



De Judicialization and Punishment Approximately Relying on Restorative Justice

Tayyiba Rezayati

Seminary Teacher, Level 2 Degree From Al-Zahra, Tehran, Master of Theology, University of Tehran,
Jurisprudence and Fundamentals of Islamic Law, Iran

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Abstract

Although the discussion of restorative justice is one of the emerging issues in the field of criminal law, but the search in jurisprudential texts and the special approach of the Islamic criminal justice system to punishment, indicates the special attention of Islamic criminal jurisprudence to the theory of "restorative justice". The challenges that made the important mission of the classical criminal justice system in order to create public deterrence and achieve the reform of criminals, provided the way for the emergence of restorative justice. This theory has tried to resolve the dispute between the victim and the offender through De judicialization and punishment measures and to repair the damages caused by the crime in the light of a participatory criminal policy with the active participation of the victim, the offender and the community. The present article describes in a descriptive way based on the teachings of jurisprudence how Islamic law in the field of provision punishments, in order to protect the basic interests of society and ensure social security by providing De judicialization and punishment solutions, has emphasized on crime prevention and correction and treatment of the offender. Encouraging delinquency and denial in the stage of prosecuting a crime, strictness in proving provision crimes and applying the rule of Dara in the stage of proving a crime and accepting repentance and pardon in the stage of sentencing and execution of provision punishments, De judicialization and punishment measures are within the provision. And provides the emergence of "restorative justice" in this type of punishment.

Keywords: *De judicialization punishment; Criminal Justice; Restorative Justice; Punishment Theory; Rehabilitation Theory; Hadd Punishments*

1- Introduction

The response to crime has gone through various stages throughout the history of criminal law. From the era of private revenge to the emergence of criminal schools that emerged to combat crime and social dissonance, leading to deep changes in criminal law and creation. Important achievements, such as the principle of "legality of crimes and punishments", the principle of "personality of punishments", the principle of "equality of persons towards the criminal law" and finally leading to the adjustment of punishment.

On the other hand, the different approaches that these schools had in dealing with the criminal phenomenon and crime, criminal or delinquent phenomenon were the main focus, gradually the role of the victim in dealing with crime and dealing with it has diminished and the government as a representative of the community took responsibility for the response to the crime at all stages of the investigation.

The classical criminal justice system, whether in the form of the theory of "punishment" and in the form of the theory of "rehabilitation" but practically, could not meet the needs of the people and the interests of society in dealing with the criminal phenomenon. Victims as one of the main pillars of whom dealing with crime, the criminal justice system faced several challenges. dissatisfaction with the performance of the classical criminal justice system, including inflation of crimes, increase in court costs and its prolongation, etc., led to the inefficiency of this system This led to the idea of the participation of civil society (victims, offenders and the body of society) in the face of crime and thus provided the basis for the emergence of the theory of "restorative justice" in the field of criminal law.

The theory of "restorative justice", which has been considered by lawyers and criminologists in recent decades, has tried with a victim-centered approach, to create a balance between the interests of the victim and society and the need for social acceptance of crime, and in In the form of a participatory criminal policy, all persons who have some interest in a criminal incident Calls for active participation to create such a balance and to resolve animosity through compromise, outside the judicial and criminal framework. This theory, above all, introduces crime as a violation of the norm in interpersonal relations; On the one hand, it tries to repair the damage done to the victim and compensate him, and on the other hand, it creates the spirit of responsibility in the crime and provides the ground for his social re-acceptance.

Now, the fundamental question is mention that what method of Islamic criminal justice system, due to the variety of punishments, has adopted in the fight against crime? And in the crimes which leads to provision, what extent has it fought through De judicialization and punishment against crime and applied the theory of "restorative justice" through impunity?

Carefulness in religious teachings shows that the Islamic theory of punishment is not a one-dimensional theory and this method governs the entire Islamic penal system. Islamic criminal jurisprudence, by presenting a multifaceted and mixed theory, in addition to accepting the theory of "punishment" and "rehabilitation", has also considered the theory of "restorative justice"; Contrary to some beliefs, in the fight against crime, it has given the largest share to preventive measures and non-criminal measures; So that some measures of Islamic criminal law support the policy of De judicialization and punishment in provision punishments.

Since the crimes are leading to provision, transgression and violation to the fundamental elements of society, and each of them damages the body of society by violating basic interests, In order to protect these interests, the Holy Shari'a of Islam, by imposing provision punishments according to the principles and rules governing the provisions, while applying the theory of "punishment" and "rehabilitation", with the measures of the De judicialization and punishment, also provided the way for the emergence of "restorative justice" in The scope of this type of punishment.

Some books and articles on the theory of "restorative justice" have discussed "restorative justice" in the field of Western criminal law, including the articles "Restorative justice, a new perspective on criminal justice" by Mustafa Abbasi, Classical Criminal Justice to Restorative Justice »By Ali Hossein Najafi Abrandabadi, Paradigms of Criminal Justice: Constructive Justice and Restorative Justice "by Abbas Shiri, as well as the books" Restorative Justice "by Hossein Gholami and Amir Samavati Pirooz," The Little Book of Restorative Justice "by Howard Zohr, etc. can be mentioned. Behrouzieh has written a dissertation entitled "Restorative Justice in Imami Jurisprudence and Iranian Law" which focuses on the theory of "restorative justice" in the field of criminology and criminal law in the West and its jurisprudential issues are not regulated in the style of the present article.

