

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ
وَالصَّلَاةِ وَالسَّلَامِ عَلَى سَيِّدِنَا مُحَمَّدٍ وَآلِهِ وَصَحْبِهِ الْأَكْرَمِينَ

INTRODUCTION

Decriminalization and diversion in Iran is a new crime control mechanism. Over-criminalization affects the efficiency and effectiveness of criminal process in preventing crimes. In Iran a number of actions and behaviour have been declared as crime and punishment has been provided. Iranian criminal policy is mainly based on Islamic canon. Alternative punishment, even under Islamic canon is found in many cases depending upon certain conditions. However, the process of decriminalization specially in the field of technical and administrative criminal law may result in effective criminal justice system. In the western countries and Europe decriminalization process is applicable even in those cases which according to the Islamic canon have been declared as crime and legal punishments have been provided. In Iran there is limited scope of decriminalization of crimes for which specific legal punishments have been provided under Islamic canon. Thus there is difference in approach towards decriminalization between the western criminal policy and Iranian criminal policy. Keeping in view these facts the topic of research was selected as “**Decriminalization in the Iranian Criminal Policy: A Comparative Study with the Western Criminal Justice System.** What is Decriminalization? What are factors which regulate the criminalization and decriminalization policy? These questions require a brief discussion.

1.1 A Glance at Decriminalization

Criminal Law which some times referred to as penal law is known as a body of rules and statutes that defines behaviour or conduct prohibited by the government in order to maintain public order or to provide public safety and welfare. It also contains punishment to be imposed for commission of such acts.

Substantive criminal law mainly deals with the definition of crime and punishment therefore, whereas criminal procedure requires the procedure to be adopted for the enforcement of criminal laws. Such procedure set out rules and regulations that administer the process of investigating, incriminating and trying the accused of a crime.

An act could not be treated as crime unless it is prohibited by law made by the legislature or declared to be crime by judicial pronouncement. The process by which certain behaviour may be transformed into crime through legislation or judicial decisions is known as criminalization. The reverse process is known as decriminalization. Decriminalization is the abolition of criminal penalties. An act is decriminalized when the society takes the view that the act is no longer harmful. Thus decriminalization reflects the changing social views and moral values.

The penal laws also speak about the characteristics of each crime with regard to the essential conditions and the legal punishment of each of them separately.

From the historical point of view, it is observed that the legislated penal laws tried to regain its position and find a rather complete rules after a series of constant decay and disorder finally in 18 and 19 centuries and

in particular after the first charter of human rights in the French revolution.

On the other hand, after independence of the America, in 1776, the penal laws of Common Law of England was adapted to the extent that it was not in conflict with the Federal Constitutions laws of the newly established states. Mr. William Black Stone, a Professor at the University of Oxford developed the legal principles of “Common Law” and his commentary became a kind of referential legal book. Then the penal law of the New United States was formed for the fifty states as modern penal rule¹.

It is worth mentioning that in the books on Islamic jurisprudence, we do not find clearly general penal issues, but in a scattered way, there are some references in the commentaries and description of penal books and other jurisprudential resources and books. This demands a lofty endeavor to collect the general issues of criminal laws of Islam from different sources here and there.

One of the important and basic subjects in criminal law is to do research and review the different corners and dimensions of criminal law of different countries in particular advanced and progressive countries which are compared and are so called "Comparative Criminal Law." Today due to correlation and interrelated global necessities of the social system and interaction at the international level, it requires elaboration by jurists and legal thinkers of criminal law and penal subjects. This will help the pillars of criminal policy, which is today in crises to be formed on the basis of humanism and to be expanded².

Thus, it is necessary that the researchers and thinkers of law take the following measures:

Firstly, they should review and compare the philosophical principles, foundations and concepts of great legal systems and schools of law.

Secondly, they should make a comparative study on intrinsic penal laws including general law and special penal law and their respective issues.

Learning about the legal schools of other countries and the neutral evaluation and assessment of the views of the scientists of legal schools and also reviewing the views of the legislators of penal laws out of existing views and rules, they could select those superior penal principles and regulations which are in harmony with the interest of humanity in order to provide security and establish justice.

1.2 Statement of the problem

Speaking about "Decriminalization" and "the comparative study of its position, in the Iranian Criminal Policy and the Western Criminal Justice System", initially, it demands precisely to state and elaborate criminalization in the realm of the penal justice system and on the other hand, it requires having knowledge on the system of prevention, position of restorative justice, models and its theoretical frameworks. The mutual link between prevention and decriminalization and also the triple mechanisms of de-penalization, diversion and decriminalization vis-à-vis criminality [which are the theoretical frameworks of restorative justice] and in a sense can be used as alternatives for classic penal justice either in punishing form or as measure of corrective and rehabilitation.

The idea of preventing of crime has a long history and dates back to 400 B.C. In Chapter 41 of the treatise on crimes and punishments, concerning the prevention of the occurrence of crime, Cesar Bacarria (1764), the philosopher of the criminology says," Preventing of the occurrence of crimes is better than punishment".

Enrico Ferry (1856-1928) the first theoretician of non-penal preventive measures is the founder of criminal sociology. Despite the fact that he was one of the pioneers of Positivism school, but he presented the theory of social defense measures through organizing the social environment in order to prevent the crime occurrence.

The second half of the twentieth century can be considered as the beginning of the attitude towards prevention and its rebirth in the realm of criminal policy. The public prevention of the crime is usually considered as a part of the primary objectives of the execution of criminal law and penal code and its range has been divided into two sections of "penal preventive measures" and "non-penal preventive measures" and reviewed.

The preventive strategy are also divided into two classes of pervasive reactive strategy (aggressive) and specific reactive strategy (withdrawal).

The mechanism of pervasive reactive strategy is criminalization and de-penalization and diversion are the mechanisms of specific reactive strategies that each of these mechanisms along with decriminalization mechanism follows a one kind of withdrawing strategy in criminal law in different proportions. The preventive responses with the non-forcibly and non-suppressive nature and with an attitude to correct, rehabilitation

and health the society are the last consequence outside the realm of criminal law.

