



## Decriminalization in Islamic Criminal Policy

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### Abstract

Inflation is acceptable in formal criminal laws and problematic in substantive criminal laws. Because this issue causes the government's expenses to rise, the crime rate to increase, society's incompatibility with the law, and the inability of criminal policy to prevent crime. So, the main question is how is it possible to decriminalize fixed and variable crimes based on Islamic criminal policy? The scientific achievement of the research is that the study of the foundations and principles of Islamic Sharia makes it clear that decriminalization does not face a jurisprudential problem when faced with secondary titles and social necessities and in the section of punishments or punishments that are considered deterrent by the ruler of Sharia. The purpose of the research is to help educational institutions, planning and students of Sharia and Jurisprudence so that they are not afraid of dealing with the fixed aspect of Islamic rulings and can remove obstacles if secondary titles appear. The research has been compiled using the library method and the study of written sources.

**Keywords:** *Inflation; Criminal; Decriminalization; Crisis, Emergency; Crime; Expediency; Harm*

### Introduction

From the very distant past, human society had come to the conclusion to deal with crime, to establish strict criminal laws, to have a severe criminal policy, so that no one would think of criminal acts. But the passage of time showed that this method was not successful. The reason for that is the inflation of substantive criminal laws, the increase in the number of criminals, and the imposition of large costs to control them in human societies. Therefore, experts in criminal science thought of starting a decriminalization policy. So that by reducing the number of crimes, it is possible to control the crime and prevent the imposition of heavy material and spiritual costs on the society, so that while establishing security in the human society, more success in crime control can be achieved. This method is a new experience that the countries of the world have applied in adopting criminal policy since the sixties.

Crimes in Islamic criminal policy have two categories: natural (intrinsic) and credit (artificial and fictitious).

So the main question of the article is what is the view of Islamic criminal policy regarding decriminalization? Accordingly, the following sub-question is raised: What are the foundations of Islamic

criminal policy regarding decriminalization? What principles govern the policy of decriminalization of Islam? How far is the decriminalization of Islam? And what are the effects of decriminalization?

In response to the main question, it seems that because crimes in Islamic criminal policy are divided into two fixed and variable categories, the decriminalization of credit crimes is at the discretion of the Islamic ruler, and it is possible to remove the criminal description from fixed crimes under the assumption of fulfilling secondary titles such as necessity.

The research does not have a documented history. There is no special chapter for it in jurisprudence. Of course, in the new researches, the issue is mentioned in general, but none of them gives the answer to the main question of this research. For example, in the book "Introduction to Criminalization and Decriminalization"; To explain the concept of decriminalization, its background and the governing principles of decriminalization have been discussed, which is related to the subject of the article; But he has not explored decriminalization from the perspective of Islamic criminal policy. The articles written in this field are more partial and comparative with traditional decriminalization, which does not provide the content of this article. In this research, the subject has been explored from the perspective of Islamic criminal policy. A thesis titled "Decriminalization of crimes without a victim" has been compiled, which again has no jurisprudential reference to reflect the criminal policy of Islam regarding decriminalization.

The necessity of this research is because it tries to explain Islam's point of view on decriminalization based on jurisprudence. This work can open new horizons for scientific centers and students.

## **Concepts and Generalities**

Knowing the concepts and generalities of the terms taken in the title of the article makes it unnecessary to refer to external tools and frees the reader from being confused about the meaning.

### **Concepts**

#### **The Concept of Decriminalization**

The concept of decriminalization is composed of two independent words, each of which has a different meaning. Crime plus decriminalization equals decriminalization.

Although the term decriminalization is used in criminal jurisprudence, it has not yet been given a clear meaning. In criminal law, "decriminalization in the strict sense of the word, i.e. the process of removing the label, title or criminal description from an act or behavior" (Ali Najafi Ebrandabadi and Hashem Beigi, Encyclopedia of Criminology p. 90.) is the definition of this term in the encyclopedia of criminology. These definitions are not jurisprudential to say that decriminalization has such a meaning from the point of view of Islam. This type of view is legal decriminalization. And in Islamic criminal policy, the term decriminalization is not defined.

#### **The Concept of Criminal Policy**

Criminal policy is a complex term. and to the set of scientific and experimental techniques, strategies, methods and policies that are foreseen and regulated for the administration and improvement of the penal system in terms of fighting against crime, prevention and control of various issues arising from the phenomenon of crime with various judicial instruments at a specific time and place, and to the legislator for the correct and precise drafting of the penal law, It is suggested to the judge for the fair implementation of the law and to the prison organization for the correct and scientific implementation of criminal sentences.( Abbas Imani, Dictionary of Criminal Law Terms, p. 344. ) In the definition of criminal policy, they stated: "Criminal policy is a familiar additive that does not deviate from the literal

meaning of the words politics and punishment, and it reflects mainly criminal and punitive measures that are adopted and implemented in order to prevent and suppress crime in a society". ( Seyed Mohammad Hosseini, criminal policy in Islam and in the Islamic Republic of Iran, p. 13.)

This definition does not have the accuracy and elegance that the jurists have presented, but it contains the general principles of the criminal policy of Islam. Therefore, the criminal policy of Islam, as a part of the criminal law of Islam, aims to apply punitive measures in a coherent manner, which considers the prevention of crime and dealing with it through the implementation of justice, the protection of high human values, and the rehabilitation of criminals. Islamic criminal policy includes criminalization, criminal responsibility, criminal procedure and determination of social response.

### **The Concept of Basics and Principles**

In terms of lexical structure, the word bases is the plural of bases. Bana in the word means principle, root, basis, foundation, infrastructure and buildings. (Hossein Anvari, Farhang Bozorg Sokhan, Vol. 7, Harf Mim.) This word does not have a special idiomatic meaning and when it is added to different sciences and scientific theories, it means foundation. For example, when the word basics is added to sociology, psychology and law, it means the foundation, basis and origin of the knowledge of sociology, psychology and law. (Jalaluddin Qiyazi, *The Basics of Criminal Policy of the Islamic Government*, p. 37.) Sometimes the word foundations is added to a specific scientific theory, such as Einstein's theory of relativity. In this case, the meaning of the foundations is the arguments that lead to the proof of the said theory. The author's point of reference here is evidence that proves decriminalization in the criminal policy of Islam.

