



## Zarar (Harm) as a Foundation for Criminalization in Islamic Criminal Policy

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### **Abstract**

Public order and security is ensured through criminalization, which itself is based on principles, one of which is the principle of harm. The principle of harm justifies criminalization in various fields. Of course, the nature of its harmfulness is different from the secular approach according to the attitude of Islam. In the approach of Islam, the realm of harm includes material harm and spiritual harm. Severe damage covers life, property, thought, victimless crimes and public areas. Islamic criminal law, in addition to the aforementioned examples, has criminalized harm to morality and chastity and prescribed appropriate punishments under the heading of extreme punishments and Shariah punishments. With this approach, the principle of harm as the basis of criminalization in Islamic criminal policy has a wide scope.

**Keywords:** *Foundation; Criminalization; Harm; Criminal Policy of Crime*

### **Introduction**

Ensuring security and establishing order requires criminal measures, including criminalization, which is an inevitable necessity in all legal systems of the world. although, different approaches can be seen in the level of criminalization and how to deal with the criminal phenomenon, criminalization takes place on the acceptable theoretical bases of government or political power with religious and religious attitudes, anthropological type, moral propositions and concepts such as freedom, justice, power and security. What is studied today under the title of the foundations of criminalization in the field of specialized studies of criminal law, are macro and general principles that include individual and social rights, legal ethics, legal patriarchy and other cases. The foundation of criminalization in Islamic criminal law is the general interest that can justify criminalization in different dimensions. Muslim jurists and thinkers have considered the foundations of Islamic criminal law as the benefits and corruptions that justify criminalization in various fields and give it a shari'a and legal color. Therefore, in religious teachings, everything that is considered obligatory has an advantage, and everything that is prohibited has corruption and harm.

There are many bases of criminalization in Islamic criminal law. The legislator of Islamic law has sometimes criminalized the current act or omission based on legal moralism or in the role of a compassionate and kind father, he has prohibited some things, but the most important basis of criminalization in the criminal policy of Islam is the principle of harm. This basis is the common value among all the legal systems of the world, and different criminal policy models, such as the minimalist criminal policy model, the moderate criminal policy model, and the maximum criminal policy model, have criminalized in the light of the basis of harm. The legal school of liberalism, with the slogan of individual rights and freedoms, has accepted the principle of harm as the basis of criminalization although the scope of harm in the process of criminalization is very limited. The criminal policy model of moderation, in addition to accepting the basis of harm, they have also used the basis of moralism and the basis of legal patriarchy in the process of criminalization and in this approach, the area of loss is somewhat wide. In the maximum criminal policy model, the basis of loss and the basis of patriarchy are very wide and totalitarian governments have used it to suppress the opposition and expand their absolute rule. In the criminal policy model of Islam, the field of harm is wide and includes harm to life, property, religious teachings, moral propositions, and the interests of society and the state.

The main research question is that to what extent is criminalization in Islamic criminal law based on harm? This article tries to explain the effectiveness of the basis of harm in the process of criminalization in Islamic criminal law. First, the key concepts will be explored, and then the position of the basis of harm in Islamic law and criminal law will be reviewed.

## **1) Conceptology**

### **1-1) The Concept of Zarar (Harm)**

Harm in the word means harming others (Tehrani, 2013, p. 271), loss of life and financial loss is another concept that is expressed for loss (Lewis, Maalouf, 2010, p. 623). Harm is also used in the concept of deficiency in finance (Saiiah, 1951, Vol. 1: 852). Harm in its general sense is loss of life and property caused by a person, group or institution to another. In this sense, harm includes all types of losses and damages. In the term, harm is the loss and damage caused to the victim by committing a crime, and it can be divided into material and spiritual loss (Abaziri Fumeshi, 2011, p. 484). Some consider harm to include components; A behavior that leads to a harmful result or carries the risk of causing harm (Fallahi, 2013, p. 256). In criminal law, harm is that which, in addition to violating individual rights, which constitutes the civil aspect of harm, endangers public order and peaceful social coexistence (ibid., p. 260). In any case, harm includes behavior that is harmful to others; It does not matter if this behavior happens in a private environment or in public places (Nobahar, 2017, p. 304). According to the aforementioned definitions, harm can be considered material and moral loss that affects individual rights and freedoms, public order and security, and religious and moral statements.

### **1-2) The Concept of Jorm (Crime)**

Jorm is from the root of Jaram and means to pluck the fruit from the tree. This word is used as a metaphor for committing a delinquency and committing a criminal act (Ragheb Esfahani, 1419 AH, p. 69). In the *Lesan Al-Arab*, a person who commits a crime is called Jarem. A Mojrem is from the family of the jorm in the sense of a sinner (Ibn Manzoor, Vol. 12, 1388, p. 91). Crime has various definitions in terms of idiom. The reason for this is that the legal systems of the world have a different approach to the criminal phenomenon based on religious beliefs, social values and the type of anthropology. And this different approach has caused ambiguity in the field of crime definition. Some jurists consider a crime as a behavior that is committed in opposition to the applicable law of the country and naturally entails a punishment. Some people consider crime as an act or omission that was enacted by the legislator to prevent disturbances in public order and to protect the interests of individuals and society, and for its violation, a legal punishment has been determined (Salimi, 2004, p. 53). A crime in criminal law is a

criminal behavior that is prohibited by the legislator and usually consists of three pillars; legal element, material element and spiritual element (Qiasi, and Khosrow Shahi, Vol. 1, 2015, p. 6-7). In religious statements, crime is defined in the form of the words taboo and sin. It is important to mention that there is a difference between crime and haram because every crime is haram, but the opposite is not true. With this approach, haram and misdemeanor are crimes and misdemeanors within the framework of a specific concept. With this definition, a crime in Islamic teachings is an act or omission for which a Shariah punishment has been prescribed (Faiz, p. 79). In another definition, the realm of crime has developed and the commission of any prohibited act is considered a crime; whether this prohibition is from the Shariah area or from the Islamic ruler. (Ibn Athir, 1988, vol. 1, p. 310). According to some opinions, crimes in religious propositions are Sharia prohibitions that are included in the scope of Hudud, Qisas, or Ta'zirat, and Sharia prohibitions are to ignore the prohibition of the Sharia and abandon the command of the Sharia (Al-Awda, 1402 AH, p. 86).

