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Validation of the Principle of Territorial Jurisdiction in Imami Jurisprudence, Afghan Law, and International Documents

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Abstract

The principle of territorial jurisdiction, as a spatial domain of criminal laws and as one of the foundations for the exercise of criminal jurisdiction by states in different legal systems, holds a varying status. In this research, the validity of this principle in three sources—Imamiyyah jurisprudence, Afghan law, and international documents—has been studied using a descriptive-analytical comparative method. The findings indicate that in Imamiyyah jurisprudence, the acceptance of this principle as a primary ruling is not admissible; however, it can be justified as a secondary ruling and a governmental ruling. In contrast, in Afghan law and international documents, the principle of territorial jurisdiction has been widely and clearly accepted. Furthermore, the research findings show that despite differences in foundations, there is the possibility of harmonization and compatibility between the approach of Imamiyyah jurisprudence on one hand and Afghan law and international documents on the other regarding the acceptance of the principle of territorial jurisdiction. Within the framework of secondary and governmental rulings, the necessary capacity can be provided to reconcile these three sources regarding the acceptance of the principle of territorial jurisdiction.

Keywords: *The Principle of Territorial Jurisdiction, Imamiyyah Jurisprudence, Afghan Law, International Documents, Secondary Ruling, Governmental Ruling*

Introduction

The Principle of Territoriality in Criminal Laws refers to a key and important concept in the criminal justice system, enabling states to determine how to exercise their authority and jurisdiction within their own borders and to prevent the application and enforcement of foreign laws. On the other hand, respect for this fundamental principle necessitates that no country seeks to apply its criminal laws within the territory of another country. By observing and applying this principle, both the internal order and security of countries are regulated, and respect for sovereignties is preserved. This principle has been discussed from various perspectives; however, its validation in a comparative study among Imamiyyah jurisprudence, Afghan law, and international documents has not yet been researched. In this article, the aforementioned principle will be studied after conceptualization and with the aim of determining the validity of this principle in the three sources, using an analytical-descriptive method:

1. The Concept of the Principle of Territorial Jurisdiction

The principle of territorial jurisdiction is significant in general criminal law and international criminal law. In general criminal law, this principle denotes the spatial domain of criminal laws, and in international criminal law, it is the most fundamental principle for resolving conflicts of criminal jurisdiction among states regarding crimes involving one or more foreign elements. Since criminalization, the drafting and enactment of criminal laws, as well as the prosecution of criminals and their punishment, are manifestations of sovereignty and power, and the sovereignty and power of states are limited to their territorial borders; therefore, states declare the spatial domain of their criminal laws to be their own territory and, concerning crimes involving foreign elements, except in specific cases, they limit the exercise of jurisdiction to matters related to their own territory. This principle in general criminal law and international criminal law are two sides of the same coin; a corollary of the limitation of the spatial domain of each country's criminal laws to its territory is the exclusivity of their criminal jurisdiction within their territory. Below, first the concept of this principle in general criminal law and then in international criminal law will be examined:

1-1. The Concept of the Principle of Territorial Jurisdiction in General Criminal Law

In general criminal law, the principle of territorial jurisdiction is examined under the title of the spatial domain of criminal laws, and legal scholars have mostly provided explanations surrounding it without offering a comprehensive and precise definition. A few instances are mentioned below:

Some writers under the title of the principle of territorial jurisdiction state: "Essentially, criminal law is intra-territorial; because it is a matter related to power and sovereignty, and without sovereignty, the organization, drafting, enactment, and enforcement of criminal law is an impossible matter" (Sarikhani, 2018, Vol. 1 & 2: 382).

Others under the title of the territoriality principle of criminal laws state: "Criminal laws are applicable to all residents of the country, whether domestic or foreign nationals; but they have no effect outside the country's borders." (Golduzian, 2024: 92)

Some others under the title of the territoriality principle of criminal laws write: "The most important principle in the enforcement of criminal laws is the principle of territoriality of criminal laws, which is accepted by almost all countries without exception. According to this principle, criminal laws are applicable to all individuals who commit a crime within the domain of the country's sovereignty, regardless of the nationality of the perpetrator or the victim" (Mir Khalili, 2015: 234).

Other legal scholars who have written works on general criminal law, when addressing the principle of territorial jurisdiction, have provided explanations similar to those mentioned above.

Inspired by the explanations of legal scholars on this matter, the principle of territorial jurisdiction in the domain of general criminal law can be defined as follows: The principle of territorial jurisdiction is: the specific and exclusive executive competence of the criminal laws of each country within the territory of that country over all its inhabitants. This definition reflects the two positive and negative aspects of the principle of territorial jurisdiction. This competence is specific; meaning it is exercised only within this territory and not beyond it, and it is exclusive; meaning this competence belongs solely to it, and the laws of other countries do not possess this competence within this territory.

1-2. The Concept of the Principle of Territorial Jurisdiction in International Criminal Law

The principle of territorial jurisdiction in international criminal law pertains to the conflict of jurisdictions regarding crimes in which one or several foreign elements are involved, and multiple countries can simultaneously claim the right to prosecute that crime. Explanations of the principle of territorial jurisdiction also exist in international criminal law. Some examples are mentioned below:

Some have attempted to define the principle of territorial jurisdiction and define it as follows: "The principle of territorial jurisdiction is the criminal jurisdiction of a state over crimes committed within its territory." (Khaleghi, 2009: 37). Others under the title of intra-territorial jurisdiction have said: "The subject of the principle of intra-territoriality is the affirmation of the exclusive jurisdiction of a state and its laws and courts over all punishable acts that occur within the territory of that state." (Hosseini Nejad, 2004: 40); and some others under the title of the principle of territorial jurisdiction state: "The principle of territorial jurisdiction is the fundamental principle governing criminal rules; meaning that all crimes committed within the territory of a country's sovereignty are prosecuted and punished according to the criminal laws of that same country." (Momeni, 2004: 154) and some others under the title of the territorial principle write: The principle of territorial jurisdiction is the ideal basis for the exercise of state jurisdiction. Events that occur within a country's borders and persons who are within the limits of its territory, even if their presence is temporary, are as a rule subject to local law. (Reka Wallace and Olga Martin Ortega, 2024: 182)

As observed, in most definitions and explanations surrounding the principle of territorial jurisdiction in international criminal law, this principle is a rule that expresses the scope of a state's criminal jurisdiction, which is the most important subject of international law; in other words, the principle of territorial jurisdiction in international criminal law indicates the spatial domain of a state's criminal jurisdiction, unlike the principle of territorial jurisdiction in general criminal law which specifies the spatial domain of criminal laws. Although this principle in these two branches of public law does not differ in outcome; nevertheless, it has been expressed from two perspectives. In one, the perspective is on the law, and in the other, it is on the state.

