

DECRIMINALIZATION IN THE ISLAM AND IRANIAN CRIMINAL POLICY

The occurrence of the Islamic Revolution along with the disintegration of Royal System in Iran in 1979 brought about a situation in which the legislation foundations and viewpoints went under changes. The Islamization of all rules and regulations were put at the top of blueprint and amid that, the realm of the Iranian penal system was subject to basic and main changes in accordance with the foundation of Islamic jurisprudence.

Therefore, before starting discussion and reviewing the position of decriminalization in the criminal policy of Iran, it is necessary to have a glance at the foundations of criminal law of Iran which has been formed in accordance with the criminal policy of Islam. The reason is that reviewing these materials will bring about the clarification of the position of decriminalization in the criminal policy of Islam and Iran.

4.1 Penal doctrine of Islam and decriminalization:

Decriminalization in the legal system of Islam demands a precise explanation on the penal laws of Islam and familiarity with the process of its criminalization.

Before starting any other discussion, it should be said that the penal doctrine of Islam also takes roots in the divine commandments. The Quran reiterates that:

¹ "ان الحكم الا الله يقص الحق و هو خير الفاصلين"

“The decision is only for Allah, He declares the truth, and He is the Best of judges” These canons have brought about the creation of the entity on the basis of justice and balance. In this regard also, the holy Qur-an says:

"شهد الله انه لا اله الا هو و الملائكه و اولو العلم قائما بالقسط"²

“Allah bear witness that Lailah Illa Huwa (none has the right to be worshipped be He), and the angles, and those having knowledge (Also give this witness); (He is always) maintaining His creation in justice.” And on the other hand, the Qur-an on the basis of this verse:

"لقد ارسلنا رسلنا بالبينات و انزلنا معهم الكتاب و الميزان ليقوم الناس بالقسط..."³

“Indeed we have sent our Messengers with clear proof, and revealed with them the Scripture and the Balance (justice) that mankind may keep up justice...”

Doctrine of Islam considers the legislation of divine commandments in line with the standards of distinguishing truth from falsehood and to procure the justice and orient the society towards sustainable salvation and to motivate people to have a just behavior. Lastly it states:

"يا ايها الانسان انك كادح الى ربك كدحا فملاقيه"⁴

“O man! Verily, you are returning towards your Lord-with your deeds and actions (good or bad), a sure returning – so you will meet (i.e. the result of your deeds which you did).

The lofty destination of human is to acquire virtues and spiritual perfections, the obedience of the creator and "moving towards Allah" and finally "to meet the Allah". With no doubt, the criminal codes are

necessary to bridle the criminals and to establish order in the society. Though the methods of correction and rehabilitation such as the establishment of the social, economic and cultural systems are inevitable for the society and will bring about the reduction of the crimes too, but these measures are not itself sufficient and even they can not be replaced with the punishment penalty. As, the punishment cannot be also replaced with the appropriate breeding and healthy social system. Even if the social system is correct and just, but at the same time some criminals will be found and the only way to prevent them is to legislate criminal codes and to enforce punishment and penalty but by observing the proportion of crime and punishment.⁵

Each of the Islamic doctrines is also different from each other, but at the same time, they are constantly integrated and solidified within a format of a system and complete.

Though in the criminal codes of Islam, prevention and deterrence are by themselves considered as independent objectives, but its socio-political system also considers the reinforcement of faith, to create correct education and to correct the society as the reducing factors of crimes and murders in the society. Though, today the humanity civilization has neither been able to control the occurrence of crime, but is has developed it too. And it is unlikely that it could create situations in which no crime happens at all.

As the foundation of each penal system is based on crime, punishment, culprit and the penal responsibility, the criminal system of Islam has also been formed on the basis of these fourfold elements.

Due to the completeness of commandments and regulations of the Islamic codes as compared with the customary laws and also the dominancy and superiority of its rules and principles in relation with the existing theories at the level of the society and also its stability and sustainability , these canons have maintained their inherent merit in all times and places constantly.⁶ Also the canons and commandments of Islamic religious law have been legislated on the basis of worldly and otherworldly humans' interests.⁷

As it is observed, for this reason, the holy Qur-an states:

اذن للذين يقاتلون بانهم ظلموا و ان الله على نصرهم لقدير⁸

To those believers against whom oppression is made, permission is given to defend by God and indeed Allah is most powerful and capable for their victory.

There is a general rule and absolute principle in the Islamic law that the Islamic codes have been legislated on the basis of considering the public interests⁹ and the reasons for creation of religious commandments and canons are the interests of the servants of God.¹⁰

These commandments and rules in the legal school of Islam are the exact wordings which determine the crimes and punishments and are considered so called "Religious criminal commandments". Gaining further knowledge about the method of legislation of these commandments, divisions and its realm, with no doubt will reveal the dimensions of the penal law system of Islam and the rate of the impact of these commandments on the crime and punishment greater.

