



The Principle of Proportionality of Crime and Punishment in International Documents

Hadi Dachak

PhD Candidate in Criminal and Criminology, Islamic Azad University, Central Tehran Branch, Iran

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Abstract

Observance of the principle of proportionality is one of the basic requirements of fairness and justice in all matters, including the determination of punishment and its purpose is to match the amount of punishment with the amount of guilt of the perpetrator. This principle is a logical basis for punishment and the factor of its legitimacy. Of course, it should be noted that the proportionality of crime and punishment is a fluid and relative matter, the regulation of which according to the principles of most criminal schools is a function of the ideology and values that govern societies. According to the principle of proportionality, justice and fairness require that the offender be entitled only to the punishment of the crime committed which is based on the severity of the crime and the situation of the victim, the situation of the offender, the circumstances of the crime, etc., the case and the action take place. In other words, there must be coordination and balance between crime and punishment in order to ensure justice. Although given the relative meaning of the principle of proportionality, it does not seem to be possible for punishment to be equal to a crime, in other words, it is true. Proportion between crime and punishment does not mean a precise mathematical proportion, but a proper ratio between crime and punishment can be established, although it does not lead to complete equality. International criminal law oversees the duty to protect international public order and to guarantee international justice. For its realization, the observance of the principle of proportionality is undoubtedly evident. As in the International Criminal Court, the determination of punishment is based on the achievements of criminology in relation to the motives of crimes and the classification of offenders and the personality of the offender, which is reflected in Article 145 of the Rules of Procedure and the evidence of the Court.

Keywords: *Principle of Proportionality; Human Dignity; Punishment; Utilitarianism*

Introduction

The theory of proportionality seeks to provide everyone with what belongs to his action and this is in the direction of justice. In fact, the question is whether any punishment with any degree of crime is justified? It seems that in determining whether the punishment is commensurate with the crime, various indicators should be considered, without a doubt one of them is the cultural indicator. Naturally, it is based on this index that it can be seen that the punishment for crimes varies in different societies. In

addition, the principle of proportionality between crime and punishment may not have a fixed standard and concept over time, which can also be attributed to changes in the culture and values that govern societies, and that is why we consider the principle of proportionality to be fluid and relative.

From about the 18th century onwards, thinkers gradually developed criteria for observing and measuring the principle of proportionality between crime and punishment. In 1748, for example, Montesquieu said, "Punishment commensurate with crime is that it is effective in preventing crime, depending on the degree of civilization and culture of each country." Or Bentham and Cesar Baccaria have proposed a social theory that the harm resulting from punishment should be greater than the crime in order to establish a balance between crime and punishment.

In the early twentieth century, Mark Ansel introduced the modern school of social defense, arguing that punishment was proportionate to the character of the accused and consistent with her. In this way, with respect to the freedom of the individual and the human status of the offender, through scientific research, the personality of the perpetrators should be identified and in order to defend their bite, a punishment that protects the community and the individual should be determined. There is another theory about the proportionality of crime and punishment, and that is that punishment is proportionate to the crime when it can return the annoying feelings of the people of the society and to the original state of equilibrium. The sense of justice depends on the level of social development of the people in that society. As can be seen, it seems difficult to provide a single, definitive and practical criterion for the proportionality of crime and punishment. This article is presented in two parts, each with three topics.

Part One: Definitions, Principles and Oaths

Topic 1: Definition and Concept of the Principle of Proportionality of Crime and Punishment

Proportion in the word means (to be related to each other is to have an occasion, to exist, and to have a relationship between two or two things and the equality of two relations). The term proportionality means maintaining a proper ratio between two elements. Proportion in the field of punishment and crime is based on the principle that justice should be given to everyone for what belongs to her and deserves it, and in this sense it means entitlement. When it comes to the proportionality of crime and punishment, it means that there must be a balance between the two. In the eyes of the citizens of a society, fair punishment means that the severity of punishment is commensurate with the crimes committed. Following such an attitude, the opposition of deviation from proportionality and the need to defend society is obvious, although such deviation may ultimately be justified.

In trying to determine and apply just punishment for crimes, the phrase (punishment should be appropriate to the crime) is the dominant and universal thinking. Since it is impossible to mathematically calculate the value of a crime in terms of punishment, proportion can best be a measure of the values associated with the harm caused by the crime and the values of the pain and suffering imposed by the punishment.

