



The Possibility of Converting Punishments in the Islamic Penal System

Ali Ashraf Tahmasabi¹; Adel Sarikfani²; Zahra Sarikhani³

¹A Graduate of Juridical Jurisprudence from Al-Mustafa Society (PBUH), Iran

²Professor of Law Faculty of Qom University, Iran

³PhD in Criminal Law and Criminology and Third-Level Student of Al-Zahra Society and a University Teacher, Iran

<http://dx.doi.org/10.18415/ijmmu.v11i2.5578>

Abstract

The full implementation of Islamic limits and punishments depends on the readiness of suitable grounds and conditions in the Islamic society, such as the formation of an Islamic government and the formation of social, political, economic, legal, judicial and penal systems and the absence of domestic and international obstacles. The permissibility of the execution of Hudud in the Age of Absence by the jurist Jame al-Sharai't does not mean insisting on the constant and unquestioning implementation of these punishments in all times and places; Rather, if the background and social conditions necessary for the implementation of Hudud punishments are not favorable, due to the mal effects that is created by their execution, it will be converted into proportionate punitive punishments as a secondary sentence. Like the verdict of stoning and apostasy, which cannot be implemented in the current conditions of the society. The change and conversion of maximum punishments will be done in three axes, firstly: change in the execution method, such as changing stoning to execution. Secondly: Substitution of lesser punishments, instead of maximum punishments, such as reducing one hundred lashes to less than that; Thirdly: Converting a limit punishment to a taziri punishment, such as turning amputation into imprisonment. It seems that the maximum punishments in the above three axes can be converted into proportionate punishments.

Keywords: *Mandatory Fixed Punishment (Hadd); Primary Sentence; Secondary Sentence; Conflict in Execution; Higher Expediency*

Introduction

Some jurists believe that religion absolutely follows the temporal and spatial conditions and does not have any fixed principle or unchangeable law that is valid for all times and all places. As a result, whatever religion includes and implements is what the time and place situation imposes.

In addition, some others believe that everything religion contains, says, and has said are fixed principles and immutable laws that will never change in any way.

However, a group of jurists believe in the separation of religious rules, that is, they consider some rules, such as the rules of worship, to be fixed and non-worship rules to be completely changeable. Also, as the fourth theory, some consider the penal sentences of Islam to be changeable with conditions without distinguishing them (Mortaza Motahari, *Islam and the Time Conditions*, vol. 1, p. 11)

In the continuation of the fourth theory, we should remember that: Laws are of two types: First, general and fixed laws that are forged based on fixed and unchanging needs (innate and natural) of human beings. And secondly, the partial and variable laws that are established based on the changing needs of human beings.

Fixed general laws that are set based on fixed human needs will never be invalidated and are valid for all times and places. But in the partial laws that have been legislated based on the changing needs of human beings, it is not the case that it has been mandatory in all times and all places, despite the different conditions governing them.

Rather, in such cases, religion shows a flexible way of itself, and in this way, it solves the needs of the society in a way that includes the interest of the public, both in this world and in the hereafter.

The reason for the legality of this change can be principles such as: the principle of obeying the rulings from the real interests and corruptions, the powers of the Islamic ruler, secondary rulings. From the sum of the principles and rules that have been briefly mentioned, it is clear that all the changes that occur in some Islamic rulings due to the circumstances governing the time and place are all due to the ruling of Islam itself.

Therefore, there is no place for this criticism for someone to say: "The change of some Islamic rulings contradicts the rule of "the halal of Muhammad (PBUH) is halal until the Day of Judgment and the forbidden of Muhammad(PBUH) is forbidden until the Day of Judgment" because as it was said, the changes in question are part of the halal and It is forbidden that the Messenger of God, peace and blessings of God be upon him, brought them.

A- Necessity of Transformation of Islamic Penal Laws

The necessity of transforming criminal laws is a fundamental and decisive question for all penal systems in the world, especially the penal system of the Islamic Republic of Iran, in the face of scientific doubts and the crisis of criminal policy and penal policy;

Because penal systems naturally desire the stability and durability of order and penal laws in collective life; However, in the context of dynamic society and the emergence of new needs, they are forced to accept the principle of change and evolution continuously according to the changing needs and conditions of time and place and the transformation of new topics and issues.

In recent decades, due to the increasing speed of scientific, social, economic, political and technological changes in the current world and globalization, this issue has become more complicated and sensitive.