The word "asl" in the dictionary means: root, foundation, foundation. (Khalil bin Ahmad Fayoumi, *Kitab al-Ain*, Vol. 1, p. 88, *Al-Munjad Madh Asal*, Ahmad Ibn Faris, *Al-Maqais al-Laghah Madh Asl* - Ali Akbar Dehda, Lat Nameh, under the word Asl.) The principle, which is its plural, has many uses in terminological concepts. Like the principles of Arba in hadiths; A certain amount in Sharia, like the principle of diya; A rule based on reason, custom and habit, a reason derived from a practical rule or principle; But what is important is what the principle means in criminal law and penal jurisprudence. The writer's intention is to use the concept of principles, foundations and rules that exist in Islamic Sharia, common sense, custom and habit, and based on them, the policy of decriminalization is applied.

### **The Concept of Expediency, Necessity or Urgency**

One of the key terms in this research is "interest" which changes the ruling as well. Expediency in the word means the opposite, opposite and opposite of corruption and corruption. As it is also interpreted as good. (Khalil bin Ahmad Farahidi, *Kitab al-Ain Madh al-Salh*, Ahmed bin Faris *Mujam Maqais al-Laghah Madh al-Salh*, Ismail bin Hamad Johari, *Madh al-Salh*.)

The word expediency, which is used abundantly in the words of Islamic jurists, and many matters have been documented, its existence and non-existence, does not have a clear definition. Perhaps this matter is because due to the clarity of the meaning of expediency in the eyes of the jurists, they did not see the need to explain it. But in spite of this, in some sources, expediency is defined as follows: "Expediency is what is beneficial and good for someone or a group or the general public, the opposite of which is corruption, which is said to be harmful to someone or the public." (Under the supervision of Hashemi Shahroudi, *Farhang Fiqh*, Vol. 8, p. 68.)

Necessity is derived from the word "harm" and it means that which befalls man and man cannot escape from it. (Jurjani, *Definitions of Harm*.) According to the above meaning, harm is the opposite of benefit and means loss and damage to humans. Most of the descriptions provided in jurisprudential sources of necessity and emergency refer to the human need for food, while with the emergence of the secondary title of necessity or emergency, the cause of immorality arises in the behavior of eating, drinking and committing crimes, and this situation causes a change in the list of crimes.

## The History of Decriminalization in Islam

As the last and most comprehensive heavenly religion, Islamic law is based on its principles and theoretical foundations which are derived from the Qur'an, Sunnah, consensus and reason, and provides human happiness in both worldly and hereafter dimensions. Undoubtedly, the rules of Islam, including the criminal laws of Islam, are the result of God's revelation and will. Islam, which appeared in the second half of the sixth century (579 AD), the societies of that time were plagued by brutality and barbarism in the fields of politics and law, and crimes were based on revenge and tribal domination, and brutal and disproportionate punishments were applied. The principles governing criminal law such as the principle of legality of crimes, the principle of legality of punishment, the principle of personality of punishment and its individuality were not known. (Ibn Athir, *al-kamal fi al-tarikh*, vol. 3, p. 343.) And the history of decriminalization in Islamic criminal policy is the same time as the rise of Islam. For example, before the advent of Islam, fishing on Saturday was a crime and prohibited, but after the advent of Islam, fishing on Saturday was decriminalized. It is stated in the Qur'an: "And ask them about (the history of) the city that was on the coast of the sea! When they were transgressing (and disobeying) God on Saturdays, when their fish were exposed on the surface of the water on Saturday (which was a day of rest and worship), but they did not come to them except on Saturday, thus We tested them with something that they were disobedient to!" (eraf verse: 163)

What can be inferred from the appearance of this verse is that before Islam, fishing on Saturday was forbidden, with the coming of Islam, this forbidden act was decriminalized and fishing is no longer sacred on any of the days of the week.

Another case of decriminalization is the removal of the criminal description of intercourse with women during the nights of Ramadan. God says in the Qur'an: "Sexual intercourse with your wives is permissible during the night of the days when you are fasting. They are your clothes and you are their clothes (both are an ornament and a reason to preserve each other). God knew that you were betraying yourself (and doing this forbidden act), so He accepted your repentance and forgave you. Mix it with them now, and ask for what God has ordained for you! And let's eat and drink, until the white thread of the morning becomes clear to you from the black thread (of the night)! Then complete the fast until night! And don't mix it with women while you are doing itikaf in the mosques! These are divine boundaries, so don't approach them! God makes His verses clear to people like this, may they become pious (Baqarah verse: 187).

The argument for this verse is also that according to the authority of the revelation of the verse, at the beginning of Islam, eating and drinking during the nights of Ramadan, if the fasting person fell asleep and then woke up, and having sex with one's wife, was forbidden and a crime, but due to the fact that Islam is a religion of sahlah and samaha, those two were decriminalized so that this act is no longer punishable. (Fazl bin Hasan Tabarsi, *Al-Bayan Forum in Tafsir al-Qur'an*, vol. 2, p. 503.)

Traditions are used in such a way that at the beginning of the revelation of the ruling on fasting, Muslims only had the right to eat before going to sleep at night. If someone went to sleep at night and then woke up, it was forbidden for them to eat and drink, but this prohibition was later removed. (Wasal al-Shia, Vol. 10, p. 114, H 12993. *Al-Bayan Al-Bayan* collection of the following verse, Bihar, vol. 90, p. 10 and vol. 93, p. 271.)

There are many texts from the Prophet of Islam, in the light of which it is possible to justify the decriminalization of prohibited behaviors in the era of the rise of Islam. One of the texts of this noble hadith is: " Say there is no god but Allah and you will succeed " (Sadouq, *Ma'ani al-Akhbar*, proofread by Ali Akbar Ghafari, p. 308) confess to the oneness of God in order to be saved.