According to what has been stated, the principle of territorial jurisdiction from the perspective of international criminal law is: the specific and exclusive competence of a state to apply criminal laws regarding all crimes committed within its territory. This jurisdiction is specific; because it is applicable only within this territory, and exclusive; because it belongs solely to this state, and other states do not have the right to exercise this jurisdiction within this territory.

1-3. The Principle of Territorial Jurisdiction in Imamiyyah Jurisprudence

This principle in Islamic jurisprudence, especially in Imamiyyah jurisprudence, can be studied from two different perspectives: idealistic and realistic. In other words, in Islamic jurisprudence, rulings are classified into primary rulings, which follow inherent and permanent interests arising from the essence of the behavior, and secondary rulings, which follow the occurrence of secondary and temporary titles. Opposed to these two types of rulings is the governmental ruling, which will be explained. Now the question is whether the principle of territorial jurisdiction is accepted in Islamic jurisprudence or not? If it is accepted, is it as a primary ruling, a secondary ruling, or a governmental ruling? This principle will be researched under these two titles in Imamiyyah jurisprudence:

1-3-1. The Principle of Territorial Jurisdiction as a Primary Ruling

This principle in Islamic jurisprudence, before being raised in customary law, has been considered under the title of the scope of the penalties of Islamic Sharia and under the title of the scope of the guardianship of the Jurist in Islamic jurisprudence. The first person to pay attention to this principle is Imam Abu Hanifah, and he accepted the principle of territorial jurisdiction for Islamic criminal law in an incomplete manner. He believes that the penal provisions of Islam apply only in Dar al-Islam (the Abode of Islam) to all permanent residents and to temporary residents if they have transgressed against the rights of others (Huquq al-Nas) (Awda, 2005, Vol.1: 228).

Abu Yusuf, a Hanafi jurist of the Sunni school, believes in the relatively complete principle of territorial jurisdiction; he says: The penal provisions of Islam apply to all residents of Dar al-Islam, both permanent and temporary residents, except concerning the musta'min (protected non-Muslim temporary resident) in matters such as drinking alcohol. (Al-Siyasi Al-Iskandari, 2003, Vol.5: 256-257).

Maliki (Al-Maghribi, 2003, Vol.3: 365), Shafi'i (Abu Ishaq Shirazi, 2003, Vol.3: 317, 324, and 328), and Ahmad Ibn Hanbal (Ibn Qudamah Al-Maqdisi, 1983, Vol.9: 383) believe in the complete principle of territorial jurisdiction; they consider the penal provisions of Islam applicable to all residents of Dar al-Islam.

Imamiyyah jurists do not have clear opinions in their jurisprudential theories regarding the principle of territorial jurisdiction; therefore, examining their viewpoint on the principle of territorial jurisdiction requires a logical analysis and explanation of the scope of the Imam's authority in the era of presence and the authority of the qualified jurist in the era of occultation. In the era of the Imam's presence, all Imamiyyah jurists agree that the scope of the Imam's authority is the entire world; because they believe that Imamate is: "A comprehensive leadership in religious and worldly matters that is designated for an individual from among the people as a vicegerent of the Prophet (PBUH)." (Mohammadi, 1999: 327) What they mean by comprehensive leadership is that the Imam has the right to exercise leadership over all individuals in the world, in any place and at any time; one of the aspects of the leadership of the Imam (AS) is the establishment of a government and the application of Islamic Sharia to the entire world; therefore, the scope of Islamic Sharia in the era of presence is the entire world. The principle of territorial jurisdiction, which limits criminal laws to a specific geography, is not acceptable regarding Islamic Sharia in the era of presence with this idealistic perspective; rather, it should be said that from the perspective of Islam, the rightful government is one and the entire world is one territory. These border demarcations are not acceptable. Consequently, the principle of territorial jurisdiction, which is the outcome of recognizing borders and the multiplicity of sovereignties, is not acceptable as a primary ruling according to these jurists in the era of presence.

However, regarding what authorities the qualified jurist possesses in the era of occultation, whether he has the right or duty to establish a government and apply Islamic Sharia, there is disagreement among jurists; some believe that in the era of occultation, the implementation of Hudud (prescribed punishments) is suspended; and the jurist has no authority in this matter. (Al-Hilli, 1991, Vol.2: 24) Others believe that the qualified jurist can; meaning it is permissible for him to establish a government if possible and implement Islamic punishments (Al-Tusi, 1996, Vol.6: 242) and finally some others say: that the establishment of an Islamic government and the effort to apply Islamic Sharia is obligatory upon the Wali al-Faqih (the Guardian Jurist). (Imam Khomeini, Vol.2, 2000, pp. 24, 29, and 66)

Based on the theory of the suspension of Islamic punishments during the occultation, discussing the principle of territorial jurisdiction is irrelevant, as the proponents of this theory do not accept the principle of jurisdiction for the jurist. Since discussing the principle of territorial jurisdiction is discussing the scope of sovereign jurisdiction, which is secondary and contingent upon accepting the principle of jurisdiction, it is not applicable. However, based on the two theories of permissibility and obligation to establish a government and apply Islamic Sharia from an idealistic perspective, it can be said that the principle of territorial jurisdiction is not accepted; because both groups consider the scope of the jurist's authority to be the entire world. That is, the group that believes in permissibility says: the jurist can apply Islamic punishment to anyone, anywhere, if possible. The late Shaykh Tusi in Al-Khilaf has explicitly stated this generality (Tusi, ibid), and the same generality is derived from analyzing the views of others; because they consider non-believers obligated to both the principles (usul) and the branches (furu'). Therefore, according to both groups, international borders are not acceptable, and consequently, raising the discussion of the principle of territorial jurisdiction, which is based on the acceptance of international borders, lacks relevance. According to these jurists, the principle of territorial jurisdiction is not acceptable regarding Islamic criminal law, whose addresses are all of humanity.