Therefore, this article seeks to examine the methods of De judicialization and punishment in provision punishments according to the theory of "restorative justice". From a jurisprudential point of view, in each topic, in accordance with the discussion, the views of "Shiite" and "Sunni" jurisprudence have been presented with narrative and Qur'anic documents, and then the place of "restorative justice" in Islamic criminal jurisprudence has been clearly examined.

2- The Nature of Hadd

2-1 The Literal Meaning of Hadd

The word "Hadd" is infinitive and its plural is "hudud" and it is considered as a common word. In dictionaries, according to its uses in the meanings of "prohibition and repulsion", "border", "barrier between two things", "sentence", "punishment", "sin" and "the end of everything" (Tarihi, 1395 AH: 1 / 471-472; Ibn Manzoor, 1405 AH: 3/140)

It seems that the main meaning of "Hadd" seems to be "prohibition" and "detention"; Because it prevents a person from returning to the same sin, and it also prevents others from committing it.

2-2 The Terminological Meaning of Hadd

In jurisprudential terms, "Hadd" is opposite to "ta'zir" and the most famous definition of "Hadd" is the same as "Mohaqeq Heli" in the Shari'a and consequently other "Imamiyya" jurists have acknowledged (Fazel Hindi, 1405 AH: 2/393; Mohaghegh Heli, 1409 AH: 4/147; Najafi 1367: 41/254) And the famous "common" jurists also believe in it (Ibn Hajar Asqalani, 1379 AH: 3/4; Kashani Hanafi, 1409 AH: 7/33; Behouti Hanbali, without date: 6/99). And it is a special punishment that is given for the pain and suffering of the body for committing a special sin that the amount of punishment has been determined by the holy shari'ah for all individuals and its examples (Najafi, 1988: 41/254), And in most cases it is considered the right of Allah (Sarakhshi, without date: 9/36). These punishments are physical and have no minimum or maximum. The "religious Hadd" prevents the offender from repeating the crime, and at the same time causes others to learn a lesson, and therefore is appropriate to its literal meaning.

What is certain is that in the Holy Qur'an there is no definition or division of limits, but the mentioned definitions can be seen only in the works of jurists. Also, Article (13) of the Islamic Penal Code, in accordance with the jurisprudence of punishment, has provided as follows: "Hadd is a punishment whose type, amount and quality are determined in the Shari'a."

"Hadd" is also sometimes used in the sense of "sentence" and "absolute punishment". In the Holy Qur'an, in some cases, "Hudud Allah" has been used in the sense of "Allah's rules" or in narrative texts with the themes that "God Almighty has set a limit for everything" and "everything has a Hadd", hadd in the meaning of " The sentence has been used. (Koleini, 1407 AH: p. 175, H9).

In jurisprudential works, "hudud" has been used in the general sense, including " retribution " and "ta'zir", as some "Sunni" jurists (Jaziri, 1419: 5/8) under the title of "the book of Hudood" They have discussed three types of punishment: "retribution", "hadd" and "ta'zir".

Despite the fact that the realm of hudud is known in the definition of hadd punishments, their cases and number have not been agreed upon by the jurists and there are huge differences between the number of hudud in their works. Some "Sunnis" believe that only the three limits of "adultery", "false accusation of adultery" and "theft" are common to all (Jaziri, 1419: 5/18) While some " Imamiyeh " bring the number of Hudud to sixteen (Khoei, 1410 AH: p. 32). This difference of opinion about the number of Hudud is due to various reasons, including the fact that some have considered the criterion of "punishment" to be considered as a punishment in the "book" and they consider that the number of Hudud

is less than the number of Hudud, in the words of those who also consider certain punishments in the tradition as "Hudud". Or that some jurists have considered some of the crimes to be included in another title and have not considered it as an independent crime; For example, they have called "fighting" as "theft", or "rebellion" as "apostasy". (Jaziri, 1419 AH: 5 / 446-449).

3- Dividing The Limits into the Right of Allah and The Right of the People

"the right of people" means a right which the legislator has prescribed for a particular person or persons to achieve the intended benefits in the light of that right, but " the right of Allah" cannot mean this; Because God is needless and it is unimaginable for him to achieve benefit; Hence, the definition of " the right of Allah " states: "It is a right that the legislator of Islam has established in relation to the whole Islamic society and the Muslim Ummah; In other words, the protection of virtues and the creation of judicial security and social justice in society are considered the rights of Allah Almighty. "(Feyz, 2006: pp. 49-47)

The right of Allah "is also of two types:

- 1) "Pure the right of Allah ": rights that only the social aspect and the interest of society, the motivation. the legislator was in its position and a part of the servant's right was not observed in it. The limits of "apostasy", "adultery" and "drinking alcohol" are among the divine limits in this category. These rights have been interpreted as rights that have been enacted "purely for the community." (Zahili, 1409 AH: 6/618)
- 2) " The right of Allah mixed with The right of people ": such as the Hadd of "false accusation of adultery" and "theft"; Because in these two crimes, there is a personal direction which is harm and harassment to a certain person and a general direction which is opposition to Allah's command and harm to society and public interests, with the difference that in some of them Like " false accusation of adultery ", the aspect of " The right of people " is predominant and in some others such as "theft", the aspect of " The right of Allah " is predominant. (Fayz, 1385: pp. 49-47).