The gravity center of the concept of prevention in criminology is the non-suppressive and non-forcibly measures.

It is said that the concepts of restorative justice have entered into the literature of criminal law since 1980's. However, despite the creditability and broad welcome extended to "restorative justice", its position is accompanied with a kind of encounter associated with prudence.

The restorative justice is a process in which all those who have a share on a specific crime come together to decide on the quality of facing the effects and results of crime and its resulting problems for the future collectively and find a solution.

This saying of Tony Marshal, the English criminologist has found a broad application in the international level today.

"Decriminalization" has a specific position and role to itself since 1990 as one of the "theoretical frameworks of restorative justice" in the criminal policy and criminal law of some countries.

Certain acts in some countries are considered as crime based on some objective justification whereas, in western countries, these objective justifications are not accepted and some act is decriminalized or at all not criminal. Thus the approach to the criminal justice system is at variance at it may be based on various reasons. Keeping in view Iranian criminal policy the dissimilarity in certain areas with the western criminal justice system a comparative study of 'decriminalization' in the

Iranian Criminal Policy and Western Criminal Justice System is the main area of research.

1.3 Limitations of Research:

1. Lack or shortage of resources and on the other hand, the existence of precise, meaningless, parallel and non-parallel resources.
2. Lack of existence of clear standards in order to purify, separate and correct³ the existing views.
3. Lack of facilities.
4. Far away distances and difficulties of near and far research trips all were deterring factors disappointing me in achieving the target, however, against these deficiencies; there have been incentives and necessities which have motivated me to adopt this method of research.

The contemporary jurists in their books have made strange interpretations due to lack of appropriate knowledge on noble Islam stances and Islamic rights system under the inspiration of Protestant school in the legal review and social regulations of Islam which indicates their low ability in this subject.⁴

By presenting their incomplete and wrong views, they have misled and made the people worried and they distort the legal system of Islam among the people of the world.⁵ More strangely than that, these individuals claim that they have knowledge about the laws of Islam with this very dim scientific capital (background). Their more ridiculous rudeness is when they blame the Islamic Laws for adaptation of old

Romans laws and consider Abuhanifeh, the great Imam and other deep thinking great jurists of Islam as the translators of ancient Romans.⁶ And even, they have not recited (read) the verses of Qur-an, but they judge on the divine rules.⁷

Unfortunately, they have wrongly impaired the intellectuals such views and some of the unlearned people have accepted that. It is in this context that any new scholars and jurists should accept any (document) or a paper in French without any question as a divine revelation⁸ and what are written in Arabic or Persian (Urdu, Indian, Turkish and so on) are papers discarded papers⁹ and free from human civilization and delicacies of law!!, whereas it seems that law and philosophy , foundations and its rules in Islam is a lofty divine art which is entrusted to the humanity and is a masterpiece among other systems and legal schools.

1.4 Objectives of Study:

The objectives which are pursued in this research are:

- A. A comparative study of decriminalization in the criminal policy of Iran and the western penal justice system.
- B. Highlighting commonalities and differences of the criminal policies of the west and Iran.
- C. Clarifying and introducing appropriate mechanisms to exercise decriminalization in the criminal policy of the west and Iran

Part Three: Scientific, historical background and the distinguishing features and innovations of the research

1.5 Hypothesize of research:

- 1) In spite of the fact that de-criminalization is a merit and efficient solution in the western penal law, but due to radicalism in de-criminalization in particular areas such as homosexuality, prostitution, alcohol, drugs of certain kinds and even their legalization in some western countries, has been successful. In other words, it has not only been unable to reduce public crime prevention but also has brought about many damages and has cast doubts on the scientific non-suppressing policy and decriminalization of these behaviors.
- 2) Prevention from the risk of over criminalization should be aimed at maintaining a balance between social changes and application of de-criminalization strategy and that to in accordance with jurisprudential regulations and international documents in the penal law of Iran.
- 3) Decriminalization in the Islamic Shariah (religious laws) will be possible in certain punishments of “prescribed punishments”, blood ransom” and also in the realm of “discretionary punishments” in line with the public interest or repelling corruption from the society provided that it is not in disagreement with the direct text of religious law and general principles or spirit of its legislation

1.6 Characteristics of Research:

The characteristics of this research are as follows;

- a. Efforts have been made to place the accessible views and beliefs beside each other to do a careful review and focus on all views and in addition to make their comparative study a simple one as much as possible.
- b. It has been tried to present the scientific facts in a simple and fluent language, in a new style and in a scientific- method to help the seekers of science, familiarized with the scientific facts, in a simple statements and in a scholarly manner and a new style. This method is a great service to the community of science. Unfortunately, in most of our old books, there are complex and pompous texts and phrases. This has created mistrust among some pessimists. Perhaps, it has been intentional and the unclearness of scientific materials has been the intention of the writer from the beginning.
- c. However, the first step is never complete and free from shortage, but efforts have been made to select and collect the Islamic reliable important resources from five branches of [Islam] religion and also the important resources and references of western law from different schools of thought, reliable works of the Western scientists and to be used and utilized. This will help not only the creation of a useful and influential work, but also there will be no need to refer to the resources and references of the subjects being

discussed in this dissertation. This will help with saving in the time of the researchers.

- d. Due to incomparable importance and great role of the theoretical human sciences, in particular law science in human life, his evolution and salvation and also the changes of human community in its different dimensions, Efforts have been made that the main and basic views of Islamic and western laws along with the study of criminal law of Iran and criminal canons of America and countries of the European Union to be noticed in this dissertation in a comparative form.
- e. Efforts have been made that the most important legal materials and issues including generalities with a philosophical view is presented in a transparent manner and with clear reasoning. At the same time, due to adaptation of the policy of “preciseness”, the “periphrasis” and “disturbing brevity” have been avoided.
- f. In addition to useful information dissemination via adding appropriate footnotes, at the end of the dissertation, and in order to sustain the important points of the concepts and materials, some relevant questions have been put forward and drawn in relation with the subject of discussions to be used by the students and interested people.
- g. Efforts has been made that the results of the research to be useful for the pursuance of studies by the students and graduates of the field of law in different academic levels of undergraduate, graduate and doctorate programs and on the other hand, it could

be profitable for those who are familiar with jurisprudence, law, political, social sciences and history of philosophy.