This official invitation of the Messenger of God by the Kaaba was from all polytheists and tribal leaders to accept the school of monotheism, and the promotion of godliness by the Prophet of Islam

meant the rejection of tribal rule and rejection of crimes such as insulting idols. Acceptance of the monotheistic system by the people of the Arabian Peninsula meant the abolition of illusory and superstitious values that were promoted by the tribal chiefs and opposing them was a crime, but Islam decriminalized the crimes imposed by the tribal chiefs.

Another example of the prophetic tradition from which decriminalization can be inferred is the words of the Prophet of Islam who said: "God did not send me to a religion in which there is monasticism and seclusion from the world, but He sent me to a religion in which there is no crookedness or deviation and it is easy and simple." I fast and pray and have intercourse with my wives. (Muhammad bin Yaqub Kilini, *al-Kafi*, vol. 5, p. 494.)

In the above hadith, the phrase "easy and easy" is mentioned, which is cited in many jurisprudential books.

Based on this, it can be said: *Sahlah* and *Samha* are synonymous, and what is meant by the religion of *Sahlah* and *Samha* is a religion in which there are no hard tasks and there are smooth and easy ways of life in it, and unprincipled and tribal criminalization is against the religion of *Sahlah* and *Samha* and is rejected according to the *Sunnah* of the Messenger of God.

According to many other hadiths that are not mentioned, the religion of Islam insists on the negation of hard tasks, and the proof of this is the clear word of God in *Surah Al-Baqarah* that at the request of the Prophet of Islam, many hard tasks in the previous nations were removed from the Almighty God. The Qur'an says: "O Lord, put a heavy duty on us, as you put on those who were before us (due to sin and rebellion). (*Surah Baqarah* verse: 286.) This verse is used that many behaviors were prohibited and crimes in the past, that the Prophet of Islam tried to solve difficult tasks with his request, and God Manan also agreed to this request and decriminalized many actions that were crimes in the previous nations. According to the traditions mentioned in the interpretation of the above verse, the religions of the past had stricter rules. (Ahmad bin Ali Tabarsi, *al-Ihtaj*, vol. 2, p. 327.)

Another example of the beloved tradition of the Prophet of Islam was his relentless and continuous struggle against the class system and aristocracy, which led to the promotion of unrealistic values. So that violating the values and traditions of the aristocracy was considered a crime.

However, with the advent of Islam and the promotion of its teachings by the Prophet of Islam, the class system was abolished and the violation of the values based on that system, which are considered a crime, was declared permissible.

The Prophet of Islam says in this regard: "O people! Your God is one and your father is one. All of us are human children and Adam is from the soil. Whoever is more pious than you is more honorable before God. Arabs have no privilege over foreigners except for piety." (Ibn Shuba Harani, Hasan bin Ali, *Tohf al-Aqool* from *Aal al-Rasul*, p. 34.) The Prophet of Islam made great efforts to promote the equality of human beings, in this way, to express the real values that provide the interests of humanity, to put an end to the rule of the aristocracy over the inferior people, and to abolish the crimes caused by such a system.

## **Basics and Principles Governing Decriminalization in Islamic Criminal Policy**

Decriminalization in Islam is based on principles that are discussed in two discourses.

### **Jurisprudential Foundations of Decriminalization**

In Islamic penal jurisprudence, there are foundations and arguments that can be used to justify decriminalization in Islamic criminal policy. Basics such as: the stability and changeability of Islamic rulings, the theory of expediency, the role of secondary titles in decriminalization, necessity and

decriminalization, and the effect of the rule of *lahrij* on decriminalization are proofs that indicate the flexibility and changeability of Islamic criminal policy and prove the positive approach of Islam towards the strategy of decriminalization in the face of delinquency.

For example, *ijtihad* is the driving force of Islam and its penal laws, which *mujtahid*, relying on Islamic principles and generalities, derives new criminal rules such as decriminalization and criminalization. Since the laws of Islam have been established for all times and places, on the one hand, the conditions of life are different and require different laws according to different situations and conditions, and establishing laws based on the number of developments and conditions is both impossible and unhelpful and unnecessary. Therefore, there are a set of general principles and rules in the Quran and Sunnah, based on which jurists theorize. (Sheikh Har Amili, *Al-Shi'a tools*, vol. 27, p. 62. )And if they find it expedient, they will decriminalize it.

The rulings of the government and the powers of the Islamic ruler are another important basis that can be used to justify changes in the criminal policy of Islam, including decriminalization. Therefore, the Islamic ruler can decriminalize governmental and punitive crimes based on *ijtihad* and determining expediency.

Another case is the rule of necessity, which has important Qur'anic and narrative documentation. God says in the Qur'an: "No doubt God has explained in detail what has been forbidden to you. Unless you have an emergency. (Anam verse: 119.) In another verse, it is stated that: "Carrion, blood, pork, and that sacrifice that is killed in the name of other than God are forbidden to you, so anyone who eats something forbidden out of necessity in times of scarcity and famine, not with the intention of sinning, (will not be punished), God is Forgiving and Merciful." (maidah verse: 3)

The necessity rule has wide examples. such as reluctance or compulsion. (Qortubi, *Al-Jaami al-Ahkam al-Qur'an*, vol. 2, p. 225, Fakhr Razi, *Al-Tafsir al-Kabeer*, vol. 2, p. 207.) The necessity of nutrition and treatment, reluctance, forgetfulness, ignorance, hardship and embarrassment, travel, illness, physical defect, custom, legitimate defense, material sent, etc. are examples of the rule of necessity. { For more information see: Wahbe Zaheili, *Theory of Necessity in Islamic Jurisprudence*, pp. 242-105) A review of the jurisprudence chapters also shows that the jurists use this title where there is a prohibition, i.e. they have discussed it under the title of secondary ruling only within the scope of the mandatory rules of respect and obligation. Islam has primary and secondary rules. Primary orders are based on real materials, but secondary orders arise due to secondary titles such as necessity or urgency. (Ruhullah Khomeini, *Tahrir al-Wasila* vol.2, p.565) For example, according to the famous jurists, sex change is prohibited according to the first rule, but today, in order to diagnose the psychiatrist and prove the strong tendencies of the male spirit in a woman, a second rule has been adopted and allowed. Therefore, Imam Khomeini issued a fatwa on its solution. (Ibid)

