



Studying the Qur'anic Foundations of the Theory of Instrumental View to Specific Punishments (Hudood) from the Viewpoint of Islamic Jurisprudence

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Abstract

Certain punishments, which are called Hudood in the interpretations of Muslim jurists, are always faced with the debate that their legislation by the Holy Lawgiver is the main goal or they play the role of a tool. This means that these punishments are imposed by the criminal lawmaker as a "instrument" to pursue criminal goals. Muslim jurisprudential thinkers have always been in the two groups of supporters and opponents of "Instrumental view to punishments", and this classification still exists today. In order to study this theory, this research was organized by adopting a independent research with descriptive analytical method and achieved the following results. From the point of view of Islamic jurisprudence, a large part of "certain punishments" are "instruments" to achive the society and the government to a greater goal. The proof of this theory has several reasons, such as, the Qur'anic foundations. Analytic study of the criminal verses of the Quran strengthened the belief that the Islamic legislative system is completely a purposeful system and by using wisdom and expediency in the way of legislation, it pursues high goals and to achieve those goals laws are made. We can infer purposefulness of Islamic criminal laws sometimes from the lens of "Being Optional" and sometimes from the appearances(Thavaher) in criminal verses.

Keywords: *Certain Punishments (Hudood), Purposefulness; Optionality; Tariqa (Instrumental View to Punishments); Quranic Principles; Islamic Jurisprudence*

Introduction

Today, among Muslim legal scholars in the field of Islamic criminal jurisprudence, this discussion is strongly discussed that the punishments found in the first-hand sources of jurisprudence are not all "objective" and from the point of view of the Shariah legislator, some of them, if not all, have "methodology" and play the role of a tool. In order to achieve higher goals, it plays in the field of social management. Perhaps the rapid changes in the emergence of social requirements and the proliferation of criminal symbols on the one hand, and the ineffectiveness of insisting on the doctrine of originality for penal

titles on the other hand, among other factors, may focus on the implementation of severe physical punishments to a large extent in the face of inflation control. to see a failed penal system and by exaggerating this issue, turn the tendency towards the "method" doctrine of penal systems into an undeniable necessity in the field of legislation.

However, considering all the influencing factors, there is no doubt that the number of supporters of the view of punishments as a tool is gradually increasing. Especially among jurists and legal scholars of Islamic criminal jurisprudence, this theory finds more supporters. Recent research approaches have strengthened the belief that the Islamic penal system looks at these laws as a way to achieve the lofty goals of constructive social management and the goal of legislation is to achieve a healthy, justice-oriented, security-oriented, law-oriented society with minimal The crime rate is based on religion. Therefore, the title of the punishments does not shape the basic goal of the Islamic penal policy maker. For this purpose, we found it necessary to independently explore the Qur'anic foundations of this issue once again to see if they and the rules governing scientific interpretations can be used in this regard.

The Holy Qur'an is the first source for their deep thinking, which they look for the original source to receive its experts. In this regard, when referring to the Holy Quran, we come across verses that provide the possibility of using the "method" of certain punishments, and therefore, we will continue to examine such verses.

Definition of Method

The term "method" is one of the most widely used terms that is discussed in criminal law circles today, and in the following we will examine it from a lexical and idiom point of view.

In Words

In the Persian language, although the word "Tariqit" is not found, but the word tariq means "way and method, way and custom... tariqat means walking on the path to the truth by refining the self" (Anuri, 2011, vol.5), pp. 4881 and 4882). And also "style, custom, face, syntax, norm" (Dekhoda, 1355, vol. 33, p. 236) or in the meaning of "mustache (Omid, 1368, p. 1399)" is found in many places. It is not unlikely to consider "tariqit" as an infinitive for "way", which evokes the meaning of having a way, being directional, having direction and being methodical. The beauty of this application is that the above meanings for "way" get a clearer meaning; And in fact, it conveys the meaning of being a tool and a means for a person to reach another destination, which is his main goal. But if we consider "way" as an adjective for "way", we get a different meaning. The difference is that there is no longer any talk of being a tool and means; Rather, it pays more attention to the way and method of using them and shows more features and characteristics that are directly related to the way of use.

This problem is not limited to the Persian language in connection with the concept of "Tariqit" and is clearly seen in the Arabic language as well. From repeated follow-ups, we found out that "Tariqit" is not found in Arabic vocabulary sources in the same way, and what was often seen is the word "Tariq" with different structures in terms of movements and several conjugations. In the Book of Al-Muhait (Ibn Abbad, 1414 AH, Vol. 8, p. 330)¹, took "Sobol" in the meaning of "way" and in two ways; He brought male and female.

¹ "-Al-Sabbail: Al-Tariq, it is female and it is mentioned."

Contrary to her, Khalil bin Ahmad Farahidi (Khalil, 1410 AH, Vol. 5, p. 97)², introduced "way" only as a female and believes that "way" is referred to any spot or line on the ground, a type of cloth or anything that is attached to another. This is while Sahib al-Sahah (Johari, vol. 2, p. 474 and vol. 3, p. 1139)³ The meaning of "way" for other words like; He knows Mursad, Sarat, Sarat and Zarat and (Pishin, Vol. 4, p. 1513)⁴ He believes that its sum comes to "atreqa wa taroq". From the point of view of expressing gender in the structure, he also agrees with the author of Kitab al-Muhait and whether it is feminine or masculine (Ibn Abbad, 1414, vol. 5, p. 1724)⁵ (accepts being for this word. But Ragheb Isfahani (Ragheb, 1417 vol.5, p.)518⁶ He clarifies that the meaning of "way" is not any way or, according to the words of the experts, every "moustache"; Rather, it is said to be a way and path of a mustache that is walked by "feet" and its plural is "taroq."