### **1-3) The Concept of Criminalization**

Criminalization is one of the most important components of criminal law. It is a process based on which criminal acts are selected with certain criteria and appropriate methods. In other words, criminalization is a set of actions that legislator, taking into account the basic interests and values of the society and relying on his accepted theoretical foundations, prohibits the act or omission and imposes a guarantee of criminal execution for it. Criminalization is a process by which the legislator or legal institution, paying attention the basic values of the society and relying on its acceptable theoretical foundations, by resorting to punishment, prohibits the act or omission of an act that disrupts order and public security and in this way, it limits some individual freedoms (Najafi Abrandabadi and Hashem Beigi, 1390, p. 90). Janathan schonsheek considers three stages necessary for acceptable criminalization. He used the word filter to clarify the process of criminalization. With this approach, actions and behaviors have the ability to be criminalized that their criminalization successfully passes the triple filter. The first filter is that it is preferable to criminalize actions and behaviors (Shamei, 2013, p. 183). This filter is called the principle filter. The second filter is that civil, disciplinary and administrative methods are not effective (Habibzadeh and Zinali, 2014, Vol. 49, p. 45). The third filter is to examine the effects and consequences of criminalization and that the positive effects of criminalization are predictable (Pourbafrani, 2013, Vol. 75, p. 25-52). With the community of triple filters, criminalization finds legal and logical means. Criminalization is an optional process in which the legislator, taking into account social norms, international standards and criminological data, enforces or prohibits certain behaviors and foresees the guarantee of criminal execution to protect them (Aghababai, p. 45). Criminalization guarantees individual rights and freedoms, and with this approach, the legislator protects the privacy of individual and community rights (Ardabili, Vol. 1, 1380: 41 and Norbaha, 2010, p. 27).

It seems that criminalization has a dual function; On the one hand, it limits some individual rights and freedoms, and on the other hand, it is a guarantee for the protection and preservation of the fundamental rights and citizenship rights of the people. The approach of the speech in this regard is that criminalization should be used as much as necessary due to its dual use. The explicit meaning of this statement is that as long as non-criminal solutions are effective, it will not be time to criminalize, and criminalization is an exception with its unique working characteristics.

### **1-4) Concept of Mabani (Foundations)**

Mabani is the plural of Mabna, and it, in the word, means principle, base, basis and foundation (Moin, 1996, p. 925 and 927). Bana and Mabna are from the same root and Bana means building (Ragheb Esfahani, 1427AH., p. 147). In fact, Mabna is used in the concept of root and basis and its synonyms. In Arabic, a child is called Ibn because the child is born from parents. According to linguists, it plays a central role in the creation and stability of the object and subject; In such a way that without a base, nothing will be created (Al-Manjad, 1986, p. 50). In the Persian dictionary, Mabani is considered to be the

plural of Mabna, and it is used in the concept of place of construction, root, and foundation (Omid, 1984, p. 125). In the term, Mabna has various definitions. Sometimes the word refers to the reasons for a scientific opinion, such as “the basics of Darwin's theory of evolution”. In this sense, Mabani means proofs and arguments that lead to the proof of a theory. In some cases, the term Mabani is added to specific knowledge, which means the general principles and rules or the fundamental content of that science, such as the Mabani of criminology and the Mabani of criminalization (Qiasi, 2015, p. 36). Mabani is used in answering the why of criminal regulations (Katouzian, 8213, p. 19). With this approach, the Mabna rationalizes criminal laws and regulations and gives them a legal color. In the absence of a basis, no legal rules and regulations will become legal because people in the society will resist it. In any case, the Mabani is set of religious beliefs, accepted social norms, moral propositions and predictable harms that justify criminalization in terms of criminal law and give a legal color to the criminal restrictions.

### **1-5) The Concept of Criminal Policy**

Criminal policy is a set of actions and reactions that are applied against crime by the government institution, and its main goal is to fight crimes, prevent crime and ensure the safety of society. Penal policy is determined by the two indicators of the government institution and criminal treatment (Qiasi, p. 40). Feuerbach introduced the term criminal policy in the field of criminal law in 1803. Criminal policy is a set of repressive measures by which the government reacts against crime (Kristin, Lazarge, translated by Ali Hassan Najafi Abrandabadi, 2003, p. 9). In this approach, criminal policy is criminal reactions that are used against crime, and the purpose of criminal policy is to deal with criminals, establish public order and security. In Dondi Yudo Wire's view, criminal policy is the use of punitive and repressive reaction against criminal behavior (Mohammad Husseini, No. 11, 1997, p. 153). Criminal policy is a comprehensive criminal response to criminal phenomena that needs to be compiled, identified and evaluated (Irvanian, 2008, p. 570). Finally, criminal policy can be defined as follows: Criminal policy is a set of criminal measures that governments react to crime and anti-social behavior by resorting to repressive methods. With the application of grand criminal strategies, it seeks to ensure security and establish order and peace in a certain society.