4- Principles and Rules Governing the Implementation of Limits

4-1 The Principle of the Necessity of Enforcing the Limits

Since the crimes subject to "hadd" are considered as aggression and violation of the basic elements of the society and each of them damages the body of the society by violating the basic interests, therefore, imposing "hadd" on the perpetrators of these crimes is considered. The Shari'a has been established and must be implemented decisively according to the interests that lie in its implementation. (Ibn Abedin, 1415 AH: 4/165)

In numerous narrations have emphasized the importance of enforcing the limits. Among them, the Holy Prophet (PBUH) and Imam Baqir (PBUH), along with hadiths, have considered the establishment of "hadd" on the earth to be more blessed than the rain of forty days and nights. (Koleini, 1407 AH: 7/174).

Also, Imam Ali (pbuh) in a hadith from the words of the Holy Prophet (pbuh) considered the closure of some of the divine "Hudud" as enmity with Allah (Hur Ameli, 1414 AH: 13/28, p. 6). All of which indicate the "certainty" and "necessity" of enforcing the limits

Therefore, due to the many benefits and positive effects that are imposed on the implementation of limits, the implementation of limits becomes such a necessity that among the effects of its implementation is an example for others and its deterrent aspect; So that Imam Reza (pbuh) states that the

reason for cutting the thief's hand due to "stealing" and the reason for flogging the adulterer's body is a punishment for him and a lesson for the people. (Sheikh Saduq, without date: 1/104 -103).

In fact, by predicting the punishment of flogging, the "principle of proportionality of crime and punishment", which is itself a level of "criminal justice", has been considered. This is both a form of "justice" and a prelude to achieving goals such as "correcting" the offender or creating a state of "deterrence" for him and others; As a result, in the religion of Islam, there is a lot of emphasis on the implementation of Hudud

4-2 No Delay in the Implementation of Hudud

It is not permissible to delay the implementation of the Hudud; This means that if proven, the divine limits must be enforced immediately. The documentary of this principle are narrations from Imam Ali (pbuh) that the Imam, in addition to the narrations, did not allow "delay in the implementation of the Hudud " (Hur Ameli, 1414 AH: 28/47, AH 1) and "delay in its implementation" equal that They have considered the closure of its implementation. (the same. 2 hadith).

His commitment to not delaying the implementation of the divine limits was such that when three people in his presence accused someone of "adultery", he demanded the fourth witness. They said: "He is coming now." The Imam immediately imposed the limit of " false accusation of adultery " on them and said: "There is no moment of delay in the implementation of the divine limits."

This principle has been proposed in the jurisprudential sources of "Imamiyya" (Najafi 1988: 395/41) and "public" (New Damascus, without date: 39/20) following the narrations.

4-3 Non-Intercession in the Hudud

There are narrations that some say that "intercession within the Hudud" is absolute (Shokani, 1973: 247/7) and some indicate that "intercession" and "mediation" within the limits, after filing a complaint. It is not possible with the ruler. (Muhaddith Nouri, 1408 AH: 18/24, H3).

According to some jurists, "Sunnis" has been considered forbidden in some places and its acceptance is forbidden (Mawardi, 1406 AH: p. 327) and according to others, "intercession" has been considered good as long as the ruler has not reached error; But when it reaches the ruler, the establishment of "hadd" has become obligatory. (Ibn Hajar Asqalani, 1300 AH: p. 327).

In the opinion of some Imamiyya jurists, due to the prophetic narrations and other texts that forbid "intercession within the limits", "intercession within the limits" has been completely eliminated, especially with reference to the narrations that have commented that Imam is not a possessor of "hadd". (Najafi, 1988: 41 / 396-395).

On the other hand, some others think that if the crime causes "hadd" is proved by the evidence on the Imam, he has no right to forgive and there is no reason left for "intercession", but if he does not reach the Imam in this way and his sinner commits the crime. To admit, the Imam has the right to pardon and "intercession" from the offender also has a reason and reason. (Khoei, 1410 AH: 1/185)

What is important in this speech is that "denial of intercession to the extent" is limited to cases where the Imam does not have the authority to pardon the offender. Therefore, what is from the texts of narrations and theology of the Imams "Shahid Imami" (Shahid Thani, 1413 AH: 14/417; Mohaghegh Ardabili, without date: 13/326) and "Sunnis" (Ibn Hajar Asqalani, 1379 AH: 4/20; Kashani Hanafi 1409 AH: 7/55) It is obtained that "intercession within the limits" is not permissible except in cases where the Imam and the ruler have the right to pardon the offender.

4-4 No Bail in the Hudud

Regarding "No bail in the Hadd", it is narrated from Imam Sadiq (A.s) that the Messenger of Allah (pbuh) said: "There is No bail in the Hudud" (Koleini, 1407 AH: 7) / 255).

According to the jurists of "Imamiyya" (Sheikh Tusi, 1407 AH: 5/41; Shahid Thani, 1413 AH: 14/417; Mohaghegh Ardabili, without date: 13/362) is not accepted as bail of Hudud and their documentary, the above narration is of the Prophet (PBUH), so that there is no difference opinion among the jurists on this issue.