Since the entire universe, including the earth, is the absolute property of God, because He is the Creator of existence; therefore, sovereignty and management over it are also His right. Apart from God Almighty, no one has the right to exercise authority over the universe, including human beings, except those who have been appointed by God for this task, such as the divine prophets (peace be upon them), the infallible Imams (peace be upon them), and the qualified jurist (based on the view of the permissibility

or obligation of the jurist's involvement in societal affairs). In the individual sphere, this includes the father and paternal grandfather regarding their children, and the master regarding their slaves and female slaves. Therefore, it is said: the primary principle is that no one has the right of authority and guardianship (wilayah) over another. This right is specific to God, except in cases where we have evidence of God granting this right to others. According to this view, all governments formed without God's permission are considered illegitimate governments and governments of taghut (tyranny), and obedience to them is not permissible. The rulers of these governments possess no type of jurisdiction.

If a government and power are not based on God's permission and on religion, they are taghut. This matter itself can take many different and diverse forms. In reality, the current governments of the world, the overwhelming majority of which are non-religious governments and not based on religion, with all their formal and structural diversity, are all examples of taghut. In many of these governments, rule may be exercised in the name of the people. Based on Quranic verses, Muslims must not obey taghut and should not go to them for adjudication and seeking justice. In the Holy Quran, it is stated: "Have you not seen those who claim to have believed in what was revealed to you, [O Muhammad], and what was revealed before you? They wish to refer legislation to taghut, while they were commanded to reject it; and Satan wishes to lead them far astray." (Surah An-Nisa: 60) Based on this blessed verse, Imam Sadiq (peace be upon him) in the Maqbula of Umar ibn Hanzala (Halabi, 1983, Vol.1: 67)

prohibited referring to taghut and provided another solution for seeking justice and resolving legal problems. This narration is, in fact, the answer to the question posed by Umar ibn Hanzala to the Imam (peace be upon him) regarding the permissibility of referring to taghut. Umar ibn Hanzala asked the Imam (peace be upon him): A dispute occurred between two of our friends regarding religion or inheritance, and they referred to the sultan (of injustice) and the judges appointed by the unjust sultan; is such an action lawful and permissible? The Imam (peace be upon him) replied: Whoever seeks judgment from them in a dispute, whether right or wrong, is as if they have sought judgment from taghut (illegitimate power). Whatever they obtain through their judgment is forbidden, even if it is their established right; because they obtained it through the judgment of taghut, while God has commanded to disbelieve in it. God Almighty says: "They wish to refer legislation to taghut." Then Umar ibn Hanzala asked the Imam (peace be upon him): So what should they do? The Imam (peace be upon him) replied: They must look at who among you narrates our hadiths, has researched them, and has become knowledgeable in our rulings; refer to him and be satisfied with his judgment; for I have made such a person your ruler. If he judges according to our command and our rulings and one of them does not accept it, then indeed he has taken the ruling of God lightly and has rejected us, and whoever rejects us has rejected God, and this is on the verge of associating partners with God. Imam Khomeini (may God have mercy on him) in his book Velayat-e Faqih (Guardianship of the Jurist), explaining this hadith, writes: "His Eminence, in response, forbids referring to illegitimate governmental authorities, whether executive or judicial. He commands that the Islamic nation must not refer to tyrant kings and rulers and the judges who are their agents in their affairs, even if they have an established right and want to take action to realize that right and obtain it. If a Muslim has killed his son or looted his house, he still has no right to refer to tyrant rulers for adjudication. Similarly, if he is a creditor and has living witnesses, he cannot refer to subservient judges and agents of oppressors. Whenever he refers to them in such cases, he has turned to taghut, i.e., illegitimate powers. If he obtains his established rights through these illegitimate powers and apparatuses, then he has obtained it unlawfully, even if it is his established right, and he has no right to dispose of it. Even some jurists have explicitly stated that, for example, if your cloak was stolen and you retrieved it through tyrant rulers, you cannot dispose of it. Even if we do not hold this ruling in specific cases (ayn), we have no doubt in the general principle (kulli). For example, if someone was a creditor and, to obtain his right, referred to an authority or position other than the one appointed by God and obtained his claim through him, disposing of it is not permissible, and the standards of Sharia dictate this." (Imam Khomeini, 2009: 90)

This verse and narration, along with other verses and narrations with similar content that exist on this matter, although they all pertain to internal taghut governments; but by refining the criterion (tanqih

al-manat), it can be said that a foreign taghut government has the same rulings; because all of them share the same state of illegitimacy. From numerous verses and narrations, it is understood that the taghut government is not worthy of obedience and establishing relations. The domain of internal taghut sovereignty, since it is considered part of the Islamic lands, must be protected; however, the domain of foreign taghut sovereignty, because it has been seized usurpatively and without the permission of the true owner, enjoys no right or respect. All non-divine governments, because they hinder the growth and guidance of people and hinder the propagation of the true religion, are condemned to overthrow if possible; because all domains belong to God and are the place for the implementation of God's religion, which guarantees human felicity. Consequently, with a primary view towards the ideals of the noble religion of Islam, its mission and goal, and without considering the current reality of the global community and the exigencies of the time, and without considering secondary interests whose preservation is necessary both for protecting Islam and for the continuation of Muslims' lives under current conditions, it can be said that the principle of territorial jurisdiction has no validity according to the jurisprudence of the Ahl al-Bayt (peace be upon them). This is because, from an idealistic perspective, taghut governments never have the right of sovereignty for us to discuss the scope of their sovereignty and, by accepting the principle of territorial jurisdiction, recognize their sovereignty within a specific geography. Rather, from this perspective, the entire earth is one domain, and the right of sovereignty belongs only to those who, according to Islamic Sharia, with God's permission, establish a government and lead all humanity towards growth and eternal felicity. In the era of the presence of the infallible Imam (peace be upon him), he is the Imam for all humanity, and in the era of occultation, the qualified jurist is his representative and the ruler over all humanity, and all obligated individuals must obey them. Those who do not perform this duty, depending on their other beliefs, are either sinners or considered unbelievers. Those who, in the era of occultation, believe in the guardianship of the jurist and consider his guardianship absolute in terms of spatial domain, hold this idealistic view, and from this perspective, the principle of territorial jurisdiction is absolutely unacceptable. In other words, the principle of territorial jurisdiction, considering the ideals of the Islamic school of thought and considering primary interests, is not acceptable as a primary ruling.