Many thinkers and intellectuals are under the illusion that due to these rapid changes, they should give up their fixed principles, values, laws and systems along with this wave and in order not to lag behind the new human civilization and change and evolve in the principles, branches, generalities and details.

This point of view is based on an epistemological premise that is mentioned in the theory of "narrowing and expansion" and the theory of "hermeneutics" in sharia. (Abdol Karim, Soroush, *Theory of Theoretical Narrowness and Expansion of Sharia*, pp. 20 and on and also Dr. Mohammad Mojtahed Shabastri, *Hermeneutics, Kitab and Sunnah*, p. 14 and on).

Accordingly, the question of stability and change in criminal laws and in general in religious and jurisprudential rulings and systems can be turned into an ontological question and viewed from this point of view.

This means the understanding and interpretation of religious and jurisprudential texts from the point of view of jurists on the one hand, and from the perspective of religious intellectuals with regard to the narrowness and expansion of Sharia and hermeneutic principles on the other hand.

From the point of view of these Muslim intellectuals, the stability and change in Islamic penal laws, in the first stage, is subject to the stability and change in the presuppositions of the interpreters of Islamic texts. If there is a change in these presuppositions, questions or expectations of these commentators, accordingly, the penal system and limited punishments and penal laws of Islam will also undergo transformation.

They have tried to meet the challenge of "jurisprudence and modern law", "tradition and modernity", "religion and democracy", "reason and revelation", "science and religion" and "freedom and religiosity" within the framework of their assumptions, and for the benefit of science. Democracy, instrumental reason, Western freedom and in one word, in favor of human rights and modernity.

But with the premise that we adhere to in this research, and without the need to reject and negate science, reason, freedom and original reality, this challenge has been solved for the benefit of authentic religious and revelation texts and Islam.

In our view, jurisprudence will determine the form, method, and order of criminal, legal, political, economic, social, educational, etc. in a systematic and responsive manner and within the framework of the original and documented principles and goals of the Shariah and considering the changing conditions of the times.

And in any situation, while maintaining stability in the principles, frameworks, foundations and goals of the Holy Shariah, it will respond to the changing needs of the times and will never stagnate or remain in a dead end.

Of course, in this process, they will never suffer from analogy, Estehsan mechanism, free expediency and scientism, and will continuously express appropriate answers within the framework of the Sharia and religious and documented texts, and will not reject the method and logic of authentic and dynamic Shia ijtihad.

There is no doubt that the system of criminalization and punishments are among the first and main tools of political power of any government. Accordingly, if it is not possible to reach a positive assessment of the interference of religion in politics in the field of Islamic penal system, the theory of Islamic government will be largely obscured.

In this regard, the correct combination of fixed and variable elements will show itself more clearly in the realm of the Islamic penal system, because basically, the Islamic penal system is the treasure house of the fundamental rights and values of the Islamic legal system, and the least disturbance in the explanation and criminal protection of These rights and their unforgivable values will have many consequences for individual and social life. Also, this issue will show its importance in the implementation of divine limits.

Although "criminology", "modern criminal law", "collective wisdom" and "human sciences" are evaluated with a positive view, they are never certain and fixed. Not only the aforementioned knowledges, but also religious texts, themes, and rulings, are all limited to the temporal and linguistic existence of humans and have the characteristic of evolution and transformation in every age. Therefore,

they are not absolute, sacred and unchallengeable truths. (Hassan, Rezaei, fixed and variable cases in the Islamic penal system, p. 20)

B- Necessity of the Existence of a Basis for Criminal Laws

Life experience has shown to man that he feels calm and secure when certain fixed rules govern his relationships with others. Stability and peace in social, economic, political, family relations and enjoyment of rights and freedoms is only possible in the shadow of the stability of legal, criminal, judicial, civil, etc. rules and regulations. Basically, citizens should be aware of their rights and duties and the results of their actions and behavior in advance, so that they can engage in various activities and not get anxious and hesitant.

All-round social, economic, political and cultural growth and prosperity can be defined in the shadow of such a fixed order. On the other hand, the stability of legal rules and regulations in the society shows the respect and acceptance of everyone towards it and harmony with the natural and original desires of man and society. and It reveals the fairness and correctness of these regulations. This stability and antiquity of the legal rules will also achieve the stability of the court decisions and procedure. It will free the judges and litigants from confusion and misunderstanding .