There is no immediately identifiable common criterion between the severity of crimes and the severity of punishments. Therefore, it is possible to measure the compatibility of the two with each other to the extent that it is graded based on the values set by the society or the criminal justice system for them. In the strict sense of the word, self-crime and punishment are not compared to each other, but it is their values that are compared to each other.

Therefore, striving for proportionality is possible only after placing the spectrum of crimes and punishments on the basis of criteria and scale of social values which can then be compared to crimes and punishments based on these values. Thus, it is clear that a correct understanding of the concept of

proportionality depends on the conclusion that the principle of proportionality is a reflection of the moral thoughts, values and hypotheses of society.

Because of this, the proportion of crime and punishment may vary from community to community and that is due to the different thoughts and values that govern these societies. In other words, the concept of proportionality in relation (proportionality of crime and punishment) has varied according to spatial and temporal situations. Punishment may be considered disproportionate at one time and place and disproportionate at another time and place. Therefore, the concept of proportionality is primarily a relative concept and has different meanings according to different cultures, times and places. But there is no doubt that it is legal and moral to equate punishment with crime.

Due to the rationality of this concept and principle, it can be considered as a common principle in all legal systems of the world. And for this reason, the principle of proportionality of crime and punishment has been accepted at the international level. As a mandatory and enforceable rule, special attention has been paid to paragraph 1 of Article 76, Articles 78 and 83 of the Statute of the International Criminal Court, and Article 145 of the Rules of Procedure and Evidence of the Court. In defining the principle of proportionality of crime and punishment in international criminal law, it can be said that this principle is: (A relationship between crime and international punishment that should be characterized by effectiveness and usefulness based on the type and extent of harm. The situation of the victim and the offender and the circumstances of the crime and the type of sense of justice in the international community and the country where the crime took place to establish the lost psychological balance of humanity and deterrence based on universal values between them. What is clear is that the main reason for the prohibition of disproportionate punishments in the international system is human rights and the prohibition of the use of human beings as tools and respect for their inherent dignity, and of course, this is also the case in domestic legal systems.

Topic 2: Principles of Proportionality of Crime and Punishment

In expressing the principles of proportionality of crime and punishment, several views and theories have been expressed, but all of them emphasize the principle of proportionality. And what is at stake is the emphasis on the principle of proportionality, in other words, the extent to which punishment should be commensurate with the severity of the crimes has led to controversy. In the meantime, the two legal perspectives of criminalism and utilitarianism are of special importance, which we will explain.

A) Proportion based on the criminal perspective:

According to this view, the offender should be punished for her act because if she is not punished, she will commit a criminal act again. Others are encouraged to commit a crime (deterrent approach). So based on this view Punishment and deterrence can be considered the oldest and simplest response to crime. In fact, the Caesarist approach calls for the criminal system to be equal or commensurate with crime and punishment, relying on what criminals deserve. In other words, the offender owes a crime to her community and punishment is the atonement he must pay for this moral religion. As a result, a balance between crime and punishment is inevitable.

The proportionality of the criminal is manifested in two ways, first, the deterministic criminalism, which determines the punishment as accurately as possible according to the gravity of the crime. In other words, the definitional punishment according to which the principles of entitlement justice should define and determine as accurately as possible the severity of the punishment.

And criminals should be punished only to the extent deserved, no more and no less. This theory, as expressed by its proponents, allow crime control, budgeting for this, or other non-discriminatory values to affect scale.

It gives general severity of punishment and the right to choose between different punishments - for which there is an assumption of equality in severity, but also emphasizes the sequential proportionality of punishments imposed on different offenders. Second - restrictive criminalism, this theory to all traditional purposes of punishment (such as social deterrence, threatening warnings, etc.). It allows role-playing but places restrictions on the person who may be punished (only those who can be blamed) and now they can be severely punished. This theory places particular emphasis on avoiding punishments that are unjustly severe.

B) Fitness based on Utilitarianism:

The tradition of utilitarianism in its present form began with Jeremy Bentham, who defends utility originality in her book (Introduction to the Principles of Ethics and Legislation). She says (the aim of the legislator should be to provide maximum happiness to the people and then she adds that because punishment is accompanied by pain, it is inherently evil and should only be implemented when it prevents greater harm). Utilitarian proportionality theory is more about the future, and proportionality is measured in this theory with the purpose of determining future punishment Goals such as deterrence, rehabilitation, and respect for society, in other words, in this view, they are not intended to be punished. That every person should be punished as she deserves, but a punishment should be applied to prevent future crimes. The school of utilitarianism considers punishment as evil and recommends that it be used as much as possible, and also recommends that a penal system should differentiate between crimes according to the degree of damage they cause. In other words, in this basis, it can be said that the school of utilitarianism believes in the principle of proportionality according to the result of crime and tries to create a table of punishments that is similar to the table designed based on the theory of entitlement. Severe punishment should be in return for a severe crime so that the perpetrator chooses a lesser crime to commit. In terms of deterrence, punishment against the offender informs and educates the people and causes that the offender gradually acquired desirable social values. In this view, the balance between the severity of the crime and the severity of the punishment is also important in order to maintain public confidence in the criminal justice system.