1.7 Methodology:

The present study is based on doctrinal method of research. The researcher has drawn help from Holy Quran, various books on Islamic jurisprudence, articles, various relevant reports and statutes. Despite the fact that the valuable resources and references of the Western scientists have been considered and used in this research frequently, but the main reliance has been upon the rich resources and references of the jurisprudence of Islam. Using the indigenous resources , attempts are made to reveal the greatness of the vast civilization and valuable services of the eastern lands to the sacred scene of science more than any other time which has not taken place truly yet.

Due to the necessity of drawing the model and structure of research and also to determine the strategy¹⁰ and doctrine¹¹ of the research, it was necessary to refer to some different texts and resources of the Islamic scientists whose names have been recorded in the history of comparative law and their works have remained eternal and brilliant. Using the comparative methods adopted by these great and pioneer figures, a new plan and style can be put forward.¹² So, the subjects of researches and methods of scholars of Islamic law were referred to in resources such as: Book "Tasis al Nazar" Obeid Allah ben Omar Dabousi [d. 430 A.H.], Book "Bedayat Al mojtahed Va Nahaya Al moqtased" Mohammad ibn Ahmad Ibn Rushd [d. 595], Book "Al Khelaf Fi Al Ahkam" Sheikh Toosi [d. 460 A.H.]¹³, Book "Al Moqni" Abdullah ibn Ahmad known as Ibn Qodamah [d. 620 A.H.], Book "Al tazkerah Al Foqaha, Al

mokhtalef va Montahi al Mataleb" Allameh Helli [d. 647, A.H.], Book "Al Mizan Al kobra" written by Mohammad ibn Abdolvahab Shaarani [d. 973 A.H.], and also from the new resources, Book "Al Fiqhe al Islami Al Moqaran" by Ahmad Mohammad Hasry, "Al fiqh Ala Al Mazaheb Al Arba" by Abdulrahman Jariri Va "Al Fiqh ala Al Mazaheb Al khamsah" by Mohammad Javad Moqniyeh, Book "Generalities of Comparative Law" by Hassan Afshar, "Legal Schools in the Law of Islam" Mohammad Jafar Jafari Langroudi and from the resources of the orientalist and contemporary western jurists, the Book "Discussions about the relationship between Byzantium and Islam" Emilio Busi, Book "Civic Codes of Rom Aimos", Book "Courses of Civil Laws of Mazeauo", and also Book "An Introduction on Comparative Law of Rene David". After a deep review of the subjects, methods and ways of reasoning in the above-mentioned resources, the "conjunction method in comparative laws¹⁴" was selected and practiced.

1.8 Chapterization:

The thesis entitled, "Decriminalization in Iranian Criminal Policy: A Comparative Study with the Western Criminal Justice System" comprises six chapters.

It is worth mentioning that in all 6 chapters, due to the adoption of the method of "preciseness" in research, the obvious and repetitive issues have been avoided in all subjects of the dissertations as much as possible. Efforts have been made to review the prominent and important issues in a comparative way, and it has been tried that prior to reasoning, no result to be presented.

The brief and synopsis of the discussed issues in each chapter of this dissertation being reviewed independently are as follow:

Chapter I:

Chapter of Introduction contains the statement of problem, Limitation and motivation of research, objectives of the study, characteristics of research and further, describes about the Methodology of research.

Chapter II:

Due to the necessity of gaining knowledge about the penal system has dealt with precise expression and clarification of the criminalization in the realm of penal justice system. In addition to definition of concepts of crime, its importance in criminology has been reviewed and the limits and borders of criminalization have also been discussed.

Since long time ago, more than anything else, by resorting to forcible punishment, the governments have taken measures to fight against crimes in order to maintain the public order from being exposed to the risk of disintegration and threat. But criminal statistics have unveiled the inability of penal system to achieve the desired objectives and reveals the necessity of finding mechanisms beyond this realm of penal law. “Preventive Responses” are the latest outcomes of this kind of penal idea which has a non-forcible and non-suppressive nature and have been put forward with an attitude towards correction and health building of the society and removal of crime. In this discussion, foundations, scope, strategy and mechanisms of preventive responses in the criminal policy have been investigated. In addition, the mutual relation between

prevention from criminality and decriminalization has been overtly clarified.

The social changes and alterations of public views and beliefs in particular in the western secular societies have brought about new attitudes towards the foundations of penal justice system being introduced under the title of restorative justice system. These changes and part of theoretical frameworks today have encompassed even the non-secular (religious) societies in all fields with the exception of the ethical domain and that is because of religious limitations. Describing this process and change in penal idea, also the necessity of inclination towards restorative justice and views of thinkers in this regard and introducing models in its theoretical frameworks is the subject of study.

Chapter III:

The concept of decriminalization and its process, position, necessity, objective and the importance of the decriminalization strategy, grounds and standards of decriminalization in the history of penal changes, realm and kinds of decriminalization including practical and formal (legal) decriminalization, views, visions and schools of decriminalization are the set of discussions which have been reviewed and studied in this discussion.

The relationship between law and ethics and that of the decriminalization and its impact on two domains of legal morality and idea of liberalism are the subjects being discussed.

In many societies, human right is considered as valuable element of social life. Guarantee of individual freedom at the stage of judicial

proceeding and repulsion of the concept of dangerous status prior to committing a crime in criminal law are some manifestations of human rights.

Form the very beginning, the UN has approved its criminal policy within the documents such as deceleration, strategic principles, recommendation , convention, and treaties which have a human rights aspect and are in the realm of fighting against crimes.

