no absolute reason for making the punishment obligatory (Tabatabai, 1983, p. 48).

Because admonishment and advice are not examples of retribution, the above is taken to mean that punishment is only resorted to when it is required. Although not all teachings of the criminal policy of Islam, which emphasize the broader concept of justice, do not directly refer to the principle of minimal criminal law, they indicate that criminalization should be within a certain and balanced framework. This is because the principle of justice requires sources and costs to be fairly distributed and divided in social bodies. Hence, extreme criminalization may direct all sources towards criminal justice systems, which causes a huge loss of sources of other sectors and will contradict the principle of justice.

Principle of Attending to Victim Interests

In general, in criminalization or lack of which, the interests of those who sustain losses from the deviancy should be attended to (Nobahar, 2011, p. 7).

Since many conducts are regarded as deviancies than crimes, the victim does not tend to pursue it through criminal channels; rather he tends to resolve it by resorting to a non-criminal source. Thus, extreme criminalization is sometimes contradictory to interests of the victim and is suggestive of the imposition of an unwanted matter on him.

Sharia Restrictions in Criminalization

Principle of authorization

Man is postulated to enjoy freedom of action and permission to perform conducts, as obligations are also assigned in this connection. For this, an obligation per se requires a superfluous reason and unless no reason is produced over an obligation, the principle is postulated to be that of authorization and innocence (Najafi Tavana & Mostafazadeh, 2013, p. 9).

Legislating is the right of God and obedience is the obligation of others. One of the divine obligations is to leave the right of legislation to the reason to get it to approve of its laws and consider its rewards and punishment. Reasoning-based legislation is the Sharia legislation and the obedience of its laws is the obedience of the holy Sharia. Shahid Motahhari writes of this: "Two subjects must be resolved: one is the issue of legislation, i.e., is there anybody entitled to legislate other than God?" He answers: "No, if the right of legislation contradicts divine rules", but "Yes, if the right of legislation is conferred upon by God and is used for partial matters" (Alidoust, 2006, p. 206).

The principle of authorization, the opposite of the principle of prohibition, suggests that unless there is a Sharia reason for the prohibition of an act, the commission of the act will not be shameful (evil).

To demonstrate that both reasoning and Sharia are based on the authenticity of the principle of authorization, the following verses are provided:

It is He who created for you all of that which is on the earth (Surah Baghara: 29).

O mankind! Eat of what is lawful and pure in the earth (Surah Baghara: 169) (Mohaghegh-Damad, 2012, p. 23).

Islam's Focus on Crime Prevention

The focus on preventive policies were asserted in Islamic guidelines (especially during Imam Ali's tenure) centuries before common law scholars ever wanted to include those policies in containing criminal phenomena. The ultimate end of Islamic teachings is to make noble and pure humans with good motives. It is needless to say that what appears to be compatible with this end is the reliance on education rather than external controls, including criminalization (Nobahar, 2011, p. 16).

The criminal policy of Islam serves as a unique criminal policy model aimed at controlling a criminal phenomenon both by using prohibitive and coercive measures. Opting for coercive means is when persuasive means may not be effective, as Ghazi Ibn Buraj stated: "Discretionary punishment is when the perpetrator is strong enough and is punished only by awarding the punishment" (Terablosi, 1985).

In Verse 45 of Surah Ankabout, the Qur'an says: *Indeed, the prayer restrains from indecent and wrongful conduct*.

As stated, for the Qur'an, the "nature of prayer" resembles a piece of gem that prevents indecency and wrongs, and it is safe to say that the prayer underlies an element of the criminal policy of Islam. Also, the Qur'an considers "laying the ground for fear of God in the fasting individual", "organizing popular affairs", and "purging of the almsgivers from vices and raising them with decent virtues" to be the philosophy of performing the fasting, establishing the Haj and paying the almsgiving (Ali Doust, 2006, p. 109).