The only way through which the acceptance of the principle of territorial jurisdiction can be justified as a primary ruling is the establishment of a treaty between the Islamic government and other governments. In this case, fidelity to the treaty is obligatory, and until the end of the treaty's term and the other party's compliance with it, the Islamic government does not have the right to violate it; adherence to it is obligatory, and the ruling of obligation for the treaty is a primary ruling and possesses inherent interest. Numerous verses of the Holy Quran emphasize the necessity of fulfilling covenants, even with unbelievers. (Al-Ma'idah:1, Al-Baqarah:177, Maryam:53, and Al-Isra: 34) In narrations as well, the necessity of fulfilling covenants, even with enemies, is emphasized in multiple instances. (Nahj al-Balaghah: Letter 53, Nahj al-Fasahah:326 Hadith 850 and Kulayni, 1996, Vol.8: 353) A large number of the peaceful communications of the noble Prophet (peace be upon him), whether with followers of other religions inside Medina or with other sovereign domains, took place in the form of treaties; such as establishing relations of the prophetic government with others through the Charter of Medina, the Treaty of Hudaybiyyah, the treaty with the Christians of Najran, his treaty with the king of Aylah, etc. The noble Prophet of Islam had specific orders from God Almighty regarding fidelity to the treaties he made with others (Al-Anfal: 61).

Among these treaties, those that have an international aspect and were concluded under somewhat equal conditions, such as the Treaty of Hudaybiyyah, are clear evidence that the Prophet of Islam (peace be upon him) accepted the principle of territorial jurisdiction in the realm of international politics within the framework of a treaty and observed it with utmost precision. In the Treaty of Hudaybiyyah, the Prophet committed that he would never make decisions regarding individuals under the authority of Quraysh, and if someone fled from Mecca and came to Medina, he would be returned to Mecca so that decisions regarding him could be made within that sovereign domain. It is very clear that the extradition agreement for criminals is contingent upon accepting the principle of territorial jurisdiction. Consequently, it can be said: The principle of territorial jurisdiction within the framework of a treaty and

covenant has been accepted according to the Islamic school of thought as a primary ruling; because the obligation to fulfill covenants and treaties is a primary ruling.

Two objections seem to arise in this regard. The first objection is that the primary ruling of fulfilling covenants and treaties is obligatory, but this does not prove that the primary ruling of observing the principle of territorial jurisdiction is also obligatory. Another objection that can be raised in this regard, considering some established jurisprudential principles, is that a treaty with unbelievers, considering the principles of nafy al-sabil (preventing the domination of unbelievers over Muslims), the principle of 'ulu (superiority), and the principle of nafy al-wilayah lil-kuffar (negating the guardianship of unbelievers), is forbidden as a primary ruling under normal conditions. This is because a treaty leads to mutual domination between the parties, and each can demand the implementation of the contract authoritatively from the other party. This situation is incompatible with the principles of nafy al-sabil and 'ulu. On the other hand, a treaty brings benefits for both parties, which leads each to desire the continuity and longevity of the other party. This is a desire that one has for one's loved ones. If the treaty is international, the continuity of each government will be a desire for the other party. This state, from the side of the Islamic government, seriously conflicts with the principle of the prohibition of the guardianship of unbelievers and places the one who loves the continuity of the governments of unbelievers among the unbelievers (Hurr al-Amili, 1995, Vol.17: 182).

The international treaties of the noble Prophet (peace be upon him) in accepting the principle of territorial jurisdiction and the obligation to observe it within the framework of a contract also cannot prove that the obligation to observe the principle of territorial jurisdiction is a primary ruling. This is because research into the international treaties of the noble Prophet (peace be upon him) reveals that: The Prophet (peace be upon him), while making treaties with others, was either in a position of weakness or had the upper hand. When he was in a position of weakness, out of necessity and compulsion, he not only respected the principle of territorial jurisdiction but also gave them unilateral concessions. In the Treaty of Hudaybiyyah, the Prophet of Islam (peace be upon him) accepted unilateral extradition (Baladhuri, 1959, Vol.1: 350). In the Battle of the Trench (Khandaq), to convince the unbelievers to make a peace treaty, he offered one-third of Medina's fruits (Mufid, 1992, Vol.1: 96). Such treaties, concluded under emergency conditions, are not evidence for the permissibility of accepting the principle of territorial jurisdiction as a primary ruling. Rather, in emergency conditions, such treaties can be used for respecting the principle of territorial jurisdiction as a secondary ruling. However, in the international treaties where the noble Prophet of Islam (peace be upon him) had the upper hand, he did not recognize the principle of territorial jurisdiction in its modern sense, which entails independence, for the treaty partner. Rather, in some treaties, he compelled the other party to pay jizyah (poll tax) according to the number of people in his country or region and to host Muslims (Muhammad ibn Sa'd, 1990, Vol.1: 221), and in others, he determined jizyah based on another criterion. (Ya'qubi, 1988, Vol.2: 81) Although he delegated their internal affairs to them under the supervision of the Islamic government, this delegation never means that the Islamic government does not apply Islamic criminal law in that territory under any circumstances. Rather, in some treaties, unbelievers were warned that if they committed certain crimes, such as usury, they would be excluded from the treaty and punished. (Ismail ibn Muhammad ibn Kathir, 1986, Vol.5: 66)

A brief look at the letters that the noble Prophet of Islam (peace be upon him) wrote to the leaders of countries also makes us understand that the noble Messenger of Islam (peace be upon him) was never willing to recognize the domain of those countries as an independent country and only desire friendly diplomatic relations with them while observing all principles, including the principle of territorial jurisdiction. Rather, in several of these letters, the noble Prophet of Islam (peace be upon him) used the phrase "aslim tasliman" (submit and you will be safe) (Tabari, 1999: under the events of the sixth year AH), which has the aspect of invitation with a threat. The noble Prophet of Islam did not greet some of the leaders of countries to whom he sent letters. Instead, in the letters addressed to them, he used the phrase "al-salamu 'ala man ittaba'a al-huda" (peace be upon whoever follows guidance) (ibid, under the

events of the sixth year AH). Greeting the addressee personally only exists in letters where the addressee had previously shown his good intentions; among them, the Negus and the ruler of Bahrain can be named.

