



Patriarchal Criminalization and the Weakening of Human Rights Norms in the International System

Mohammad Sarwar Shujayi¹; Mohammad Nihad Noori²

¹ PHD Student in Criminal Law and Criminology, Afghanistan

² Master's Student in International Relations, Afghanistan

sarwarshujayi076@gmail.com

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Abstract

Criminalization in all human societies is regarded as one of the necessary tools in the hands of governments to confront anti-social behaviors. To prevent governments from attacking individuals' freedoms and human rights under the pretext of criminalization, legal experts have proposed several criteria for criminalization. These criteria are known as the “principles of criminalization.” One of the principles of criminalization is legal paternalism, under which the criterion for criminalization is the discretion of the authorities. According to this criterion, criminalization can pose a serious threat to human rights, particularly to individual freedoms, equality, and human dignity. This research seeks to, through an analytical-descriptive approach, define and explain criminalization in light of the principle of legal paternalism, while also addressing the risks and challenges this type of criminalization poses to citizens' human rights and demonstrating how criminalization based on “legal paternalism” can threaten citizens' human rights. At the same time, this research proposes solutions for moderating criminalization in the context of legal patriarchy. The research findings indicate that criminalization within the framework of legal patriarchy, if applied indefinitely and unconditionally, can jeopardize many of citizens' human rights, including, freedom, equality, and human dignity, and their right to grow and mature, are threatened; because under the principle of legal patriarchy, the government's hands are free to criminalize, and it can, under the pretext of “exercising its discretion,” engage in broad and unnecessary criminalization that leads to the violation of citizens' rights. Ultimately, to counter these dangers, it is recommended that governments criminalize only in specialized cases and with genuine, acceptable justifications, taking greater care to consider the will of the people and international considerations. Furthermore, criminalization should be avoided in public and social spheres where people are capable of sound judgment, so that while preserving the public interest, individual rights and civil liberties are protected.

Keywords: *Legal Patriarchy, Human Rights, Criminalization, Principles of Criminalization*

Introduction

Criminalization is considered one of the most fundamental strategies for combating anti-social behaviors, a strategy that holds significant importance and a very long historical background. As a governmental function, criminalization is, on the one hand, always regarded as an absolute necessity for maintaining order and freedom in human society, and on the other hand, it leads to the creation of restrictions and, naturally, the imposition of hardships on citizens. Therefore, throughout history and especially in the modern world, this question has captured the attention of thinkers and human elites: with what approach and by what criteria should criminalization be undertaken to establish a rational balance between the exercise of governmental authority and the fight against crime on one hand, and the preservation of citizens' human rights on the other? in a way that neither results in a society devoid of criminalization and criminal courts, nor places citizens' human rights under threat through state criminalization. In response to this question, legal scholars have proposed various criteria for criminalization, which are known in contemporary criminological literature as “principles of criminalization.” One of these criminalization principles is the “legal paternalism” or “criminal patronage” principle. According to the legal paternalism principle, the main criterion for which behaviors are criminalized in society is the government's own discretion. In this view, the state is considered in the criminalization process like a caring father for society, who deems himself competent, and indeed obligated, to determine the community's welfare and then to secure it. Therefore, in any case where the state deems criminalization to be in the community's best interest, it proceeds to criminalize, even if this action goes against the inner will of all citizens.

In such a situation, the fundamental question that arises—and around which this research revolves—is: if criminalization is carried out in light of the principle of legal patriarchy, what relationship does this type of criminalization have with human rights? The likely answer is that criminalization under the principle of legal patriarchy cannot be free of risks and threats to citizens' human rights. These conflicts can manifest in various aspects of human rights, which will be addressed in the text of the article.

Research into criminalization in light of the principle of legal patriarchy and its human rights dangers is significant because today, in authoritarian regimes—and especially in ideological and religious regimes like Afghanistan and Iran—criminalization is carried out entirely from a legal patriarchy perspective. In such a situation, Legal scholars and writers have a duty to warn about the dangers this type of criminalization poses to human rights and to propose solutions that, while criminalizing based on this principle, prevent its human rights risks. The aim and mission of this research is to, with an analytical-descriptive approach, highlight and analyze the dangers and threats that criminalization under the principle of legal patriarchy poses to human rights, and then propose solutions for softening and moderating legal patriarchy so that, while criminalizing under this principle, the risks to citizens' human rights can also be prevented.