Avoiding Extremes in Islam

Extremity in matters suggests derailing from the path of moderation. The principle of moderation has been envisaged in the [religious] legislation of rulings. For Islam, the one who goes to extremes moves out of justice because justice means putting anything in its own place. The Qur'an has used the term "intention" to express the concept of moderation. Therefore, the Muslim Ummah (community) is a moderate and balanced community whose laws, ethics and rulings are founded upon moderation. In Verse 110 of Surah Al-Imran, God the Almighty considers the Muslim Ummah as the best community created on the earth; a community whose building blocks are based on moderation.

Although not all teachings of the criminal policy of Islam, which emphasize the broader concept of justice, do not directly refer to the principle of minimal criminal law, they indicate that criminalization should be within a certain and balanced framework. This is because the principle of justice requires sources and costs to be fairly distributed and divided in social bodies (Nobahar, 2011, p. 24).

Criminalization by Considering Social Interests

Observing the element of interest in criminalization requires relying on collective wisdom and utilizing expert views in various domains to consider all effects and outcomes of criminalization (Nobahar, 2011, p. 19).

Legislating social laws is aimed to found social life; hence, if social laws are means to establish and organize security in society, they are legitimate. Therefore, it is incumbent upon the Muslim government to observe social interests and needs of Muslims. This is a fixed principle and a public rule. Needless to say, social interests vary with time and place condition differences and the legislator never trespasses the farmworker of Muslim social interests. Changing social rulings and laws based on time and place requirements and based on social interests will not render in changing the truth of the religion and evolution of Islamic Sharia.

Main Sources of Criminalization Subordination in the Criminal Policy of Islam

Previous sections sporadically debated the subordination of criminalization in the criminal policy of Islam, but this section concerns with the sources of this principle to better demonstrate its position in the criminal policy of Islam. The most important source from which we get our rulings is the divine book. Does this source mention the principle?

The Book (the Quran)

Qur'anic rulings are based on moderation and this quality is noted in every corner of the holy book. Moderation best characterizes a Muslim government and reaffirms the idea that it is the building block of Imam Ali's criminal policy of Islam, where he said: "The best of the affairs is the most moderate of them".

Concerning criminalization, observing moderation and avoiding extremes are the most outstanding orders by the Qur'an. This is evidenced by the manner of enforcing the punishment of intentional killing, as in the verse 17 of Surah Isra' "*How many generations We have destroyed since Noah! Your Lord is sufficient as [a witness who is] well aware and percipient of His servants' sins".*

"Do not kill a soul [whose life] Allah has made inviolable, except with due cause, and whoever is killed wrongfully, We have certainly given his heir an authority. But let him not commit any excess in killing [the murderer], for he has been assisted [by law]."

Today, advanced criminal systems across the world distance from maximal criminalization and criminal swelling and turned to decriminalization policies. Beside minimal criminalization, these systems utilize corrective and educative measures as well as security and preventive measures to counter crimes and delinquency. Meanwhile, the

Qur'an provided the minimal criminalization system back in 14 centuries ago and opted for the moderation path in legislating criminal and penal regulations (Danesh-Pezhouh et al., 2016, p. 148).

The Tradition

The famous hadith by Imam Ali reads as: "The last choice is punishment". This is inferred as saying that punishment can only be applied as the last resort for dealing with delinquency (Nahj al-Balaghah, Sermon 168).
Prophet Muhammad (PBUH) says: "Whoever veils a Muslim's faults shall have his faults veiled by God in the Hereafter" (Naraghi, 1894, p. 209).
Another hadith by Imam Ali is clearly indicative of the necessity of criminalization in the criminal policy of Islam, which says: "My Lord, You witness what we ruled was neither out of the willingness for caliphate nor for obtaining worldly riches; rather, we aimed to restore the effects of our religion and establish prosperity and comfort in cities so that Your servants are in peace and that may Your rules flow again" (Nahj al-Balaghah, Sermon 131).
Again, the Imam writes in his letter to Malik Ashtar: "The most distant and hated people before you be those who most seek others' faults because people have faults. The ruler is the most deserving of people to veil those faults. For this, do not look for the blunders remained hidden from you. You are bound to purge the faults revealed to you and God shall rule over what has been hidden from you. So, cover the indecencies of people as much as you like others to cover your indecencies" (Nahj al-Balaghah, Letter 53).
Imam Sadegh is narrated as saying: "Whoever discloses to others the [faults] of a believer shall be among those whom God says: "Verily, those who like to uncover faults of the believers shall face an agonizing punishment in the afterlife" (Koleini, 2010, p. 1).
Imam Bagher is quoted by Kheir Umar Bin Gheis as saying: "Truly, God sets limits on what He has made incumbent on the faithful and punishes those who violate them" (Koleini, 2010, 59/1).