By carefully examining the treaties and letters of the noble Prophet of Islam (peace be upon him), it is understood that the Prophet of Islam (peace be upon him), under normal conditions and when the necessary military, economic, etc., capabilities were available to pave the way for achieving his ideals, never desired to establish friendly diplomatic relations with unbelieving states while observing all the principles prevalent today, including the principle of territorial jurisdiction. Rather, His Eminence desired their submission to the Islamic government through peaceful means, and otherwise, he considered the rulers of unbelieving states, after delivering God's message to them, guilty and deserving of punishment. Delegating internal affairs to some states that had submitted to the Islamic government and desired to live peacefully under the protection of the prophetic government is not out of respect for the principle of territorial jurisdiction in its modern sense. Rather, this delegation was under specific conditions, among which are the payment of jizyah and zakat. In this assumption, these states are not considered independent states; rather, they must consider the interest of Islam and Muslims in their internal and external policymaking, and the Islamic ruler can issue rulings and punish criminals in that domain regarding some political or ordinary crimes.

But we must see from another perspective; that is, considering the actual reality of the global community, the exigencies of the time, and the current necessities of the Islamic government and the life of Muslims, can this principle be accepted or not? By accepting this principle from this perspective, both the issue of the multiplicity of Islamic governments is resolved, and the relationship of the Islamic government with other members of the global community is regulated. Before addressing the main discussion, attention to one point is necessary: Human beings have various material and spiritual needs, and no individual or country alone can provide all their requirements. This diversity of needs has led to the division of labor. Each human group, utilizing their God-given talents and by understanding needs, works to fulfill one of humanity's needs. Then, through exchange, which takes place within the framework of social life, all human needs are provided. Therefore, due to need for others, whether out of necessity or because of the nature of creation, human beings cannot live individually. On the other hand, the natural resources needed by humanity are limited and do not exist everywhere. Moreover, the tendency for excess in various domains—economic, political, etc.—exists in humans, both in the realm of national life and in the arena of international life. This situation, without designing laws of life that both distribute resources justly and prevent greed, leads to conflict and strife in various spheres of life and endangers one of humanity's fundamental needs, which is security. One of the legal principles considered among the fundamental principles of international relations, whose observance prevents many problems in international life, is the principle of territorial jurisdiction. A country that does not observe it will undoubtedly become isolated in the global community, because no country wants to have relations with another country that seeks to establish interventionist relations in its domain. Has Islam, as a divine religion with global ideals, considering that its source is pure reason and one of its sources of inference is also reason, thought about the international relations of its followers until the realization of its global ideals? Does it accept the principles of international relations, including the principle of territorial jurisdiction, as a secondary ruling out of necessity, or as a governmental ruling for securing the interests of Islam and Muslims until the establishment of a single global government, or not?

2-2. The Principle of Territorial Jurisdiction as a Secondary Ruling or a Governmental Ruling

Following this, while explaining the existing differences between secondary rulings and governmental rulings, first the acceptance or non-acceptance of the principle of territorial jurisdiction as a secondary ruling, and then its acceptance or non-acceptance as a governmental ruling, will be discussed:

2-2-1. The Principle of Territorial Jurisdiction as a Secondary Ruling

A secondary ruling is a religious ruling that is established under specific conditions and under the influence of particular states, such as coercion, necessity, hardship, etc., and results in the temporary

suspension of the primary intrinsic ruling of a subject; it continues until these specific conditions are removed. For example, the permissibility of consuming carrion in conditions of necessity, while its primary ruling is prohibition. Upon initial reference to Islamic jurisprudential texts with a non-precise view, it seems that secondary rulings only have an individual aspect and lack a social and political dimension. However, by examining the foundations of jurisprudential principles that are the source of secondary rulings, it becomes clear that these rulings can also be utilized in the social and governmental dimensions. This is because the criterion and standard for implementing these rulings—the realization of secondary titles—is also achieved in social life and in the relations of the Islamic government with non-Islamic sovereignties. Recognizing the jurisdiction of illegitimate and taghut governments, accepting the principle of territorial jurisdiction, and establishing relations with them, although contrary to the ideals of the Islamic school of thought and not acceptable as a primary ruling, and lacking inherent interest, the Islamic community and the Islamic government, until the realization of its ideals, face problems that have no solution other than establishing relations with other countries—a necessary condition of which is recognizing the domain of their sovereignty and respecting the principle of territorial jurisdiction. In such a state of necessity, utilizing the capacity of the principle of necessity (qaidah al-idtirar), relations can be established with unbelieving states on equal terms, and the principles of international relations, including the principle of territorial jurisdiction, can be accepted, thereby finding a solution for the state of necessity. In cases where non-establishment of relations may impose significant harm and loss upon the Islamic society and government, or impose a situation that is usually unbearable upon the Islamic society, under such conditions, by using the capacity of the principle of no harm (la darar) or the principle of no hardship (la haraj), harm and loss can be prevented or hardship can be ended. On the other hand, the gradual propagation of Islam and conveying the message of Islam to individuals and other states is possible within the framework of relations with them. Severing relations with others hinders the progress and gradual development of Islam, and this is a harm whose imposition on Islam is unbearable, and undoubtedly the Legislator (Shari') would not be pleased with it.

The then Speaker of the Islamic Republic's Parliament, Mr. Hashemi Rafsanjani, in Mehr 1360 (September/October 1981), regarding utilizing the capacity of secondary rulings for enacting necessary laws, wrote to His Eminence Imam (may God have mercy on him) as follows: "As your honorable self is aware, a portion of the laws passed in the Islamic Consultative Assembly are, due to the regulation of overall affairs and the necessity of preserving interests or repelling harms, such that according to secondary rulings, they must be implemented temporarily, and in reality, they relate to the implementation of Islamic rulings and policies and matters that the noble Legislator is not pleased to be abandoned. Concerning such laws, the need arises for the exercise of guardianship and ratification by the leadership authority (marja'iyat-e rahbari), who, according to the Constitution, oversee the three branches of government. Therefore, it is requested that you assist and guide the Islamic Consultative Assembly in this matter."