In another place (Hamiri, 1420 AH, vol. 7, p. 4091)⁷, introduces "Tariq" directly as "mustache" and its plural "Torq" and considers it plural. Ibn Manzoor in "Languages of the Arabs" (Ibn Manzoor, 1414 AH, vol. 10, p. 220)⁸ Along with "Al-Muhait" in the feminine and masculine forms of the construction of the word tariq, he defines it as "mustache" and explains that this word can be described with two forms of the masculine adjective (Tariq al-Azam) and the feminine adjective (Tariq al-Azmi) and also It is closed with two different constructions "Atreqa" and "Torq". Among these, Fakhreddin Tarihi (Tarihi, 1416 AH, vol.5, 250)⁹ He is the only one who, although "tariq" means "moustache", but unlike others, he believes that the masculine nature of this word is not common among the entire Arabic-speaking community, and this issue is mostly discussed among the people of Hijaz.

However, in fact, the spirit of all words in ancient and modern Arabic language is that the way with all its features means the way. Therefore, if we extract the lexical concept of "Tariqit" from these meanings, we have to take refuge in its infinitive meaning and use the same Persian meaning with the same explanation as above.

In the Term

From the point of view of criminal law, it is a means to the goal and a means to reach the main goal. In the laws, sometimes it recommends a certain course of action, even if it does not reach the destination; The evidence that is the way of the judge is like this, that is, the testimony of two witnesses is a valid proof, even if the evidence is not certain, the judge must proceed in the same way. In such cases, it is said that the expression has subjectivity, not method. Qasm has a subject, not a method. But the tape recorder has a method if it is proof (Jaafari Langroudi, 2011, p. 2435). Because: "The way is the means to reach the destination, so if someone reaches the destination by going astray, there is no problem and it is not obligatory to reach the destination by a certain way. In the terminology, this word is used in a case where a legal act has been carried out according to the intention and purpose of the legislator, but it is not compatible with some of the appearances of a certain law. It is legal, and this has been interpreted as the principle of tariqat" (Pishin 1384, p. 289).

² "And the female path, and all my land, my class, my dress, or something that is attached to each other, is a path".

³ "Al-Masrad: Al-Tariq... Al-Sirrat and Al-Sirrat and Al-Zirrat: The Path."

⁴ "And al-Jama' is a path and a path".

⁵ "Al-Sabbayil: Al-Tariq, Y'unth and Y-Zakkar"

⁶ " Al-tārīq: the path that strikes with the legs, that is, it strikes... the plural of al-tārīq".

⁷ "Al-Tariq": Al-Sabil, and Al-Jama': Toroq, and the plural of Al-Jama': Toroqat".

⁸ "Al-Tariq: Al-Sabil, remembrance and femininity; It says: Al-Tariq Al-Azam and Al-Tariq Al-Uzmi, and as well as Al-Sabeel, and Al-Jam Al-Tarqa and Tarruq".

⁹ "Al-Tariq: Al-Sabil is masculine in the language of Al-Hijaz, and the plural of tarqas are two-fold, and the plural of tarqas are tarqat." And the length of the gathering of the roads on the language of Al-Tirqa".

Some others (Aghababai, 2013, vol. 8, p. 122) have used the explanation of the concept of method in the proofs of the lawsuit, including the confession under the title that the judge in criminal cases is not an impartial observer and as a representative of the society, he should seek to "discover the truth". We read the same meaning elsewhere (Ashuri and Mohadi, 1395 p. 96); and the author states that from the point of view of Islamic jurisprudence, the mentioned method has tariqa. This means that the Islamic legislator was only looking for the "discovery of the truth" in the process of investigation and therefore does not consider non-compliance with this method to invalidate or violate the proceedings. When "discovering the truth" is the main goal, it is permissible to use any means to achieve it. And because "proof, as a method to the truth, is merely a matter of proof" (Shams Natri, 2015, p. 35), the concept of "method" in this criminal procedure and the whole of criminal law indicates that it is a tool and has no characteristics. Both in handling methods and in the principle of criminal titles .

Therefore, we believe that from the point of view of criminal law, the main understanding of "method" is only focused on the function and role, and it is used to achieve a higher goal. According to some researchers (Seyd Abbas Mousavi,...), "Tariqit" is only an intermediary in proof, not proof. It means that the role of "methodology" is only discovery and nothing more. Punishment in this assumption is a set of tools that the holy law has established to achieve a greater goal and wants to cover the valuable goals of the society by this means. Therefore, when "method" is mentioned in penal jurisprudence, without a doubt, the same meaning is conveyed to the mind that most or some of the punishments proposed in jurisprudence are not the main intention; Rather, it is designed to fulfill a higher purpose.

So far, we have come to the conclusion about the definition of "Tariqit" that in Islamic criminal jurisprudence, although the practical meaning of this term is understandable, the void of a clear definition is still felt. Finally, our opinion is that in penal jurisprudence, the subject of "methodology" is that: "The holy Shariah considers the set of penal titles as tools, devices and mechanisms so that it can pursue a higher goal through them". This amount is enough for us to understand the definition correctly, and we leave more details elsewhere.

Flexibility in Imposing Criminal Regulations

It seems that in many cases, the criminal law of Islam has established criminal responses in such a way that it has the most flexibility in facing criminal events, and the main profile of such laws can be seen to some extent in the Quranic verses. In the following, we refer to examples of laws that are highly flexible based on Quranic texts. The optional nature of many of the punishments in the Holy Qur'an strengthens the option of their being a way rather than being the main goal.