Research Background

Due to the importance of criminalization in human life, the subject of criminalization and the principles of criminalization, including the principle of legal patriarchy, have attracted the attention of researchers. Among the notable works are “The Foundations of Legal Paternalism with a Focus on Its Role in Criminalization” by Dr. Rahim Nobahar and “Criminal Paternalism: Its Concept, Types, Legitimacy, and Examples in Criminal Law” by Ja'far Yazdian, which are examples of the numerous studies in this field. However, to date, no research has specifically addressed the human rights risks of criminalization in light of the principle of legal paternalism or offered solutions to prevent this problem. This study seeks to fill that gap.

Section One: Conceptualization and Generalities;

In this section, an attempt is made, on the one hand, to conceptually define and explain some basic terms, and on the other, to analyze and examine the theoretical foundations and the elements that constitute “patriarchal criminalization” as follows.

A: Conceptualization

1: Legal Paternalism

Legal paternalism has been defined in numerous ways. For the sake of brevity, and given the lack of significant differences in the definitions offered, this paper will suffice with presenting one definition by an Iranian scholar, which is both the most eloquent and the one accepted by this research. “Legal paternalism is an ideology in which the ruler considers himself a permanent guardian and custodian for his people and defines his relationship with the nation as that of a caring father to his children. According to this ideology, the ruler only seeks the nation's best interests and does whatever he deems is in the nation's interest, even if it goes against the will of the people.”

2: Human Rights

Numerous definitions of human rights have been proposed, given their importance, and they do not differ significantly in substance. This research will suffice with citing one definition of human rights that is endorsed by the author, which is as follows: “Human rights are the set of entitlements and obligations that human beings are entitled to, purely by virtue of being human, regardless of any other possession or lack thereof. These rights and entitlements are today reflected in conventions, treaties, resolutions, the statutes of international organizations, and generally in binding international instruments.”

3: Criminalization

Criminalization has also been defined in numerous ways, which conceptually do not differ much from one another, and the content of all these definitions can be summarized as follows: “Criminalization is the prohibition of a behavior and the determination of a punishment for the person who commits that behavior by a competent authority in the form of criminal laws.”

B: The Foundations of Criminalization in Light of the Principle of Legal Paternalism

Those who propose the principle of legal paternalism as a rule for criminalization and advocate criminalization by the sovereign in light of this principle naturally have theoretical and rational support for this perspective. The most important intellectual foundations that justify criminalization by the standard of the principle of legal paternalism are as follows:

1: Epistemic Paternalism

One of the theoretical foundations of criminalization in light of the principle of legal paternalism is “epistemic paternalism.” In this approach, the government considers its level of understanding and insight to be superior and deeper than that of its citizens, and assumes that citizens are incapable of understanding the community's best interests and the right path. Therefore, if they are given the authority, they may make mistakes, whereas the government has a greater ability and understanding to discern what is in the public interest. The result of this perception is that the government itself acts to determine the public good, criminalizing whatever it deems harmful to society and expecting only obedience and respect for its decisions from its citizens. Just as a father, by virtue of feeling superior in understanding and foresight, considers himself entitled to make decisions for his minor child, even if those decisions go against the child's wishes. Therefore, it can be said that criminalization, in light of the principle of legal patriarchy, is rooted in epistemic patriarchy, and epistemic guardianship is one of its most important theoretical foundations.