One of the most important rules in Islamic jurisprudence is the rule of negation of difficulty and hardship in Islamic Sharia. The adherence of jurists to the above rule in various chapters of jurisprudence, including criminal jurisprudence, is a proof of the importance and many benefits of this rule. However, some jurists of Islam believe that what is meant by embarrassment is personal embarrassment. (Al-Moula Ahmed Naraghi, "*Rajas al-Ayam*" p.: 195, Nasser Makarem Shirazi, p.) . But the famous Imamiyyah jurists are of the opinion that what is meant by *Harj* is a type of *Harj* because the evidence can be analyzed into a personal and type of *Harj*. In one of the issues of *Hajj*, *Sahib Jawahar* considered financial and spiritual hardships to be included in the rule of negation of hardships, in addition to personal hardships, and said: "If there are two ways to go to *Hajj*, and a person is prohibited from taking one of them, he should go for *Hajj* by another route if time and money permit... and at this time, if he fears for his life, wealth, or reputation, *Hajj* will be canceled from him due to hardships." (Mohammad Hassan Najafi, *Jawahar*, vol. 17, pp. 290-291)

Allameh Hali considered psychological and personality disorder to be included in the rule. (Yusuf al-Bahrani, al-Hadaïq al-Nadira, vol. 13, p. 473) Therefore, according to this rule, if the substantive criminal laws are inflated, it will require hardship and embarrassment, and crimes can be decriminalized. Regarding the example, abortion is prohibited and a crime based on the original ruling in jurisprudence, but if the fetus is harmful to the mother's health and requires harm and the spirit has not been breathed into it, it has been decriminalized based on the rule of harm.

Another basis for decriminalization in Islam is the principle of non-harm. The reflection of this rule is very wide in jurisprudence. Its basis is the narration of the Prophet of Islam, who said: "There is no harm and no harm in Islam." (Muhammad bin Al-Hassan al-Har al-Amili, Al-Shia's Tools, vol. 25, p. 428.) This rule, as a definite general law in Islamic jurisprudence, is the reference and justification for the decriminalization of credit crimes in Islamic criminal policy; Because the subject of this rule is the negation of harmful rules in Islam. According to this rule, damage can be prevented due to the high volume of crimes. Its reference in justifying decriminalization in Islamic penal policy is based on many necessities of the day of death that are cited in jurisprudence books.

### **Principles Governing Decriminalization in Islamic Criminal Policy**

Just as in criminalization, principles such as: the principle of legality, the principle of individuality, the principle of the proportionality of crime and punishment, rule; Decriminalization is also subject to the principles that must be considered in jurisprudence and law. These principles are the foundations, basic values and rules that have been taken into account in jurisprudential sources. In jurisprudence, the requirements of time and place, the need to reduce interference in individual freedoms, to remain immune from the negative effects of criminal inflation, alignment with international forums and the need to use new scientific experiences are important.

What is meant by the requirements of the time is the desire of the environment, society and life; (Morteza Motahari, collection of works, vol. 3, p. 186.) What is meant by the requirements of time are the things that humans need during their lifetime and solve their problems through them. "If what has been found in time is the product of human knowledge and wisdom and is in the direction of progress and not degeneration, Islam has a favorable opinion about it." (Fundamentals of Islamic Economy, Vol. 1, p. 59.)

The requirement of time and place has an effect on decriminalization in terms of Islamic criminal policy. The grammar rules are established and researched with that in mind. In a narration of Imam Sadiq, it is said: "There is a small distance between something halal and haram, and this is what causes things to change and become halal or haram." (Mohammad Baqer Majlesi, Bihar Al-Anwar, vol. 6, p. 94.)

From the point of view of jurists, the rulings are subordinate to the interests, and the interests change due to the changes of time and are different in relation to different obligees. For this reason, it is possible that at one time, a certain thing is beneficial for a group, and for this reason, the command and command of God to do it belongs to it, and at another time, it is associated with corruption for another group, and therefore it is subject to God's prohibition. (Allameh Hali, Kashf al-Murad fi Sharh Tajrid al-I'taqad, p. 485). In addition to that, cases such as: the occurrence of abrogation in some written rulings due to the passage of time and changes in social conditions, changes in the subjects of the rulings or attributes, or the limitations and conditions of the subjects of the (primary) rulings due to changes in time and the change of rulings as a result of it are also among the cases of the requirements of time on Shari'a rulings. (Naser Makarem Shirazi, the precise concept of time and place in ijtehad, Masjid Magazine, No. 4, p. 9.)

Therefore, the principle of the requirements of time as one of the principles governing decriminalization in the criminal policy of Islam is accepted by the criminal legislator, but its meaning is not the relativity of all crimes, but criminal behaviors are divided into two fixed and non-fixed groups. Crimes such as: crimes requiring punishment, retribution, and diat are criminalized on the basis of

permanent objects, so that the changes caused by the changes of time have no effect on them. Just as oppression against others is always considered a crime and cannot be decriminalized with the changes of time, the existence of very important materials in the mentioned and natural crimes cannot be changed due to the requirements of time and cannot be decriminalized. The reason for the impossibility of decriminalization of this category of crimes based on the necessity of time is that the criminality of fixed crimes is caused by unchangeable materials and according to the basic human needs, it originates from the depth of human's spiritual and physical structure, from the nature of social life. (Mohammad Ghafari, Factors justifying decriminalization, *Adalat Ara Legal Journal*, Vol. 8, pp. 154-168.)