### **2) The Position of the Principle of Harm in the Statutory Law**

Harm is one of the concepts that has been considered in all legal systems of the world as the foundation of criminalization. However, there are many differences between the legal systems of the world. The principle of harm is the accepted basis of criminalization in the liberal legal system. This approach has been transferred from the philosophy of law and ethics to economics and has survived and continued through thinkers such as John Locke, Bentham and Smith (Bertrand, Russell, 1994, p., 85).

In the liberal view, the existence of the individual is original and objective, and the society has a subjective and hypothetical existence. Therefore, the society has no interests beyond the interests of individuals (Rahmat Elahi and Panahi Boroujerdi, 2011, p. 108). In this intellectual system, individual rights take precedence over social rights because society is made up of people and it is these people who act collectively but always seek their individual benefits. In other words, in liberal thought, collective interests find meaning through individual interests.

John Stuart Mill has a new approach to the category of harm. In his opinion, individual freedoms precede collective rights, and people have a wide freedom to flourish, show their talents and creativity, and the government plays the role of the night watchman (Javadi and Husseini Sorki, 2016, p. 113). John Stuart Mill, the English philosopher of empiricism, considers individual interests to be superior to social interests and believes that public power should not hinder the development and flourishing of individual talents by interfering in the personal and private affairs of individuals. Therefore, freedom is the only value that governments should try to preserve. Nevertheless, John Stuart Mill, from the approach of

lawlessness, has proposed a collective solution between individual freedoms and the rule of law (Ibid., p. 11). In the view of traditional liberalism, harm means limiting individual rights and freedoms. What is harm and how an institution can distinguish between harmful and non-harmful actions is one of the important topics in the field of criminal law that needs analysis and interpretation. Therefore, the beginning of the components, the nature and the scope of the harm will be re-read and then the position of the harm will be analyzed as a foundation for criminalization.

## **2-1) Harm Territory**

There are different perceptions of the scope of the principle of harm, individual rights and freedoms. The reason for this is the ambiguity in the concept of harm. Harm has undergone a semantic change in the context of social changes and the passage of time, and this change has made the interpretation of the principle of harm face many ambiguities. Some have considered any harm to be of criminal reaction, while others have made a difference between harm that occurs in the realm of private life and harm that occurs in the public domain and some others consider only severe losses to be penalized. It seems that among the thinkers and philosophers of criminal law, harm fluctuates in its broad and narrow meaning.

### **2-1-1) Harm in the Broadest Sense**

In this view, the realm of harm is wide and includes harm to the individual and the society, whether direct or indirect. John Stuart Mill has stated that some people believe that a person's inappropriate behavior is an example that he sets before others, and some people in society are affected by this and some members of the society are affected by this passage. Criminalization of this type of behavior will prevent the loss caused by corruption in the society (Mill, p. 204). In rejecting this view, Mill says that it is true that the behavior of people in a society has a mutual effect, but a difference must be made between the direct effect and the indirect effect of a behavior (Noorbahar, p. 306). Some people have stated in the extended interpretation of the principle of harm that in an organized society, there is no group of behaviors that do not harm anyone or only cause harm to the perpetrator. By criticizing John Stuart Mill's point of view, they have stated that the division of harm to oneself and others is a justification that Mill has expressed, and such an explanation does not appeal to the heart. The main criterion in criminalization is the harm that comes to an individual or society (Hart, Herbert, p. 34).

Harm, in its broadest sense, includes actions and behaviors that result in harm to the perpetrator himself or to the society. Considering the mutual influence of people's behavior on each other, it is clear that the good or bad behavior of a person has its own impact on the society and it is possible that some people in the society will spread that behavior in the society by imitating the inappropriate behavior of a person. This is why relationships with bad people provide the basis for crimes and anti-social behavior. A general look at the teenagers who have been led to deviation and destruction due to following the example of their unfaithful friend, is an expression of this fact that influence in relationships is an unquestionable principle and no one can deny its mutual influence. With this approach, it is not accepted to exclude the harm in the private district from the circle of criminalization because such harm will have its effects on the society. For example, a driver who gets drunk as a result of drinking alcohol, cannot continue his work until the end of his drunken state, and the consequence is that he does not fulfill his responsibility towards his children and family. In such cases, it cannot be easily ignored with the argument that the harm caused by drinking alcohol comes back to the perpetrator himself, but the harm in its broad sense includes such cases as well. The fact is that the behavior of people in a society has a mutual effect and each person's behavior, whether good behavior or bad behavior, affects others whether they like it or not. It does not matter if this behavior is done in private or in public. In other words, a person's bad behavior first affects the people who are related to the perpetrator, and then over time it affects the society (Noorbahar, p. 306).

One of the extended interpretations of harm is the generalization of harm to material harm and spiritual harm. With this approach, the field of harm includes religious teachings, moral propositions and accepted social values. This perception is related to the basis of legal ethics (ibid., p. 308). The development of the concept of harm creates the capacity that criminal law has entered the field of ethics in the light of the basis of harm. With the approach of expanding human virtue and fighting against the manifestations of sins and impurity, criminalize damage to the basic values of society, and in this approach there is no difference between the private and public districts (Fallahi, p. 276). This approach is based on the unity of the individual and the society, and the interests of the individual come out of the interests of the society. In other words, individual rights and freedoms are subject to the requirements and conditions of the society, and the interests of the individual and the interests of the society are tied together (Noorbahar, p. 307). Such an understanding of the concept of harm is very broad and overlaps with the foundations of legal ethics, meritocracy and legal patriarchy and is in complete opposition to individual rights and freedoms. It is true that the principle of harm includes moral and religious propositions, and harm to religious beliefs and the basic values of society can be criminalized. However, it seems that this understanding of the concept of harm destroys individual rights and freedoms. In fact, the broad perception of harm itself leads to much harm for the individual and the society.