• **Divine legislation of commandments:**

In accordance with "ان الدين عند الله الاسلام" ¹¹, the Qur-an considers the religion in the sight of Allah is Islam of the God (for the human community as a single one). The following verses of Holy Quran are relevant in the context of religion and Law :

"وليحكم اهل الانجيل بما انزل الله فيه..." ¹²

“Let the people of the Injil (Gospel) judge by what Allah has revealed therein...”

"... لكل جعلنا منكم شرعه و منهاجا..." ¹³

“To each among you, we have prescribed a law and clear way.”

"و ان الحكم بينهم بما انزل الله ولا تتبع اهواءهم..." ¹⁴

“And so judge (you O Mohammad, P.B.U.H,) between them by what Allah has revealed and follow not their vain desires...”

The aforementioned verses of Holy Quran clearly indicates that the religions and canons (laws) as to be different. So that, though, the foundations and the spirit of the divine religions are harmonious and common, but due to the necessities of the conditions of time and place and needs of the human society, always, different commandments can be observed.

Researches about crimes and punishments in other religions also indicate that the crimes such as adultery, theft, false accusation of unlawful intercourse, wine drinking and murder have always been prohibited and banned and the divine commandments on determining

the punishment of the criminals have changed on the basis of the conditions of time and culture of the people for example, the punishment for murder in the religion of Moses was retaliation, in the religion of the Jesus Christ, blood money or forgiveness and in the religion law of Islam in relation of murder, three forms were determined as punishments: retaliation, blood money and forgiveness so that the avenger of the blood could have a right to select one of them.¹⁵

The political, social commandments, in particular the criminal commandments of Islam has also been communicated to the prophet (p.b.u.h.) after his emigration from Mecca to Medina and the formation of the government. Permission to do the holy war against the polytheists¹⁶ in the second year and confrontation with idol worshipping¹⁷ in the third year, the communication of the commandment of adultery punishment¹⁸ in the fourth year, the communication of the supplementary stage of the commandment on wine drinking in the fourth year [which its communication had already begun before the emigration]¹⁹ and then the revelation of the verses of retaliation²⁰ and also the verse of prescribed punishment of stealing²¹ and verses of prescribed punishment of resorting to arms in order to frighten people²² in the last months of the life and prior to the demise of the Messenger of God (p.b.u.h.) which indicate the divine tradition in legislation of the commandments to supply the needs of the human society in accordance with the conditions of time, place and culture of the people which have been revealed to the prophet (p.b.u.h.) gradually and in different occasions and opportunities during the twenty three years.

In a macro classification, the religious commandments, that is to say, the exact wordings have been divided into obligatory and legislated commandments²³ The jurists of Islam consider the obligatory commandment as a commandment upon its necessities; the religion asks the responsible person to do an action or abandon an action or the person has option to select one out of the two: action or abandoning an action.²⁴

For example, concerning the obligation to do an assignment, such as returning a deposit to its real owner (Surat Nesa, Verse 58) and judging among the people in a justly way (Surat Nesa, Verse 58), on the obligation to abandon an action such as unlawfulness of blood shedding (Surat Esra, Verse 33), and lack of approaching to committing adultery (Surat Esra, Verse 32) and about the option between doing an action or abandoning it such as lawfulness of hunting after putting on special garment of Haj pilgrimage (Surat Maedah, Verse 2) and power to retaliate for the avenger of the blood. (Surat Esra, Verse 33).

The legislated commandment is also the one upon its necessity an issue becomes as cause or condition or obstacle for the other issue²⁵ such as stealing which cause the amputation of hand of the robber or committing adultery which makes the imposition of lash on the perpetrator of adultery, or the provability of the adultery crime subject to the witnessing of four witnesses or the amputation of the hand of thief if the cost of the stolen goods to be one fourth of Dinar or more.

- **Categories of commandments in Islam:**

At the same time, the divine commandments and canons, in Islam, have different aspects and objectives upon which they can be grouped:

- **The fixed and flexible commandments:**

The spirit of the canons of Islam is fixed with the fixed needs of human and changes with that of its changing needs because, in accordance with this attitude, the base and philosophy of existence of these regulations in the society is to meet the demands of human. The fixed commandments are equal in all conditions. But the flexible commandments can change in terms of time and place and the social conditions within the framework of the divine orders by the [Supreme Ruler of the Islamic Government] (اولى الامر).²⁶

- **Ritual practice and transactional commandments:**

The nature of ritual practice commandments is based on obligatory servitude and the necessity of intention to approach God and it is not subject to situation. Moreover, conditions have no impact on it, but the transactional commandments are not of the type of obligatory servitude and can be altered on the basis of reason and the changing conditions.²⁷

- **The guiding and authoritative commandments:**

The commandments and regulations which are understood or are not understood by reason are divided into two guiding or authoritative groups.