His Eminence Imam wrote in reply:

"That which is involved in preserving the system of the Islamic Republic, such that its action or omission causes disruption of the system, and that which is necessary, such that its omission or action entails corruption, and that which its action or omission entails hardship, after the subject matter is determined by the majority of representatives of the Islamic Consultative Assembly, with an explicit statement of its temporary nature as long as the subject matter is realized, and which is automatically annulled after the removal of the subject matter, they are authorized in its approval and implementation. And it must be explicitly stated that any of the officials in charge of implementation who exceeds the specified limits will be considered a criminal and will be legally prosecuted and religiously disciplined (ta'zir)." (Imam Khomeini, Vol.15: 267).

From the statement of His Eminence Imam Khomeini (may God have mercy on him), it is understood that secondary rulings do not only have an individual aspect; rather, with the realization of their subject matter as determined by customary understanding or by experts and specialists in political,

economic, etc., affairs, they also apply in public and governmental matters. According to him, secondary rulings, alongside governmental rulings, are tools in the hands of the Islamic ruler that can be used to solve some difficulties of society. (Ibid: 297 and ibid, Vol.18: 242) Therefore, if adopting a specific policy in the domestic or international sphere, including accepting the principle of territorial jurisdiction in the precise sense discussed in international criminal law, acquires the aspect and title of being preliminary for the obligation to preserve the system of the Islamic government, or if repelling harm, etc., from Muslims seriously demands adopting that policy, then adopting and implementing that policy becomes obligatory as a secondary ruling.

Some jurists, while not accepting the absolute guardianship of the jurist (wilayat al-faqih al-mutlaqa), consider obedience to the regulations and decisions of the Islamic government as absolutely obligatory and note that this obligation and obedience is not due to the absoluteness of the guardianship of the jurist; rather, it is due to a secondary ruling derived from the realization of necessity and other secondary titles. (Hosseini Shirazi, Vol.105: 172)

From the aforementioned points, it is understood that although the principle of territorial jurisdiction may not be acceptable in Imamiyyah jurisprudence as a primary ruling, it is acceptable as a secondary ruling upon the realization of its titles, because the evidence for secondary rulings cannot be limited to private matters. The Quranic verses (Al-Baqarah: 172; Al-Ma'idah: 3; Al-An'am: 119; Al-An'am: 145; Al-Nahl: 115) although appear to pertain to private matters; however, there is certain rational evidence that expands the scope of these verses. Sound reason can never accept that necessity and other secondary titles remove responsibility regarding the primary ruling in the individual sphere; but if necessity, etc., afflicts a nation, it does not remove responsibility. Rather, reason considers necessity, etc., as even more strongly removing responsibility in the second assumption. Among the narrations that have reached us regarding secondary rulings, many are absolute and applicable to both the private and public spheres. For example, the famous hadith of raf' (removal) begins with the phrase "raf'a 'an ummati..." (removed from my nation...) (Muhammad ibn Babawayh, 1995, Vol.2: 417). Or the hadith narrated from Imam Sadiq (peace be upon him) with this wording: "Al-taqiyyah fi kulli shay'in yadthurru ilayhi ibn Adam faqad ahalla Allahu lahu" (Dissimulation is permissible in everything that a human being is compelled to do, for God has made it lawful for him) (Imam Khomeini, 2003, Vol.2: 10). Both narrations are absolute and applicable to the public and governmental aspect as well. Narrations that appear to pertain to the private sphere are generalized by rational evidence.

2-2-2. The Principle of Territorial Jurisdiction as a Governmental Ruling

In Islamic jurisprudence, governmental ruling has been referred to as the ruler's ruling (hukm al-hakim), guardianship ruling (hukm al-wilayi), sultanic ruling (hukm al-sultani) (Imam Khomeini, 2000, Vol.5: 522), etc. A governmental ruling is a ruling that the Islamic ruler issues for implementing religious rulings, or for establishing and maintaining order in society and administering the system based on the public interest (maslahah) of Islam and Muslims. These rulings are not permanent; rather, they are subject to the interest upon which they are issued. Their legitimacy is based on the evidence for the guardianship of the jurist or the obligation to obey secondary rulings. Their scope encompasses the entire breadth of a sovereignty, from the appointment and dismissal of a judge to regulating the internal and external relations of the Islamic government. Since this category of rulings is issued based on public interest and unavoidable exigencies of the time—such as the ruling prohibiting tobacco and prohibiting Hajj—they take precedence over other rulings. Imam Khomeini believed that since government is a branch of the absolute guardianship of the Messenger of God and is one of the primary rulings, it takes precedence over all subsidiary rulings, even prayer, fasting, and Hajj, and the ruler can, if the interests of society require it, suspend any matter, whether devotional or non-devotional. (Imam Khomeini, 1989, Vol.20: 452).

Regarding what relationship exists between governmental rulings and other religious rulings, there is disagreement; but regarding their precedence over other rulings, there is no disagreement. Even those who do not accept the guardianship of the jurist consider obedience to governmental regulations and rulings, even if contrary to a primary ruling, obligatory upon everyone, based on the obligation to obey a

secondary ruling arising from necessity and giving priority to the more important, etc. (Hosseini Shirazi, ibid: 172)

The relationship between governmental rulings and primary and secondary rulings is a subject of disagreement. Some consider governmental rulings as primary rulings (Ma'rifat, 1997: 79 and Momen, 1996: 80 onwards). Others count them among secondary rulings (Safi Golpayegani, 1994: 15). Some consider governmental rulings as being in line with primary and secondary rulings and as executive rulings for implementing primary and secondary rulings, having a purely executive nature. (Makarem Shirazi, 2007: 498 onwards and Javadi Amoli, 1999: 467-468)

Among these, the viewpoint of Imam Khomeini (may God have mercy on him), as the architect of the Islamic government in the modern era and as a qualified Shiite jurist who issued the most governmental rulings after the era of the Imams (peace be upon them) and is the most important theoretician of the guardianship of the jurist, holds special importance. The question is: What theory does Imam have regarding the discussion related to the scope of the Islamic ruler's guardianship? Different interpretations can be derived from his statements. From some of his words, it appears in zahir (outwardly) that he considers governmental rulings as primary rulings; where he said: "The guardianship of the jurist is among the primary rulings." (Imam Khomeini, 1989: 457); or he said: "Secondary rulings have no connection with the exercise of the guardianship of the jurist." (Imam Khomeini, 1987: 321). However, from some of his other statements, it is understood that governmental rulings are of the type of secondary rulings; as he said: "The ruling of Mirza Shirazi regarding the prohibition of tobacco; since it was a governmental ruling, it was obligatory to follow over all other religious authorities, and all the great scholars of Iran followed this ruling. It was not a judicial ruling where a dispute occurred between a few people over a subject and he judged based on his own understanding. Based on the interests of Muslims and as a secondary ruling, he issued this governmental ruling." (Imam Khomeini, 2009: 124)