### **2-1-2) Harm in the Narrow Sense**

In the liberal intellectual system, the principle of harm is a cover to protect individual rights and freedoms, and the principle of harm protects the privacy of individuals. The negative concept of harm in the approach of liberalism is that criminal law protects the realm of individual freedoms by criminalizing harm to others (Ibid., p. 304). It is true that the principle of loss is more concerned with the field of harmful behavior and the field of loss is placed in the next stage, but the decriminalization of behaviors that do not harm others limits the scope of the government's interference in the private district of individuals. This is what protects the privacy of individual rights and freedoms (Ibid., p. 305). In this approach, criminalization has a double function, in its negative aspect, it prohibits any kind of harm to privacy and in the other application, it supports the realm of individual rights and freedoms. In the view of liberalism, the government's interference in the private realm of individuals is minimal and individual independence and fundamental freedoms cannot be limited by moral propositions. Fundamental individual rights and freedoms are rooted in the right to life, and this right does not have any limitations except harm to others (Fallahi, p. 273). Modern liberal governments have criminalized harm to public order. Therefore, the disruption of public order is a harm that justifies the intervention of criminal law. In the modern liberal approach, the definition of public order is different from state order. In state order, the government pursues its authority and sovereignty in the criminalization process but public order is not only against individual rights and freedoms, but it is the umbrella of protecting fundamental individual freedoms. In this approach, individual rights and freedoms emerge from public order, and public order is nothing more than the protection of individual rights (ibid., p. 275).

It seems that the narrow interpretation of the harm principle and the exclusion of the private district from the criminalization process can be rejected in several ways:

First of all, it is difficult to demarcate the exact boundaries between the public and private districts in practice, and this ambiguity makes criminalization in the light of the basis of harm problematic due to the lack of separation between the public and private districts.

Second, the concept of harm has undergone a semantic transformation over time, and the most important reason for this claim is that behavior in a religious and moral society is considered harmful and in non-religious society, this is not the case. Therefore, it is not possible to prescribe a single standard for societies with different religious and cultural values.

The second thing that seems important is that in most societies, accepted social values, religious teachings, and moral propositions are not less valuable than life and property. Sometimes the preservation of religious and social values takes priority over the preservation of life, such as the primary or defensive jihad in Islam or the defense of territorial integrity and national sovereignty. Therefore, damage to religious values and damage to moral propositions, as well as damage to life and property, justify the intervention of criminal law.

### **2-1-3) Severe Harm**

Causing loss to another person harms the relationships of people in a society, and this may seriously endanger peaceful living. Therefore, it is necessary to know what behavior harms the public order and peaceful relations of people in an organized society. John Stuart Mill believes that actions that harm the interests of others cannot be prevented by non-criminal means, and should be criminalized. In order to protect the fundamental rights and freedoms of the people, the government is obliged to prevent harm (Mill, p. 201-203). Most jurists consider crimes against physical integrity to be a serious harm, and the reason for this is the inherent dignity of human beings. Intentional murder is considered a serious loss because the fundamental right to life is taken away from the victim with intent and malice, and intentionally taking the life of an innocent person is a great loss that is not compatible with human dignity. Intentional crime against bodily integrity is considered a serious harm in all legal systems of the world (Fallahi, 295).

Reckless or negligent homicide due to the violation of government regulations and non-compliance with government laws and systems is also a serious harm, and the criminalization of a quasi-deliberate crime has legal justification and such crimes that lead to organ failure are included under the category of severe damage. Crimes against public order, crimes against security and public tranquility and crimes against the government are examples of severe harm (ibid, p. 296). Crimes against property, crimes against the environment, crimes against religious statements, and basic social damages are considered serious harm. Undoubtedly, severe harm considers the intervention of criminal law necessary and justifies criminalization.

### **2-1-4) Unjustified Harm**

In this view, damage is divided into justified harm and unjustified harm. It is obvious that unjustified harm justifies criminalization. Some losses are justified; such as the loss of a merchant in some transactions or daily life losses that people face more or less. Such losses cannot justify criminalization (Mill, p. 240). For this reason alone, unjustified loss can be criminalized in the light of the principle of loss, and governments are obliged to prevent unjustified loss through appropriate criminal measures, but governments have no responsibility for justified losses and society does not support losses that are an integral part of normal life (Fallahi, p. 300). It seems that the unjustified harm has the ability to justify the criminalization process and force the public power to react criminally.

## **3) Position of Harm Foundations in Islamic Criminal Law**

The foundation of harm in Islamic criminal law has a wide scope, and in addition to the public interest, it includes any damage to the interests of the government, society and social institutions. In this approach, the public power through criminalization should prevent harm to the privacy of legitimate political power, accepted social values and religious statements. "The Rule of no harm" as a jurisprudential and rational rule prohibits any harm (Hosseini Sistani, 1414 AH, p. 135) and by that, it is forbidden to cause harm to others. The difference between intentional and non-intentional crimes is not criminal responsibility although there is a difference in its amount (Taheri, p. 244). Proving the relationship of causation between a harmful act and its perpetrator justifies criminalization based on harm,

and proving fault is not a condition (Goldozian, 2009, p. 84). According to the explanation of the concept of harm and its divisions, we will examine the criminalization based on harm in Islamic criminal policy. It is important to mention that the scope of criminalization based on harm in Islamic criminal law is wide and it is neither necessary nor logical to state all its examples. Therefore, with a narrow interpretation of the concept of harm, the main focus of the discussion will be the explanation of the most important examples of severe harm in the form of crimes against physical integrity, property domains, religious and religious beliefs, the realm of government security and public comfort, and victimless crimes.