2: The Ruling Authority's Lack of Trust in the People's Honesty

Another reason the ruling authority, in light of the principle of legal paternalism, regards its own discretion as the sole criterion for criminalization is its distrust of the honesty of society's members. This kind of distrust is typically seen in totalitarian and authoritarian regimes. In these systems, creating an enemy by the regime is essential, and the government regards certain groups of the nation or specific systems as enemies of itself and of the oppressed society. In this view, if the people are allowed to make decisions, they are steered toward celebrities and elites, who are usually affiliated with or hired by the enemy; therefore, instead of making honest decisions for their own good, the people will act according to the enemy's plan. With such a perception and outlook, the regime deems it appropriate to criminalize under the principle of legal patriarchy and to consider its own discretion the sole criterion for defining crimes. This is yet another basis for criminalization under the principle of legal patriarchy. As some Islamic countries today have criminalized the absence of a headscarf against the will of the majority of citizens, viewing supporters of unveiling as deceived individuals who have been misled by the enemy.

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4: Lack of decisive citizen influence in criminalization

Within the framework of legal paternalism, the will of the citizens regarding criminalization and decriminalization is only taken into account to the extent that the sovereign does not deem it contrary to the interests of society. Therefore, in this system, the role of the majority's will in the process of criminalization and decriminalization is considerably more limited compared to a democratic system. The sovereignty can criminalize any behavior it deems detrimental to society, even if this criminalization goes against the will of the overwhelming majority of the people. This situation is similar to the role of a father who, by making unilateral decisions, limits a child's authority to determine their life's path. Thus, another element of criminalization, in light of the principle of legal paternalism, is the limited role and influence of citizens in the criminalization process.

Section Two: Manifestations of the Dangers of Paternalistic Criminalization for Human Rights

Now that the definition of criminalization has been explained in light of the principle of legal patriarchy, as well as the elements and foundations of this type of criminalization, it should be noted that if this type of criminalization is examined more deeply and precisely, it cannot be free of dangers and threats to the human rights enshrined in international human rights instruments. These confrontations and conflicts will be analyzed and examined in detail below.

A: The Dangers of Paternalistic Criminalization for “Freedom”

Article 1 of the Universal Declaration of Human Rights states: “All human beings are born free and equal in dignity and rights.” Furthermore, Article 3 of this Declaration states: “Everyone has the right to life, liberty and security of person.” According to these articles, freedom is one of the most fundamental

human rights that all human beings possess, and every individual must enjoy this right simply by virtue of being human. To secure this vital right, it is not enough for laws merely to grant it to citizens; rather, the law must also block any attempts by others, especially the government, to infringe upon this vital right of citizens. In fact, the philosophy and primary purpose of drafting constitutions in various societies is to prevent the government from infringing upon this right, and these laws were created to regulate the relationship between power and freedom. Furthermore, Article 1 of the International Declaration of Human Rights emphasizes that governments are obligated to protect these rights.

However, in systems where the standard for criminalization is the “legal paternalism principle,” this vital right is severely endangered. This is because, on the one hand, criminalization always imposes restrictions on individual freedom, and on the other hand, under the principle of legal paternalism, the will of the government is the sole basis for criminalization, not the will of the community's majority. In other words, if the government wants to engage in extensive criminalization under the pretext of determining the public interest and significantly restrict individual freedom, it can do so, and this is certainly a serious threat to individual liberty.

As a result, criminalization based on the legal patriarchal standard, while not necessarily leading to a conflict with human rights, at the very least poses a distinct risk and threat of violating the rights outlined in Articles 1 and 2 of the Universal Declaration of Human Rights, because under such a standard there is no guarantee to protect freedom and the state can easily attack that freedom. Of course, in some cases, it may be necessary for the government to take specific measures to determine the public interest, especially when doing so requires specialized expertise. But if the government's hands are permanently free to act under the pretext of determining the public interest, then people's freedom is placed in serious jeopardy, and individuals under such conditions will certainly lack peace of mind.

A clear example of this situation can be seen in the current system of the Islamic Emirate of Afghanistan, where people go to sleep at night and wake up in the morning to find that their fundamental freedoms, such as freedom of dress, education, and thought, have been attacked and criminalized.

B: The Dangers of Paternalistic Criminalization for “Equality.”

Article 1 of the Universal Declaration of Human Rights states: “All human beings are born free and equal in dignity and rights.”