When the reason independently identifies the standard and gives a commandment in relation with the subject, in that case, the existence of the order of the legislator will be of the type of guiding one such as the evilness of cruelty and goodness of righteousness which reason gives commands on doing it. Some believe that the abolition of the authoritative type order by the legislator and or in the case of existence

of rational restriction, the issuance of authoritative order can also be placed in the rank of the guiding commandments.²⁸ In the cases reason has no basis for understanding, the issued orders by Islamic legislator are of the authoritative type²⁹ and by having order to implement, it would be necessary to follow and obey.

- **The signatory and establishing commandments:**

The signatory commandments are commandments which were practiced in the society of that day and before the emergence of Islamic religious law which exactly or with amendment and expurgation have been confirmed by the Islamic religious law. The origin of the signatory commandments is religions and the divine schools and or the customs and rites of the day of the society which have been put in the list of rules or in determined form by religion such as prison for life for adultery crime in the years before revealing the verse of adultery prescribed punishment or they have been created in determining form such as determining hundred camels for the blood money of the murder by Hazrat Abdolmotaleb, the ancestor of the holy prophet (p.b.u.h.).

The signatory canons have been created on the basis of the customs and the necessity of their own time. The legislator of the establishing rules have also been God and his prophets (p.b.u.h.).

The establishing and signatory canons are subject to the reasons and could be reinstated if the conditions demand.³⁰

- **The primary and secondary real commandments:**

Primary real commandment is merely applied on deeds and subjects with primary titles without paying attention to the exceptional status of

the responsible person such as urgency, duress, inability, hardship and as likes. The knowledge or ignorance of the responsible person does not include his/her exceptional status. Thus, the subjects of primary real commandments are the primary titles. For example in the unlawfulness of stealing, the subject of unlawfulness is placed on the title of stealing. The secondary real commandment is also applied to the subject which is described with the adjective of necessity, duress, inability, hardship and as likes and the responsible person gives priority to the most significant one between the two commandments of important and more significance due to the commandment of reason and practice it which this act is also confirmed by the Islamic law such as consuming the meat of the dead body at the state of necessity for the survival of self.³¹

- **The divine and governmental commandments:**

The position of legislation of codes is different. If it is legislated to meet the individual or social needs of the individuals and administrating the society, these commandments are considered divine which were revealed to prophet (p.b.u.h.) in form of revelation and if in accordance with the interests of the Islam and the Muslims, the commandments and codes are legislated by the messenger of God (p.b.u.h.) or his successors (Supreme Ruler of the Islamic Government) in the realm of their authorities (on the basis of interests in the domain of social issues), these commandments are governmental ones.³²

From the viewpoint of Islamic jurists and scientists, the realm of governmental commandments has been divided into four theories:

The first theory: This group believes that the humans have two fixed and flexible demands and the commandments are also determined on the basis of them.

In this theory, the fixed commandments are legislated for all humans and in all conditions by the holy legislator due to human fixed demands and the flexible demands are also in the realm of the authorities of supreme rule of the Islamic government by maintaining the framework of principles and foundations of Islamic law in terms of conditions of time and place.³³

The second theory: A group also believes that the governmental canons are at the level of executive regulations and the supreme ruler of Islamic government can merely legislate law for the implementation of religious commandments. This theory considers the Supreme Ruler of the Islamic Government to be authorized in adopting partly the policy of the secondary real commandments based on necessity.³⁴ Thus, he can prevent of the implementation of some of the primary real commandments.³⁵

The third theory (view): Some other jurists believe that it is necessary to take a further step and the Supreme Ruler of the Islamic Government in addition to the enforcement of the fixed commandments of Islamic law has authority and can legislate canon in line with the implementation of religious regulations and also he can legislate on the basis of the social necessity in accordance with the conditions of time³⁶, because it is likely that a commandment to be in line with the interests in a specific time but at other time, its conditions do not exist and it should be changed³⁷. But legislation in both situations includes the cases which are substantially

lawful and they must not be in conflict with the commandments of God.³⁸

The Fourth Theory: This thinking trend believes that the human needs are of two groups:

The individual and social needs. The development of code within the limit of the individual demands is undertaken by the religious legislator. But the social needs are also divided into two groups: Either constantly fixed or flexible constantly fixed codes are legislated by the religious legislator and the Supreme Ruler of the Islamic Government can only legislate law to implement them. Flexible codes are needed due to change in conditions of the society and legislated and implemented by the Supreme Ruler of the Islamic Government Religious Leader. In this theory, the Islamic ruler can prevent of the implementation of some secondary commandments for the sake of observing the interests of Islam and the Muslims.³⁹

The governmental commandments are usually subject to the interest of their own as soon as the interest annihilates, their creditability is also eradicated.⁴⁰ In addition, the governmental commands and commandments issued by the Supreme Ruler of the Islamic Government are also obligatory to be followed by other jurists.⁴¹

At the same time, custom and the base of the wise can also have impact on the legislation and religious commandments under conditions, but they must not take origin.⁴² As, the Qur-an also emphasizes on the prescribed punishment of the thief in the following verses:

⁴³ "والسارق والسارقة فاقطعوا ايديهما جزاء بما كسبا نكالا من الله والله عزيز حكيم"

“Cut off (from the wrist joint) the (right) hand of the thief, male or female as a recompense for what they committed, a punishment by way of example from Allah. And Allah is all powerful, All-wise.”