### 3-1) Crimes Against Physical Integrity

Crimes against physical integrity are among the severe damages that cause the loss of innocent human life. Islamic criminal law 1400 years ago considered killing a human being as a serious harm and criminalized this behavior. Muslim jurists and jurists have divided crimes against bodily integrity into intentional, quasi-intentional, and wrongful homicide, and have written numerous books on its interpretation and analysis. In order to better explain the discussion and what the position of the principle of harm in religious statements is, it is necessary to investigate the crime against physical integrity under the title of intentional homicide.

**Intentional Homicide:** The right to life is an important divine gift and one of the basic human rights. From the point of view of religious teachings, man has inherent dignity. And this right must be protected through proper criminalization. Protecting the inherent dignity of a human being means that his life is supported by the society. One of the important examples of crimes against physical integrity is intentional homicide. In this great crime, innocent human life is taken away. Undoubtedly, the end of an innocent person's life is a great loss that cannot be easily compensated. In the following, the Qur'an's attitude to this important matter will be examined. According to the Qur'an, man is a respectable and dignified being. In the Holy Qur'an, God considered man worthy of respect and gave dignity to the children of Adam. Based on the Qur'anic propositions, many blessings have been provided to man and they are superior to many other creatures (Isra', verse 70). Human dignity is inherent and this dignity has been given to mankind regardless of beliefs. The dignity and honor of a person is preserved through the protection of his life, property and dignity. Therefore, in religious statements, harming an innocent person's life is in conflict with his inherent dignity. Religious teachings consider the killing of an innocent human being equal to the killing of all human beings and consider saving his life equal to giving life to all mankind (Ma'idah, verse 32). According to the Qur'an, killing a believer is an unforgivable sin, and the punishment of the burning fire will await the murderer, in such a way that he will be left alone in the burning fire of hell, and he will be subject to God's wrath and fury (Nisa, verse 39). Based on this, the depth of harm that appears after killing a person, especially a believer, is revealed from the perspective of the Qur'an. Thinking about retaliation and interpreting it to life also shows the depth of the loss resulting from the crime of murder. In another place, the Holy Qur'an strictly prohibits the killing of an innocent person and considers the criminalization of suicide as a guarantee of maintaining the inherent dignity and sanctity of human blood (Israa, verse 32).

As can be deduced from the contents of the mentioned verses, the killing of an innocent person is a severe harm that affects the victim, family and society. It is a severe approximation that whenever a deliberate murder occurs, the main victim is the victim and his family. The victim's family mourns the loss of a loved one, and the loss of a family member is a great tragedy and loss that cannot be compensated for, at least in terms of mental suffering. Assuming that the family loses its breadwinner, the loss will be more severe because the loss of the father of the family on the one hand and the financial loss caused by this loss on the other hand imposes double pressure and severe damage on the family. Therefore, in Islamic criminal law, the infliction of severe harm through intentional homicide is severely criminalized (Esfahani, 1406 AH: 18). The criminalization of intentional homicide in the criminal policy of Islam is based on severe harm. In addition to the verses about intentional crime against physical integrity, the "rule of harmlessness" as a jurisprudential rule, confirms this claim (Hosseini Sistani, p. 9).



Based on this rule, serious harm has been criminalized by the legislator of Islamic law, and no harm in the famous prophetic hadith indicates sanctity (Esfahani, p. 19). There is a difference of opinion among Muslim jurists regarding the scope and indication of the "rule of no harm", some have considered the meaning of "no harm" to be the negation of a harmful ruling, and they have considered the promise of the rule of harm to be the negation of the ruling in the language of the negation of the subject. Some have interpreted the "harmless rule" as the negation of harm, which is not the place to express it here. In general, the rule of harm is agreed upon by Imamiyyah and Sunni jurists (Hosseini Sistani, p. 11).

The Messenger of God has attached great value to the preservation of human life and has considered criminalization based on religious teachings as a guarantee for the protection of human life. The Holy Prophet of Islam, in the light of the Qur'anic verses and its interpretation, has criminalized cases based on harm. One of the important examples is the criminalization of revenge against the intentional killing of an innocent person. Killing an innocent person is an unforgivable sin and the murderer deserves the death penalty (Sunan Nasa'i, vol.8, p. 23). The Noble Messenger of Islam has an eloquent statement about the intentional killing of a believer, and the summary of his speech is this: When the people of the earth and the sky participate in the intentional killing of a believer, God will punish them all in the fire of hell. (Coleiny, 1429 AH., p. 237). It is obvious that in intentional murder, great harm is caused to the victim, his family and the society. The severe damage to the victim's family is clear and does not need to be analyzed, but how the severe damage of intentional homicide affects the society needs to be analyzed. Intentional murder in the society in fact inflames the psychological atmosphere of that society and the news of the murder spreads throughout the city. This reflection targets the peace of society and plunges people into deep anxiety and worry. This situation includes the government as the guardian of people's security because according to the constitution and normal laws, the government is responsible for ensuring the security of the people, and those responsible for the security of the society will be questioned as a result of the situation.

Imam Ali (AS) considered the protection of human life to be the basis of criminalization. As the successor of the Holy Prophet of Islam, Ali (A.S.) has not made any new criminalization rather, in line with the explanation of religious propositions, the protection and safeguarding of innocent human blood, he has interpreted and explained the basis of the criminalization. Hazrat Ali (a.s.) has said that the law of retribution has been made to protect the blood of a righteous person, and religious propositions in this regard do not show any neglect or negligence (Sayed Razi, 2011, Hikmat 252). A deep look at Mawla Ali's statement shows that it is possible to protect a person's life through criminal measures, and retributive punishment can be interpreted and analyzed as a guarantee of protecting human life in the light of the foundation of harm. In the eyes of Imam Ali (a.s.), the crime of intentional murder causes severe harm, and its smoke goes not only to the eyes of parents, but also to the eyes of citizens, and the society suffers from it in some way. The result is that criminalization with the approach of extreme harm is consistent with the rule of no harm (Husseini Sistani, p. 134).