Principle of Legality

The principle of legality of crime underlies criminal law. Unlike other branches of law that can utilize other sources such as custom, habits and doctrines, criminal law simply uses the source of law, especially when only the law governs over establishing criminal titles and deciding punishments.
In criminal law, the principle of legality indicates four general categories:
First: No act is determined to be a crime unless a binding law preceding that act confirms the prohibition of that act (legality of crime).
Second: Punishing a criminal act is based on a law that prescribes the punishment of that act; so, prescribing punishment is not arbitrary (legality of punishment).
Third: The court that has been conferred upon by the legislator the discretion to handle a criminal act can deal with the committed crime (legality of court).
Fourth: No ruling is handed over to anyone unless a legal proceeding at competent authorities follows and takes legal terms (legality of proceeding).
The principle of legality relies on intellectual, Sharia and legal reasons. To justify this principle, law scholars have introduced various theories, which are as follows:

A) The first reason is psychologically oriented, which means the laws warn citizens prior to intervention, prosecution and punishment so that they would recognize which act is prohibited and punishable by the laws;
B) The second reason is politically oriented, which means as per social contracts, intended by the 18th century philosophers, society must not restrict, reprimand or punish its citizens out of legal rules and regulations or deprive them of freedom under any circumstances.
C) The third reason is institutionally and organizationally oriented. As per this, the principle of separation of powers recognizes the Legislative Power to be exclusively a competent legislating body that indicates public will, thus barring executive bodies and judges from intervening with this exclusive right. The judge who represents the government cannot apply the rights with which citizens are not satisfied (Garofalo, 1998).

Significance of the principle

A fair trial from the beginning to the end of a procedure process, especially in criminal matters requires a series of explicit principles that monitor over the procedure process. By the procedure, it is meant a broad concept and appears to originate from legislation. In this connection, the most important stage of a fair trial is the stage of legislation, which, if properly held, can help other stages work well. One of the most important principles that ensure a fair trial is the principle of legality. The significance of the principle of legality lies with the fact that it prescribed for the Legislature and Judiciary Powers major duties which, if go unobserved, could violate the principle. The duty of making substantive and procedural laws is exclusively rested with the legislator, which must be executed after going through established stages. To realize this principle, the legislator must use utmost explicitness and employ it in legislating criminal laws. It is evident that an ambiguous criminal title deprives citizens

of any assurances against arbitrary measures by the criminal justice system, and observing this principle warrants the continuous updating of criminal texts.

History of the Principle of Legality in Statutory Laws

Following human thinking developments that led to the transition from personal retaliatory thinking to the formation of primitive governments and establishment of royal courts, the idea of developing laws and performing work accordingly also arose. The clay tablets discovered from Sumerian government kings dating back to 6000 years B.C. and the collection of Hammurabi and Hittite laws reveal that man has sought to enact laws for his life. However, the review of Sumerian, Hammurabi and Hittite laws reveals that nowhere has the principle of legality been explicitly mentioned, though the principle had been implicitly recognized.

By 1215 A.D., Article 39 of the Great Charter or "Magna Carta" stipulated: "No free man shall be seized, imprisoned, dispossessed, outlawed, exiled or ruined in any way, nor in any way proceeded against, except by the lawful judgement of his peers and the law of the land" (Fazael, 2013, p. 9).