Optionality of the Punishment for Wrongful Death

The first example of the punishments that are more leniently designed from the point of view of the Holy Quran is the punishment of wrongful death. At first, it may seem that being optional does not mean the "method" of punishments according to the Holy Qur'an, and it cannot be linked to the desired point of view. There is no doubt that the territory and number of punishments are clearly defined in Kheer, and the ruling discourse in the formulation of Islamic penal policy is that the main attention is given to the functions and goals that correspond to them and in the direction of achieving social justice in all periods of history, and Naming several criminal titles against one crime does not limit the meaning of the originality of these titles themselves. In addition to that, the other function of the central goal and leaving the hand of legislation, defends the effectiveness of punishments well in all eras. This issue clearly strengthens the perception that there is a direct relationship between the optionality of punishments and their "methodology". With this description, in the following we will refer to the verse or verses that such foundations can be obtained from their appearances.

The Ninety-Second Verse of Surah Nisa

Among the verses that apparently indicate the optionality and then the "method" of punishments, this is the ninety-second verse of Surah Al-Nisa, which states the sentence of wrongful killing. From the point of view of Islamic criminal law, this murder does not punish the murderer with retribution and imprisonment; Rather, from the very beginning, he goes to other examples of punishments that have nothing to do with the human body and soul. similar penalties; Freeing the slaves, paying ransom and blood price for the survivors of the victim, even if the killer does not have the necessary power for any of them, it is time for forgiveness and self-improvement, which is more of a moral and educational aspect than a legal one.

«وَمَا كَانَ لِمُؤْمِنٍ أَنْ يَقْتُلَ مُؤْمِنًا إِلَّا خَطَأً وَمَنْ قَتَلَ مُؤْمِنًا خَطَأً فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ وَدِيَةٌ مُسَلَّمَةٌ إِلَىٰ أَهْلِهِ إِلَّا أَنْ يَصَدَّقُوا فَإِنْ كَانِ مِنْ قَوْمٍ عَدُوٍّ لَكُمْ وَهُوَ مُؤْمِنٌ فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ وَإِنْ كَانَ مِنْ قَوْمٍ بَيْنَكُمْ وَبَيْنَهُمْ مِيثَاقٌ فَدِيَةٌ مُسَلَّمَةٌ إِلَىٰ أَهْلِهِ وَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ فَمَنْ لَمْ يَجِدْ فَصِيَامًا شَهْرَيْنِ مُتَتَابِعَيْنِ تَوْبَةً مِنَ اللَّهِ وَكَانَ اللَّهُ عَلِيمًا حَكِيمًا»

No believer should kill another believer except by mistake. And anyone who kills a believer by mistake must free a believer's servant and hand over his blood price to his family, unless they forgive the blood price. And if the victim is a believer and from a nation that is your enemy, he should free only a believing slave, and if he is from a nation that made a pact with you, then the blood price should be paid to his family, and he should free a believing slave, and whoever does not find a slave To repent, fast for two consecutive months. And God is All-Knowing and All-Wise.¹⁰

A large number of commentators (Ibn Arabi, undated, vol. 1, p. 470; Jisas, 1405 AH, vol. 3, pp. 312 and 231; Tabarsi Kiaharsi, 1405 AH, vol. 2, 497; Sabzevari, 1419 AH, p. 98; Faiz Kashani, 1418 AH, vol. 1, p. 230; Tayyab, 1378, Vol. 4, p. 168) and Faqehan (Fazel Moqdad, 1425 AH, Vol. 2, p. 367; Mohagheq Ardabili, no date, p. 677; from the same, 1430 AH, vol. 11, p. 506; Ibn Modud Mosali, 1426 AH, vol. 5, p. 57; Ibn Najim Hanafi, no date, Vol. 8, p. 375; Al-Shibani, 1403 AH, Vol. 3, p. 350; Ibn Rushd, 1988, Vol. 3, p. 205; Al-Bohoti, Vol. 1, p. 646; from the same, Vol. 3, p. 299) Muslim considered the subject of this verse to be wrongful killing and who To understand from the statement of the verse itself the specified type of punishment other than that. The clarity of this issue from the understanding of the above verse is so telling that even Shahid (Shahid Thani, 1413 AH, Vol. 15, p. 504) claims that there is no opposition among Muslim thinkers and they all agree on this point.

Finally, it is appropriate to state that all the options mentioned in the verse show that the criminal response to intentional homicide is voluntary and has the necessary flexibility. This means that from the legislator to the executive and the condemned, each of them has the right to choose one of the available options (Diya) according to their abilities. In other words; In issuing the verdict or the payment trustee, each of them has full authority in choosing the preferred option according to their ability. The flexibility of criminal laws and favoring the judicial system in execution paves the way for the implication of the above verse to argue in defense of the "method" theory.

In general, the meaning of matching the verse on Takheer in the punishment of wrongful killing is very clear, and this issue is sufficient to prove our claim on "Tariqit". If the meaning of Shariah was really related to the title of punishment, it would not be appropriate to talk about takhir in order to lead the legal doctrine astray in addition to the judge issuing the sentence and its executioner. Especially in the criminal law, which unlike the civil law, the clarity of the article in terms of the text and the phrase used in it is an integral part of an up-to-date and efficient law, which if not followed, will not only not lead to the implementation of justice, which may even violate it. Another form of the verse's indication of the choice and guiding it towards the "method" strategy seems to be more attainable than this one.