It has been narrated from Ibn Jozi that "whenever a new custom came into existence, follow it and whenever that custom is nullified, you also abolish that. Do not stick to the outward appearance of books. Whenever a person approaches you from another city and asks your opinion, do not respond him/her in accordance with the custom of your city, but ask about the custom of his/her city and comment on it by considering his/her city".⁴⁴

Thus, on the basis of the set of commandments and theories, in the realm of the penal law of Islam, it can be concluded that:

1. All divisions of divine commandments and codes exist within the format of a set under the title of "religious commandments" and have an integrated nature. In this set also, "the religious criminal commandments" express the penal codes of Islam.
2. The changes of religious commandments in accordance with the necessities of time and in order to respond to the demands of the humanity indicate the universality of the Islam religion.
3. The adaptation of the commandments with the condition of life, needs and economic, political and social changes of time is an essential issue which should be materialized within the framework of principles and foundations of Islamic religion and besides the implementation of the fixed commandments and different opinions among the jurists is merely within the

limit of the governmental commandments. At the same time, the conditions have no impact on the divine fixed commandments.

4. Establishing changes in the religious commandments in accordance with the necessities of time does not mean the abolition of divine commandments or these commandments can not become customary. Because the "lawful made by Mohammad (p.b.u.h.) is lawful up to the resurrection day and whatever has been unlawful by him will be unlawful up to the resurrection day" is an eternal commandment, so that, abolition has no place in the commandments ,but its concept means a change in the commandments and each change does not necessarily mean abolition, in addition it means the adaptation of those commandments with the new civilization and real demands of humanity which Islam never deter these real needs of the human and merely prevents the whims. So that Islam accepts changes in the commandments, but it does not accept the abolition of commandments and change has a general meaning than abolition.

In this manner, by drawing the bases of exact wordings determination the crimes and punishments, we have approached the realm of criminal law of Islam.

- **The realm of criminal law and criminalization in Islam:**

In each penal school, its accepted values are the foundations for criminalization. Also, in the legal school of Islam, whenever the basic individual and social values of humans are exposed to danger, by determining punishment and penal guarantee of enforcements

(punishments) and proportional with the importance, the support of the system of criminal law of Islam is extended to those values.

These basic values such as life, asset, fame, generation and lineage, originality, reason, religion and ⁴⁵public security which are accepted by many of the jurists too are usually enumerated as vital pillars and principles of society and are always fixed and perpetual. They will never undergo changes due to social changes or scientific and intellectual advancements of the human societies.

Murder (aggression on life or self), adultery (aggression on generation), false accusation of unlawful intercourse (aggression on dignity and fame), wine drinking (aggression on reason), stealing (aggression on asset), resorting to arms in order to frighten people (aggression on public security), apostasy (aggression on religion), and revolt (aggression on government)⁴⁶ are among the crimes which in the main Islamic law, in accordance with the principle of legality of "crime and punishment"⁴⁷ have been precisely forecasted in the crimes of retaliation and prescribed punishments and in the event of lack of any obstacles for enforcement or lack of possibility to enforce due to religious reasons, they must be exerted.⁴⁸

Thus, the Islamic criminal law ⁴⁹ includes a set of public and perpetual rules which has been prescribed by the Islamic Shariah (religion) in order to prevent of occurrence of crime and secure the health and protect people, establish justice, and to maintain order and security in the society by Qur-an and tradition and has made its adaptability with social, economic, political, scientific, cultural and ethical changes

possible in different societies and all times by resorting to reason, analogy and consensus.

Islam has prohibited any behavior which leads to the degradation of individual or society with the guarantee of implementation of penal worldly and otherworldly punishment and has made them subject to enforcement of punishment and or the security and training measures.⁵⁰

- **The concept of crime in the religion:**

From the viewpoint of Islamic Shariah (religion), crime means the deterrence of prohibited deeds or religious unlawfulness which have been prohibited by the God through the prescribed or discretionary punishment.⁵¹

So that, crime means the disagreement with the commands and prohibitions of the Book and Tradition or committing an act which is led to the decay of individual or the society and the holy legislator has prescribed a punishment for that. In that case, each crime has a penalty which has been reiterated by the holy legislator or its authority has been shifted to the Supreme Ruler of the Islamic Government or the judge.⁵²

The Islamic Shariah has full agreement in the definition of the crime with the new customary canons, because, from the viewpoint of customary laws, doing an act or forbearance from an act is not considered a crime unless it is subject to penalty and punishment in accordance with the law of punishment.⁵³

- **Elements of crime:**

The behavior of the criminal human is on the basis of legal, spiritual and physical elements of the crime which has a public aspect and their existence in all crimes is necessary.