4-5 The Publicity of the Implementation of the Limits

What is certain in the conduct of the infallible is that the Hudud were set in the presence of the people and the people gathered to enforce the limits. Because the "public execution of fines" is based on "social interests" and in order to prevent the occurrence of the next crime, and if it is done "in secret", it has the effect of "deterrence". Loses. It is documented is the Surah Noor that Allah says: "A group of believers should witness the fulfillment of Hadd." (Noor / 2)

Although this verse is about the punishment of flogging and is related to the hadd punishment of "adultery", the jurists have extended it to other hadd punishments in order to refute its provisions. In addition to the verse of the Qur'an, many narrations indicate the "public execution of hadd punishments." (Hur Amoli, 1414 AH: 28/55, H3)

Accordingly, many "Imamiyya" and "Sunnis" jurists (Ibn Qadameh, without date: 10/137; New Damascus, without date: 39/20), have considered the presence of some to carry out severe punishments. So that some have considered the necessity of "public execution of hudud" (Najafi, 1988: 41/353; Mohaghegh Ardabili, without date: p. 660) and others have considered it as desirability. (Sheikh Tusi, 1378 AH: 8/8; Mohaqeq Hali, 1409 AH: 4/939).

5- De Judicialization and Punishment in the Hudud and Emergence of Restorative Justice

Despite the principles and rules governing the Hudud that emphasize the axis of criminal justice, punishment and deterrence; The Islam in the field of crimes subject to the Hudud has applied the aspects of the system of restorative justice in punishments, which can be considered in two areas of prosecution and proof of crime and the stage of its implementation.

5-1 In the Stage of Prosecuting and Proving the Crime

5-1-1 Encouraging Delinquency and Denial of Limits in the Pursuit Stage

Islamic law, while imposing punishment for behaviors that endanger society and the human race if it is prevalent, and warns of divine punishment, exposes both rulers and individuals. He has called for non-disclosure of these crimes and has blocked the way for the punishment of criminals and invited them to repent to Allah

In many cases, individuals, according to the life-giving teachings of Islam, whenever they committed one of the hadd crimes, they introduced themselves to the court in order to be cleansed of the sin committed in this world. From all the hadiths that exist in this regard, it can be concluded that Islam's view on the crimes of "Allah's right" is to keep them secret and to encourage denial.

It is narrated that a person came to the Imam Ali (A.S) and said: "O Ali, I have committed adultery; "Cleanse me." The Imam turned away from him and said to him: Sit down, and then he turned to those present and said: "Can not one of you hide his sin when who has committed a sin, as Allah has hidden it. once again the man stood up and said: "O Amir al-Mu'minin, I have committed adultery; "Cleanse me." The Imam said to him: "What made you make such a confession to yourself?" "To be clean," he said. The Imam said to him: "What purity is superior to repentance?" Then he turned to his

companions and began to talk to them. The man stood up and said: "O Ali, I have committed adultery, purify me." The Imam said to him: "Do you read the Qur'an?" the man said: yes. Imam said: "read." The man recited a few verses of the Qur'an correctly. Amir al-Mu'minin again asked him: "Do you know your necessary issues about Allah's rights in prayer and zakat?" said: yes". The Imam asked him questions and the man answered correctly. He said to him "Are you not sick and do you not feel a headache or a chest tightness?" "No," he said. Amir al-Mu'minin said to him: "Woe to you, go so that as we have openly asked about your health, we will seek your health in the absence, and if you do not return, we will not summon you", and when the man left the Imam and Imam asked his companions about his physical and his psychic condition, they said: "She is completely healthy and in a normal state." After a while, a man came back and said: "O Amir al-Mu'minin I, I have committed adultery; "Cleanse me." The Imam said to him: "If you did not come back, we would not have asked for you. Now, for the fourth time, your confession and Allah's ruling on you have become necessary, we will not set you free. (Koleini, 1407 AH: 7/186).

The following narration can be used that in pure divine law, the opinion of the shari'ah is "hiding the sin" and "encouraging not to confess" or "denying the confession" and the repentance of the servant is virtuous.

5-1-2 In the Proof Stage

A- Strictness in proving these crimes

According to verse 15 of Surah Al-Nisa ', "adultery" is proven by the testimony of four righteous men. The testimony of three men and two women or two men and four women can also prove the occurrence of a crime. (Mohaghegh Helli, 1409 AH: 4/935) In proving "sodomy" and "lesbianism", like "adultery", but even more severely It has become more severe. These two crimes are proven by the testimony of four men who have witnessed sexual intercourse. In this regard, even the testimony of three men and two women is not enough. (Najafi, 1988: 41 / 377-376)

Some jurists, in justifying the "strictness of the Shari'a" in proving "adultery", "sodomy" and "lesbianism ", believe that the aspect of this ruling is devotional; Because although "murder" is more important than "adultery", it is proved by the testimony of two men, and the wisdom of proving "adultery" by four witnesses is that the shari'ah wants as much as possible to cover up such acts. And people should not be easily offended. (Same / 155)

Some have introduced this as a step towards preserving the dignity and honor of individuals and contributing to the health of society, and consider it God's will that such matters should not be easily discovered and proven in order to preserve the dignity of individuals and society. Imam Khomeini 1378: 9/286) Even in many crimes, the confession of the offender is not applied at once, but the way to escape the proof of the crime is presented to the offender and the judge states the consequences of the confession so that the person returns from his confession and Do not prove the crime. (same. / 283).