¹⁰ Al-Nisa (4), verse 92.

Criticism of the Meaning of the Verse

It seems that the argument to the above verse has two problems in proving the claim. First of all, the subject of the verse was only the verdict of ransom in wrongful killing and not beyond that. However, the fact that the verse came before the legalization of the ruling on dowry in such a case and included the freeing of a slave in the text of the law does not mean that it is optional. Because Takheer is where the lawgiver has asked for only one ruling and one duty, but in the position of expression and legislation, he has mentioned the names of two or more other duties and in the position of expression, he has linked each one with the other by using conjunctions. This issue is not seen in the verse. According to the signification of the verse, the first sentence of punishment was about freeing the slave, and next to that, he raised the issue of payment of ransom to the survivors of the victim. It seems that we have two independent sentences here; In one case, he must free the slave and in the next step, pay ransom to the heirs of the deceased. The link used in this expression is "wow" of emotion, not "aw."

On the other hand, let's assume that the verse refers to Kheer Tam, but it is not easy to use the "Tariqit" method and we cannot take such verses as evidence for it. Discussing the freedom of slaves in Islamic criminal law, along with other punishments, is a temporary ruling based on the existence of the subject. As long as there is a culture of slavery in the society, there is no problem in freeing a person from them along with paying a ransom. But when this culture disappears from social life, in the law of dowry in unintentional murder, it is required to pay dowry from the very beginning. Therefore, the discussion of Kheer is excluded from the basis and has no application for us.

Of course, if we consider the discussion of the possibility of "forgiveness" of the debt, which is used in the form of an exception and with the phrase "an yasadqwa" as a penal solution, and there is no room for doubt, the issue of discretion will automatically return to its place and the objection to the argument on the verse will be removed. became. In this case, according to the dowry law, the murderer is obliged to pay the dowry to the heirs of the murdered. On the other hand, it opens the way for "pardoning" the ransom as it was in Qisas, and this itself is the best penal mechanism of spiritual perfectionism, which distinguishes the penal system of Islam from other penal systems. In the end, the argument to the verse remains free of problems and we prove the choice so that in the next step, the "methodology" can be easily proved.

Optionality of the Punishment of War

In addition to some of the crimes mentioned in the Holy Quran, the optionality of their punishments has been explicitly pointed out and their "method" has been argued, the punishment of a "warrior" and someone who, according to the interpretation of the Qur'an, Islamic traditions and the sayings of Muslim jurists, makes an effort to The earth creates corruption and spreads it. Removing social security and destroying public peace is the most obvious symbol of the attempt to create and spread corruption, which was met with multiple and varied punishments in Islamic penal jurisprudence. The multiplicity of criminal titles in the face of a criminal act is a clear sign from the point of view of the Sharia lawgiver regarding the lack of attention to the nature and spirit of punishment and it leads us to the direction of its "method". Although these verses are not so many in the Holy Qur'an that examining all of them leads to the elaboration of the topics and in terms of the research method, we face a dead end, but the further analysis of each of the different scenes in itself expands the scope of the discussion and provides development. For this reason, choosing the interpretation of verses instead of verses, from the point of view of the literary rules of writing, it is considered to express the number and plural, it is only for the sake of tolerance, and if we discuss only one verse in the following or similar cases in the past, it should not be considered as an objection. The fact that we were able to find verses from the Qur'an that directly imply the choice of criminal title and can be used as the basis of ijthad, solves the need for research. With this introduction, we go to the thirty-third

verse of Surah Al-Ma'idah to see how it refers to the choice in the legislation, the issuing of judgments and the execution of the punishment of "warrior".

Verse Thirty and Three of Surah Ma'idah

The optionality of Mohareb punishment is well shown in the Holy Qur'an in the following verse and it is a good strategy to use it in the "way" of knowing the limits contained in Islamic penal jurisprudence, including the limit of Mohareb and trying to shape corruption and its development in all the geography of the earth.

«إِنَّمَا جَزَاءُ الَّذِينَ يُحَارِبُونَ اللَّهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الْأَرْضِ فَسَادًا أَنْ يُقَتَّلُوا أَوْ يُصَلَّبُوا أَوْ تُقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُمْ مِنْ خِلَافٍ أَوْ يُنْفَوْا مِنَ الْأَرْضِ ذَلِكَ لَهُمْ خِزْيٌ فِي الدُّنْيَا وَلَهُمْ فِي الْآخِرَةِ عَذَابٌ عَظِيمٌ؛

The punishment for those who fight against God and His Messenger and try to corrupt the earth is that they will be killed, or taken away, or their hands and feet will be cut off, one on the left and one on the right, or they will be exiled from their land. These are their disgrace in this world and they will be caught in a great torment in the hereafter.¹¹.

Based on the clear meaning of this verse, we consider the listed items as optional. All the Muslim jurists, whom we mentioned in the past when discussing the "method" of punishing Muhareb, have argued against this verse and ruled that it is optional. Therefore, we do not need to repeat their names and signs again, and in this section we will try to present our understanding of the text of this legal article. According to this verse, the legislator and the criminal ruler have the authority to hang the criminal, or to cut off one of his limbs, or to exile him from his place of residence to another place in the city or a distant village.