However, decriminalization of non-specific crimes such as non-punitive crimes and government crimes, based on the necessity of time and the assumption of expediency, seems to be possible. Because man has fixed destinies and fixed crimes based on fixed needs, the same man has variable and non-fixed needs that change due to time and place, and this point causes behaviors that were crimes in the past, be decriminalized by the Islamic ruler. Mohammad Hossein Tabatabai considers the acceptance of change (decriminalization or criminalization) in this part of crimes to be the authority of the ruler and guardian of Muslims and says: "Any new regulations that are useful in the development of the social life of the society and end up being good for Islam and Muslims are related to the authority of the governor and there is no prohibition in its establishment and implementation... But the decrees of God, which are in the text of the Shari'ah, are fixed and stable forever, and no one, not even the governor, has the right to change them according to the expediency of the time. (Seyyed Mohammad Hossein Tabatabai, collection of works, Vol. 9, pp. 83-84.)

As a result of decriminalization based on the requirements of the time in Islamic criminal policy, it seems possible and decriminalization of behaviors such as: dissection of body parts in today's conditions, selling human virginity, chess and also decriminalization of minor economic and environmental crimes, traffic crimes, etc. Based on the principle of the requirements of the time, it can be read and accepted. And crimes such as selling blood in the past and possessing obscene films and the like, which were crimes in the past and have been decriminalized in the current situation. These decriminalizations have taken place due to the passage of time.

Respect for individual freedoms is another principle that has an effect on decriminalization in Islamic criminal policy. We must accept the fact that the Islamic legal system announced it 1400 years ago and based on respecting the fundamental rights of individuals, it proceeded to provide a list of prohibited behaviors under the headings of fixed and variable crimes. Fixed crimes in Islamic criminal policy based on the observance of rights and freedom are few; (Iran's Islamic Penal Code, approved 2013.) However, most of the crimes in Islamic criminal policy are unscriptural punishments. If their number is compared to today's crimes in the criminal law of developed countries, it is very small. Therefore, it seems that the list of crimes in Islamic criminal policy is based on the observance of individual rights. Despite this, the central core of the philosophy of punishment is to discipline and prevent people from committing crimes. Punishment in taziri crimes has a corrective aspect, and it is up to the Islamic ruler to review its implementation and determine its type, and if the Islamic ruler deems it appropriate, he can decriminalize taziri crimes.

Today, it is assumed that the principle of aligning the penal policy of the states with the international community in the issue of decriminalization and other common principles is one of the civilizational phenomena of the last two centuries. But the truth is that the criminal policy of Islam is flexible and transformable according to the above reasons, and the criminal policy of Islam claims to have invented principles such as: the principle of the legality of crime, the principle of minimal use of criminal law, the principle of respect for individual freedoms. "The Prophet of Islam at the beginning of Islam, after regulating and reforming the relations of the Arab tribes and organizing the internal affairs of the Islamic government, started communication with the neighboring governments and governments and concluded several treaties, including the Charter of Medina, the Hudaibiyah Peace Treaty, etc."



(Mahmoud Attardi, *The Globalization of Criminal Law, Requirements and Obstacles*, p.: 45 (dissertation))

After the period of Rashidin caliphs, the agreement between Abd al-Mulk Marwan and the order of the Byzantine Ravi in 70 AD and the agreement between Harun al-Rashid and the Queen of Byzantium in 182 AD and the agreement between Malik Kamel in 1238 and the German government regarding the handing over of Jerusalem to the Christians show the importance of alignment and confrontation with the world. (Labib Ahmed Basul, *International Treaties in Islam*, pp. 39-41) Just as the penal policy of Islam by accepting the institution of wisdom, the principle of payment of money was harmonized with the conventional principles in the era of the advent. Even today, considering the international agreements and observing the red lines, it considers itself bound to observe the common principles governing international criminal law, and in the assumption of expediency, it uses the strategic principle of decriminalization policy, punitive and governmental crimes in order to reduce the interference in individual freedoms. The behavior of individuals in the criminal policy of Islam is divided into the areas of dos, don'ts and blasphemy, and the criminalization of governments in the field of blasphemy is against the principle of abaha, and the use of decriminalization policy according to the principle of alignment with the international community seems obvious.

The principle of accuracy and comprehensiveness in decriminalization is also emphasized in terms of Islamic criminal rules. Just as criminalization, as the most important process of criminal law, should be based on specific standards and through a favorable and acceptable selection and with accuracy and comprehensiveness, the process of decriminalization should also be done based on the principle of accuracy and comprehensiveness. Islamic jurists pay special attention to the principle of precision in decriminalization.

### **The Realm of Decriminalization and Its Effects in Islamic Criminal Policy**

Decriminalization has a territory and effects that need to be recognized and introduced in the criminal policy of Islam. So, in the first speech, the territory and its works will be analyzed in the next speech.

### **The Scope of Decriminalization (Certain Crimes and Variable Crimes)**

The scope of crimes in Islam is definite and indefinite. Crimes whose punishment is determined in Sharia are specific crimes, such as Hudud, Qisas, and Dayat. Another type of it is Ta'ziri and government crimes, the amount of punishment of which is not determined in the Sharia, but is at the discretion of the Islamic ruler.

The amount of punishment for criminals has been determined in Anwar's Sharia, and it differs from Tazeerat in this characteristic. Because punishments are punishments whose amount is not determined in Sharia law, but the judge and ruler of Sharia are allowed to determine its amount. (Mohammad Hasan Najafi, *Javaher al-Kalam fi Sharh Shariah al-Islam*, vol. 41, p. 255)

From the point of view of jurisprudence, "Hudud are punishments whose amount and amount are completely determined and no one can increase or decrease it". (Houshang Shambiati, *General Criminal Law*, vol. 2, p. 312.)

Decriminalization of extreme crimes in Islamic criminal policy is not acceptable according to the primary rulings and this issue is due to the stability of expediency in the crimes of extreme crimes, but despite this, with the addition of secondary titles such as: repentance, reluctance, urgency, hardship and embarrassment, decriminalization of them seems possible. This means that if one of the secondary titles is fulfilled, the principle of behavior does not require a limit, crime, and this is due to the presentation of titles such as compulsion, necessity or urgency.