The theoretical frameworks of restorative justice in the documents since 1990 have been traced. These documents recommend and emphasize on non-suppressive measures by giving priority and specific position under the title of independent institution of “prevention of crime” along with measures of penal justice system.

Using this reasoning that “prevention is better than suppression”, in addition to obliging governments to observe individual freedoms and rights, the human rights documents make them committed to do duties and adopt policies and mechanisms by which they could also prevent crime, though it is likely that the fruit of adopting such as policy lead to “minimum results” and only to reduction of the scope and forms of criminality.

The relation between theoretical frameworks, restorative justice such as decriminalization, diversion and de-penalization with human rights approaches and mechanisms have formed the contents of this discussion.

Foundations and principles of believe in Decriminalization, reviewing the views of its pros and cons and studying the impacts and results of

attitudes towards non-penal strategies are the frameworks of remarks under investigation in this discussion.

Chapter IV:

Since the contents of criminal law of Iran is a mixture of Islamic criminal law and on the other hand is under the influence of legal system of Roman-German, in this discussion, the analysis of viewpoint of Islam towards decriminalization has inevitably been made.

While reviewing and describing the penal teachings of Islam and learning about the jurisprudential and legal views of five jurisprudential schools of thought of Islam on the realm of criminalization and religious punishments alongwith the subject of decriminalization in the criminal law of Islam has also been dealt with. Furthermore, in this chapter, the approaches which cause abatement, conversion or denial of punishment in criminal jurisprudence, [taken place through the establishment of “pardon institution” and observed in the conduct of the messenger of Allah (p.b.u.h.) and the Rightly Guided Caliphs with regard to criminal cases] by referring to the history of Islam have been independently studied.

In this discussion, decriminalization in the criminal policy of Iran has been discussed in details and initially, two general periods of customary criminal laws and background of criminalization have been discussed:

- i. Periods of royal system
- ii. Periods after disintegration of royal system

Then the highlights of the law of Islamic punishment, the importance and influencing factors on criminal law of Iran have also been studied.

The background and present situation of decriminalization, de-penalization and diversion mechanisms in the criminal law of Iran in the recent quarter of century along with the reasons of necessity of tendency towards mechanism of decriminalization matters of this discussion.

In this discussion decriminalization in the criminal policy of India has been discussed in details.

Chapter V:

Despite distance in the viewpoints of two different thinking trends in the movement of social defense, i.e. the view (theory) of Gramatika and the other the view (theory) of Mark Ancel, the necessity of limiting the scope of classic penal law in both views is common.

The mobility which was created by the new school of social defense became a turning point for the emergence and exceptional influence against exerting penal system.

And in 1970 to 1980 this movement was developed and expanded in a big way and sustained its impact strongly. The Europe and the North America have had main shares in this movement and as a result of indifference towards religion and ethics, they have fallen into extremism.

In this chapter, also after making a comparative macro study of criminal policy of the west and Iran along with the review of the viewpoint of Islam, have been discussed making comparative micro study and by selecting one of the important samples of decriminalization in the west, so as to make comparative study: For this purpose, the subject of decriminalization of drugs has been selected and studied comparatively

in order to clarify the dimensions of criminal policy of Iran and west. Apart from detailed briefly comparative study of decriminalization in the filed of abortion, suicide, alcohol, prostitution and homosexuality has been made highlighting mainly the western and Iranian law.

Conclusion and Suggestions:

In conclusion the effects of over criminalization have been identified. It lead to creation of new attitudes towards the foundations of system of classical penal justice which has been introduced under the title of system of restorative justice. Further it has been concluded, how the mechanisms of de-penalization, diversion and decriminalization developed. The impact of failure to adopt the process of decriminalization in some criminal behaviours and petty offences has been elaborately discussed. The extent and scope of decriminalization in the Iranian policy have been discussed specially in the light of religious commandments.

Keeping in view the prevention policy as one of the characteristics of applied criminology and with the purpose of etiology of crime, a number of suggestions have been mentioned for the criminal policy of Iran and also for the criminal policy of the West. It has been suggested, how and to what extent the mechanism of decriminalization may be adopted in Iranian criminal policy. Taking a critical view of the decriminalization of the west, some suggestions have been made.

REFERENCES:

1. For further information, refer to. Scheb, John Malcolm, penal law of the New United States, p.36.
2. For further information, refer to Ansel, Mark, Social Defense.
3. Purification, [Tafriq in Arabic], Separation or Detachment [Ehsa in Arabic], Correction or Final Approval [Tanqih in Arabic]
4. The European who have written precise and incomplete books on laws of Islam have never been formal students of jurisprudence and have never studied in Islamic schools. So they have gained incomplete and worthless information merely as a result of their encounter with some Muslim students in the world or by interaction with Muslims in particular the Muslim living in the North of Africa. As an example , the sample of the writings of Mr. Rene David in the book "Les grands systemes de droit contemporains" is presented. In page 472 of his book, he writes. "Pour le juriste musulman il ne peut s'agir que d'interpretation, non de creation du droit."

That is to say that the Muslim jurist only describes the law and does not establish the right. (In other words) for a Muslim lawyer the issue is that he/she only interprets the laws and not creating laws!. In order to nullify this baseless and unscientific view , the very phrases of Abdulvahab Sharani Shafei , a jurisprudent from the 10 century After Hijrah of the page 75 of the Volume One of his book , " Almizan" is presented here:

قال المحققون ان العلماء وضع الاحكام حيث شاوا بالاجتهاد بحكم الارث لرسول الله (ص) .

فكما ان للشارع ان يبيح ما شااء لقوم و يحرمه على قوم آخرين فكذلك للعلماء ان يفعلوا مثل ذلك (...)

Which means: The researchers have said; "The scholars of Islam who are the inheritors of prophets are authorized to legislate laws via Ijtihad (qualification to give religious views) and they can legislate the lawful and unlawful like the prophets. (narrated from Jafari Langroudi Mohammad Jafar , Legal Schools in Islam Laws, p. Foreword).