Utilitarian Fit Has Two Aspects:

The first aspect is the appropriateness of the purpose and addresses the issue of whether the cost of pursuing the goals of a criminal conviction is heavier than the benefits derived from it. (For both society and the offender) and another aspect of utilitarian fit is the fit of tools that evaluate lower-cost alternative punishments to achieve the same benefits. It has been explained among the tools that have an equal effect to achieve the goal, less expensive and less troublesome tools are preferred. The two theories of punishment and utilitarianism differ mainly in the degree of emphasis on the principle of proportionality. In other words, the question of the extent to which the punishment should be commensurate with the severity of the crimes has led to controversy. But both emphasize the principle of proportionality of crime and punishment.

Topic 3: Types of Proportionality of Crime and Punishment

It is desired to observe the principle of proportionality in both legislative and judicial stages.

A) Proportion in the legislative Stage:

The legislature may not impose a penalty for a criminal act which is the subject of the conditions under which criminalization is permissible. This prohibition refers to both the type of punishment and the amount of punishment, in other words, the legislator cannot determine any kind of punishment for any

criminal act. Also, the legislature is not allowed to impose punishment on the amount that has determined (for example, it cannot impose life imprisonment for any crime). This proportionality is interpreted as legal proportionality or proportionality in legislative criminal policy.

Now, in order to observe the proportionality, the legislator must pay attention to the severity and weakness of the criminal act and the degree of guilt of the accused and the time and place conditions, the history of the perpetrator and other effective factors.

In short, the legislator, when criminalizing an act or omission, must be aware of both the proportionality of the punishment with that crime and the proportionality of the punishment with the offender. The first case (proportionality of punishment with crime) arises from the concepts of entitlement and punishment, which means that punishment requires that everyone be punished according to the severity of her crime. And in the second case (proportionality of punishment with the offender), the punishment must not only be proportionate to the crime, but also proportional to the character of the offender. In any case, it seems that the legislator's lack of attention to the rules of proportionality of crime and punishment in drafting its laws has reduced the sense of trust and security among citizens. As a result, we will see the loss of deterrence of punishments and will not lead to a favorable legislative criminal policy.

B) Proportion in the Judicial Stage:

The problem at this stage is that when the legislature sets a penalty for a crime between the minimum and maximum severity: Is the judge limited in determining the punishment or should she observe the proportionality in determining the amount of punishment according to the principle of individualization? Or in cases where the legislature allows the judge to determine a sentence of pardon, if there are appropriate conditions, can the judge not show mercy or is she obliged to show mercy? The principle of individualization means paying attention to the personality of the perpetrator when determining the punishment. Definitely between someone who commits theft out of greed One must distinguish between one who steals from hunger and compulsion. It is certainly not possible to look at the one who has to kill a chicken to satisfy his hunger with the one who steals gold and jewelry with one eye. This is where proportionality comes into play in the judiciary.

In fact, the principle of proportionality of punishment with the crime is only one of the purposes of punishment, which is the necessity of entitlement of criminals for their actions.

It also provides objectively and impersonally. Punishment must take on a personal dimension in order to be more fully entitled and to meet the other utilitarian purposes of punishment. That is, observing the principle of proportionality of punishment with the offender and paying attention to the personality of the perpetrator.

In other words, the judge must judge based on a combination of available events. This means that even if there are some similarities in the events related to different lawsuits, it cannot be said that there will be a single procedure in determining the punishment. So there will be important indicators which should be taken into account in determining the appropriate punishment.

The statements of the prosecutor, the statements of the accused, the expression of sincere remorse of the accused, the insolence of the accused in court, etc. can all be effective in determining the punishment. In any case, the court must try to tailor the punishment to the circumstances and the nature of the crime. In fact, this is the art of the judge. To create a kind of coordination between different components, determining punishment is more of an art than a science. In order to achieve proportionality in the judicial stage, the legislator must provide the judicial authority with various levers (such as determining the minimum and maximum punishment, the qualities of mitigation).