Qisas is one of the certain Shariah punishments. In Islamic jurisprudence, the place of its implementation has been determined. Usually, revenge is sometimes carried out in committing crimes against the physical integrity (murder of the soul) and the material character or natural life of a person, and sometimes it is carried out in the commission of crimes against us without the self (surroundings) and sometimes it is realized in the destruction of the interests of the body parts. (Ruhollah Khomeini, Tahrir al-Wasila, vol. 2, p. 508)

There is no possibility of decriminalization in crimes that require retribution, as a clear example of fixed crimes, but the approach of Islamic criminal law is to recommend forgiveness for this category of crimes. (Incomplete Decriminalization) It is stated in the Holy Qur'an: "The punishment of evil is a punishment similar to it, and whoever pardons and amends, his reward is with God. God does not love wrongdoers." (surah shura: 40) Below the verse is a beautiful promise to those who forgive and reform instead of revenge. And apparently, the meaning of correction is to correct the oppressed between himself and his Lord. (Mohammad Hossein Tabatabai, translation of Tafsir al-Mizan, vol. 18, p. 94.)

One of the fixed crimes is committing a crime that is punishable by paying ransom. (Hasan bin Youssef bin Motahar Asadi Hali, Qa'am al-Ahkam fi Marafah al-Halal wa Haram, vol. 3, p. 667) Due to the fact that it belongs to the category of property, as a rule, the guarantee resulting from its causes should be considered among the civil responsibilities in terms of financial and so-called legal guarantee. However, since some of the causes of dowry are of the type of crime and punishment, and dowry itself is proven as a crime due to the punishment. It is considered a part of criminal law. (Abbas Ali Omid Zanjani, *ibid.*, p. 452) Because sometimes the crime is committed against the soul and sometimes against it. The behavior that requires ransom is one of the crimes that only happened to humans and does not apply to other living beings, and the causes of ransom are summarized in two types of crimes: murder and crimes against others. (Abbas Ali Omid Zanjani, *ibid.*, p. 452)

The rule of dowry is one of the rules of signature, and it was also prescribed in Jahiliyyah in a customary way, which Islam has approved, and dowry is from the category of human rights, which becomes obligatory with murder and according to the rules "Do not bear the burden of another woman." The responsibility of paying it is the responsibility of the soul, and proving the guarantee of the dowry is against the rule and must be proven with a definite reason, and only in the case of wrongful killing, there is such a reason, which is also the guarantee of the dowry and one of the contractual obligations. (*Ibid*) It should be noted that decriminalization of crimes requiring money is impossible, according to the basic rule of Islam, but with the emergence of the secondary title of forgiveness and necessity, decriminalization seems possible. The most important range of variable crimes in Islamic criminal policy are punishment and government crimes; And in Islamic criminal law, punishment is the main part of it and it is placed against the limits and retribution. (Mustafa Mohaghegh Damad, Rules of Jurisprudence, Vol. 4, p. 195.)

In fact, Islam has two types of penal rulings, which are referred to as "provincial rulings" and "divine rulings". "Divine rules" are the fixed and universal rules of Islam, and "provincial rules" are the changing and situational rules arising from the fixed rules in a specific situation. In fact, fixed rules are the bases and roots of changing rules, and situational and changing rules are the branches and fruits of fixed and universal rules in a specific situation. (Mehdi Hadavi Tehrani, Velayat Faqih, p. 19)

Based on this, penal and governmental crimes are studied and investigated as branches of fixed crimes in the realm of variable crimes. The opinion of some jurists is that there are some crimes and violations that are against Islam, but because they are of lesser importance and do not cause much harm to people, therefore, a special sentence is not considered for them, and the punishment is left to the discretion of the imam, who punishes the offender and the violator accordingly. This punishment is changed according to the case and according to the committed act and the circumstances of the perpetrator, and it is called "Tazeer". (Houshang Shambiati, General Criminal Law, vol. 2, p. 332). It is often seen in the interpretations of jurists that ta'zeer is one of the Islamic punishments, the type and size

of which is not determined in the Sharia, but the determination of its quantity and quality is entrusted to the judge of the court. Therefore, all the crimes for which the Islamic penal laws do not have the punishment of Hudud or retribution or diat, can be included in the scope of Islamic punishments. (As stated in Article 11 of the Penal Law of the Islamic Republic of Iran: "Penalty is discipline and punishment, the type and amount of which is not determined in the Sharia law and is left to the opinion of the court ruler, such as imprisonment, fine, whipping, which should be less than the limit.") And for every crime that has ta'zir punishments, in jurisprudence, a minimum and maximum punishment has been determined for it, which is the responsibility of the Islamic ruler; If the Islamic ruler recognizes that the amount of government crimes or ta'ziri crimes requires material and spiritual losses to the society, he can decriminalize some of them according to the appropriate conditions.

### **The Most Important Effects of Criminalization**

However, decriminalization has negative effects and consequences such as protecting the rights of the injured (Abbas Shiri, dignified behavior with the victim, granting authority in the investigation and prosecution phase, p. 447) Violation of the defense rights of the accused (Mansour Rahmdel, fair trial and criminal procedure regulations in Iran, p. 312.), The normalization of committing undesirable behavior is due to decriminalization, it causes disorder in the society, promotes legalization and reduces the authority and efficiency of the criminal justice system. (Hassan Aghaei, general prevention of delinquency is an obstacle to decriminalization, p. 81.)

But the positive effects of decriminalization include: reducing the inflation of criminal laws, reducing the number of cases to the judiciary [court] (Amin Taher Khovani, reducing incoming court cases and improving judicial efficiency, p. 4). Reducing government spending (Golnaz Moradi Pasand and others, a comparative study of the manifestations of criminalism in legal systems and its impact on patterns of punishment, p. 210.) Reducing government interference in individual freedoms (Hamzeh Zainali, review of Iran's laws in terms of decriminalization, p. 153.), It is aligned with international forums. These issues have not been discussed regularly in jurisprudence, but the examination of jurisprudential texts leads to finding evidence for them.