In reasoning about this verse, we are satisfied with the fact that numerous and diverse punishments are connected to each other with the inflectional letter. Its meaning is that none of them have inherent originality and only in order to facilitate the administration of justice and fight against crimes, the legislator is free to choose any one he deems useful, and this is the same method. The Muslim commentators are mainly in favor of takhir and have followed it for this reason (Hosseini Jurjani, 1404 AH, vol. 2, p. 679; Tayyab, vol. 4, p. 355; Daas, 1425 AH, vol. 1, p. 254; Davrpanah, 1375, vol. 7, p. 59; Abuhian, 1420 AH, vol. 4, p. 240). From the point of view of the logic of the legal doctrine, such a choice first explains the legislator's duty and in the next step, it refers to the judicial institution, which must necessarily comply in the two stages of issuing a verdict and implementing it. The exclusivity at the beginning of the verse from the phrase "Innama" is the second form and reason for consolidating the theory of discretion in all the three stages of legislation, issuance and execution of rulings.

Therefore, what should we have more clearly than this to prove the doctrine of "method" of punishment and to show the capacity of the two institutions to pass the law and implement it in the selection of the mentioned cases. Even those who have somehow gone to order and appear to be opposed to such powers, are not in any way among the opponents of "Tariqit" and are not considered to be opposed to this view.

Criticism

Surveys show that there is no single opinion among Islamic jurists and commentators regarding Kheer, and there are those who disagree with this opinion and consider Qol to be preferable and more appropriate. If it is determined that the arrangement has more and better points, in the end, the application of the verse will not be very effective in defending the doctrine of "methodology."

¹¹ Al-Maedah (5), verse 33.

According to the word, in the order mentioned in *Kenz al-Irfan*, there are approximately five types of punishment that are eye-to-eye. First, if he only committed murder, he will be killed for revenge. Now, if the guardian forgives the murderer, the murder penalty remains in force and he is killed because of the limit of war and not revenge. In the second assumption, it is as if the criminal has committed two crimes (murder and taking property). In this case, the stolen property will be returned first, and after that, his hand or foot will be cut off against him and he will be sentenced to death. In the third hypothesis, he is satisfied only with stealing the property, first he cuts off the hand and foot in an opposite way and then he is sent to exile. In the fourth hypothesis, if he did not do anything other than causing the injury and did not take any money with him, first he will be sentenced to retribution for the injuries and then he will be buried. But according to the fifth case, if he caused the destruction of public security only by promoting the weapon, then he should be sentenced to a punishment of the execution type and therefore there is no choice.

In addition, the punishments mentioned in the above verse do not have a discretionary aspect, and the types of punishments are distributed and divided according to the details provided in the circumstances of committing the crime. Finally, the verse of *Takheer* cannot be used anywhere between types of punishment. This issue will cause the "method" of these punishments to be questioned by itself and remain without support.

But in response, it should be said that the type of structuring of the words and letters used in the verse in terms of the rules of the Arabic language; That is, the inflection of criminal titles with the letter "Ao" indicates that they are optional. If the legislative audience of the verse is order, then such multiple titles of punishment should not be connected with one specific letter. As a result, we did not consider the raised objection and we continue to defend the theory of *Kheer* which is supported by numerous and multiplied narrations.

In addition to that, the discussion may be raised in another way, that according to the monopoly caused by the implication of "*Innama*", the realm of punishments is limited to the few mentioned punishments and does not include the rest of the crimes, and therefore, it does not exist in favor of the theory of "*Tariqit*". benefited But let's keep in mind that the mentioned limitation does not intend to limit the number of punishments; Rather, he seeks to specify them only within the scope of the crime of war and says that all punishments are assigned to this crime. Because, after the interpretation of *Hesr*, the name of the punishment of such criminals is mentioned and not other crimes or criminals. In other words, from the perspective of the *Qur'an*, the criminal legislator has no right to use these punishments to punish other criminals; Because according to the existing restrictions, the mentioned punishments are imposed only for this specific crime and not for other crimes.

The Flexibility of Life Imprisonment at Home for Female Criminals and the Possibility of Release for Them

According to some *Quranic* verses, when a woman commits the crime of adultery, she should be sentenced to life imprisonment. The life of this legal article in terms of implementation, although it is allowed to be permanent during the period of serving the punishment, but in the following verse, by putting forward a possibility, it completely changes the fate of serving the period of punishment and promises the end of the period of the sentence by replacing it with complete freedom for the convicted person. which is a clear example of flexibility. A mechanism that strengthens the perception of "method" even more.

In the following, we will take a look at the verses that clearly deal with the category of crime and criminals with a gender perspective and express a special punishment for women. In these verses, in the first step, he went to life imprisonment at home for women who committed the crime of "adultery" and stipulated that they should be kept in home prison until death (life imprisonment). After that, there was

talk of the possibility of their release by enduring a certain period of imprisonment and predicting such a situation is not far from the mind. Among the verses indicating this issue is the fifteenth verse of Surah al-Nisa, which is mentioned below.

The Fifteenth Verse of Surah Nisa

According to the explicit text of the above verse, the criminal sentence is life imprisonment at home for women who commit the crime of adultery, who must remain in home prison until the last moments of their lives, or after enduring a period of time, they are freed from imprisonment and return to social life.

«وَاللَّاتِي يَأْتِيَنَّكَ الْفَاحِشَةَ مِنْ نِسَائِكُمْ فَاسْتَشْهِدُوا عَلَيْهِنَّ أَرْبَعَةً مِنْكُمْ فَإِنْ شَهِدُوا فَأَمْسِكُوهُنَّ فِي الْبُيُوتِ حَتَّى يَتَوَفَّاهُنَّ الْمَوْتُ أَوْ يَجْعَلَ اللَّهُ لَهُنَّ سَبِيلًا؛

If there are women from your (community) who commit indecent acts, ask for four Muslim witnesses against them, and if they testify, keep those women at home until their lives end or God makes a way for them.¹².