Muslim jurists and thinkers have discussed and investigated intentional killing by using the legal rule of no harm, the rule of dissipation, the rule of causation and the rule of sanctity of Muslim blood. The jurists have used the word crime about murder. Documenting the view of Muslim jurists on crimes against bodily integrity, in addition to the aforementioned verses and traditions, are the definite rules of jurisprudence that were mentioned. In Islamic teachings, human beings have a very high position compared to other beings, and this respect is to such an extent that killing an innocent human being is assumed to be the same as killing all human beings, and saving the life of one human being is considered as saving all mankind (Surah Ma'idah, verse 32). Deliberately killing a believer is worthy of the fire of hell (Surah Nisa, verse 39). Spilling the blood of a righteous person is a great sin and a great harm, and taking the life of an innocent person will undoubtedly result in severe punishment (Najafi, vol. 43, p. 410). The blood of any Muslim is not wasted (ibid., 410). In religious propositions, man has inherent dignity, and the right to dignity and respect is violated by taking the life of an innocent person, and the blood of any Muslim (human) is not wasted (Ibn Abi Jomhour, 1405, vol.2, p. 365).

In order to preserve the sanctity of human blood and prevent serious harm, religious teachings have developed their protective umbrella for the right to life, and have placed the responsibility of the Islamic government on the responsibility of the murder of which the killer is not known (Majlisi II, 1404, vol. 24, p. 174). Hor Ameli, 1409, 29, p. 145). Imam Sadiq (a.s.) was asked about a deliberate murder in which the killer had fled, Imam (a.s.) said that the victim's blood money is in the killer's property, and if he does not have the property, the blood money is taken from his relatives, and assuming that the escaped murderer has no heir, the deceased's blood money is paid from the treasury (Kilini, 1429, vol. 14, p. 522; Tusi, 2010, vol. 4, p. 262).

Jamil bin Darraj asks Imam Sadiq (a.s.) whether the testimony of women regarding hudud is accepted? Imam (a.s.) said: "The testimony of women is only accepted in the case of murder because Hazrat Ali (a.s.) said that the blood of an innocent person is never wasted." (Kilini, 1367, vol. 7, p. 39; Tusi, 1365, vol. 6, p. 266; Makarem Shirazi, 1422, vol. 3, p. 102). One of the contemporary jurists has stated that human blood is not wasted under any circumstances. If a murder takes place and the killer is not known, the victim's ransom must be paid from Bait Al-Mal. From the point of view of this jurist, whenever a motorcycle rider pours incendiary substances in the alley where children are playing and if a child or a passerby is killed due to a fire caused by incendiary substances, the Islamic government will be responsible for paying the dowry (Makaram Shirazi, p. 132). The Islamic Penal Code of 2012 also confirmed this point of view (Islamic Penal Code, 2012, Article 487).

Harm is a general concept that does not recognize gender, ethnicity and religion. Therefore, it seems that the Muslim adverb in the rule (sanctity of Muslim blood) has no characteristics according to the following content: (1) In the religious approach, man has inherent dignity (Isra', verse 70), (2) according to the commandment of the beloved Messenger of Islam, all human beings are equal like the seeds of the shoulder (Sheikh Saduq, vol. 4, p. 379) and (3) In the letter of Hazrat Ali (AS) to Malik Ashtar regarding the equality of people in the territory of the Islamic government, it has been specified that O Malik, people either share with you in religion or are one with you in creation. Therefore, you should not differentiate between Muslims and non-Muslims (Nahj al-Balagheh, letter 53). The result is that in the light of the clarity of verse 70 of Surah Isra, the words of the Holy Prophet of Islam and the letter of Mullah Ali (AS.), the word Muslim in the aforementioned rule has no character. And this rule as a general rule is applicable to all innocent people with any belief and religion. With this approach, innocent human blood is not wasted under the rule of the Islamic State.

### **3-2) Property and Moral Statements**

#### **3-2-1) Severe Harm in Property**

The principle of harm in the field of property and ownership justifies criminalization. Based on the principle of harm and jurisprudential rules such as the rule of non-harm, the rule of dissipation and the rule of causation, damage to other people's property creates guarantee and the perpetrator of the harm is required to compensate for it. Property in all countries is very important, in such a way that individual rights and freedoms without civil and criminal protection in the field of property and ownership will be no more than a mirage (Gary, p. 139). Protection of property and private ownership has a significant relationship with the individual's free will and the protection of the said area is an integral part of the life of every free person (ibid., p. 106). There is a difference of opinion among the liberals, and modern liberals have imposed more restrictions on property and ownership (ibid., p. 101). Severe damage against property justifies criminalization (Fallahi, p. 423). Severe damage is specifically included in the field of property and ownership (Nobahar, p. 308). Legitimate property is supported by religious propositions and severe loss is not compatible with protection of property and ownership (Esfahani, p. 26). It seems that severe damage in the field of property and ownership, like severe damage against physical integrity, has the ability to be criminalized, and religious teachings and the principle of harm in statutory law confirm this claim.