As is evident from the above statement; from some of Imam's words, it is understood that governmental rulings are primary rulings and secondary rulings have no relation to the exercise of the guardianship of the jurist; but from some of his other statements, it comes to mind that these rulings are among secondary rulings. Although reconciling these statements seems difficult at first glance, the late Imam himself, in a letter written to the then President of the Republic in 1987, addressed this topic with great precision and patience. From his statements in this letter, it is understood: The original right of governance and intervention in public affairs, as a branch of the guardianship of the Prophet (peace be upon him), is one of the primary rulings of Islam and is at the forefront of all subsidiary rulings. Consequently, governmental rulings are also, in their own rank, among the primary rulings and, in case of conflict, take precedence over all commonly understood primary and secondary rulings. (Imam Khomeini, 1989: 451-452)

The preferred theory (al-nazariyyah al-mukhtarah) is: Governmental rulings are a type of primary ruling that the legitimate Islamic ruler issues based on real, non-permanent interest for managing the affairs of the community (ummah), preserving the Islamic system, removing obstacles to the propagation of the teachings of the noble religion of Islam, regulating the internal and external policies of the Islamic government, implementing primary and secondary rulings, etc. To explain: The interests (masalih) and harms (mafasid) upon which religious rulings are established are of two kinds: Some interests and harms are permanent, existing in the essence of the subject or the ruling's object, for which a permanent ruling has been established.This type of ruling is perpetual and always accompanies the subject, except in exceptional conditions where, under these conditions, this permanent ruling is suspended and, instead, another ruling suitable for those exceptional conditions is temporarily established. That permanent ruling is called the primary ruling, and this exceptional ruling is called the secondary ruling. Those permanent and real interests and harms, as well as these exceptional conditions, are predictable. Therefore, God Almighty has established these two types of rulings and specified the obligation of the servants in these two domains. However, there are some compelling interests and harms that are non-permanent and also

unpredictable. Such interests and harms are determined by the conditions and exigencies of the time. Conditions of the time may require that Muslims establish diplomatic relations with unbelievers, sign treaties with them, etc. Or conditions may require that an important act of worship be suspended for a limited period. Or an interest may necessitate issuing mandatory rulings in the area of al-faragh (indifference/permissibility), or some primary or secondary rulings be formulated as laws and their observance made obligatory upon everyone through a governmental ruling, and in addition to the worldly and otherworldly guarantees for non-compliance that God Almighty has considered, new worldly guarantees be defined, etc. God has placed the establishment of rulings based on such interests and harms at the disposal of the ruler of the Islamic government. This type of ruling is called guardianship ruling (hukm al-wilayi), sultanic ruling (hukm al-sultani), governmental ruling (hukm al-hukumi), etc. This ruling is issued by the Islamic ruler based on interests and harms with God's permission. The ruler has permission from God to issue these rulings; therefore, his ruling is God's ruling and obligatory to follow. However, governmental rulings are not necessarily limited to the framework of commonly understood primary or secondary rulings. The Islamic ruler may issue a ruling that has no precedent at all. Therefore, for issuing a governmental ruling, the existence of a permanent interest is not necessary, and likewise, the realization of one of the titles that are the subject of secondary rulings is not obligatory. For example, it is possible that the Islamic ruler, under non-necessary conditions, for organizing the economic system of the Islamic state, for a limited period, prohibits and declares forbidden the import and export of a commodity from the Islamic country, or to establish relations with unbelievers and conclude a treaty with them, issues a ruling permitting giving them a unilateral concession.

The Islamic ruler, for managing the affairs of the community, preserving the Islamic system, adapting Islamic rulings to the exigencies of the time, is authorized by God, utilizing the flexibility capacity of the religion of Islam, to originate rulings that are issued based on the variable interests of Islam and Muslims and are obligatory for all to observe. Since these rulings are temporary and based on immediate interests, the failure to secure these interests creates irreparable problems; therefore, in case of conflict with primary and secondary rulings, they take precedence over them. Although these rulings are primary in their own type and issued based on real interest, they differ from commonly understood primary and secondary rulings in terms of the originator, the characteristics of the subject, the addresses in some cases, etc. Of course, in some cases, the Islamic ruler may himself re-originate a primary ruling as a governmental ruling due to laxity in acting upon it, define worldly guarantees for it, and apply these guarantees for a period to prevent sin. Or in some cases, he may re-originate a secondary ruling as a governmental ruling due to the sensitivity and extreme importance of the case, such as the ruling prohibiting tobacco, which is in fact a secondary ruling but, due to the sensitivity of the subject at the time of issuing the ruling, was expressed in the form of a governmental ruling. In such cases, although an identity relationship apparently exists between the primary ruling and the governmental ruling, and likewise between the secondary ruling and the governmental ruling, in reality, there is a difference between them in terms of the originator, the subject, and the attributes, and a state of incompatibility exists. If a commonly understood secondary ruling, under a specific condition, is re-expressed as a governmental ruling, from this perspective, it is a primary governmental ruling that is issued based on a compelling interest or repelling a compelling harm and is obligatory for all to follow, and even takes precedence over primary rulings.

From the previous discussion, it is understood that governmental ruling is a category of primary ruling in the broader sense (hukm awwali bi ma'na al-a'am) and is separate from secondary ruling. To explain: Religious rulings are either issued based on interest or for protecting the obligated person (mukallaf) in exceptional conditions. This latter category, which is a temporary ruling, is the same as the commonly understood secondary ruling. But primary ruling in the general concept: if it is originated based on an inherent and permanent interest existing in the essence of the subject and the ruling is permanent, and its originator is God Almighty, this category is the same as the commonly understood primary ruling. However, if it is originated based on a non-permanent and non-fixed interest, and its originator is the qualified Islamic ruler, and the ruling is lifted when that temporary interest ceases, this category is called primary governmental ruling (hukm awwali hukumi) in this research.