This is may be the first law that explicitly considered the principle of legality in statutory laws. This law was adopted by the English Parliament in 1354 A.D. The main source of this principle of common laws is Cesar Beccaria's treatise on Crimes and Punishments in 1746. Since then, debates were made about Hegel and Beccaria's writing on lawful governments. In other words, all are in the laws and no one is above the laws. In the second half of the 20th century, the emerging Social Defense School levelled a major criticism over criminal law. This movement held that in the first 50 years of the century, broad criminalization was a means to maintain authoritarian systems and referred to Hitler, Mussolini and Stalin's interpretation of the principle of legality, arguing that the criminal justice system was reminiscent of suppression and persecution. The movement stressed that this title had to change to a social defense law (Najafi Abrand-Abadi, 2003, p. 1145). This radical viewpoint received little success as the most radical criminal system proponents also advocated the principle of legality. Today, the most important features of this principle are as follows:

1. In most legal systems across the world, this principle has gained constitutional validity
2. In constitutional procedural processes at Constitution Protection Courts, the principle has been repeatedly emphasized
3. Its sphere of inclusion comprises sanctions such as administrative laws, and
4. It has been internationally recognized following the establishment of the United Nations (Najafi Abrand-Abadi, 2003, p. 1147).

Principle of Legality in Iranian Laws

Historically, this principle dates back to 1946 when the supplementary constitution law was ratified. Principles 9-14 of the supplementary constitution law referred to the concept of the principle and demonstrated its implications. Pursuant to Principle 12, no punishment is prescribed unless by the laws. The legislator also adopted the mentioned principle in 1925 upon enacting Articles 2 and 6 of the General Penal Code, and the ex post facto law was explicitly introduced to the Iranian laws following the modification of the principle back in 1973 (Mohaghegh Damad, 2012, p. 35). After the victory of the Islamic Republic of Iran, the mentioned principle was explicitly and implicitly enshrined in Principles 22, 25, 32, 33, 36, 37 and 169 of the Constitution. The legislator also adopted the principle in criminal laws, including the 2013 Islamic Penal Code, which explicitly refers to the principle enshrined in Articles 2, 10, 12, 13, and 18.

Principle of Legality in Islam's Criminal Policy

According to the dynamic Shia jurisprudence, since reasoning was considered as a source of jurisprudence, i.e., in the era of Abu Ali Bin Juneid (991 A.D.) (Mohaghegh-Damad, 2012, p. 13), the principle of shamefulness of punishment without declaration of law was considered to dominate reasoning principles. However, various interpretations have indicated that the principle of authorization, opposite of the principle of prohibition that was common to some Sunni scholars, did exist prior to the emergence of the principle of shamefulness of punishment without declaration of law (Mohaghegh-Damad, 2012, p. 13).

This principle is also noted in the remarks by Sheikh Tousi who, in the book "Al-Khalaf: Ketab Al-Tahara: Problem 17", says: "The principle of authorization takes precedence and the principle of prohibition requires reasoning". In Al-Iteghadat, Tousi writes: "We believe that everything is absolute until a prohibition appears in one of them".

This principle later developed and was quoted by Seyed Morteza as saying: "An obligation without a certain and prior order is shameful".

In contemporary era, Mirza Qomi expounded this principle, saying: "No obligation is there unless the [law] is prescribed" (Mohaghegh Damad, 2012, p. 14).

By all means, the principle of shamefulness of punishment without declaration of law is a taken-for-granted rule among jurists and principle proponents. This principle, for Shia jurists, is not only necessary for the obligation but

also its declaration to the person and his knowledge thereof constitute the conditions of the obligation. The principle states "Unless an act is prohibited by the Sharia and the prohibition is communicated to the obliged person, if the latter committing the prohibited act is not informed of it, the punishment of such a person shall be rationally shameful, and this also applies to an omission".