The Islamic religion, from the very beginning has noticed to the divisions by dividing crimes into intentional crimes, quasi-intentional crimes and pure mistake in addition to determining the criminal description (legal element) with a criminal intention or criminal guilt in the criminal behavior (spiritual element) and materialization of outward operations which indicate the criminal behavior (physical element) and penal liability too and this viewpoint is considered an important change in the penal law.

This theory was presented when merely the physical element of crime was the standard of responsibility and no attention was given to its legal and spiritual elements. Now, the customary criminal law, with regard to legitimacy of spiritual or psychological or ethical elements of crimes has merely divided the crimes into intentional and non-intentional crimes.⁵⁴

It must be said that in each crime, in addition to its general elements, there are specific elements and conditions which bring about the distinction and identification of the crimes from each other such as stealing an asset deceitfully (movable asset belonging to someone else) which has defined and stated the forming and specific element of stealing crime and detach and distinguish it from the physical or spiritual elements which are the characteristics of fraud and abuse of confidence crimes.⁵⁵

Also, crimes in accordance with their own specific nature are divided into crimes against individuals, crimes against assets and ownership, crimes against family and family obligations, crimes against chastity and infallibility and good morality and crimes against welfare, general security and interests, i.e. on the basis of the subject of crime and punishment.⁵⁶ But such a grouping has been less noticed by the jurists, because, as it was stated, most of the jurists too, have divided the general and important interests of the human society into six groups upon which, the religious crimes are classified as follow:

1. Crimes against the physical totality and spiritual dignity of individuals such as murder, blow, wound and accusation of unlawful intercourse.
2. Crimes against assets and ownership such as stealing.
3. Crimes against general security such as resorting to arms in order to frighten people.
4. Crimes against religion such as apostasy and insulting the prophet (p.b.u.h.).
5. Crimes against reason such as wine drinking.
6. Crimes against generation such adultery and sodomy.

Despite the fact that these divisions are similar to the divisions in the customary criminal law, but due to the fact that the penal enforcement guarantees (punishments) has no position in the limit of personal relations of individuals with each other or their relations with God in the customary criminal law and according to their belief, they do not disturb

the social order directly, so the crimes against religion, reason and generation is outside the limit of interference of penal law. Thus, only the first three categories in the realm of customary penal law⁵⁷ have been accepted.

- **Concept of punishment in Islam:**

Other type of divisions and classification of religious crimes have been conducted on the basis of punishments which are usually noticed by the jurists in the criminal section of jurisprudence.

The jurists have defined the crimes by classifying and describing the punishments, in the sense that what kinds of punishments are proportional with the crimes.

In the criminal jurisprudence of Islam, the religious punishments have been introduced as "Al Oqubat al Shariyah" [العقوبات الشرعية] in an independent form in the book "Alhodood val Qesas val Diyat val Tazirat" [الحدود والقصاص والديات والتعزيرات] and their dominating feature of those punishments is bodily punishment.

With the exception of discretionary punishments, in other cases, the type, rate and quality of execution of punishment have been fully determined and any kind of violation from them is unlawful and subject to liability and punishment.⁵⁸

These punishments in the system of criminal law of Islam have two dimensions:

- A) Determined and prescribed religious punishments which are known as limits imposed by God and retaliation. These

punishments are fixed, are not changeable and have not alternative punishments but they might be negated.

- B) The non-determined punishments which are so called "discretionary punishments" and generally, no prescribed punishments (limits) have been prescribed for them and only part of these crimes which are always against the interest of the individuals and society have been elaborated⁵⁹ and the Islamic ruler can change them, adds or reduce them in accordance with the specific necessities of each time and place subject to the observance and maintenance of religious principles and foundations and enforces it in accordance with the specific conditions and also psychological situations and the record of criminal or the occurrence of crime or victim of an offence.⁶⁰

Also, in discretionary punishments, the Islamic ruler can give commands on more than one punishment or pardons part or the whole punishment or discount, intensify or suspend it.⁶¹

- **Legal nature of punishments:**

Now, this question is raised that what is the legal nature of these punishments?

In describing this issue, it must be said that the legal nature of these punishments have been divided into four categories.

- **The first category; Limits imposed by God [حدود]:**

The public interests, maintenance of health and security of the people demand, in the Islamic religion, certain crimes have been legislated and Islamic jurists have introduced the punishments of these crimes under the title of "Right of God"⁶² or prescribed punishment (limits imposed by God) [حدود].⁶³ The meaning of this term is that punishment has been prescribed in order to support the society. The creditability of penalty as "Right of God" brings about a situation in which it is not susceptible to negation by the individuals or the society or to be discounted or suspended too. In other words, however, the victims of these kinds of crimes are certain individuals and it is related fully to their interests, such as stealing or false accusation of unlawful intercourse, but its base refers to the interests of the society and also on preference of the interests of the society on the interests of individuals, so that , the forgiveness of individual and or views of the people will not have any effects on crime, negation or discount of punishment and in the case of proving, the punishment should be implemented, because the effects of its possible prevention and deterrence, if not to prevent of repetition of crime, it will absolutely bring about its reduction.⁶⁴

The theory of non-forgivable status of imposed punishment by God on two cases of punishment for stealing and false accusation of unlawful intercourse has been provided exclusively by the Islamic jurists which is presented in the following lines.⁶⁵

- **Prescribed punishment for stealing:**

1. The views of Sunni jurists:

The Sunni jurists have expressed two views on this subject.