### 3-2-3) Moral Values and Chastity

Severe damage also includes chastity crimes (Noorbahar, p. 308). Based on this, illicit relations, homosexuality, qazf (Attributing adultery to another person) between a believer and his wife, intoxicants and narcotics can be criminalized through harm (Hawizi, p. 5). Sexual relations outside the Shari'a framework and unjust accusations in the form of qazf is a serious harm that destroys the foundation of the family, and sometimes this type of chastity crimes causes conflicts and bloody fights in the society. (Hor Ameli, p. 241). Homosexuality also causes severe harm, and the most important harm is the substitution of the opposite sex for the legal spouse and the dependence of men on men and women on women, which, in addition to being contrary to human nature, follows severe and destructive harms in The matter of birth and reproduction (Muhaddith Nouri, vol. 14, p. 3). The result of the inappropriate behavior of Lot's people is a clear proof of this claim (Shara'a, verse 166). The harm of Qazf between a believer and his wife is also severe, and this type of unjust accusation destroys the honor and dignity of believers and increases hypocrisy and discord between husband and wife. The blessed verses also consider ignoring the above values as a cause of great harm (Nisa, verses 16-15, Noor, verse 2, Araf, verses 81-80, Baqarah, verse 219 and Maedah, verse 90).

In Islamic criminal law, the field of moral and chastity values has been given serious attention and severe damages against religious values have been criminalized. This type of crime often has a social and public aspect, and considering the extent of the damage caused by it, it can be criminalized. (Abul Hasan, Mohammadi, *ibid.*, p. 58). Chastity crimes often take place in the social district, even if they occur in a private environment between two people. Its most important consequence is the deviation and contamination of society (Esra, 32). Chastity crimes often cause huge losses, the extent of which, in addition to the perpetrators, also affects the society (Hor Ameli, *ibid.*, Chapter 1, p. 241). Crimes against religious ethics are a serious harm in Islamic criminal law. It doesn't matter if these crimes happen in private or in public although the punishment for chastity crimes in public will be more. Severe harm is prohibited in religious teachings (Hosseini Sistani, p. 135). The principle of harm in its narrow sense justifies the necessity of criminalizing moral and chastity values and gives it a legal color.

### 3-3) Crimes Against the Security of the Government, Private Sector and Victimless Crimes

#### 3-3-1) Crimes Against State Security

The security of the government and the establishment of public order are of particular importance and the political power will never be tolerant in this area. Political authority and sovereignty are intertwined with public security and social order. Therefore, damage against independence, sovereignty and national authority is considered damage against the power of the government (Najafi Esfad and Mohseni, 2011, p. 130). Regarding crimes against security and political power, authoritarian political systems use zero tolerance policy and broken windows strategies. Based on the strategy of broken windows policy, the government should react strongly against petty crimes and not allow the commission of petty crimes to provide the ground for the commission of major crimes (Shamei, 2012, p. 265). The zero-tolerance criminal policy is usually used against misdemeanors and minor crimes, and its purpose is to disable criminals from committing larger crimes.

The nature of this policy is that there should be no tolerance for crimes, and criminal treatment in the fight against crimes, especially crimes against the security and comfort of the people, is severe, and this severe treatment should be applied in the process of criminalization and execution (Gholami, 27, p. 108). Dealing with crimes that disrupt public security and order and thereby impose a huge loss on society should be severe and unforgiving (Shamei, p. 266). With this approach, the principle of harm in the field of crimes against the security of the state and the nation is also a justification for criminalization. Harm, in its broad sense, has the ability to cover the previously mentioned fields (Falahi, p. 316). Harm has a wide scope from the point of view of religious propositions and statutory law, and it would be logical that in

addition to harm to life, property, religious and moral values, the public district and crimes against security are also criminalized (Nobahar, p. 308). In the criminal policy of Islam and democratic political systems, especially the liberal democratic political system, the strict policy of broken windows and the harsh strategies of zero tolerance have no legal place, and crimes against the security of the state through severe harm are subject to criminal measures.

In religious statements, crimes against the security of the state are mentioned under the title of war and corruption on earth (Ma'idah, verse 33). Shia and Sunni jurists have expressed extensive information about Muharabeh (war). Sunni thinkers have limited Moharabeh to armed banditry and scaring people (Bin Qadam, vol. 1 and 11, p. 312; Al-Sar Khosri, vol. 3, p. 135). Armed banditry and intimidation of the people disrupts the security and public comfort of the people and causes disruption in the people's livelihood system. Therefore, it has the ability to criminalize (Hasfaki, 1415, vol. 4, p. 18; Sidi, vol. 4, p. 2). Hanafi jurists have distinguished between muharabeh and rebellion and have considered muharabeh as a crime against the security and comfort of the people, and sedition as a crime against the Islamic government (Abu Yusuf, n. d., p. 53). In the attitude of Shia jurists, there is also a difference between muharibeh and baghi (rebellion). Muharibeh is crimes against public security and peace and rebellion against the Islamic government (Tusi, vol.2, p.514). Sheikh Tusi, one of the prominent Shia jurisprudents, has made a precise demarcation between Muharibeh and Baghi (Marwarid, 12 and 13, p. 1411). Late Shiite jurists have followed Sheikh Tusi's point of view (Har Amili, vol. 15, p. 77). Despite the necessity of criminalizing extreme behaviors that contradict national security, it should be noted that one should not go to extremes in this field and consider any street protests and civil demonstrations as examples of crimes against national security and by adopting an ambiguous procedure in criminalization, it left the government's hand free to deal with the protesters whose demands may be right.