Mohaghegh Damad argues that the sphere of this principle is broader than the "principle of legality of crime and punishment" in common law. The sphere of this principle is also broader than the "principle of legality of crime and punishment" in contemporary common law, because the "principle of legality of crime and punishment refers to the enaction of laws, and subsequently its stages of communication and publication. Jurists have also resorted to this principle in cases where the obliged person is uninformed of the issued obligation not due to negligence but for another reason. In other words, by *declaration* in this principle is that of communication rather than issuance; hence, its sphere of inclusion goes beyond the principle of legality of crime and punishment (Mohaghegh Damad, 2012, p. 15).

Documentation of the principle of Shamefulness of Punishment without Declaration of Law in Jurisprudential Texts

Rational Reasoning

The first rule of the shamefulness of punishment without declaration of law is the rational reason, which means the punishment for the act not declared [as being a wrong] by the legislator for the perpetrator is shameful, as independent rational rulings include the decency of justice and fairness an indecency of oppression. To Ayatullah Khoui: "Punishment for violating an obligation not declared [by the legislator] is an example of oppression" (Khoui, n.d., p. 254).

On this matter, Allame Helli says: "Justifying an obligation on an individual who's not aware of it means demanding something outside the ability of him and is so to speak a burdensome obligation, and this is shameful and indecent" (Helli, 1970, p. 93).

So, what appears to be rationally decent is good; otherwise, it is indecent and its conduct is rational shameful. For scholars, prescribing punishment for an act prior to declaring its prohibition shall be shameful and indecent.

Principe of Innocence

The presumption of innocence holds that when there is doubt as to obligation and authorization, the principle is postulated to be authorization. Doubts also apply to rulings and to subjects. Concerning errors (mistakes) in law, should the obliged person have doubts whether an act is incumbent on him or not, the principle is postulated to be innocence. Should he also doubt as to the prohibition of the act, the principle is postulated to be innocence. The first category doubts are referred to as positive errors in law and the second category doubts are called negative/prohibited errors in law. In each of these categories, the origin of doubts could be due to the lack of wording, ambiguity, a brevity of wordings and the contradiction of texts (Mohaghegh-Damad, 2012, p. 34).

Ignorance of Law

Ignorance of law arises in two ways: Or out of fault or negligence. Ignorance out of fault is caused by the non-feasance of an individual who does the [prohibited] act, despite the possibility of gaining knowledge regarding it, while ignorance out of negligence is caused by the individual's inaccessibility to the sources that make him fail to notice the prohibition. Hence, the first-category punishments are not rationally shameful and indecent; however, punishments for the second category are rationally and narratively shameful and indecent. This is confirmed by Verses 97 and 98 of Surah Nisa', which is agreed upon by most Muslim scholars:

"Indeed, those whom the angels take away while they are wronging themselves, they ask, 'What state were you in?' They reply, 'We were oppressed in the land.' They say, 'Was not Allah's earth vast enough so that you might migrate in it?' The refuge of such shall be hell, and it is an evil destination. Except the oppressed among men, women and children, who have neither access to any means nor are guided to anyway"

This verse clearly shows the difference between faults and negligence and reveals divine retribution for the first group and forgiving for the second group.

Sources of the Principle of Legality in the Criminal Policy of Islam

The principle of legality has been reaffirmed in all criminal law sources in Islam and this is evident because the rulings enacted by the Creator, who dominates all creatures, are fair and equal rulings. We know that divine rulings are just and from which arise no oppressions or wrongs. This is reaffirmed in Verse 40 of Surah Nisa': "*Indeed Allah does not wrong [anyone] [even to the extent of] an atom's weight*". So, it is only divine laws and rulings that are reliable and involve not even a grain of oppression. The principle of legality in Islamic law sources are examined as follows:

The Book (the Qur'an)

The Qur'an has repeatedly debated this principle, some of which are as follows:

- *apostles, as bearers of good news and warner, so that mankind may not have any argument against Allah, after the [sending of the] apostles (Nisa:165)*
- *We do not punish [any community] until We have sent [it] an apostle (Isra: 15).*
- *Allah does not task any soul except [according to] what He has given it (Talagh:7)*
- *So that he who perishes might perish by a manifest proof, and he who lives may live on by a manifest proof (Infagh: 42)*
- *Allah does not lead any people astray after He has guided them until He has made clear to them what they should beware of (Towbah: 115).*