Based on the many narrations on the subject of which the jurists have decree, the testimony of the witnesses must be free of any ambiguity and they must have observed the act of sexual intercourse completely (Hur Ameli, 1414 AH: 28/95, H 1, 2 and 3). It is usually impossible or very rare.

The number of witnesses must be four; Therefore, if three people testify to the occurrence of "adultery" without the need for the accused to take an oath, the verdict will be acquitted and because the required number has not been completed, the witnesses will be sentenced to "sodomy". In this case, there is no difference between the fact that the witnesses are in fact truthful or liars. (Najafi, 1988: 41/298)

Other precautions are taken to ensure that the testimony of witnesses is correct. For example, in the execution of the punishment of stoning, according to the fatwas of most jurists, it is necessary for the witnesses to start stoning. Also, in cases where the punishment of stoning has been proven by the confession of the perpetrator, the ruler initiates stoning. (Najafi, 1988: 41 / 352-351) Such a precaution

makes it more accurate to prove the crime. Witnesses and the judge are usually present if they are the initiators of the execution of the sentence if they are completely sure of the occurrence of the crime. It is also possible consciously and with the will of the perpetrator. (Same / 280-279).

Many jurists believe that the four confessions should be in four separate parliaments; Therefore, confession four times in one assembly cannot prove "adultery". (Sheikh Tusi, 1378 AH: 4/8) They came and advised to avoid confession. Thus, "strictness in proving crimes subject to hadd" can be analyzed in order to emphasize the role of "general deterrence" of punishment; Whenever a punishment is imposed on a large number of people, it loses its "deterrent" aspect. Of course, "strictness in proving a crime" is also compatible with the principle of "justice"; Because "justice" requires severe punishments to be carried out when there is a complete certainty of the crime.

It is also important to note that the aspect of "deterrence" has been taken into account more in the legislation of these punishments than in its implementation; Because the "strictness in proving these crimes" and the emphasis of religious leaders on delinquency in the Hudud, indicates this issue.

B. The rule of Dar

One of the measures of "punishment" that has been accepted by Islamic law is the "rule of Dar" according to which, despite any suspicion and claim of reluctance, mistake, error and forgetfulness on the part of the accused, if the claim is true, the punishment is eliminated. And with the application of this rule in the criminal procedure, all the reasons, the UAE and the suspected evidences are removed from the number of positive criminal reasons. In particular, judicial authorities, in cases of suspicion, have been prevented from investigating to prove guilt by the perpetrator.

Despite such measures, in the penal policy of Islam, resorting to violent action in the prosecution and detection of crimes is prohibited and the escape of the offender from punishment is preferred to the punishment of the innocent.

Documentary of this "rule" is the countless narrations in "Imamiyya" and "Sunnis" jurisprudence that have been ordered to reject and set aside Hudud in cases of doubt. The most important reason is the hadith narrated by the famous "Imamiyya" and "Sunnis" jurists quoting the Messenger of God. In addition, a hadith has been quoted from Prophet Muhammad (PBUH): Repel the Hudud due to doubt "(Sheikh Saduq, 1413 AH: 4/74).

The "Sunnis" jurists have also narrated this hadith with various phrases from the Holy Prophet (peace and blessings of Allah be upon him). For example, it is narrated from Aisha that the Messenger of Allah (PBUH) said: "Keep the limits away from the Muslims as much as you can. If there is a way to avoid punishment, release the accused. If the Imam makes a mistake in acquitting, it is better for him to make a mistake in punishing. (Termezi, without date: 2/439).

The important point is that since the word "doubts" is a plural with (Al)", therefore, the hadith includes all the thematic and jurisprudential doubts, and the jurists also refer to the jurisprudential and thematic doubts in jurisprudential chapters. (Najafi, 1988: 41/417).

The "rule of thumb" is consistent with the "rule of interpretation of doubt in favor of the accused" in the case law, which has been discussed in the two realms of general criminal law and criminal procedure. The content of this principle is that the criminal judge in the position of proof, if he has any doubts, should apply the suspicion in favor of the accused and vote on the innocence of the accused based on the principle of "innocence" and insufficient reason (Stephani et al., 1998: P.174)

It seems that in the Islamic penal system, due to the belief in the unfortunate consequences of using criminal repressive tools, by accepting this rule, a kind of escape from using certain punishments has been targeted by the legislator. Thus, the purpose of Islamic penal policy in predicting severe punishments has been more "general deterrence" which has been done through "threat of punishment" and

less "special deterrence" has been considered through "imposition of punishment" and the ruler intended to refuse to prove and enforce the maximum sentences as much as possible.

5-2 In the Stage of Sentence and Execution of Punishment

Repentance and amnesty are two elements that focus on the restorative aspect of the Islamic penal system in the field of crimes subject to hadd.