### **Conclusion**

The division of crimes in the Islamic legal system into two fixed and variable categories shows the flexibility and changeability of crimes in the criminal policy of Islam. In this research, an attempt was made to study the possibility of decriminalization of crimes in Islamic criminal policy and it resulted in the following results:

- 1-The primary principle in Islamic criminal policy is the impossibility of decriminalization for fixed crimes; Because fixed crimes such as Hudud, Qisas, Diyat and Tazirat, have valid texts from the Qur'an and Sunnah and are valid until the Day of Resurrection, and it is possible to decriminalize them only in exceptional circumstances and by finding secondary titles such as: Difficulty, necessity or emergency can be justified, and basically decriminalization as a practical strategy is more related to variable crimes such as punishment crimes and government crimes, not fixed and natural crimes.
- 2- According to the basic rule, decriminalization of punishment and government crimes is one of the powers of the Islamic ruler. He can decriminalize cases of governmental and punishment crimes by identifying benefits and corruptions.
- 3- The compliance of Islamic criminal rules with the interests and corruptions and ijtiḥad of Islamic criminal rules, the intellectual ugliness of inflation of substantive criminal laws, the emergence of secondary titles such as: Necessity or urgency, criticality of inflated substantive criminal laws, paying attention to the requirements of the time and abrogating historical laws, minimal use of

criminal law, the necessity of using the scientific experience of others and reducing the interference of the government in relation to individual freedoms are the most important bases, documents and principles according to which the possibility of decriminalization of two categories of fixed and variable crimes in Islamic criminal policy can be proven.

- 4- The use of decriminalization policy not only weakens the justice system, but also strengthens the efficiency of the justice system and is considered a suitable method in reducing the material and moral losses of the government and the nation.

## **References**

Holy Quran.

Nahj al-Balagha.

Ashuri, Dariush, political encyclopedia, Marvarid publishing house, Tehran, 2013.

Aghaei, Hassan, Public prevention of delinquency is an obstacle to decriminalization, Legal and Judicial Journal of Justice, Law Quarterly, Volume 38, Issue: 1, Spring: 2008.

Alousi, Seyyed Mahmud, Ruh al-Ma'ani fi Tafsir al-Qur'an al-'Azeem (Vol. 13), Beirut Dar al-Katb al-Alamiya: 1994.

Ibn Athir, Ezz al-Din Ali, The Complete Great History of Islam and Iran, translated by: Abu al-Qasim Halat and Abbas Khalili, Tehran, Scientific Press Institute, 1992.

Ibn Shuba Harrani, Hasan bin Ali, Tohf al-Aqool on Aal al-Rasoul, Jamia Modaresin, Qom, 1943/1983.

Ibn Manzoor, Lasan al-Arab, Lebanon, Beirut, Dar al-Asaq, 3rd edition: 1993.

Ahmed Basoul, Labib, International Treaties in Islam, translated by Mehdi Shafian, Imam Sadiq University, Tehran, first edition: 2010.

Anuri, Hassan, Farhang Bozor Sokhon (Vol. 1), Tehran, Sokhon Publications, first edition: 2001.

Imani, Abbas, Dictionary of Criminal Law Terms, Tehran, Nameh Hesti Publications, 2016.

Babaei, Parviz, Dictionary of Idioms and Political Schools, Negah Publications Institute, Tehran, 2019.

Bejnordi, Seyyed Mohammad Hassan, Al-Qasas al-Fiqhiyyah, Qom, Al-Hadi Publishing House, Al-Wali edition: 1998.

Bahrani, Youssef, al-Hadaïq al-Nadrah fi Haqam al-Atrah al-Tahirah, research: Mohammad Taqi al-Irwani, Qom Institute of Al-Nashar al-Islami, affiliated to Jama'ah al-Madrasin, first edition: 1984.

Jafari Langroudi, Mohammad Jafar, Expanded on Legal Terminology, Tehran, Ganj Danesh: 2005.

Jafari Tabrizi, Mohammad Taghi, Faqhi Letters (Theft Punishment in Islam), Tehran, Karamat Publishing House: 1998.

Johari, Ismail bin Hammad, Sahah al-Lagheh, Dar-e-Al-elam Lal-Malayin, Beirut, 1989.

Haramili, Mohammad Bin Hasan, Shiite Tools, Qom Maktaba al-Islamiyya, first edition: 1988.