5. In his various books, Majid Khadouri, the Iraq origin -Christian jurist considers that the stance of Islam in identifying non-Muslim governments is negative and believes that the law of Islam has divided the world into Dar-al Islam and Dar-al Harb. The inhabitants of a land which is called Dar-al Harb do not have legal authority to be the addressee of the subject of Islamic international laws, so the non-Muslim countries, instead of being the addressee of the Islamic international laws , are the targets of its attacks and aggressions. In the book of “Peace and War from the Viewpoint of Islam “the mentioned author writes:

ان قواعد القانون الدولى فى الاسلام لا تقوم على الرضا المتبادل بين اعضاء جماعه الدوليه و لكن على اساس تفسير المسلمين و فهمهم لمصالحهم السياسيه و الخلقيه و الاجتماعيه

That means that the principles of the international laws in Islam , is not based on the satisfaction and free will of the members of the international society (governments) , but it only takes form on the basis of the interpretation of the Muslims and their political, social and religious interests.

In another part of that book, he writes,” The Followers of Sunni Sect” do not believe in such a condition , i.e. (the presence of innocent Imam) for primary war (holy war), but they believe that whenever the Muslim reach to that stage of power and capability which is necessary for a primary struggle and holy war , then they are obliged to leave the stagnation stage and began war. [According to Mohaqeq Helli in Sharayeh Al Islam , Vol. 1, p. 109 and Sheikh Mohammad Hassan Najafi , in Javaher al Kalam , Vol. 21 , p. 11 and Zein al Abedin Zul-majdain in the description of the Notes of Allameh Helli , Vol. 1 , p. 286, the Shiite believes: Attempting to primary war (holy war) is subject to the existence of Imam or his special deputy. This kind of war is not obligatory for a specific person , unless Imam or his special deputy calls a person or persons to join war for certain reasons and necessities such as insufficient number of the warriors of Islam. [Religious Obligation is the same. Obligation is divided into two types. A) Obligatory for Each One: that means it is obligatory for every body and every individual of the Muslim community such as Prayers , Fasting. B) Obligatory for the community : Which means that it is obligatory for the community of the Muslims to

do a certain function and by conducting this action by one or some people , it will be ceased for other individuals of the society such as medicine , judgment, Ifta, business , as narrated by Allameh Shahid Motahari, Morteza in the book “An Introduction to Islamic Sciences” Sadra Publications, Tehran, p. 56]. It should be added that war and holy war in Islam is also of two types:

- A) Primary Jihad (holy war) which according to Fazel Meqdad in the Second Volume of the Book ”Kanz al Irfan” p. 6 began by the Muslims for the sake of calling towards Islam. According to Seyed Qotb in the Book of Philosophy of Jihad in Islam, p. 111, that war occurs in order to remove the infidel systems who are guardians of class regulations and main reasons for economic and social disorders and it is obligatory for the community.
- B) The defending holy war which is the same legitimate defense and is used to confront the armed intrusion and aggression of the non-Muslim countries. The objective of that is to repel the attack and suppress those who violates the agreements and those who are aggressors and firing them from the occupied lands and freeing those regions and defending properties, chastity and Islamic beliefs. They are among the cases of obligatory for each. In Quran, three terms have been used for the war which are “Harb”, “Qetal” and “Jihad”. According to Qur-an interpretation , only “ Jihad and Qetal in the path of Allah” is the legitimate war. The holy war(Jihad) became obligatory for Muslims from the second year after Hijrah. The first verses which have been descended are [the verses : 190 to 196 , Surah Baqarah, after that , 218-244 of the same Surah, verses 76 and 96 from Nesa Surah , verse 54 from Maedah, Verse 66 Anfal Surah , verses 41 and 123 from Tubah Surah , verse 78 Surah Hadj, Verse 69 Surah Ankabut, verse 15 Surah Hujurat and verses 4 and 11 ,Surah Saf.]

It is clear that the result of such an idea is that Islam and its ideas are in conflict with recognizing the non-Muslim nations and the Muslims can not recognize non-Muslim society except in temporary form (in the periods which a peace agreement is signed between the Islamic government and the non-Muslim government) and thus inevitably , they all are groups of warriors against Allah and will be deprived of all rights which are accepted by the international relations today. It is a pity that some of the

unlearned Muslims also have accepted the views of “Majid Khadouri” which is with no doubt the result of his lack of awareness towards the infrastructural values of Islam religion. Whereas the acceptance of such a view means an admission on lack of the creditability of the international law in the view point of Islam. Therefore, it is observed that unfortunately some jurists have introduced Islam as a religion of war and in conflict with the belief freedom and independence of nations. On the other side, the Christianity , with all its narrow-mindedness attitudes in the course of history and many massacres performed by the Christians and the Jews against each other which is revealed to everybody , is introduced as the religion of peace , reconciliation and respect to the views of others and what realizes the world peace and security. ! [Team of the authors of the Research Center of Seminary and University, Islam and International General Laws, Samt Publications, 1993, p. 8]. There is no doubt that such kinds of mistakes and misinterpretations for any reason can distort the image of Islamic legal system before the people of the world. It can make an assumption upon which the global peace and security will be possible only on the basis of the values existing in the western schools of thought. Whereas it is not a hidden fact to the researchers that Islam is the founder of reconciliatory life of different nations or ideologies beside each other and it was about one thousand years before the establishment of Protestant school , that the holy Qur-an invited the followers of religion towards a peaceful life. The Surah Al-Imran , Verse 64 reads:

قل يا اهل الكتاب تعالوا الى كلمه سواء بيننا و بينكم الا نعبد الا الله و لا نشرك به شيئا ولا يتخذ بعضنا بعضا اربابا من دون الله فان تولوا فقولوا اشهدوا ابانا مسلمون .

Also Qur-an has summoned the Muslims to perform good actions and respect all humans who do not intend to fight against Islam. The Surah Momtahrenah , Verse 8 reads:

لاينهاكم الله عن الذين لم يقاتلوكم فى الدين و لم يخرجوكم من دياركم ان تبروهم و تقسطوا اليهم ان الله يحب المقسطين.