This verse clearly talks about the punishment of one of the two sides of the crime of adultery, which clearly includes women. Women who commit the crime of adultery and are proven guilty in a fair trial must be kept at home. The duration of this maintenance is not known. They may stay there permanently, or after some time of suffering punishment, a way to save them will be found, either by formulating an alternative punishment or releasing them without suffering punishment.

Among Islamic jurists and commentators, two views can be seen in the criminal analysis of the verse. According to the first point of view, the sentence of house arrest was an initial sentence that was later canceled. Because in the doctrine of Islamic penal policy, gender discrimination has no place and all people are punished for their actions in accordance with the crime committed and in the same way. It is not like that "adulterous" men are punished in one way and women in another way. The general conditions of the criminal duty are directed at all people regardless of their gender, religious affiliations, and social affiliations. For this reason, in the continuation of the verse, he used the expression "mustache" to announce the cancellation of the previous ruling and the imposition of new laws such as "lashag" or "stoning". (Hosseini Jarjani, *ibid.*, vol. 2, p. 563; Jisas, 1405 AH, vol. 3, p. 41; Ibn Idris Shafi'i, undated, vol. 1, p. 215; Beidawi, 1418 AH, vol. 2, p. 65; Nishaburi, 1415 AH, 320).

On the other hand, the second point of view is fundamentally opposed to the abrogation of the rulings of this verse and still insists that all criminal rulings, both formal and substantive, remain valid and none of them have been invalidated (Ibn Arabi, vol. 1, p. 354). Because cancellation means removing the previous ruling and it is placed in the order when the legislator is faced with two conflicting rulings and cannot solve the problem by issuing a note. It should not be overlooked that there is no conflict between this legal article and other legal articles such as the verses that consider whipping for adulterous criminals. Each of them presents their own language and logic. The ruling that we see in this verse and legal article is quite clear and has some enforcement limits. Not only is there no start and end time for it, but even at the end of the article, it has officially promised a new solution that will facilitate the criminal situation of the criminal, and thus, there is no doubt of conflict with other legal articles.

In support of this theory, the contemporary jurist (Makaram, 1421 AH, vol. 3, 149) also opposes the abrogation point of view and considers it completely rejected. In his opinion, speaking about the abrogation of the mentioned verse is not very scholarly, because the legal article itself shows from the

¹² Al-Nisa (4), verse 15.

very beginning that the sentence of life imprisonment for this category of criminals is temporary and not permanent. The temporary ruling has a specific life and when it ends, there are no more regular effects and results on it, so we put ourselves in trouble and look for cancellations and the like. In addition to that, the last part of the verse of the very interpretation (Yejaal Allah Lahan Sabila) proves the temporary nature of the ruling as much as necessary, and there is no doubt left for the cancellation. It is said in a place that a new law will be enacted and it will bring positive changes to those sentenced to life imprisonment, not that it will bring a new punishment and make them taste the pain and suffering of whipping once again, or that they will be executed, which is much more painful than To die in prison is to lead.

It seems that the second group is right and the verses of "Jald" and the like are not abrogation of the old law. Especially with the argument presented by the contemporary jurist about the abrogation and the conditions governing it, we realize the sophistication of this view. Adding to that, legal logic dictates that the introduction of new laws must necessarily be able to reduce the severity of the punishment and benefit the accused in the capacity of the proceedings or the convicted in the capacity of execution of the punishment. It is not worthy of criminal justice to "whip" or stone those who have suffered years of deprivation from being in the society by spending time in state prison or even house arrest and waiting for death. Such a sentence is not fair and in favor of the accused and the convicted. While we all know, the legislative body in the Islamic penal system has always sought to use educational methods as much as possible instead of burning and destroying, and to adopt a preventive approach at different stages by formulating an up-to-date criminal policy or establishing effective punishment regulations. give and carry forward reformatively. In many cases, we can clearly see the decriminalization and sometimes even the decriminalization of some criminal behavior in its appearance, and the expression "Sibel"; We consider it a new strategy. The strategy, which is fundamentally different from the previous law, provides the individual and social goals of the legislator and creates a platform for the convicts.

Therefore, the mentioned verse is one of the verses that is a good support for the "method" of the punishments included in Islamic jurisprudence, whether we consider the sentence of imprisonment as temporary and oppose it with the idea of cancellation, or provide a new legal interpretation from the final verse of the verse.

Criticism

Regarding the meaning of this verse, we accept all the words and views presented regarding the rejection of the abrogation theory and the acceptance of the temporary nature of the criminal sentence, and we agree that the verse has not been abrogated and is still valid. But it should not be forgotten that first of all, the interpretation of "even" is used in the text of the law, which excludes the temporary nature of the sentence and connotes permanent imprisonment for a specific gender. Because the word "even" means the end and indicates the continuation of the ruling until the emergence of a new solution. Also, the interpretations after that are a clear proof that life imprisonment is not a temporary sentence. It is neither a temporary detention order nor a temporary punishment. It is also true that at the end of the verse, the term "mustache" is used to mean a legal solution, but in the end, it does not convey anything but the gist. It will only lead to the detention of women until they die or the introduction of new laws. This amount does not indicate that, firstly, the current law is temporary, secondly, it does not indicate that the new law is necessarily lighter and easier for the criminal. Perhaps the legislator may consider a policy that is tougher than imprisonment for him. How many days or months a person has spent in prison can be calculated, and the same amount can be counted in the new article and considered as punishment for the criminal.