- Hosseini, Seyed Mohammad, *Criminal Policy in Islam and in the Islamic Republic*, University of Tehran, second edition: 2019.
- Hali, Moqdad bin Abd Allah Seyuri, *Kunz al-Irfan fi Fiqh al-Qur'an*, Qom, Mortazavi Publications, 2004.
- Hali, Hasan bin Yusuf, *Varif al-Shi'a fi Haqam al-Sharia* Qom Bostan Kitab, 6th edition, 1997.
- Khomeini, Ruhollah, *Tahrir al-Wasila*, Beirut, Lebanon, first edition: 2011.
- Khajeh Nouri, Yasman, *Effects of fair trial in children's criminal law (a collection of articles in criminal science news)* by Ali Hossein Najafi Abrandabadi, Tehran, published: 2013.
- Davoudi, Saeed, *Criminal Law in the Qur'an*, Tehran Institute of Islamic Culture and Thought, first edition: 2016.
- Dehkhoda, Ali Akbar, *Dictionary*, Tehran Dehkhoda Dictionary Institute, under the supervision of Mohammad Moin and Seyyed Jafar Shahidi, first edition: 1966.
- Ragheb al-Isfahani, Hossein bin Muhammad, *Mujajm Fardat al-Qur'an*, Research: Nadim Marashi, Al-Ta'ab al-Arabi Press; First edition: 2013 A.H.
- Rahmdel, Mansour, *a collection of articles from the conference on ways to reduce the prison population*, Tehran, publication Mizan: 2007.
- Razavi, Seyyed Ahmad, *Decriminalization of Rostam city's judiciary under the protection of divine justice*, Tafass publishing house, Tehran, 2009.
- Rahami, Mohsen, Heydari, Ali Murad, *Decriminalization of non-victim crimes with a view of Iranian law*, Journal of Private Law, Qom Campus of Tehran University, Year: 2005 Issue: 52.
- Zaheili, Wahba, *Theory of Necessity in Islamic Jurisprudence*, translated by Hossein Sabri, Islamic Propaganda Office, Khorasan Razavi Branch, first edition: 2009.
- Under the supervision of Hashemi Shahroudi, *the jurisprudence of Ahl al-Bayt*, (8 vols.), Qom, Encyclopedia Institute, first edition: 2019.
- Saket, Mohammad Hossein, *Procedure in Islamic Law*, Tehran, Mizan Publishing House, 2003.
- Sobhani, Jafar, *Forough Ebdit (a complete analysis of the life of the Holy Prophet (PBUH))*, Bostan Kitab, Qom, 2005.
- Shambiati, Hoshang, *General Criminal Law*, vol. 2, Tehran, Majid Scientific and Cultural Forum, 1997.
- Sheikh Sadouq, Ma'ani al-Akhbar, corrected by: Ali Akbar Ghafari, Qom, first edition: 1982.
- Shiri, Abbas, *dignified treatment of the victim, granting authority in the investigation and prosecution phase (a collection of articles in criminal science updates)* by Ali Hossein Najafi, published by Mizan: 2015.
- Sadri Afshar, Gholam Hossein and others, *Contemporary Persian Culture*, Printing and Publishing Organization of the Ministry of Culture and Islamic Guidance, Tehran, 2002.
- Tahir Khani, Amin, *reducing incoming cases of courts and improving judicial efficiency*, Journal of Judicial Developments, No. 3, Summer and Fall: 2017.

- Tabatabai, Seyyed Mohammad Hossein, collection of works vol.9 (Islamic studies vol.1 and 2) by: Seyed Hadi Khosrowshahi, Qom Bustan, book first edition: 2019.
- Tabarsi, Fazl bin Hasan, Majma al-Bayan fi Tafsir al-Qur'an, Nasser Khosrow Publications, Tehran, 1993.
- Tabarsi, Ahmad bin Ali, died in the 6th century, al-Ihtjaj Ali Ahl al-Jajj, Morteza Publishing House, Mashhad, first edition 1982.
- Tarihi, Fakhruddin, Majma Al-Baharin, revised by: Ahmad Hosseini Ashkouri, Al-Tehran, Al-Mortazavi, 1996.
- Tusi, Muhammad bin Al-Hassan, Kitab al-Khalaf, Qom Institute of Al-Nashar al-Islami, first edition: 1996.
- Attardi, Mahmoud, Globalization of criminal law requirements and obstacles (master's thesis in criminal law and criminology, Razavi University of Islamic Sciences) year: 2018.
- Ameli, Zain al-Din, Masalik al-Afham to the revision of Sharia al-Islam, Qom, Islamic Encyclopaedia Foundation, 1992.
- Allameh Hali, Hasan bin Yusuf, Kashf al-Murad fi Sharh Tajrid al-Itqad, research: Hassanzadeh Amoli, Qom Institute of Al-Nashar al-Islami, 7th edition: 1996.
- Omid, Hassan, Farhang Farsi Omid, Tehran, Rah Rushd Publications, 2010.
- Omid Zanjani, Abbas Ali, Ayat al-Ahkam, Tehran Office of Islamic Studies and Research: 2003.
- Oudeh, Abdul Qadir, Punishment and its foundations and types, translated by Hasan Farhoudini (Vol. 2), Tehran, Yadavaran Publishing House: 2010.
- Ghafari, Mohammad, Decriminalization Factors, Adalat Ara Legal Journal, No. 8, 2016.
- Fayoumi, Ahmad bin Muhammad, Al-Masbah al-Munir Qom Manshurat Dar al-Hijrah, first edition: 1984.
- Qortubi, Muhammad bin Ahmad, Al-Jaami Lahakma al-Qur'an, vol. 19, Tehran, Nasser Khosrow, 1985 AH.
- Ghazizi, Jalaluddin, The Basics of Criminal Policy of the Islamic Government, Qom Institute of Islamic Sciences and Culture, second edition: 2003.
- Kilini, Muhammad bin Yaqub, al-Kafi, revised by: Ali Akbar Ghafari and Muhammad Akhundi, Al-Tehran, Dar al-Kitab al-Islamiya, first edition: 1986.
- Louis Maalouf, (1994) Al-Munjed Arabic Culture in Language and Al-Alam, Dar Al-Mashrekh, Beirut, Lebanon.
- Qorshi Banaei, Ali Akbar, Qur'an Dictionary (Vol. 2), Tehran Dar al-Kitab al-Islamiya: 1991.
- Majlisi, Mohammad Baqir, Bihar al-Anwar, Lebanon, Al-Wafa Institute, Beirut, third edition: 1982.
- Mohagheq Damad, Seyyed Mustafa, Jurisprudence (Vol. 4), Tehran, Islamic Sciences Publishing Center: 1985.
- Motahari, Morteza, collection of works, Volume 3, Tehran, Sadra Publishing House, first edition: 1988.

Mustafawi, Hassan, *Tahaqiq fi kalamat al-Qur'an al-Karim*, Tehran Ministry of Culture and Islamic Guidance: 1989.

Najafi Abrandabadi, Ali Hossein, Hashem Beigi, Hamid, *Encyclopedia of Criminology*, Tehran Ganj Danesh, second edition with new edition: 2011.

Najafi, Mohammad Hassan, *Javaher al-Kalam fi Sharh Shariah al-Islam*, Lebanon Beirut, Dar Ihya al-Tarath al-Arabi, 7th edition (Bita).

Naraghi, Ahmad, "Received Al-Ayam", Qom Maktabte Al-Basirti, third edition: 1987.

Hadavi Tehrani, Mehdi, Velayat Faqih, Tehran Institute of Contemporary Culture, Knowledge and Thought, Publishing Center of Islamic Culture and Thought: 1998.

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