Of course, judges must have the freedom to exercise their judicial discretion so that they can decide on a case-by-case basis. Freedom to choose between different options means freedom to decide policy, not freedom to respond to an unusual combination of events. However, the court must decide on the punishment that seems appropriate for the accused. And determine a punishment that prevents her from committing the crime as much as possible.

Part Two: The Principle of Proportionality of Crime and Punishment in International Documents

Topic 1: The Principle of Proportionality Authorized in International Documents:

The principle of proportionality of crime and punishment is specified in Articles 76 and 78 of the Statute and Article 145 of the Rules of Procedure of the International Criminal Court, emphasizing the severity, importance and crime of paying attention to the personal circumstances of the convicted person. Paragraph 1 of Article 76 states (... in case of conviction of the accused, the primary branch (appropriate punishment) that should be imposed on the convict, to achieve this goal, it will consider the evidence presented during the trial and related to the punishment)

Article 78: Determination of Punishment:

- 1- When determining the punishment, the court is obliged to consider various factors such as (importance and severity of the crime) as well as (the circumstances of the convicted person) in accordance with (rules of procedure and evidence).
- 2- In case of determining the punishment of imprisonment, the court is obliged to calculate it and deduct it from the period of imprisonment if the convicted person is detained for a period of time according to the order of that authority. The court may also deduct from the period of detention any period for which the convicted person has been detained in a manner other than a court order in connection with the commission of an act related to that crime.
3. In cases where it has been established that the convict has committed more than one crime, the court is obliged to determine a separate punishment for each of the mentioned crimes and for all of them a general punishment that indicates the total length of imprisonment. This general period shall not be less than the maximum term of imprisonment for each of the offenses and more than thirty years of imprisonment or life imprisonment in accordance with part (b) of paragraph 1 of Article 77.

Article 145: Procedure and Evidence (Determination of Punishment)

1. The Court in determining the punishment pursuant to paragraph 1, Article 78 (Articles of Association):
 - (A) Consider that the totality of the imprisonment and fine imposed on a case-by-case basis in accordance with Article 77 should reflect the guilt of the convicted person.
 - B) Assess all relevant factors, including mitigating and aggravating factors, and examine the circumstances of the convicted person and the crime.
 - C) In addition to the factors mentioned in paragraph 1, Article 78 [Articles of Association], including the extent of the damage, especially the damage to the victims and their families, the nature of the illegal behavior and the tools used in the commission of the crime take into account the degree of

participation of the convicted person, the degree of intent, circumstances and circumstances [affecting] the behavior, time and place, and age, educational, social and economic conditions of the convicted person.

2. In addition to the above factors, the Court shall consider [the following] as appropriate

A) Abbreviations qualities such as:

1) Conditions to reduce the reasons for the exemption from criminal liability, such as serious analysis of mental ability or reluctance

(2) The convicted person's conduct after the act, including any attempt to compensate the victims and any cooperation with the Court.

B) As aggravated qualities:

1) Any previous criminal conviction relating to offenses within the jurisdiction of the Court or of a similar nature;

2) Abuse of official authority or power

3) Committing a crime where the victim is specifically defenseless.

4) Committing a crime with special cruelty or where there are multiple victims.

5) Committing a crime with any discriminatory motive in the fields mentioned in paragraph 3, Article 21 [Articles of Association]

6) Other qualities, although not enumerated above, are similar in nature to the above. Imprisonment is imposed when the convicted person is justified by the gravity of the crime and the special circumstances in spite of one or more aggravated qualities.

Topic 2: International instruments related to the principle of proportionality in the concept of fair trial when it comes to the proportionality between crime and punishment, the result is a (fair trial). In other words, the principle of proportionality is one of the requirements and components of fairness.

So when proportionality is not observed, the result is a lack of a fair trial. So both in international documents and laws and in domestic law wherever (fair trial) is mentioned, one of its components will be observance (the principle of proportionality between the offense of punishment).

Among the international documents that mention this important:

International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966: Article 14 1 1 of the present Covenant provides:

1)"Everyone has the right to a fair and public hearing by an independent and impartial tribunal established by law.

2) European Convention on Human Rights, adopted on November 4, 1950.

Article 6 of the Convention provides: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of her rights and obligations and of any criminal charge against her."