The first view: Cutting (amputation) of the hand of the thief and implementation of the prescribed punishment is subject to the demand of it by the losing party, because the right of servant overcomes the right of God.⁶⁶

The second view: Cutting the hand of the thief is not subject to the demand of the losing party and without his/her demand, the hands of the thief can be cut. Because, in the prescribed punishment of stealing, the right of God is dominant over right of people and the general intention of the verse:

"والسارق والسارقة فاقطعوا ايديهما...." has not been allocated exclusively and cutting the thief's hand is not subject to demanding by the losing party as it is the same for the case of prescribed punishment for adultery.⁶⁷

2. The view of the jurists of Shiah Imamiyah:

Cutting the hands of thief is subject to the complaint and demand of assets by the losing party and without that, the Imam or the ruler of the Muslims has no right to execute the prescribed punishment, however there might be an evidence being presented and in the case of the forgiveness in the side of loser of the crime, the prescribed punishment is negated (denied) of thief.⁶⁸

- **Prescribed punishment for false accusation of unlawful intercourse:**

1. The views of the Sunni jurists:

The Sunni jurists consider the prescribed punishment for false accusation of unlawful intercourse as having both rights of God and rights of people and have presented views on the mastery of one over the others.⁶⁹

The first view: The right of God is dominant over the right of people. So that in the case of overlooking by the losing party of the offense, the execution of the prescribed punishment is not negated.⁷⁰

The second view: The right of forgiveness (overlooking) in the prescribed punishment for the false accusation of unlawful intercourse belongs to the servant, in that case, the prescribed punishment is negated from the perpetrator.⁷¹

The third view: The prescribed punishment for unlawful intercourse before referring to the ruler is the right of people and after referring to him for investigation has been converted into right of God and its forgiveness is not permitted and can not be settled down.⁷²

The fourth view: Ibn Hazam Zaheri, considers the prescribed punishment for false accusation of unlawful intercourse like the prescribed punishment for adultery and wine drinking as the pure right of Allah, so that, in his view, the persecution of the crime is not subject to the request made by the victim of the offense.⁷³

2. The view of the jurisprudents of Shiah Imamiyah:

These jurisprudents believe that the prescribed punishment of false accusation of unlawful intercourse has both aspects of right of God and right of people. But right of people has a dominant feature and the losing party of crime has a right to forgive either before referring to the religious judge or after that.⁷⁴

According to the views of jurisprudents, in these crimes, the Supreme Ruler of the Islamic Government can forgive the prescribed punishment.⁷⁵

• **The second category; Retaliations and blood moneys:**

Whereas these crimes including the intentional bodily injuries which are imposed on individuals are related to the society in one way or another too, but the right of individual has preference on the right of the society, so that the victim of the offense or the avengers of blood have rights to forgive the retaliation and blood money which are two main punishments prescribed in crimes such as murder, injury and intentional amputation. This right has been granted to the individual because, the crime is related to individuals directly⁷⁶ and thus the dominancy over these crimes is the "right of people".⁷⁷

The crimes of retaliation (intentional murder and injury) and blood moneys (quasi-intentional murder, murder by mistake, and by mistake injuries) include part of intentional physical damages or all unintentional physical damages. If the victim of offense and the holder of the right forgive or in lack of existence of conditions, the retaliation is abolished, the blood money punishment is replaced with retaliation.

In this case, the criminal, in lieu of the imposed damage against the physical totality of the victim of offense ,should pay as the compensation of an asset whose quantity is determined by the holy legislator to him/her or his/her successor. If for an injury or an organ, no blood money is determined, then the "criminal indemnity for defect"⁷⁸ which is determined by the Islamic ruler or judge should be paid to the victim of the offense or his/here successor.⁷⁹

It should be noted that though forgiving of retaliation is in limit of right of people, but in the quantity of blood money, "the holder of the right" has no full authority and determining the quantity of blood money is part of right of Allah. Of course, reconciliation is also possible, so that any kind of forgiveness or reconciliation in enforcement of these punishments is merely the right of the person being damaged from the crime.