Answer: Of course, despite this number of objections, it should not be taken from a distant point of view that the meaning of the verse is still valid and it can cover the "method" of punishments. Because the word "mustache" is not comprehensive and its meaning is that first of all, the life of the previous law

was not permanent and the legislator wants to establish a new criminal policy. Secondly, common sense dictates that the new law, in addition to being easy, should also be more beneficial for the benefit of the individual and the society. Especially since the Shariah legislator is at the peak of the wisdom of legislation and is more aware of all interests and interests of people even than themselves. Therefore, it can never be accepted that the legislator will definitely go for a more difficult solution and apply more strictness in the new legislation. Because, as mentioned in the following analysis of the same verse, the logic governing reaching criminal justice dictates that the new solution should be better and more accessible, and the aspect of respecting human dignity should be more important, not more difficult and strict.

Goal Oriented Criminal Regulations

Just as the religious regulations of Islam are purposeful and help to bring the citizens to spiritual closeness, the set of laws, including criminal regulations, also seek large and small goals in the scale of individual and social life. And this purposefulness is considered a good help for the use of the "method" of punishments, and it has appeared in several verses of the Holy Quran. For example; Execution of whipping in the crime of unmarried adultery, cutting off the hand of a thief in the crime of theft are such cases that strengthen the purposefulness of punishments and make the process of proving the doctrine of "method" easy.

The General and Specific Preventive Function of the Punishment of Non-Mohsan Adultery in Verse 2 of Surah Noor

The appearances of some Quranic verses, including the second verse of Surah Noor, evoke the purposefulness of some punishments. For example, in the crime of unprotected adultery, we see the punishment of whipping and lashing, which shows the purpose of its implementation is to prevent the crime.

«الرَّائِيَةُ وَالرَّائِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِنْهُمَا مِائَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَلَيْشِهْدُ عَذَابُهُمَا طَائِفَةٌ مِنَ الْمُؤْمِنِينَ»

Give a hundred lashes to every adulterous woman and adulterous man, and if you believe in God and the Last Day, do not feel sorry for those two in [the work of] the religion of God, and a group of believers should be present at the punishment of those two.¹³

In terms of meaning, the above verse is absolute and includes both protected and unprotected adultery, but Muslim jurists have often interpreted the meaning of the verse as unprotected adultery. Therefore, as an analysis, we refer to two parts of the verse to understand the purpose (central purpose in the form of general and specific prevention).

In the first paragraph, God has strictly ordered the legislators and criminal enforcers to put aside any mercy and sense of pity in order to execute justice and punish the criminals and resolutely implement the punishment of whipping. Because the powerful implementation of criminal laws, on the one hand, demonstrates the authority of the judicial system in fighting criminals and creates fear in potential criminals, and on the other hand, introduces the character of the punished criminal to the public opinion so that everyone can exonerate him. Seek

In the second part, it strictly orders the judicial body to publicly announce the punishment and to officially invite all citizens to participate in such a ceremony, so that a significant number must be present

¹³ -Eleanor (24), verse 2.

and see the execution of the ceremony closely. It is clear that the most obvious purpose of the public announcement for the presence of citizens at the place of execution of the whipping is the general and specific intimidation.

Therefore, by putting together the above two analyzes, we come to the conclusion that the principle of "whip" has no characteristics and the most important holy law is to control crime and ensure social security. By proving that the "whip" is purposeful, the ground for its methodical use is gradually provided.

Criticism

It seems that the use of "the method" of having a "whip" from the above verse is not correct, relying on the important element of its goal-orientedness. Because we have seen jurists who believe that the mentioned verse is meant in this sense, and on the contrary, it indicates that the main goal of the legislator is assigned to the "whip" itself, and the issue of general or specific intimidation is the secondary goal of the law and not its primary one. In such a case, it is not possible to take the "method" of whipping from the verse. The late Tabarsi's opinion regarding punishment by "lashag" is placed in the same row. (Tabarsi, 1372, vol. 1, p. 207). On the other hand, according to the interpretation of some other commentators, the meaning of the word (cover) is the same as "whip" (Tabatabai, 1417AH, vol. 15, p. 80), which today is known among people as "whip" as a tool for beating humans and animals. Johari, 1410AH, vol. 3, p. 135

Another way is that from the point of view of the Islamic criminal legislator, there may be two goals in the position of legislation, one of which is assigned to the nature of the punishment and the other to the results of its implementation. In the first assumption, what the Shariah wants is the use of "whip" in punishing the non-immune, and it is never satisfied to be replaced by another punishment. Therefore, "whip" is the main goal of Sharia, and general and specific lessons are its secondary results. For this reason, he immediately orders the executors to put aside their feelings of pity and implement the divine laws with authority.

As an answer, it can be said that such an interpretation of the above verse does not seem very correct; Because in addition to the above explanations, there are other verses in the Holy Qur'an which clearly indicate the transfer of the authority to establish penal regulations according to social conditions and events in the way of crime management and control. For example, it is stated in the Holy Qur'an: "I do not waste the work of any male or female. I will not waste the action of any of you who do it, be it a woman or a man; You are of the same species, and of each other's species."¹⁴

Although the appearance of the verse shows the moral discussion and issues related to prayer and migration, but with a deeper look, its legal use in the field of punishments is not far from mind. In general, the mentioned verse provides us with two important issues. One is that the implementation of justice and its realization in the society is the main duty and mission of all human beings and at the head of all legislative and judicial institutions, and justice is sometimes achieved by implementing the prescribed punishments, and in some cases we need alternative punishments. Second, religious experts in criminal affairs have the authority to add new tools to this list if new punishments are needed. Therefore, God has promised that the rewards of new punishments will be guaranteed in terms of legal guarantees in addition to spiritual matters, and the new laws will have the necessary legitimacy. Therefore, by canceling the application of the "whip" verse by the said verse, being goal-oriented still remains in force.