3) The Dakar Declaration and Recommendations adopted by the African Commission on Human Rights and the People 1981:

The preamble to the declaration states that the right to a fair trial is a fundamental right and that failure to do so violates other human rights.

4) The Arab Charter of Human Rights, approved by the Council of the Union of Arab States in 2004.

Article 13 of the Charter states: "Everyone has the right to a fair and independent hearing within a competent, independent and impartial tribunal for the purpose of considering any criminal charges against him or of any decision concerning his rights or obligations. »

5) The American Commission on Human Rights has declared: "The right to a (fair) trial is one of the main pillars of a democratic society ..."

According to various international and regional documents, it can be argued that:

The right to a fair trial, one of the components of which is the principle of proportionality and the principle of impartiality, is part of customary international law."Therefore, even countries that have not acceded to these treaties are required to observe this right and exercise it in their judicial systems."

Topic 3: International instruments related to the principle of proportionality of crime and punishment in the sense of prohibition of cruel punishment and prohibition of torture

The principle of proportionality of crime and punishment is enshrined in international instruments, as well as through the prohibition of cruel and inhuman punishments, including:

Article 5 of the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948:

(No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment)

Article 7 -United Nations International Covenant on Civil and Political Rights, adopted on 26 December 1966:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one should be subjected to medical or scientific experiments without their free consent).

Article 3 - European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on November 4, 1950 - Rome

(No one should be tortured or subjected to inhuman or degrading treatment or punishment)

Article 5: African Charter on Human and Peoples' Rights, adopted in 1981. This article recognizes the right to freedom from inhuman, degrading or cruel, inhuman or degrading treatment or punishment

Introduction: United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (... Pursuant to Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, regarding the prohibition of torture or other cruel, inhuman or degrading treatment or punishment of individuals, as well as

Article 5 Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948 (No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment)

Article 20- Islamic Declaration of Human Rights, approved on August 5, 1990:

(Arrest or restriction of liberty or deportation, or punishment of any human being is not permissible except in accordance with the Shari'a)

Part 2 of the American Convention on Human Rights, adopted November 22, 1969:

[The right to humane treatment and the prohibition of torture and inhuman, degrading and cruel treatment are emphasized)

Conclusion

From aforementioned discussion, it can be said that severe and harsh punishments are disproportionate to the crime committed because it is a kind of instrumental use of the offender to achieve a goal. It is contrary to the inherent dignity and honor of human beings, and human beings have the right to be protected from such behaviors and punishments by observing the principle of proportionality of crime and punishment, which in fact means denying the end of human beings. According to the principle of proportionality of crime and punishment, claims related to (public protection and social benefit) through intimidation and deprivation of the power of crime or compassionate and paternalistic claims related to the correction of the offender. It can not be used to increase the amount of punishment that is beyond proportion.

In order to apply the principle of proportionality of the crime and punishment, criteria such as the type and extent of the damage, the type of crime committed, its severity and weakness, the personality characteristics of the offender and the guilt of the victim must be considered. The quality and manner of observing the principle of proportionality of crime and punishment in the subject law of a country can be a criterion for measuring the efficiency, central justice and development of that legal system. Similarly, at the international level, the observance of this principle indicates the tendency of the international community to preserve human dignity and the determination of countries to achieve justice and fairness. Of course, it should be noted that the principle of proportionality of crime and punishment means creating a balance between them to maintain order and security in society. As well as the rights of the offender, therefore, it is not possible to commit unrestricted criminalizations under the pretext of society, and the principle of proportionality of the crime and punishments cannot be abandoned under the pretext of punishment. In short, since the purpose of imposing punishment on criminals is to correct, educate, learn lessons, avoid committing and repeating crimes, and bring them back to society.

And this important and humane goal will be achieved if the punishments are determined and applied according to the personality of the offender, the type of crime, the severity of the crime, the extent of the damage, the ugliness of the act, deterrence, justice and human dignity.

In fact, without observing the principle of proportionality of crime and punishment, it is unlikely to achieve true justice. On the other hand, since the principle of proportionality is a reflection of social feelings and moral values, it is constantly changing. And it is not objective and fixed, but it is obvious that proportion should be considered as an ideal and not a completely achievable goal. With careful consideration of international documents and laws, it seems that the tendency of the international community is to emphasize the preservation of human dignity and values and to maintain the security and good of the international community. That is, the imposition of punishments commensurate with the consideration of human dignity and non-recourse to harsh punishments and the application of any kind of torture and the observance of moral principles and fairness through a fair and just trial.

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