Also, Article 7 of this Declaration specifies: “All are equal before the law and are entitled to equal protection of the law without discrimination.” According to the aforementioned provisions, all citizens must enjoy equal opportunities and facilities, and the government must act toward all citizens with an impartial and equal outlook and treatment. The International Covenant on Economic, Social, and Cultural Rights, adopted by the United Nations General Assembly in 1966, also reaffirms these principles.

However, criminalization in light of the principle of legal paternalism can lead to a loss of governmental neutrality and be considered a threat to citizens' enjoyment of “equality.” Under the standard of the principle of legal paternalism, the government often, without regard to public opinion, treats certain issues as the “public good.”

It criminalizes. This approach allows the government to impose its own interpretation as the representative of the nation's highest interests on others. In this scenario, a group of citizens who submit to the government's judgment accept what has been criminalized and benefit from the greatest number of job and educational opportunities. But another group, who hold the opposing view and believe that the government's judgment cannot be a comprehensive standard for the public interest and that citizens' opinions should be taken into account when criminalizing, are subjected to government harshness and even wrath, and their access to resources and opportunities is restricted.

This situation jeopardizes the “equality of citizens,” which is a natural right of all citizens. A prime example of this phenomenon can be observed in some Islamic countries where not wearing the hijab is

criminalized. In these circumstances, those who agree with this decision have access to special privileges, even if they are less qualified. In contrast, those who consider freedom of dress and choice their right are subjected to government sanctions and receive the bare minimum of resources. In this context, equality, which is a natural right of individuals, is severely violated. Thus, another example of a human right that is threatened and endangered by criminalization in the light of the principle of legal patriarchy is “equality,” which is specified in Article 1 and Article 7 of the Universal Declaration of Human Rights.

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Of course, in purely technical matters that require technical expertise, government decision-making is not necessarily a violation of human dignity; but if the government, in a general way, considers the people incapable of discerning their own best interests and bases criminalization on this assumption, its conflict with human dignity—and consequently with human rights—becomes apparent. An example of this situation can be seen in some Islamic states that, despite the opposition of the majority of society, criminalize the removal of the hijab under the pretext of identifying moral or spiritual interests—an approach that regards people as lacking independent reason and conscience and is contrary to Article 1 of the Universal Declaration of Human Rights.

D: The Conflict Between Legal Paternalism and Individual Growth and Maturity

The content of Articles 27, 22, and 29 of the Universal Declaration of Human Rights each, in their own way, recognizes the attainment of maturity and intellectual growth as a right of the people and considers providing the conditions for such growth and maturity to be the responsibility of the government; However, in a system where criminalization is carried out in the light of the ideology of legal paternalism, this right of the people is largely jeopardized and threatened, because the people of a society are only considered mature, mature and rational, will have the right to give opinions, make decisions, and determine what is in the public interest in all areas of their lives, including in the criminalization and decriminalization of acts, which are among the most important actions in social life. Only then will the members of a society reach the necessary growth and maturity and develop a spirit of creativity and initiative; but in a system based on legal paternalism, where the government, in the interest of the nation's welfare in all spheres—including the criminalization and decriminalization of offenses, which are among the most important actions in social life—considers only itself competent and disregards the people's views and judgment on criminal matters, The nation will suffer from intellectual lethargy and a stagnation of creativity, remaining in all areas of life dependent on the government's discretion to determine its own best interests. In such a case, the nation loses its spirit of innovation, initiative, and creativity and is deprived of the necessary intellectual growth and maturity. For this reason, the right to intellectual growth and maturity of the people, which is one of the manifestations of human rights, is violated.

E: Violation of Privacy

The right to privacy is a fundamental human right. This right is explicitly recognized in authoritative human rights instruments, including Article 12 of the Universal Declaration of Human Rights, Article 17 of the International Covenant on Civil and Political Rights, and Article 18 of the 1990 Islamic Declaration of Human Rights. According to the provisions of these documents, every person has the right to privacy, and no one is permitted to invade, interfere with, or spy on the privacy of others.