Considering the aforementioned points, the seemingly different statements of His Eminence Imam regarding governmental rulings can be reconciled as follows: His meaning when he says: The guardianship of the jurist and governmental ruling are among the primary rulings (Ruhollah Khomeini, 1989: 458), is that these rulings are established based on real interests and harms, not based on the existence of secondary titles; therefore, these rulings are primary. It is very clear that his intended meaning of primary rulings is not the commonly understood primary rulings in jurisprudence; because there is a difference between governmental ruling and the commonly understood primary ruling in jurisprudence in terms of the type of interest and the originator. Rather, his intended meaning is primary governmental ruling. His meaning when he says: Secondary rulings have no relation to the exercise of the guardianship of the jurist. (Ruhollah Khomeini, 1987: 321) is that the scope of governmental ruling is not limited to the framework of secondary rulings; as some contemporary jurists have said (Lotfollah Safi Golpayegani, 1994: 15); rather, the guardian-jurist (wali al-faqih) has broad authority to originate rulings wherever there is a need, for preserving Islam, preserving order, and policymaking, in the domestic and foreign domains, etc., both within the framework of primary and secondary rulings and outside it, he can originate rulings. With this perspective, there is no contradiction between these statements of His Eminence Imam and his statement regarding the prohibition of tobacco; because his meaning is that in this case, a secondary ruling was expressed in the form of a governmental ruling.

Conclusion: The principle of territorial jurisdiction in Imamiyyah jurisprudence, although not acceptable as a primary ruling considering the ideals of the religion of Islam and the primary principles of Islamic jurisprudence, is justifiable as a secondary ruling and a governmental ruling.

3-The Principle of Territorial Jurisdiction in Afghan Law and International Documents

As stated, territorial jurisdiction means that the criminal laws of each country apply only to all residents of that country and have an intra-territorial nature. This jurisdiction, referred to as the principle of territorial jurisdiction, has two positive and negative aspects: on one hand, it applies to all residents, and on the other hand, it has no validity outside the country's territory.

This principle is the oldest and most important principle in determining jurisdiction. According to it, states' jurisdiction to prosecute a crime is determined based on the place where the crime was committed. Adherence to this principle has important benefits and effects, such as swift access to evidence, indicia, and clues; preserving the authority of the state where the crime was committed; better achieving the goals of punishment; etc. Therefore, this principle has been accepted in the laws of developed countries.

This principle has been supported by figures such as Voltaire, Montesquieu, Rousseau, and Beccaria. In his book Philosophical Dictionary, Voltaire considers the place where the crime occurred as the best place to prosecute it. Montesquieu emphasizes the necessity of the law being compatible with the ethics, history, and environment of each country and believes that one specific society cannot legislate for another society. Rousseau, in his book The Social Contract, also holds that the principal element in the hypothetical social contract concluded among the members of society is the territorial element, and this contract only obligates those who have signed it. Finally, Beccaria in On Crimes and Punishments states: They have reached such audacity that they say if a crime is committed in Constantinople, the perpetrator of that crime can be punished in Paris, and they even argue that those who insult a human society should be considered enemies by all people, and the world should view them with contempt and hatred. But it must be remembered that judges are not avengers of the human race; they are defenders of specific covenants that bind a group of individuals together. A crime must be punished where it was committed. The reason is that only there, and not elsewhere, are individuals forced to repair the evil effects produced by the crime through punishment. A criminal whose previous crimes did not violate the laws of a country of which he was not a member may be detested in this society and expelled from it, but the law cannot impose another punishment on him; for this law is established for the offense committed against it, not for a crime that never harmed it. (Mir Mohammad Sadeghi, 2024: 23-24)

This principle, which is a requirement of human rights and human freedom, after the French Revolution, found its way into French law and the laws of other civilized countries, including Afghan law. The Penal Code of Afghanistan stipulates: "The provisions of this law apply to any citizen of Afghanistan, stateless persons, or any foreign citizen who commits a crime within the territory of the country." (Penal Code, 2016: 16). Also, in the former Penal Law of Afghanistan, it was stipulated: "The provisions of this law apply to persons who commit a crime within the area of the Islamic Republic of Afghanistan." (Penal Law, 1976: 14)

In international documents, territorial jurisdiction is an undeniable and established matter. All international treaties are founded on the principle of territorial jurisdiction, because having territory and exclusive sovereignty over it is one of the conditions for membership in the global community. International documents contain materials that clearly show this principle is an established principle in international documents. The Charter of the United Nations states: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state." (UN Charter, 1945, Article 2, Paragraph 7). Also, Paragraph 2 of Article 2 of the Charter states: "The Organization is based on the principle of the sovereign equality of all its Members." In the Statute of the International Criminal Court, the jurisdiction of the Court is repeatedly described as complementary. (Rome Statute of the International Criminal Court, 1998: Preamble, Paragraph 1, and Article 1). The principle of complementary jurisdiction, referred to as the cornerstone of the International Criminal Court, has played a very important role in states' willingness to join this Court and cooperate seriously with this international body. The aforementioned materials clearly indicate the established nature of territorial jurisdiction in international documents.

Summary and Conclusion

The present research, through a comparative examination of the foundations of the principle of territorial jurisdiction in Imamiyyah jurisprudence, Afghan law, and international documents, shows that this principle does not enjoy the same support in different legal systems. The findings indicate that in Imamiyyah jurisprudence, the principle of territorial jurisdiction as a primary ruling is not acceptable because it contradicts the universal ideals of the religion of Islam and does not recognize governments that lack the conditions of legitimate governance. However, at the same time, by relying on the foundations of secondary rulings and governmental rulings, it is acceptable and justifiable as a secondary ruling and a governmental ruling. In contrast, in Afghan law, this principle is clearly and widely supported. In the criminal laws of this country, the principle of territorial jurisdiction is presented, and its limits and exceptions are also stated. Furthermore, in international documents, this principle is one of the established and undeniable principles. Such analysis shows that there is a possibility of convergence between Imamiyyah jurisprudence on one hand and Afghan law and international documents on the other regarding the acceptance of the principle of territorial jurisdiction. By utilizing the capacity for flexibility in Imamiyyah jurisprudence, this jurisprudence can be considered harmonized with modern law from this perspective.

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