5-2-1 Repentance

A- The corrective role of repentance in hadd crimes

Another principle of Islamic punishment is its flexibility and the fall of punishment in case of "repentance" of the offender, and therefore in Islamic criminal law, "repentance" is considered as a legal establishment, as in other There are no examples of criminal schools. In particular, as one of the serious issues of criminology in the system of "restorative justice" and "correction", which in contrast to "punitive justice" emphasizes the correction of the offender, has attracted the attention of criminologists. Criminologically, the reason that "repentance" is the cause of the fall of punishment is the changes that occur in the offender. And the offender is punished under the influence of his conscience without apparently being punished, and this punishment has two effects on the offender. One effect is that it "corrects" him and the other is its "deterrence"; That is, the offender decides not to commit a crime in the future, thereby ensuring that the offender is not dangerous.

The realm of the effectiveness of "repentance" in the fall of worldly punishment is in crimes that return to "the right of Allah" but in crimes that have the aspect of "the right of people" does not cause the punishment to fall; Because the perpetrator and the offender, in addition to ignoring the divine commands and prohibitions, have caused financial and physical damage or disgrace to others and must compensate.

Well-known Imamiyya jurists believe that if a guilty person "repents" before the crime is revealed and proven through evidence, his punishment and sharia limit will be revoked. Also, if he "repents" after confessing to the crime, the Imam is free to pardon the offender or impose the divine limit on him, but if he "repents" after proving it through evidence, his punishment will not be revoked. → Najafi, 1988: 41/390)

Their documentaries are the verses of the Qur'an (Al_Ma'idah / 33, 34, 38 and 39; Al_Nisa' / 16; Noor / 4 and 5), narrations and consensus (Sheikh Tusi, 1407, 5 / 468-467). In the verses related to "repentance", the condition of "reforming" is followed by it, and the commentators have considered this condition as the reason for the necessity of "repentance"; Therefore, if it is found that "repentance" is not real and is done to escape punishment, it will not affect it. (Jorjani, 1404 AH: 2/655).

The narrations explicitly refer to the role of "repentance" in the fall of punishment. Meanwhile, a narration from one of the two Imams Baqir or Imam Sadeq (as) was asked about a man who stole or drank wine or committed adultery and no one was informed about them or arrested, he "repented" and is corrected. Imam (as) replied: "Whenever he is corrected and a beautiful deed is seen from him, no hadd will be imposed on him." (Koleini, 1407 AH: 7/250).

It is also narrated in a correct narration from Imam Sadeq (as) that the Imam said:

"If the thief comes to the judge with his foot and in a state of repentance and returns the stolen property to its owner, his hand should not be cut off." (Hur Ameli, 1414: 28/36, H1).

Regarding the "repentance" of confession to a crime, in a narration sent by one of the two Imams Baqir or Sadeq (as), it is narrated that a man came to the Commander of the Faithful Ali (as) and confessed to stealing. The Imam (as) said to him: "Have you read anything from the Qur'an?" The criminal replied, "Yes, I have recited Surah Al-Baqarah." The Imam then said: "I forgive your hand because of Surah Al-Baqarah." Ash'ath said in protest to the Imam (A.S): "Do you close some of the

limits of God?" The Imam said: "O man, what do you know? Whenever a statement has been made, the Imam cannot pardon, and whenever the offender confesses to a crime, it is the responsibility of the Imam to forgive or punish. (Hur Ameli, 1414 AH: 28/41, H3). It is clear from the above narration that "repentance" does not directly cause the punishment to fall in such cases, but causes "forgiveness" by the Imam.

The "Sunnis" jurists, according to the consensus, consider the "repentance" of the warlord before his arrest as Muscat "hadd", which it is documentary as the "Imamiyya" jurists, the verse "34" of Surah Ma'idah. (Ibn Qadameh, without date: 10/314) But they disagree about the "noncombatant" Some of the jurists "Shafi'i" and "Hanbali" believe that punishment is abolished by "repentance", but "Malik" and "Abu Hanifa" and some other jurists "Shafi'i" and "Hanbali" believe that " "Repentance" is not " Muscat of hadd" in the case of "noncombatant", and there is no difference between before and after the arrest and uprising. (same. / 319-314).

Articles 72, 126, 133 and 182 of the Islamic Penal Code, following the opinion of the Imami jurists, have considered "repentance" as a condition for the abolition of punishment, so that if the crimes are to the extent that the aspect of "right of Allah" " is predominant if it is proven by confession and the offender "repents" after confession, the judge will be free to order his "pardon" from the guardian or impose "hadd" on him. And according to Articles "81", "185", "120" and "181" of the Islamic Penal Code, in those crimes in which, in addition to the aspect of "Allah's right", the aspect of "human right" is also Like theft subject to hadd, the Islamic Penal Code addresses the characteristics of a private lawsuit, including a private plaintiff's complaint and the "compensation" inflicted on the victim of a crime.

B- The restorative role of accepting repentance in hadd punishments

One of the conditions for starting and entering the processes of "restorative justice" is that the offender first admits to committing his mistake and implicitly confesses to committing his mistake. (Zohr, 2004: p. 25) The criminal in Islamic law is considered as his acceptance and his decision to "correct" himself. Is one of the capacities that prevent the offender from facing sharia punishment and in such circumstances, it also provides the possibility of benefiting from "restorative justice" programs.