This stance has been put by Islam in a period in which other nations and even the followers of divine religions did not consider any rights for the opponents of their belief and they believed that all individuals who have views opposite to their views are doomed to be annihilated. Such a status has been dominant in all

middle ages throughout the Europe. Whereas the founders of Protestant school and all freedom seekers who contributed in the social reforms and movement of religious reform of the Europe , such as Luther, Volter, Russo , have taken their pattern from the prevailing system of the Islamic society. They intended to establish the religious freedom which existed in the Islamic society vis-à-vis the inquisition (court to investigate the beliefs) which had endangered and rather destructed the life of millions of people. Quoted from “prof. Mahmesani, Sobhi, Al-nazariyat al-amah lelmojebat va al-Oqoud”, Volume 1, Printed in Beirut, 1948, Introduction and also Falsafehye Atashrie, p.29-30.

6. The great Imam Abu Hanifeh is an Iranian originally and named as Abu Hanifeh. His name and descent is “Noman ben Sabet ben Zooti ben Mah”. He was born in 80 A. H. He was one of the fourth great jurisprudent Imam of the Sunnis and enjoyed special talent and specific skill in Fatwa (religious commands) and practicing the views and deduction and had unprecedented views. He died in 150 A.H. when he was 70 years old. He is buried in Baqdad.

{Qiyas: deduction- It has two meanings. In word, it means measuring and scaling and it also means equality. In jurisprudence and principles of Fiqh, it is closer to the latter meaning. Which means equality between main and subordinate in the cause of decree. (quoted from Amedi in the book entitled, "Al Ahkam fi Usool al Ahkam")

7. A famous American writer, namely Washington Airving (1859 A. H.) has written a book about the life of prophet of Islam entitled, “Muhammad and His Followers”. Quoting Dr. Heikal, (An Egyptian famous writer) Washington Airving has described the principles and foundations of Islam at the end of his book. After mentioning the beliefs in God, faith angles and divine books, prophets and resurrection day, he says, “ The last and the sixth rule which is in the row of Islam bases is the idea of Compulsion. Muhammad (P.B.U.H.) was utilizing this rule for the advancement of war affairs. Because in accordance with this rule, each events which occurs in the world is predestined by the science of God and before being created in the world, it has been registered in the kept table. The destiny of every body and the

time of his/her death are predetermined and can not be altered and relocated. The Muslims who used to take these points take it for granted and had belief in it, at the time of war were attacking the enemy without any fear. In their views, the death in the war was equal to martyrdom and would bring about paradise for them. So they were sure that if they are killed, or overcome the enemy, in either situation, they will win. What other belief could move the ignorant and proud armies to the war fields and secure them that if they remain alive, they will gain spoils of war and if being killed, then they will be placed in the paradise. Such a belief had made the Muslims army strong and bold such that no army could resist against them,. But at this very belief had such a poison which annihilated the influence of Islam. When the successors of the prophet left fighting and conquering the world , and put their swords into its sheath, the ideas of compulsion revealed its destructive property. Of course, Dr. Mohammad Hasanian Heikal gives a detailed explanation in reply to this American author on the basis of his own talent and idea in the Book of Muhammad's Life (P.B.U.H.), but the following words can be said on the baseless words of Washington Airving and other western :

Firstly: Islamic destination and immutable decrees is so far from the idea of compulsion ; some examples will be presented confirming that those very armies of the early days of Islam who are termed as ignorant and proud by Mr. Washington Airving , under the light of the teachings of their distinguished teacher , i.e. the great prophet (p.b.u.h.) could distinguish this difference completely which Mr. Washington is incapable to grasp.

Example One: The holy messenger (p.b.u.h.) was asked that certain objects for protection (Herz) are used to heal. (According to Imam Muhammad Qazali in *Ihya al olum* , the question was about medicine and Herz). Can they prevent the immutable decree of God? The prophet replied, ”انها من قدرا” that is to say those are also the divine immutable decrees. Their impact in preventing the disease is in accordance with the divine immutable decrees. (narrated from *Bahar al Anvar* , New Edition, Volume 5 , p. 78).

Example Two: Imam Ali (A.S.) was sitting under the shade of an inclined wall. He moved from that place and sat under the shade of another leaned wall. He was told ,” oh , ruler of the believers ;,

" تفر من قضاء الله؟ ا " , do you escape from the decree of God? , he said:

افر من قضاء الله الى قدر الله, I escape from the divine destiny to immutable decree of God. That is to say that I take refuge from one kind of divine destiny and immutable decree to another kind of divine destiny and immutable decree. (Narrated from Tuhid, Sadouq, Printed in Tehran, p. 337). and its meaning is that if I sit and then the wall collapses on my head , it is divine destiny and immutable decree , because in the process of causes , if a human sits under a broken wall and imminent to collapse , that wall will fell down and he will be damaged and this is also divine immutable decree. If he sets aside himself , he will be immune from that danger and this is also divine immutable decree and destiny.

It is possible that in that position , in another case , another danger directs at him and that is also divine immutable decree and destiny. That is to say that keeping oneself from danger is escaping from divine decree to divine decree (destination).

Example Three: In the description of Ibn abi al Hadid on Nahj al Balaqa , the Sermon 132 reads,” Umar ben Alkhattab, the second Caliphate (Razi Allah Anh) in one his trip to Sham , and before entering into Sham, he learned that there is a disease of plague in that area. He consulted with his companions about entering into Sham. Everybody prohibited him with the exception of Abu Obeideh Jarrah who was the commander of the Muslims in Sham. He said to the Caliphate,” Oh, ruler of the Muslims, “ افر من قدر الله؟ ”, that is to say, do you escape from the divine decree?” The Second Caliphate said , “ نعم ، افر من قدر الله بقدر الله الى قدر الله ” , that means I escape from the divine decree under the divine decree into divine decree. And at the same time, a person claimed that he had heard from the prophet that when there is a plague in a city , and you are outside that city, do not enter into that city and if you were inside a city and then plague prevailed, then do not leave that city. The second caliphate who was doubtful before hearing this tradition changed his mind and did not enter into the city.