Because the change of the laws will upset the past situation and acquired rights and will confuse the judges for a long time in how to interpret and implement them. (Nasser, Katouzian, Philosophy of Law, Volume 1, pp. 466-650)

The British and members of the "Common Law" legal system family are very pessimistic about the written law in the sense that is common in other countries, and they say that the enactment of the law, which takes place with one sitting down and standing up in the legislative assembly, is the most important factor in tyranny and opposition to freedom.

Because with one sitting down and standing up, all customs and habits and acquired rights that are based on history and historical method will be destroyed at once. Therefore, people's rights are facing the risk of being trampled every moment and lose their stability and durability. (Hossein, Nojournian, Basis of Legislation and Procedure, p. 62)

It should be noted that the "Common Law" system has now surrendered to new demands and laws that were approved by the majority of parliamentarians and are not compatible with their previous customs and history in any way. The laws allowing homosexuality in England and some American states show a kind of contradiction in the theory and practice of this system.

(Jalaluddin, Qiyasi, Hamid, Dehghan and Qadratullah, Khosrowshahi, Comparative Study of General Criminal Law, Volume 1, Pages 312 and 313.)

This problem is also observed in other human legal systems and it shows the deficiency and relativity of human knowledge and his inability to recognize the fixed laws and traditions that govern man and the universe, and finally, it shows the need and even more, the urgency of man for divine revelation and protection.

In this regard, the great French lawyer and writer "René David" says:

"Although the laws of the church are based on the principles of Christian ethics, they are in no way derived from revelation; Rather, it is man-made and therefore many changes have been made in it over time. But Islamic rights are a part of the religion and come from revelation; The laws of Islam, even in detail, are an inseparable part of the religion of Islam, which has the same divine and heavenly aspect, and as a result, no force in the world has the authority to change it. (Rene,

David, *Great Contemporary Legal Systems*, translated by Hossein Safai, Mohammad Ashuri and Ezzatullah Iraqi, pages 453 and 454.)

C- The Flexibility of Islamic Criminal Laws

Everything that has been said about the need for stability and rootedness of Islamic laws and legal rules and its benefits does not mean stagnation and inflexibility of Islamic legal and penal rules. The laws of Islam, although in terms of the basis of its legitimacy (wise and expert Shari), do not need to be changed;

But in terms of changing the conditions and implementation context, it has the ability to change. The mechanism of this change will be done to preserve the religious identity and within the framework of the foundations, principles and goals of the Sharia, to ensure individual and social rights, universal justice, maintain order and security, the authority of the Islamic system and its public interests, and also to protect divine values and limits.

As we have said, the determination of the main penal rules of Islam, both in terms of criminalization and punishments (Sharia and governmental punishments), is one of the powers and authority of the Islamic government and one of the aspects of the authority of the Islamic system. However, these regulations can be changed according to the requirements of time and place, but within the framework of Sharia and the interests of the system and its foundations and purposes.

To the extent that if at some point during the execution of the fixed-mandatory punishments (Hudud) there are obstacles, it will be stopped and changed to another suitable punishment either as a primary sentence due to the priority of one expediency over another or as a secondary sentence due to urgency and necessity.

Although the texts say that these punishments are permanent and fixed according to the first sentence.

(For more explanation, refer to: Mohammad Javad, Arasta, *Determining the expediency of the system from a jurisprudential-legal point of view*, p. 65 onwards and also Muhammad bin Abi Bakr Ibn Qayyim, *Al-Jawzi, Governance Methods In Sharia Policy*, p. 125 and also Abdul Hossein, Sharaf al-Din, *Text And Ijtihad*, pp. 230 and 231.)

As we know, the evolution of human life and the emergence of new relationships and needs, and the development of civilization and new tools of industrial life, require the establishment of criminal laws and new criminalization for some actions. The emergence of chemistry has led to the creation of heroin, hashish, opiates and chemical and microbial bombs, resulting in drug trafficking, mass murder and war crimes.

On the other hand, the formation of international institutions such as the United Nations and its pillars and the development of media, media wars and global public opinion have influenced the relations and behavior of countries in relation to other nations and international institutions;

Membership in these international institutions and conventions has given the members obligations and duties, including the observance of individual and social freedoms and human rights;

Therefore, it can be seen that these institutions are even involved in the establishment and implementation of internal criminal regulations;

For example, the extreme punishments of stoning, flogging, cutting, and whipping, according to these international institutions, global public opinion, and powerful cross-border media, are considered

punishments contrary to human rights and international conventions, and cruel and anti-human, and even barbaric and inhumane.

For example, the punishments of stoning, crucifixion, amputation, and whipping are considered cruel and even barbaric punishments against human rights and international conventions, according to these international institutions, global public opinion, and powerful media.