However, in cases where criminalization is based on the principle of legal paternalism, the privacy of individuals is often threatened. This is because in such an approach, the authority to determine what is in the public interest lies with the government, and the will and opinion of the people play no role in the criminalization process. As a result, this allows the government, at its own discretion, to criminalize matters that directly pertain to individuals' private lives. A prime example of this is the Taliban's Emirate regime's action of criminalizing women's visits to their fathers' homes and women traveling without a male chaperone, when these matters clearly fall under the category of personal, private life issues. Obviously, if public opinion and consent had been taken into account in the criminalization process, the people of Afghanistan would never have accepted the criminalization of such matters.

Moreover, sometimes to uncover and prosecute such crimes, the government is compelled to implement extensive surveillance; in such a way that “agents and employees must engage in broad surveillance, eavesdropping, and information control of suspects and the community. In these circumstances, individuals' rights to privacy and solitude are violated, and a completely security- and police-oriented atmosphere prevails over society.”

Therefore, whenever the authorities criminalize in the light of the legal patriarchal principle, the right to privacy—one of the most fundamental examples of human rights—will be seriously threatened and jeopardized.

Summary and Conclusion

Ultimately, it can be concluded that criminalization under the principle of legal patriarchy, while possessing some advantages and perhaps necessitating the application of its provisions in certain cases to serve the public interest, is nevertheless accompanied by significant harms and negative consequences that, on balance, far outweigh its benefits. Therefore, the acceptance of paternalistic criminalization should be very limited and conditional. The limits and conditions for this acceptance can be explained as follows:

The existence of a real and acceptable justification by the authorities

The authorities' discretion in paternalistic criminalization should not be so broad that they can, at any time and in any manner, criminalize without providing a reason, simply invoking the principle of legal paternalism. Rather, the government is obligated to provide a real, rational, and acceptable justification for its paternalistic decisions and criminalization; in a manner that satisfies society, common sense, and the sound judgment of the majority. In the absence of such justification, resorting to a claim of superiority in determining the public interest cannot be considered a license for criminalization.

- The danger or harm from the behavior must be significant.

If the state, acting within the framework of legal paternalism, criminalizes in a patronizing manner and interferes in the lives of adult, sane individuals, this interference must be genuinely necessary; such that, without it, significant and serious harm would be inflicted upon society. Therefore, the government is not permitted to readily resort to measures such as criminalization merely due to minor or trivial harms or concerns. For example, if in a specific case a driver has an accident due to distraction from listening to music, this alone cannot justify the criminalization of listening to music while driving, because the

government cannot, citing such cases, declare itself the guardian of society and impose the necessity of such criminalization on its citizens.

- Alignment with International and Global Logic

Another of the intermediary principles in the legal exercise of patriarchy for criminalization is that a sovereign's action to protect the interests of society must have international legitimacy and be consistent with global logic, in such a way that the action is not considered unknown or universally condemned on a global scale. Therefore, in the contemporary era, where the universal principle of the legal right to education for all of humanity, regardless of gender, is recognized, a government cannot criminalize women's pursuit of education and justify it as an action in the interest of society. This is because the complete denial of education and its criminalization are not compatible with the universal logic of humanity and accepted global standards today, and will undoubtedly not be approved internationally under any justification.

Specialization of the Scope of Action

Another intermediary principle for criminalization in light of the principle of legal patriarchy is that the government should only criminalize in those areas within the framework of legal patriarchy that are specialized in nature and where the general public cannot typically accurately discern their own best interests. In contrast, in areas such as the social, economic, and moral spheres—where most people are capable of expressing an opinion and are expected to be able to make sound judgments—paternalistic criminalization is unnecessary.

Given the foregoing discussions, it must be said that the government cannot absolutely avoid any paternalistic criminalization and must always subject criminalization to the people's judgment; Rather, the sovereignty, as guardian of the public interest, is compelled in certain cases to resort to paternalistic and patronizing criminalization; however, these criminalization must be applied solely within the conditions and constraints outlined above to maintain the necessary balance between the demands of sovereignty and the protection of citizens' freedoms.

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