What is learned from the set of news and traditions of Shiite and Sunnis is that the holy messenger (p.b.u.h.) has surely put forward the issue of divine decree and destination for his companions and Imam Ali (A.S.) has frequently talked about it.

Example Four: In the volume two of Kamel by Ibn Asir , in page 313 , narrated from the history of Tabari , a letter attributed to Saad Vaqas is mentioned which was exchanged between [Saad Vaqas] and the Second Caliphate (Razi Allah Anh). In the letter, he wrote,”

و امر الله بعد ماض و قضائه مسلم الى ما قدر لنا و علينا فنسئل الله خير القضاء و خير
القدر في عافيه

That means : the divine commands are influential , and His decree is definite. We have no idea what kind of destination He has drawn for us. We can ask him to give us the best decrees and destinations.

Totally, from the Islamic history , we learn that the Muslims of the early days of Islam , with their firm belief in divine decree had received this teachings such that they did not consider it in conflict with their destiny. The issue of changes of destinies and that these changes are part of divine decrees was taken for granted by them. So their firm belief in destiny did not lead them to a compulsion idea or it did not make them indifference and destiny-oriented individuals. While performing their strange and self reliance incomparable activities, they were always asking God the best destinies , because they know that each case there are various divine decree and destination and asked God to grant them the best ones.

It is strange to note that what they ask the God was [the best destinations and decrees rather than the best destined and decreed ones]. *

* قضاء: (Qaza): Divine destination and decree which is determined for the creature

* قدر: (Qadar) : determining the scale of the destiny of believers by God

(ما يقدره الله من القضا و يحكم به تعلق الاراده بالاشيا فى اوقاتها) (Almonjed Alanjadi , Printed in Beirut,.1986 , p. 789)

* مقضى : (Maqzi): finished , determined for the believers by God

* مقدر : (Moqaddar): what has been determined and destined.

What is surprising is that these great teachings have been inspired to people of early days of Islam in such a skill and mastery which is so far from " obligation" and have not made them follower of pre-destined religion and consequently with no will and with no self confidence. Both their deeds and words which have been communicated more or less in the early days of Islam prove this. In later periods, when the Islamic scholars came and wanted to analyze the issue, they could not make a distinguish between belief in pre-destination and obligation. After 14 centuries from that time, there are few people in the east and west who have been able to make a difference between these two beliefs.

The origin of such a teaching in which the believer have a belief in divine destination and determined destination and at the same time believe in domination over his/her destination comes from holy Qur-an.

The holy Qur-an names different divine destinations:

(هوالذى خلقكم من طين ثم قضى اجلا و اجل مسمى عنده) Surah Anam:Verse 2.

Translation: "It is He who created you from mud and determined a destination and the time of destination is kept before him."

At the same time that the holy Qur-an speaks about the kept table and eternity book and past destiny says:

(ولا رطب ولا يابس الا فى كتاب مبين) Surah Anam, Verse 59.

or the Qur-an reads:

(ما اصاب من مصيبه فى الارض ولا فى انفسكم الا فى كتاب من قبل ان نبراهها) Surah Hadid , Verse 22.

At the same time it says ,

(كل يوم هو في شان) Surah Al-Rahman , Verse 2,

i.e. in completing the blessings to the people, God take an action every day [dealing with that every day].

انحن في امر فرغ منه ام ؟ The messenger of Islam (p.b.u.h) was asked - Are we busy with jobs that God has been disengaged from them ? Or their destinies will be known ? He said :

في امر فرغ منه و في امر مستانف . You are busy with the jobs for which the God is both disengaged and engaged. (Narrated from Mulla Sadra , in Book of Description of the Osul Kafi, Under tradition 394)

Secondly: The holy Qur-an has confirmed the freedom and free choice through many verses. Those who became fond of choice and considered compulsion in contrast with justice and compassion of God , despite the claim made by the orientalist did not rebel against the elevated teachings of Qur-an and they did not mean to ‘ modify’ the words of Qur-a , but they adopted their views from the Qur-an.

Thirdly: This great author , despite the view of Dr. Heikal is a zealous Christian and terms Christianity the religion of purity and self-sacrifice as a result of lack of attention to the issues of life , but he finds fault with Islam for this attention and considers the old divine science a satire.!!

How is it possible that one who believes in God can deny the eternal old science over all objects? Is it a fault with Qur-an that believes God is aware of all affairs and processes from the beginning ?!.

Fourthly: He says , “ the followers of Muhammad (p.b.u.h.) did not care the rule which says” help yourself in order God help you”.

This author did not want to make an effort and read the translation of holy Qur-an at least once , otherwise, he did not make such a claim. Holy Qur-an directly says,” We help each group in the same way which they have chosen by their own efforts and will.

The God's assistance does not stop for any people with will and determination" (The Words of Majid Allah) Surah Asra, Verses 18-20.

The followers of Muhammad had grasped higher teachings and that is ,” Assist God , so that God will assist you (ان تنصروا الله ينصركم و يثبت اقدامكم) Surah Muhammad, Verse 7. The holy Qur-an has put assist God (which has a public and humane aspect and associated with service to the public) instead of assist your self which has a personal taste and is associated with self benefit, greed.

But the secret of dominancy of Cross over Crescent, which Mr. Washington Airving considers it definite and eternal , is not limited to Mr. Airving In the writings of each western writer , even those who have shown a kind of neutral position to some extent, we observe similar comments. All of them think Islam is a compulsory religion. The difference is that some has not considered this belief as the reason for the decay of the Muslims and some has done so and even considered it as the main reason.

Will Dourant opposite to Gostavloboun, in the History of Civilization, Volume Eleven, p. 42, after referring to the subjects of some verses from Qur-an on divine science and divine will and considers compulsion as the tools of Islamic thought, Will Durant says” As a result of this belief , the believers were bearing the most difficult problems of life with a confident heart , but this very belief in recent centuries prevented the development of the Arabs and disabled their mind”.