The acceptance of "repentance" in Islam is important in two ways. One is that in practice it leads to "impunity" and provides the necessary space for the application of "restorative justice" programs, the second is that it theoretically shows the "reform" approach of Islamic law in the future.

The realization of "repentance" in the offender and the order of its effect in Islam, is a kind of removal of the offender from passivity in the face of "criminal justice". One of the most important goals of "restorative justice" for the offender is to give him a more active role in the stage of reaction to the crime, and to get him out of mere passivity, in front of the criminal and judicial system, and to strengthen his morale of responsibility "in him.

By accepting "repentance", the offender is allegedly asked to try to "reform" and return to society instead of accepting punishment. In this way, the context of his "social acceptance", is achieved one of the goals of "restorative justice",

5-2-2 Amnesty

A- Amnesty and reduction of punishment in limited crimes

"Amnesty" and "forgiveness" for the offender never mean that justice has not been done; Rather, "pardon" and "forgiveness" means that the judiciary has accepted that a person is a criminal and deserves punishment; But after the punishment, he does good to him. In other words, the implementation of "justice" is not limited to the execution of punishment, but the sentence of guilt and proof of criminal responsibility for the individual is the implementation of "justice" itself.

In addition to the social consequences of "amnesty", basically the "amnesty" of criminals, even if it is wrong, is superior to the punishment of criminals for error; Because in the second hypothesis, there may not be a way to compensate and a great injustice to the seemingly guilty person, but in fact innocent. But in the first case, in any case, "forgiveness" is a moral act that will not go unanswered in the sight of Allah, and the person will enjoy the reward of his good deed. Therefore, reducing the grievances of the penal system also depends on the rule and dominance of this view of criminals. In this regard, Imam Baqir (A.s) while narrating said: "Repentance is more virtuous and easier than remorse over punishment." (Koleini, 1407 AH: 2/108, AH 5).

In view of the above, in the Islamic penal system, in extreme crimes which, in addition to the aspect of "divine right", also have the aspect of "human right", the holy shari'a has adopted a special penal policy that is different to some extent with crimes that the aspect of pure "divine right".

According to the jurisprudential consensus of the "Imams" (Najafi, 1988: 41/551) and the "Shafi'is" and the followers of "Malik" and "Ahmad Ibn Hanbal" whenever the owner of the property "pardons" the thief before filing a complaint and lawsuit with the ruler, the hadd will be revoked, but if he "pardons" after filing a complaint, the hadd will not be revoked. (New Damascus, without date: 20 / 95; Ibn Qadameh, *Bitā*: 10/277; Ibn Hazm, without date: 11/151; Ibn Hajar Asqalani, 1300 AH: 4/21; Ibn Rushd, 1415 AH: 2/372). But "Abu Hanifa" believes that after filing a complaint to the ruler, if the loser hands over the property to the thief or gives it to him or sells it, the hadd will be revoked from him and his hand will not be cut off. (Sarakhsi, without date: 9 / 186).

The Documentary of the opinion of the "Imamiyya" jurists, is many narrations, including a Halabi sahih from Imam Sadegh (as) about a man who stole when the Holy Prophet (pbuh) cut off his hand. They said, the owner of the property said: "Will you cut off his hand for stealing my robe?" The Imam said, "Yes." Then the man said, "I will forgive him." Then the Messenger of God (PBUH) said: "Amnesty has an effect if it is before turning to me."

Another narration is the authenticity of hearing from Imam Sadegh (as) that the Imam said:

"Whoever catches a thief and then pardons him, this is his right. But when he refers to the Imam, he imposes the hadd on the thief. If a person whose rubbing has been stolen says: I forgive him, it will not be accepted by the Imam. And when he turns to the Imam, the Imam imposes the hadd on the thief. And this is the word of Allah Almighty: "And those who keep the limits of Allah" so whenever the Hadd leads to the Imam, no one can leave it. (Same, H3).

As it is clear from the above phrase, Imam (A.s), citing a noble verse, does not consider "amnesty" after referring to the ruler as a muscat. What can be deduced from the words of the jurists is that "amnesty" and "forgiveness", if it is before referring to the ruler and filing a complaint, because its "humanistic" aspect prevails, prevents the planning of the aspect. It becomes public and leads to the forgiveness of the lost but after complaining about the dominance of the "divine right" aspect, forgiveness is ineffective. Article "200" of the Islamic Penal Code, in accordance with the well-known opinion of Imami jurists, state as follows:

"The Hadd of theft will be valid if the following conditions are met: 1- 2- The owner of the property before the complaint, has not forgiven the thief. "Therefore, theft subject to hadd has the aspect of human right before the complaint, but after the complaint, it has the aspect of divine right, and the hadd does not fall with the forgiveness of the rightful owner." (Mir Mohammad Sadeghi, 1374: pp. 115 - 114).

B- The restorative role of amnesty in crimes subject to hadd

One of the cases that justifies the punishment is the infliction of harm on the victim. In the Islamic penal system, in crimes against property, the realization of material damage to the victim has been considered by the Islamic legislature; So that the victim plays a major role in filing a complaint.