Sometimes, the issuing of resolutions of these assemblies and propaganda against the Islamic State follows; which causes the humiliation of Islam and Islamic government in the world public opinion.

Inevitably, in order to prevent these damages and bad propaganda against the Islamic system, the Islamic ruler may convert some of the definite punishments into other punishments as an emergency order; However, according to the original ruling and the language of the texts, these punishments are fixed and unchangeable.

It is obvious that in all these and similar cases, the qualified Islamic mujtahid and ruler, taking into account the goals and principles of the Sharia, tries to deduce the sentence of new subjects or change some punishments by applying the principles to the branches.

For example, in some cases, it can be observed that the Islamic jurist and ruler will face the development of new forms of crimes such as corruption in the land, robbery, and theft, so he will spread the prohibition and punishment to new cases ; or in some cases, he tries to convert and change some punishments and criminal sentences .In both cases, indeed he is faced with the development or narrowing of the examples of the titles and subjects of the sentences; and in each case, he issues the appropriate sentence.

In another case, he is sometimes forced to remove some crimes and definite punishments such as apostasy and stoning from the list of crimes in the criminal law, like what the Iranian legislator of criminal code has done.

And this does not mean abandoning or removing such crimes or punishments from the official law of the Islamic government, but the legislator indirectly stipulated in Article 220 of the Islamic Penal Code: "Regarding the Hudud that are not mentioned in this law, it will be implemented according to the principle (167) of the Constitution of the Islamic Republic of Iran ". (that is, refer to authentic Islamic sources and jurists opinions)

Therefore, the authority to convert, reduce or intensify the definite punishments is only for the Islamic legislator, and according to the basis of the Islamic Republic of Iran, the judge cannot interfere in the quality, type and amount of the definite mandatory punishments.

D- Stability and Change of Definite Punishments

We begin this section with a question:

If we think carefully about man and the universe, are all the needs, talents, conditions and dimensions of human existence, or the systems and laws governing the universe, changing and transforming, and there are no fixed things in them? Can't be seen? Are all the affairs of these two constantly undergoing transformation, or behind their transformed shell, there is a static core and fixed relationships?

The truth is that human beings, while evolving and transforming intellectually and spiritually, behavioral and physical changes and historical and social movement, have a natural stability and identity. The change in social relations, manners of dress, way of living and different tools of life and the

emergence of new sciences, industries and techniques have never changed his nature, identity, instincts, needs, talents and existential composition and organism.

In the universe, despite the constant movement and transformation, there are constant relations, laws, systems and traditions in the phenomena. This innate stability and the combination of creation, specific human talents and needs, traditions and fixed laws in the world and phenomena, can and should be the basis for the stability of knowledge and laws governing the world, and the basis for the stability of religion, ethics and rights, including the measurement of the possibility of the change the definite punishments.

It is necessary to explain that everything that is based on transformation, including values, norms, morals, rights, crimes and punishments, etc., inevitably changes and transforms; But the issue is whether along with these changes and movement, it is possible to assume fixed laws and systems and proceed with policy making and legislation based on that?

Is it possible to accept fixed principles, values, and laws, live with them, and regulate the social relations of human beings, outside of the concepts, presuppositions, and apparently scientific theories?

In response to this question, the authentic religious worldview, based on divine revelation, says that along with all the movements and transformations in the fast-moving caravan of existence and human society, there are fixed relationships, laws and traditions that are the basis of religious systems (Educational, moral, social, political, managerial, legal, judicial, penal, etc.) and real science and knowledge. Therefore, what is based on them will inevitably not change. (Yet you will never find any change in Allah's precedent, and you will never find any revision in Allah's precedent. Fatir/43)

The organs, face and physical and mental shape, even the finger lines of each person are different from another person. Even none of the organs in a person remains constant over time. The heart, the respiratory system, the digestive system, the circulatory and nervous system, etc., undergo changes every day;

But the important point is that along with these changing phenomena, there are always constant relationships. The relationship of the human heart with the digestive and respiratory system and with other systems has always been constant and is the same in all the organs of all humans.

These constant relationships are the basis of the system and fixed laws, which are the basis of science, in the form of scientific laws. Not only in the human body and soul, but in the entire system of existence and human society, with the assumption of continuous change, transformation and movement, fixed relationships and specific systems prevail among phenomena, and what is based on these relationships does not change.