### **3-3-2) Private District**

In a brief summary, the private district includes two areas: (1) the area of personal and family relationships, the right to privacy and the dignity of housing. (2) the realm of trade and social services (Noorbahar, p. 49). Freedom of thought, individual rights and liberties are the most central indicators of the private sphere (Fallahi, p. 231). In the field of family and privacy, the principle of harm can also enter. Using violence in the family environment, thinking that it is in the realm of private life, is not a reason to exclude this type of behavior from the category of severe harm. This part of family life, like the public domain, can be criminalized through extreme harm (Noorbahar, p. 301). According to the logic of liberalism, violence in the family environment is also in the realm of extreme harm and justifies criminalization. Crimes against moral and religious propositions are placed in the realm of severe harm. Therefore, it has the ability to criminalize (Hart, p. 34). The general values of the society (whether it is in the area of protecting individual rights and freedoms or in the scope of religious propositions or has strong social acceptability and legitimacy) have the ability to be criminalized. And just because this kind of behavior occurs in the private life environment, it cannot be excluded from the scope of severe harm (Noorbahar, pp. 301-300). Criminalization in the private sphere of property has two goals. The first goal is to protect the sphere of individual rights and freedoms. Criminalization in this regard can provide the necessary platforms for benefiting from the aforementioned rights. The second goal is to prevent serious harm from behavior in the private sphere through criminalization, or to disable potential criminals. Based on religious propositions, the criminalization of private spheres can be interpreted and analyzed with the approach of extreme harm (Esfahani, p. 28).

### **3-3-3) Victimless Crimes**

One of the important topics in the field of harm-based criminalization is victimless crimes. This term is used for behaviors that do not harm anyone and includes cases that a person resorts to alone or in agreement with other people. Drug addiction, intoxicants, abortion, homosexuality, prostitution, suicide and vagrancy do not have specific victims (Najafi Abrandabadi, Hashem Beigi and Hamid, 2019, p. 286).

Car accidents without harming others, nudity in public places, driving without wearing a seat belt, drinking alcohol and polluting the environment are examples of victimless crimes (Shamei, *ibid.*, p. 176). The question that exists in this regard is whether crimes without victims can be criminalized.

Some lawyers are in favor of decriminalizing victimless crimes. They believe that the basis of criminalization is the existence of harm to the victim. Considering that in victimless crimes, no harm is caused to a certain person, criminalization will not be logical (Najafi Abrandabadi, *ibid.*, p. 286). With this approach, some countries have decriminalized victimless crimes such as relationships outside legal marriage, prostitution, drinking alcohol, etc. (*ibid.*, p. 286). Some countries have criminalized crimes against the environment such as environmental destruction, environmental pollution and noise pollution due to opposition to the third generation of human rights (*ibid.*, p. 287). John Stuart Mill considered the criterion of criminalization to be harm to others. Therefore, in crimes without victims, criminalization has no legal basis (Shamei, p. 180).

The fact is that it is true that in victimless crimes, there is no specific and direct victim, but there are indirect victims. Therefore, the opponents of the theory of victimless crimes believe that the criterion of behavioral criminalization is the occurrence of severe harm, whether the harm is direct or indirect. Indirect victims in victimless crimes will be the family, society and the government (Shamei, p. 179). In religious texts, chastity crimes and crimes against religious morals have been criminalized due to their direct impact on society and the destruction of the family foundation. With this approach, victimless crimes will not have a place in Islamic criminal law.

## **Conclusion**

Harm-based criminalization is acceptable in all legal systems of the world, but there are many differences regarding its scope. The principle of harm in the approach of liberalism is the concept of protecting privacy and individual freedoms. Therefore, governments are obliged to provide the necessary platforms for people to optimally use their individual rights and freedoms in light of the harm principle. In other words, governments do not have the right to impose restrictions, unless freedom causes severe harm to others. Therefore, in the intellectual system of liberalism, the scope of criminalization is limited. Crimes of chastity and other examples of crimes without victims, due to the absence of victims and the absence of harm to others, are outside the scope of the government's intervention, and the legislator has no right to enter into this area. With this approach, there is no conceivable harm in crimes against morals and chastity because this type of behavior is done with the consent of both parties and the complete consent of both parties prevents the criminalization of this type of behavior. With this attitude, the realm of the principle of harm is limited to public spheres and private spheres are often outside the sphere of criminal involvement.

Some lawyers have decriminalized victimless crimes with the attitude that there is no victim in such crimes. With this approach, they want to avoid criminal inflation and maximum criminalization. Following this approach, some countries have decriminalized victimless crimes in their criminal laws.

Criminalization based on harm has a wide scope in Islamic criminal policy. Contrary to the view of some jurists who have considered the model of Islamic criminal policy to be maximalist or totalitarian, criminalization in Islamic criminal law has moderation and rationality. The reason for this claim is that based on the research findings, the scope of Shariah fixed crimes such as Hudud, Diyat and Qisas is limited and it is consistent with the minimal criminalization model. In non-fixed crimes, such as Shariah and government Ta'zirat, considering the existence of the institution of repentance, the rule of Dara and non-criminal actions such as sermons, commanding good and forbidding evil, authorities of the ruler of Sharia in replacing punishment, criminalization in this field also has moderation mode.

Crimes without victims, with the interpretation that was made in the subject of victimology, have no place in Islamic criminal law because chastity crimes, which are the most important examples of victimless crimes, have been severely criminalized in religious statements. And such crimes have been considered as moral and chastity crimes, which require criminal treatment. Destroying and polluting the environment, with the approach of harm, has been criminalized in religious propositions. With this attitude, the discussion of victimless crimes will not be logical and legal due to the allocation of most of its cases. Finally, the fact that harm, in its broad sense, justifies criminalization in many areas, and the "harmless rule" despite the difference in its interpretation and scope, is often consistent with the "principle of harm" in statutory law. Therefore, the principle of harm, as the foundation of criminalization in Islamic criminal policy, has a wide scope and many applications.

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