The Tradition

Criminal policies adopted by religious scholars have also emphasized the observance of the principle of legality. Hence, the following narratives are required to explain this principle in the criminal jurisprudence of Islam:

- The prophet said: "My Ummah shall not be called to account for nine things, including mistakes, forgetfulness and matters deemed duress for them, matters they have no knowledge of, etc."
- "My Ummah shall not account for what God has made them ignorant of"
- "People are open towards what they don't know"
- "Everything is absolute (has no ruling) until it is prohibited"
- "You shall find everything lawful unless you are sure it is prohibited and unlawful" (Majlesi, 1982, p. 251).
- "Judges are four groups, three of whom are in the Fire and one rests in the Garden".

A) He who judges a wrong and hands it over knowingly shall be in the Fire
B) He who judges a wrong but is not cognizant of the ruling shall be in the Fire
C) He who judges a right but has his ruling not based on the knowledge of rulings shall be in the Fire
D) He who judges a right and has his decision based on the knowledge of rulings shall be in the Garden (Harrani: 2003, p. 663).

- In part of his letter to Malik Ashtar concerning the appointment of the judges, Imam Ali ordained: "Among people, choose the best of them before you for judgment; those who shall not be plagued by repeated visits, not get pleased with little research into matters, who work more conservatively in doubtful affairs and decisively hand over rules based on Sharia" (Nahj al-Balagha, Letter 53).
- Imam Sadegh is quoted by other narratives as saying: "Those [the rulers] who possess executive powers (commanding lashes and sticks) may become disbelievers even in deciding two Dirhams that contradicts divine ordainment" (Ameli, 2019, p. 11).

The narratives clearly show the origin of the principle of legality of crime and punishment, which demonstrates the unconditional prohibition of judges' powers in deciding retribution against delinquents; This is because judges have been strongly threatened and frightened over the loss of their entire religion (being regarded as a disbeliever) by violating the principle of legality, as proposed by the legislator. In any case, for the infallible Imams, the judge is confined to what has been set out in the Sharia and forfeits the right to provide personal and arbitrary interpretations.

Conclusion

Needless to say, acting upon Islam Sharia would lead to the correction of the world and the hereafter of the people. Islam is the religion of moderation and has no room for extremes. In this connection, criminalization needs more discretion as it deals with public honor, life and property; for this, the principles, which stress this discretion, are of high importance in Islam's criminal policy. Thus, the principles of minimality and legality of criminalization have received much attention.

The principle of legality and minimality of criminalization in the criminal policy of Islam has a broader scope than those in contemporary common law. By declaration in this law, it is the declaration of communication rather than issuance; hence, its sphere of inclusion is much broader than that of the principle of legality of crime and punishment (Mohaghegh-Damad, 2011, p. 15). These principles are evidenced by rational and Sharia and even moral documentation that prompt the legislator to comply with them when producing criminalization. Disregard of the scope of the stated principles, they are food for thought in Islam's criminal policy. These principles date back to 14 centuries ago when the factors contributing to or divesting responsibility from criminal liability did not exist and could see animals also held accountable for criminal liability, with criminal thoughts could also face punishment.

No doubt, the Islamic legal system is the cradle of principles of law and this is confirmed by the holy book, prophet traditions, and narratives of Imams. Contrary to views of the enemies and those who are unaware of the Sharia, rulings and commands, Islam is not confined to special time and place conditions; here, what diverts jurisprudence from its main path should be averted. It is thus essential to fully attend to jurisprudential principles and focus on ruling inferences to avoid extreme penal rulings.

It is noteworthy that criminal policy-makers properly ascertain the criminal policy of Islam and better understand requirements of Iranian society so that they would develop a comprehensive and promising policy based on recent criminological findings.

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