The revealed laws and rulings, including crimes and definite mandatory punishments, are based on real benefits and corruptions, which are constant and unchangeable along with changing events and phenomena; However, at some point of time, due to the obstacles and the lack of proper background and the occurrence of emergency and exceptional circumstances, some of them are not subject to the primary ruling and find a new ruling.

In other words, among religious rules and regulations, there are many orders that change based on fixed principles and intentions, along with changing conditions and respond to new needs and new conditions. (Hossein, Mir Mohammad Sadeghi, Crimes against property and ownership, pp. 298 and 299.)

Therefore, in a situation where the implementation of some definite punishments is faced with obstacles such as accusations of violence in Islam and opposition to human rights, it is logical that the Islamic government, in order to preserve the supreme interests of Islam and the Islamic government, will

replace the punishments with other proportionate punishments until the obstacles are removed. Sometimes these punishments introduce a new form of definite punishment (Hudud), and sometimes they become a mild or less punishment and take the form of Taziri punishment. (Ali Ashraf Tahmasabi Nik, stability and change in crimes and punishments, p. 4 onwards)

E- Changeability of Limited Punishments in Quran and Sunnah

Despite the evidence of the fixedness of Hudud punishments, we have traditions from which it can be inferred that the type, amount and method of implementation of definite punishments are not always fixed in the Islamic penal system, and for some reason, if the conditions and context for the implementation of these sentences are not ready, they will be stopped, reduced or converted, and their primary sentence is changed in the event of the presentation of secondary titles such as harshness or humiliation of Islam, or by the priority of the primary sentence of the expediency of Islam and the Islamic government over them.

We mention them below:

Adherence of the Rules and Punishments on Benefits and Corruptions in the Quran and Sunnah

As stated in the previous chapters, the rules of Islam are based on theological principles based on real interests and corruptions. This means that no ruling is made in the form of obligation unless there is an expedient in doing it and in relation to it, and no ruling of God is made in the form of prohibitions unless there is corruption in doing it. Sometimes expediency is in the subject of the ruling and sometimes in the ruling itself.

It should be said that this expediency is different from free interests, which has no proof of its Shariah validity, and is sometimes used in Sunni jurisprudence.

An example of the compliance of the Hudud punishments with benefits and corruptions in the Holy Quran:

In some cases, the Holy Qur'an refers to the wisdom of legislating laws, such as verses 90 and 91 of Surah Ma'idah:

(O you who have faith! Indeed wine, gambling, idols, and the divining arrows are abominations of Satan's doing, so avoid them, so that you may be felicitous.

Indeed Satan seeks to cast enmity and hatred among you through wine and gambling, and to hinder you from the remembrance of Allah and from prayer. Will you, then, relinquish?)

In addition in the hadiths, many harms and evils of drinking alcohol and gambling have been mentioned in detail, and we will limit ourselves to mentioning some examples.

An example of compliance of the definite punishments with interests and corruptions in hadiths.

- Sahih narration of Jameel bin Darraj from Imam Sadiq (peace be upon him): (In fact, this narration can be cited, in general, regarding the criterion of expediency and real corruption in the legislation of Islamic Sharia) its text is as follows:

Ahmad bin Abi Abdullah Barqi from his father, from Yunus bin Abd al-Rahman and from Jamil bin Darraj:

I asked Imam Sadiq (peace be upon him) about cases of halal and haram, and the Imam said: Nothing (of laws of halal and haram) has been legislated in the Sharia except because of the point (of wisdom, corruption, and expediency) that it had.

- The second narration is narrated by Najashi from the book *Fiqh al-Reza* by Yahya bin Imran Halabi, who is a very reliable person:

"Know that God Almighty did not permit any food or drink except because of the expediency and benefit in it, and He did not forbid any food or drink except because of the harm and corruption in it."

(*Fiqh Al-Reza (Al-Fiqh)*, jurisprudence attributed to Imam Reza, without author, Al-Al-Bait Institute - Mashhad, 1406 AH, p. 277).

- Narrated by Ibn Sinan from Imam Reza (peace be upon him):

"Everything that God has made lawful is the interest and benefit of God's servants, and it is the reason for their survival and durability, and they need it. And whatever of the forbidden things that we have reached, the servants of God do not need them, and it is corrupting for them and causes their destruction..."

(Muhammad bin Ali bin Babouyeh, Sheikh Sadouq, "Ellal al-Sharia", (Reasons of Shari'ah) Vol. 2, p. 592)

In this narration, the 8th Imam (peace be upon him) considered the reasons for the permission and prohibitions of the Sharia as a general law precisely, because of the corruptions and real interests in the subject of these rulings.