(Narrated and extracted from Allameh Shahid Morteza Motahari, Human and Destiny, pp. 60-66)

8. Narrated from Jafari Langroudi, Mohammad Jafar, Legal Schools in the Law of Islam, Ganje Danesh Publications, Tehran, 2003, p. 3
9. In order to judge on this issue and casting doubt on the originality of the baseless views and claims made by the European orientaisits, one may refer to the tiresome efforts of the jurists and scholars of Islam:

First Example: The valuable book of “ Alsyar Alkabir” written by Mohammad Sheibani (the pupil of Imam Abu Hanifeh), who died in 182 A.H. is among the primary publications and resources in reviewing the Islamic international laws. Prof. Sobhi Mahmesani in *Alqanoun val Alaqat Alduliyah Fi Islam* writes that he has written two books about Seyyar namely *Alseyyar al Saqir* and *Alseyar al Kabir*. [Seyyar means the Islamic concept of general laws including peace affairs, war and impartiality – Quoted from Prof. Mohammad Hamid Allah – *The law of International Relations in Islam, The MUSLIM CONDUCT OF ISLAM.*, 1941].

Second Example: Shams al Din Sarakhsi (Died in 483 A.H.) was born in the year four hundred A.H. in Bukhara. There, he used to study and then began teaching. Finally, on the basis of the advices or an objection which he had against the then Khaqan , he was imprisoned for a long period. He has written most of his works in the prison of “Ouz Jand” including a book namely “Almabsut” in thirty volumes. Its tenth volume is *Al Seyyar al Saqir*. In that book , Shams Aldin has collected a set of jurisprudential subjects and the book of Mohammad of Sheibani. He has made commentaries on another book of Mohammad Sheibani entitled “ *Alseyyar al Kabir*” in four volumes. It was published in Heyderabad , India in 1335 A.H. and its Turkish translation was published in Istanbul in 1241 A.H.. It is worth notifying that some of the western scientists have always blamed the Islamic ideas, ethical beliefs and regulations of Sunni and Shiite and have considered and introduced them as the factors of decay and backward state of the Muslims. For example , the cases of accusations are as follows:

In the section of [Islamic beliefs, believe in destiny and divine decree, believe in day after and humiliation of worldly life, mediation] and in the section of [Islamic ethics to the elements of asceticism, contentment, patience, consent, surrender, reliance] and in the section of [Islamic regulations , dealing with the issue of government and its consequences for which according to some scholars , Islam has not specified the duties of Muslims in this important issue fully, penal law of Islam which has been unattended for many years, and therefore many people in Islamic

countries have adapted their penal laws from other countries and face the punishment of their action to some extent , in civil laws, the rights of women and economic regulations of Islam in particular on ownership and inheritance and etc and the limitations which have been established by Islam on the relationship between the Muslim and non-Muslims such as marriage between a Muslim or a Non-Muslim or impurity of the infidel , or slaughtering of a Non-Muslim and precisely the Islamic international laws and duties]. (Quoted from Allameh Shahid Motahari, Morteza, Human and Destiny, Sadra Publications, 1989, p. introduction).

10. The research strategy: The Encyclopedia of Britannica, Webster Dictionary and the scientists of strategic sciences have presented many different definitions in order to grasp the concept of strategy, so the concept of strategy is among the concept which is in its own type multi- meaning and there is no comprehensive definition and unanimous definitions about strategy. Here the strategy of our research is the “strategic macro policies” which have formed basic ideas for this research and created a regular and coordinated link to achieve the final objectives of research.
11. The doctrine of research: The term of doctrine was used for the first time in 1823 by James Monroe, the fifth president of the America. It is divided into two national and military levels. Its application is at the national level, orientation of national power in cultural, social, political, military and economic dimensions and at military level. It is divided into strategic and tactical operational levels. Here the doctrine of research is the scientific orientation and practical support from the macro, intermediary and partial objectives and policies under investigation.
12. However, the method of jurisprudential texts of Islam is not similar to the general views of the western laws from the view point of style, and on contrary, the foundations of the Muslims on jurisprudence researches is different from that of the westerners, and in no time, the jurisprudence of Islam has followed their foundations, because the European law is taken from the laws of the old Rome which is not considered by the Islam jurisprudence. In addition, the Muslim jurisprudents have their own style in scientific methods and understanding the jurisprudential decrees.

(Quoted from Prof. Sobhi Mahmesani, *Falsafeh al Tashrie al Islami*), p.38, Printed in Beirut, 1946

13. Sheykh Abu Jafar Toosi , known as Sheykh Altaefah is one of the brilliant stars of Islam world. He was born in 385 in Khorasan. He immigrated to Baghdad at the age of 23 in 408 A.H.. Freedom of thought, scientific chastity, avoiding blind prejudice is of the specifications of his character. In addition to leading the jurisprudence of Shiite, due to skillfulness in different jurisprudential religions used to issue religious decree and teach on the basis of the religions of the Sunnis. His dominancy over the jurisprudential views of different Islamic jurisprudential religions was to the extent that Seqat al Islam Tajoldin Taqi al Din Alsabki , the great jurispudent has considered him as the jurisprudents of Shafeiyeh in the book named *Tabaqat Alshafiyeh*. Abu Ali , his son and his daughters were jurisprudents and his household were among the famous jurisprudents and scientist of Islam in many generation. He died in 460 A.H.

14. Moqarenah (Conjunction): It is an Arabic term and lexically it means closing together and connecting, but in the method of reasoning jurisprudence, it is a knowledge about the regulations and reasons of realizing in order to achieve the religious decrees and identifying different views. But here, by “adopting the conjunction method in comparative laws” , it means the science of identifying and making a comparative review on regulations, foundations and views of different legal systems and schools and measuring their reasoning as compared with each other and determining their common things and difference and realizing and achieving a superior and prominent view.

* Conjunction: A combination of events, etc that causes a particular result: *Oxford Advanced Learner's Dictionary*, 6th Edition, Oxford University Press, 2003, Page. 259