¹⁴ -Al Imran (3), verse 195.

Falsification of Punishment as a Suitable Response to the Criminal Action of the Thief

It says in the Holy Quran:

«وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جَزَاءً بِمَا كَسَبَا نَكَالًا مِنَ اللَّهِ وَاللَّهُ عَزِيزٌ حَكِيمٌ»

Cut off the hands of the male thief and the female thief as a punishment for what they have done, as a divine punishment! And God is Mighty and Wise.¹⁵

At first, it seems that the punishment mentioned in the verse does not have a "method" aspect and is more inclined towards "subjectivity", but with a deeper look, the "method" was used. Because, firstly, the Shari'a legislator has formulated this kind of punishment as a reaction against the behavior of thieves. Second, the cutting off of the hand is a warning and "Nakal" in every sense is declared for the criminals to learn a lesson. (Johri, 141 AH, vol. 5, p. 835). And literally, "Nakal" happens when it causes fear to others. (Ibn Manzoor, 1418 AH, vol. 5, p. 372; Ibn Abbad, 1414 AH, vol. 6, p. 265).

Therefore, faking cutting off the thief's hand is not the main goal; In addition to a specific lesson, it also entails a general lesson. Because in addition to preventing the criminal himself from repeating the crime, it also makes potential criminals think that committing theft will undoubtedly face such a fate and it is not worth killing the best part of the body for small sums of money in addition to social shame. to lose and this is the central goal.

Criticism

According to the three terms that some jurists have used, it seems that the use of "Tariqit" having "cut" does not have much legal and jurisprudential implications. They obtained the first meaning from the placement of the words "thief" and "thieves" under Al and Alam Istighraq (Shaheed Thani, 1412 AH), Vol. 9, 234) and also used the second meaning from the word "cut" itself (Fazel Moqdad, 1425, vol. 2, p. 349)¹⁶. Or because of the assignment of "punishment" as the passive object or passive object for the verb "Iqtawa", it reached the third meaning in the verse (Fazel Moqdad, *ibid.*, p. 348), which finally approaches the opposite view of "Tariqit". Even assuming that the verse indicates the criminal response of "cut" to the crime of theft (Marashi Najafi, 1428 AH, p. 30), it cannot be said that this punishment has an instrumental aspect. From this verse, it can be understood that cutting is the main goal. It cannot be understood more than that.

In response, it should be said that despite the three applications, there is no doubt about being goal-oriented for other goals. Because there is no doubt about the intrinsic purpose of "cut off", but we are silent about the purpose of being something else, and the meaning of the verse includes both. In addition, the same analogy of using the word "Nkala" which was a warning for other possible criminals, can be considered a good help in rejecting the purpose of being intrinsic to the purpose of being something else. Because as long as social security resulting from general prevention and specific prevention is not the main and basic goal for the criminal policymaker, warning alone seems far from wisdom and expediency.

¹⁵ - Maeda (5), verse 38.

¹⁶ -Fazel Moqdad believes that cutoff can happen in two ways and in fact has two meanings. Sometimes "cut" is used to mean cutting the will without actual separation between body parts. For example, when someone uses the expression that I sharpened the pen but the knife cut my hand, it does not mean that the hand is separated from the body structure, but only that an injury has happened to it, and the speaker has used the word cut to express the importance of the matter. But in some cases, they use "cut off" and report from it the meaning of complete separation of the organ or organs of the body. Although the order in the verse of Sharifa is possible for both cases, but because it is a Shariah ruling and the statement of the Shariah ruling seems to be closer to the second meaning.

And such an idea has no meaning for a legislator who is at the peak of wisdom and knowledge and who is more expedient and aware of the requirements of time and place than anyone. As a result, in addition to being a harsh criminal response to a criminal act knowingly and intentionally, "cut" is also a means to achieve another greater goal, which we interpret as "method."

The Result of the Discussion

It is argued that, conceptually, the word "Tariqit" means way, means and tool, and in the legal and jurisprudential discourse, it can be considered as the means, means and way of the punishments that are mentioned in the sources of Islamic penal jurisprudence. . By referring to several verses of the Holy Qur'an as the foundations and evidences of the "method" view of having specific punishments from the perspective of Islamic criminal jurisprudence, we came to the belief that all or a large part of these punishments do not have originality and inherent desirability; Rather, the holy law has established them to ensure social security, either in the form of general prevention or self-control and specific deterrence as higher criminal goals. In order to reach the point of view, the verses are analyzed with two approaches: the optional imposition of punishments and their goal-orientedness; We checked. The outcome of Ayat Kheyiri was that the holy law, by establishing numerous penal titles in the face of criminal phenomena, left the legislator's hand open so that in case of changing social conditions and the appearance of new expedients at any point in time, he would not hesitate and be able to conduct in-depth studies. Jurisprudence in the basics and recognizing the social needs to impose appropriate punishment in order to finally achieve justice and public security. Also, in analyzing and examining the verses of "adultery" and "theft", we came to the goal-oriented nature of the punishments, which had more explicit meaning, and we responded to the incoming or possible criticisms as much as possible in this brief.

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