At the end of this section, it is useful to note that the expediency and corruption that exists in the divine laws, is sometimes in the ruling in the matter in question, such as the examples that were mentioned in the aforementioned verses and traditions. And sometimes it is expedient in the legislation itself, such as orders from God just to exam the slaves. (Mirza Mohammad Taqi, Amoli, "Masbah al-Hadi fi Sharh al-Uruwa al-Wothqi", vol. 3, p. 441.)

Therefore, it should not be assumed that the sharia rulings related to the mandatory punishments and their implementation method are absolutely fixed and unchangeable, and as a result, in all times, places and conditions, they must be implemented objectively and without any shortages, even if it causes humiliation of Islam and Muslims and become a tactic in the hands of the enemy to attack propaganda against the Islamic government and mobilize public opinion and the world media against the Islamic Republic of Iran and force the international organizations that support human rights to react against the Islamic system.

Therefore, if in certain circumstances, the implementation of some definite punishments or its implementation methods are in conflict with the interests of the Islamic system and its preservation, it can even be said that for the sake of preserving the existence of the Islamic system, according to the first ruling, the higher expedient should be preferred over the inferior expedient and the type or execution method of such punishments be changed to eliminate the unfavorable conditions. We will mention it later.

F- Changing the Definite Mandatory Punishments Based on the Principles of Jurisprudence

It is not possible to impose some definite punishments such as stoning and amputation, whether in terms of the type of punishment or the method of its execution, to the quality that is stated in Shia jurisprudence sources, currently in Iran. Because it is against the expediency of the Islamic system. For example, according to jurisprudential rules and regulations, the punishment of stoning for someone who has committed adultery has a special implementation method.

The condemned person should be put in the hole, then the believer people who don't commit any crime of Hadd type, should stone him with special stones. The implementation of such a ruling now that

the mass media and virtual space and the Internet reflect all the scenes to the world will cause a heavy weakening of the Islamic system and will mobilize global public opinion and human rights forums against the Islamic government.

It is also crucifixion or amputation of limbs and similar cases. It is obvious that the establishment of such punishments in the current global environment faces serious obstacles. In such a situation that the implementation of such punishments in our country is facing now, there is no other choice but to convert them into other proportionate punishments, and practically, in the current situation, these punishments are not applied in our country and other types of punishments have been replaced.

Finally, the question that must be answered here is, in terms of jurisprudence standards, the conversion of these punishments is justified based on which jurisprudential evidence? In response to that, the following can be suggested:

1 -Confrontation During the Execution of Sentences

Whenever the Islamic ruler (infallible imam or legal guardian) recognizes that the implementation of certain punishments will result in corruption and harm to the Islamic government, and the Shariah will never consent to this corruption and harm, he will impose another proportionate punishment that is such It does not lead to corruption. (Seyd Mahmoud Shahroudi, Penal Jurisprudence, p. 203.)

These corruptions and losses can be the darkening of relations between the Islamic State and other countries, which sometimes even leads to severe tensions, war and bloodshed between countries. In some cases, it causes weakness in the Islamic government or the turning away of the world public opinion from Islam, which the Shariah is never satisfied with.

The term “confrontation”, is a term in the principles of fiqh that has a semantic load and special rules, which we will briefly explain about. The confrontation in principles of jurisprudence is where two different obligations fall on a person (whether real or legal), but the oblige is not able to combine these two obligations. In such a way that the compliance of one of these two obligations depends on the opposition to the other obligation.

In such a case, one of the two duties must be prioritized over the other in accordance with the rules of the confrontation. For example, a house is on fire and extinguishing the fire depends on breaking the door, window or destroying a part of the house. In this case, in order to save the lives of people caught in the fire and extinguish the fire, the fireman may have no choice but to destroy a part of the house. And we know that destruction of other's property is normally considered is forbidden.

On the other hand, in case on confrontation, we know that two reasons (for example, the jurisprudential evidence that says: saving human life is obligatory and the reason that says that destroying other people's property is a crime and haram) do not conflict with each other from the point of view of Shari'I ruling. Unlike the "conflict" cases, where the two jurisprudential evidences contradict each other at the stage of making a ruling.

(Sayed Abulqasem, Khoei, *ibid.*, vol. 3, p. 385.)

The important point is that in the event of confrontation between two rulings, one should refer to the rules of preference principles chapter by which one of these two rulings should take precedence over the other. One of principals of the preference is the priority of the important task over the less important task.