According to the Imamiyya jurists, if the crime of "theft" is proven or the perpetrator confesses twice, but the victim leaves and complains and gives him the property, the hadd punishment will be revoked and its execution will be subject to a demand. The owner of the right and the plan to complain to the ruler. (Mohaghegh Heli, 1409 AH: 4/957; Allameh Heli, 1413 AH: 3/567; Mohaghegh Ardabili, without date: 13/281).

The "common" jurists, the "Hanafis" and the followers of "Shafi'i" and some of the "Hanbalis" agree with the "Imams" in this regard, but the "Malikis" and some of the "Hanbalis" believe that cutting off the hand of a thief After proving or confessing, he does not stop at the claim of the rightful owner, because the right of Allah prevails. (Jaziri, 1419 AH: 5 / 276-275)

As mentioned earlier, in the "classical penal system", since the crime is considered aggression against the state, it is clear that there is not remain any Thing for the victim to intervene in the consequences of the crime. It is a person who is out of the process and has been marginalized, and it is the government that plays a role instead of society and the victim and considers itself the successor of the victim. But in the Islamic penal system, such as the theory of "restorative justice" in the crimes of "human rights" and including limits, in cases such as "theft" and "sodomy" have the aspect of "human rights", the victim according to the cases the above plays a key role in proving and enforcing the sentence also in "restorative justice" the offender is required to reform the effects of the crime and help the victim through "compensation" which is one of the main features and basic elements in "restorative justice". And portrayed a manifestation of "participatory criminal policy." So that, even if the thief cuts off his hand, he must return the property to its owner, and in case of an excuse, he will guarantee the price and if he dies, it is the responsibility of his heirs to pay the property and in If there is no heir, it is the responsibility of the Imam to pay the damages to the victim and the lost property. Also, if, despite the proof of "theft", in some cases, the thief's hand is not amputated, but he must be responsible for the damage to the property and he is responsible for "compensation of property" and "compensation". In this way, if the crime of theft is proven by one testimony and oath or one confession, the current limit will not be imposed, or if he confesses to the crime of theft and then denies it (Najafi, 1988: 41/528)

Conclusion

The system of "criminal justice" in its specific sense, which was formed in the eighteenth century, in Islamic law in the seventh century, its principles and foundations were formed and had the necessary executive guarantee. The method of restorative justice in recent decades It has been considered by criminal jurists in the religion of Islam, especially in the field of crimes against individuals. In fact, the religion of Islam has institutionalized a combination of both the "criminal justice" system of punishment and deterrence and the "restorative justice" system. Considering the lexical and idiomatic meanings of "hadd", the principles and rules governing "hadd punishments", as well as the measures of "punishment" that have been considered in the field of these crimes, it becomes clear that the holy shari'a of Islam in the field Crimes against "religion", "generation", "security" and "reason" have adopted the methods of "crime-oriented" and "criminal" In fact, the attention of Islamic law in these crimes is to preserve the "religion", "intellect", "generation" and "security" of human beings. Of course, in case of harm to a certain person or persons, in addition to committing any of the above crimes, Islamic law has also paid attention to the private rights of individuals. For example, in the case of "combatant", if a person is injured, killed or injured while committing this crime, his "compensation of private right" will be necessary.

In these crimes, the imposition of severe corporal punishments such as the execution of an "apostate", the stoning of an "adulterer", the execution or crucifixion of a "warrior", the whipping of a "drunkard", failure to "reduce" or "delay" the punishment And the application of "amnesty", except in limited cases, the minority of the role of the "victim" - if any - the recommendation to "make public the

execution of punishments", all indicate the law's attention to "deterrence" and "punishment" of the crime. Therefore, in the field of the mentioned crimes, Islamic criminal policy is more compatible with the theories of "punishment" and "deterrence". However, by applying the methods and measures of the "punisher", he has not neglected the issue of correction and purification of the offender, and in case of "repentance" of the offender before the arrest and testimony of witnesses, the ruler does not have the right to execute his punishment and in this area of crime can be provided for the emergence of "restorative justice".

In the field of crimes against "property", in addition to restoring order and security, special attention has been paid to the issue of "compensation" for the damage done to the victim, and although in the case of "theft", if there are special conditions, the possibility of amputation of the thief's hand and in case of repetition, amputation of the left leg and even his execution is foreseen. However, if the thief provides action or consent to the return of his property before the plaintiff's complaint, the penalty of "theft" will no longer be legally abolished. Of course, the Islamic ruler can take action to restore public order against the thief's "discretionary correction", such as imprisoning him. Therefore, in this field, while accepting the theories of "punishment" and "deterrence", the method of "restorative justice" has been considered by Islamic law, but in terms of the effect of "theft" in disrupting public order and security, the field of implementation of Restorative justice is limited. This means that if the thief does not act quickly to obtain the plaintiff's consent and the lost property complaint enters the prosecution stage, even with the loss of the lost property, it is not possible for the "hadd" punishment to fall.

Thus, the dynamism of the Islamic penal system, which depends on the coordination of this system with the course of social developments according to the conditions and requirements of time and place, is in line with Islamic law and in order to achieve the goals of Islamic criminal jurisprudence. Adapted from Islamic criminal jurisprudence, which in the best way, has established the emergence and formation of the implementation of "restorative justice" programs. It has taken steps in the direction of "De judicialization and punishment" and has paved the way for the theory of "restorative justice" in the field of fines.

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