In the present case, preserving the expediency and integrity of the Islamic system, which is one of the most important obligations, and even the most one, will take precedence over the implementation of a Hudud punishments. And finally, because these punishments have alternatives and another appropriate

punishment can be implemented in their place, preserving the expediency of the Islamic system will come first.

2. Elimination of the Goal and Purpose of the Execution of Definite Punishments

If the establishment of the Islamic Hudud causes the main purpose of imposing such a punishment to disappear, it will certainly cause the cancellation and non-implementation of such a punishment; Because the purpose of the execution of the punishment is to reform the criminal, general and specific deterrence, the execution of justice and its social benefit.

Now, if the implementation of a definite punishment causes people to turn away from Islam and undermine the Islamic system, and endangers the interests of society and the Islamic system, surely the Islamic ruler, based on the dictates of reason and Sharia, should replace the specific Sharia Hadd with another appropriate punishment. But and at the same time it should not lead to corruption, the purpose and goal of Islamic law and legislation should be provided as much as possible, and the proportion between crime and punishment should be considered, and finally it should be a deterrent too.

3 Analogy of Priority

As the Islamic ruler has the authority to pardon the perpetrators of extreme crimes. (such as Imam Ali's pardon of a young man who had committed theft but memorized Surah Al-Baqarah), with a stronger argument, he can change the limited punishment to less (in terms of quantity or quality).

As one of the contemporary jurists insists on converting the limited punishment into another type or a milder punishment, he insists on the analogy of priority and says:

"From the point of view of common sense and reason, it can be understood from the jurisprudential evidence that it is permissible for the ruler to forgive the hadd, that it is permissible to forgive a part of the hadd or reduce it and make it a lesser punishment, in a stronger way.

The appropriateness of this ruling according to common sense and reason is that such a criminal, after confessing or repenting, deserves another opportunity with the opinion of the ruler and his discretion to repent well, and make his behavior correct and stable. Just as this point sometimes requires pardoning the Hadd, sometimes it also requires moderation or reduction. (Sayed Mahmoud, Shahroudi, Penal Jurisprudence, p. 198)

4- Sharia Discount Regarding to the of God's Right

As mentioned in the hadiths of the chapter on Huddud, the holy sharia aims to establish a reduction in the punishment in those categories of hadd crimes that have the aspect of God's right. For example, it is mentioned in the hadiths of this chapter that:

if the perpetrator has been proven guilty by confession,

or if he has voluntarily confessed, then if he retracts his confession, his punishment will be waived.

Or in the case of adultery where the victim escapes from the hole, it will not be returned. Because the Hadd in these cases has the aspect of God's right, and the holy legislator in this type of limit is aimed at mitigation.

In the end, in line with the theory of the possibility of changing the definite punishments, whether based on the first ruling regarding confrontation or on the basis of the second ruling, we refer to several fatwas of the jurists:

Allameh Helli writes about the permissibility of conversion of definite punishments:

"Divine laws and the implementation of them are based on interests, and interests also change with the change of command and differ with the differences of the obliges, so it is possible that a certain ruling at a time is expedient for a people, in which case they will be obliged to it and At another time, it will be corrupt for another people, which will be prohibited in this case.

Motahari also writes about this issue:

"If the reason discovers benefit or harm in a case that is more important than the ruling expressed in the Shariah and in confrontation with it, in this case the it limits that Shariah ruling.

Perhaps a mujtahid can ban a halal prescribed by the Shariah because of the corruption that his intellect has discovered, or even ban an obligatory thing or make a forbidden thing obligatory due to a more necessary expediency that only his intellect has discovered. (Mortaza, Motahari, Islam and time conditions vol. 2, p. 29)

Imam Khomeini also accepted the conversion of stoning to execution in response to an inquiry.

Ayatollah Seyyed Ali Sistani has accepted the conversion of Huddud to ta'ziri punishments if the rules of confrontation are available. (Treasure of judicial inquiries, *ibid.*, question 4198.)

Conclusion

The penal system of Islam includes crimes and punishments based on Imami jurisprudence in the form of definite mandatory punishments (Hadd) , retribution (Ghesas) , blood money(Diah) and other Taziri punishments.

The implementation of Islamic rules and punishments fully depends on the readiness of the appropriate fields and conditions in the Islamic society. In the current conditions of our society, the implementation of many definite and harsh punishments is in confrontation with the highest interests of the system and its preservation, and causes the system hardship, embarrassment and harm, therefore, as a secondary ruling, it is necessary to turn to appropriate punishments instead of such punishment;

Just as the stoning and apostasy has not been reached in the Islamic Penal Code of Islamic republic of Iran (1992, solar), and the crucifixion and amputation is not carried out in the courts of the country, cause it faces serious obstacles; Therefore, the change and transformation of the Hadd punishments will be done in three different directions:

- 1- Change in the method of the implementation of Hadd punishments, such as changing from stoning to execution.
- 2- Substitution of lesser punishments instead of Hadd punishments, such as reducing one hundred lashes to less than that.
- 3- Converting a Hadd punishment to another types, such as turning amputation into imprisonment.

References

The Holy Quran.

-Arasta, Mohammad Javad, Recognizing the expediency of the system from a jurisprudential-legal point of view, Tehran, Young Thought Center, 1381.

-Amoli , Mirza Mohammad Taghi, Mesbah al-Hodi fi Sharh al-Uruwa al-Wothgha.,

- Al-Kolaini, al-Razi Muhammad bin Yaqub, Al-Asul al-Kafi, Tehran, Dar al-Kotob al-Islamiyya, 5th edition 1363.
- Al-Horr al-Ameli, Muhammad bin Al-Hassan, Vasael al-Shia, Beirut-Lebanon, Dar Al ahya al-Torath al-Arabi, 1388 AH, vol. 18.
- Al-Baruni, Isa Ayyub, financial control during the reign of the Prophet(PBUH) and the Caliphs of the Rashedin.
- Javadi Amoli, Abdullah, Sharia in the Mirror of Knowledge, Tehran, Raja Cultural Publishing Center, Maravi Press, 1372.
- Khoei, Seyyed Abulqasem, Basics of Compendium of Al-Manhaj, vol.3.
- David, Rene, Great contemporary legal systems, translated by Hossein Safaei, Mohammad Ashuri and Ezzatullah Iraqi, Tehran, Academic Publishing Center.
- Rashid al-Reza, Al-Manar, vol.7 , Dar al-Marafah, Beirut, Lebanon ,1337.
- Rezaei, Hassan, Fixed and Variable in Islamic Penal System, thesis for obtaining PHD in penal law and criminology, Tarbiat Modares University, Tehran, summer 2011.
- Soroush, Abdul Karim, Theoretical narrowness and expansion of Sharia, Tehran, Sarat Cultural Institute, 2013.
- Tabatabai, Mohammad Hossein, collection of essays, questions and answers, essays on ijtihad and Imitation in Islam and Shia,.
- Tahmasabi Nik, Ali Ashraf, stability and change in crimes and punishments, rewritten by Mohammad Ismail Begi, Publisher Jungle, 1389.
- Abdul Hossein, Sharafuddin, text and Ijtihad, .
- Qiyasi , Jalaluddin, Dehghan, Hamid, Khosrowshahi, Qadratullah, Comparative study of Islamic general criminal law and statutes , Volume 1(General principles) , Hozwa and University Research Institute, 3rd edition, 2019.
- Mojtahad Shabestri, Mohammad, Hermeneutics of the Book and the Sunnah, Tehran, New Design Publications, 2013.
- Mir Mohammad Sadeghi, Hossein, Crimes against property and ownership, 15th edition, Tehran, Mizan publishing house, autumn 2013,
- Muhammad Ibn Abi Bakr Ibn Qayyim, Al jawzi, Governance methods in Sharia policy, .
- Motahari, Morteza, Islam and time conditions, Vol. 2, 2017.
- Majlisi , Mohammad Baqir, Bihar Al-Anwar , Beirut, Lebanon, Al-Wafa Institute, vol. 10,.
- Makarem Shirazi , Nasser, article on the realm of Quranic knowledge and the value of our understanding of the Quran, Monthly magazine Marefat , vol. 5, second year, vol. 1, summer 1990.
- Katouzian, Nasser, Philosophy of Law, (Vol. 1), Tehran, publishing company, 1991.
- Nojournian, Hossein, Fundamentals of Legislation and Procedure, Mashhad, Astan Quds Razavi Islamic -Research Foundation, 1974.

-Nawi, Mohi al-Din, Al-Majmoj Sharh al-Mohazzab ,Vol. 20 , Beirut-Lebanon, Dar al-Fikr,.

-Hashemi Shahroudi, Seyyed Mahmoud, Basics of Criminal Jurisprudence, Tehran, Mizan Publishing House, Judge's Publishing House, 1st edition, 1419 A.H.

Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/4.0/>).