In the case of forgiveness by the victim of offense, the criminal is not released but for the sake of the interests of the society which is related to the act of criminal indirectly, he/she is also punished on discretionary punishment.⁸⁰ Concerning the negation of the punishments of retaliation, the views of Sunni and Shiah Imamiyah jurists are as follow:

1. The views of Sunni jurists:

Most of the Sunni jurists, in the case of negation of retaliation consider the proving of discretionary punishment, but they have different opinions on being permissible or obligation of it.⁸¹

The first view: The Hanafiyeh say, "If retaliation is negated due to some causes with the exception of death of the murderer, the

discretionary punishment of the murderer becomes obligatory. Because retaliation is both right of Allah and also right of people." In addition, Malkiyeh add that the murderer should be whipped by one hundred lashes and to be imprisoned for one year too, no matter whether or not he/she has paid the blood money. Mavardi, from the Shafeiyah also is coordinated with this group.⁸²

The second view: In retaliation, the dominancy is with the right of people and in the case of forgiveness in the side of victim of offense, merely the prescribed punishment of retaliation is negated, but the discretionary punishment is the right of the society and punishing the murderer will also cause the public interest. So that, it is necessary to implement the discretionary punishment and the Muslim ruler to correct the criminal in accordance with the interest.⁸³

The third view: In the punishment of retaliation, the whole Sunni jurists do not consider discretionary punishment to be obligatory after it is forgiven by the victim and they believe that it is in the realm of authorities of the Islamic ruler to punish the wicked person in accordance with interest by imprisonment, lashing and as likes.⁸⁴

2. The view of the jurists of Shiah Imamiyah:

In retaliation also like the prescribed punishment for stealing which are both rights of Allah and rights of people, if the victim of offense forgives, the Imam of Muslims can make a discretionary punishment over the criminal in accordance with the interests of the society and the Muslims.⁸⁵

- **The third category; Discretionary punishments:**

[تفعيل] Taf'eel is an infinitive of the chapter of Taazir [تعزير] and from the root of Azzar [عزّر] and from the trilateral infinitive of Alazr [العزر] and it has been translated as to glorify and to respect⁸⁶ [تعظيم] and [توقير], to prohibit⁸⁷, to get back⁸⁸, to punish⁸⁹ and to deter⁹⁰.

Also, it has been said in the jurisprudence that:

"والتعزير تاديب على ذنوب لم تشرع فيها الحدود"⁹¹

and also

"هو العقوبه المشروعه على جنايه لا حد فيها"⁹²

But in the criminal law of Islam, by Taazir [تعزير], it means "to correct" and the common feature of all these concepts among the jurists indicate that Taazir [discretionary punishment] is a punishment like prescribed punishment with this difference that firstly the quantity of the penalty in Taazir is not mostly determined and secondly, it does not limit to bodily punishment.⁹³ However, the jurists of Shiah Imamiyah do not have consensus on types of discretionary punishments, for example, some of them do not consider the financial discretionary punishment as lawful, but like the jurists of followers of Sunnah⁹⁴, they believe that the diversity of discretionary punishments as allowable and consider that each crime for which the holy legislator has not determined a prescribed punishment and or expiation is part of the realm of discretionary punishments.

Along with the views of all jurists, it can be said that Taazir is both a punishment and a sin⁹⁵ for which prescribed punishment and penance has not been prescribed, either the sin is right of Allah which is

related to the rights of society and or its order and security or right of people, i.e. related to the rights of individuals.⁹⁶

Taazir gives this possibility to the Islamic ruler to determine and implement appropriate punishment in harmony with each crime. These can be rebukes, bodily punishments, punishments which negate the freedom (prison), punishments which limit the freedom (exile), financial punishments (paying compensation or financial damage), punishments which negate the right (in the issue of betrayal of guardian of a pious endowment or the executor being appointed by the testator in his will, or guardian or their moving beyond their own religious limits and duties and or in the case of intentional murder of the praepositus by the heir, closing down the place of business or abolition of its permit) and other things.

The Islamic religion has not stated any of the discretionary crimes and despite the prescribed crimes, retaliations and blood moneys which are determined, the discretionary crimes are not determined to be increasable or reducible, but only that part of discretionary crimes have been stated which impose damage on the interests of the individuals of the society and public order .It has authorized the leaders of Ummah to legislate code in accordance with conditions and for the interests of the society and its orientation and punish any disagreement with those canons. In this relation, any kind of prescription or prohibition is also subject to the observance and maintenance of exact wordings and general principles of Shariah and coordination with the spirit of its legislation and from the viewpoint of prohibition or prescription of deeds, the leaders of the society are in lack of absolute freedom.⁹⁷

Now, this question is put forth that what are the acts that are subject to discretionary punishment and the limit of negation of discretionary punishment in the religion? The acts which are considered by the Shariah as subject to discretionary punishment are in three categories:

- a. Acts which have been inherently prohibited in the texts of wordings of Shariah (Qur-an) and are considered crime and the act is always unlawful and a command on doing discretionary punishment has been issued for it. In this case, the ruling power has no authority to make exception in determining the punishment and can not make that action permissible or abolish its punishment and determines only the degree of punishment on the basis of its own Ijtihad by each ruling power which might be different such as co-sleeping with a strange woman. In these crimes, if the punishment has been determined, and the public interest demand and or the crime to be occurred in a place or time such as mosques or holy month of Ramadan which cause the crime become heavier, there would be no obstacle to enforce both the determined penalty and discretionary punishment.⁹⁸
- b. The acts which have been prohibited by the holy legislator inherently and are considered to be petty offense and not the crime and that practice is also either a command or prohibition .In this case also, no punishment and penalty has been determined and the determination of punishment is the responsibility of the ruler to legislate the punishment and determine its rate.⁹⁹ In this case, it is possible that there

would be different opinions on legislating the punishment and its quantity in accordance with legal reasoning of each of ruling powers. Such as cancellation of fasting or the sacred state in pilgrimage to Mecca, breaching oath, sexual intercourse at the time of menstruation and injurious comparisons. These kinds of crimes are limited and the discretionary punishment and penance is not authorized, because it is necessary to be content with the punishment of expiation.¹⁰⁰

- c. Acts which have not been inherently prohibited by the holy legislator, but practicing it is prohibited due to a specific description. The authority to prohibit and deter these kinds of acts, due to public interests and repulsion of corruption from the society has been shifted to the Supreme Ruler of the Islamic Government and if an act is prohibited by him and punishment to be determined for that in line with the interests of the society, then it is subject to the domain of discretionary punishment.¹⁰¹

In these kinds of discretionary punishments, conditions, situation and status of time and place of each society determine the situation of prohibition or authorization of the act. The enforcement of these kinds of punishments, in addition to the proportional fitness between the crime and punishment, depends also on the situation of criminal, his/her psychological status and his/her records. It can begin from admonishing and lead to physical punishments, punishments negating freedom and even murder in the great crimes. Sometimes, discretionary punishment might have more than one punishment or discount, suspension or

intensification of it. These "legal freedom fields" or "free zone" [منطقه ما لا نص] which includes all cases which there is no express ruling [الفراغ فيه] regulates the social relations in its most complex forms by determining the governmental commandments.¹⁰²

These kinds of discretionary crimes can have three situations:

1. Crimes which by nature have the prescribed punishment, but are in lack of the conditions to implement it such as stealing outside safe custody or stealing less than limit or incomplete stealing, starting to adultery and its preliminaries such as privacy and kissing the strange women.
2. The crimes which have a prescribed penalty, but due to doubtfulness, the prescribed punishment is negated such as killing the child by the father.
3. Crimes which have neither inherently prescribed punishment nor any penalty of prescribed punishment is determined for that and most of the sins and crimes are in this realm.

Such as: usury, bribery, insulting, shortchanging, false evidence, abuse of confidence in the side of trustee, eating the meat of corpse or blood or meat of pig, gambling, quest, arrival into the residence, punishment of discerning (minor) children due to abandoning prayers and state of purity, prohibition of the mad of mixing with the people because of imposing any damage on them), support and security of the society against the suspicious and dangerous individuals.

These kinds of crimes negates of determined punishment and penance, that is to say, they have no other punishment except of discretionary punishment.¹⁰³

Concerning the negation of discretionary punishment too, the views of Sunni and Shiah jurists are as follow:

1. The views of Sunni jurists:

Discretionary punishing of those who have committed a sin for which there is no prescribed punishment or penance¹⁰⁴ or not determined is part of the right of Allah. Thus, the enforcement of discretionary punishment or the negation of it is the authority of the Supreme Ruler of Islamic Government. In line with this, the Sunni jurists have expressed two views:

The first view: Hanafiyeh and one of the two remaks from Hanabelah believe that discretionary punishment like prescribed punishment is the right of Allah and forgiveness by the Imam of Muslims is not permitted and discretionary punishment should be implemented.¹⁰⁵

The second view: Shafeiyeh and one of the two other words from Hanabelah believe that discretionary punishment can be forgiven in accordance with the interests by the Imam of the Muslims.¹⁰⁶

2. The view of the Shiah Imamiyah jurists:

There are different opinions about the forgiveness by Imam of Muslims in the enforcement of discretionary punishments which is the right of Allah and due to the fact that the holder of the mentioned right is God and or the public people of the society; it has no impact on negation of

persecution or implementation of punishment but some jurists believe If one of the divine laws to be violated and the criminal individual is merit to be forgiven and indulgence, then the enforcement of discretionary punishment is negated in accordance with the competency and forgiveness of the Islamic ruler and this action is not only correct but also appealing.¹⁰⁷

So, the Supreme Ruler of the Islamic Government has right on the basis of interests of the society and repulsion of corruption from the people on his discretion forgive part or whole of the discretionary punishments if they are not in disagreement with the exact wordings of Shariah.¹⁰⁸

The expiations are of the cases which have been dealt with in the criminal jurisprudence of Islam in the part of religious punishments and in particular efforts have been made by the Sunni jurists in line with this objective sufficiently.¹⁰⁹

- **The distinguishing features of religious and customary punishments:**

Based on what was presented, the realm of criminalization in the criminal law of Islam became clear, but there are also specific distinctive features between the religious punishments and customary punishments in particular with the definition which is presented by the jurists from the realm of discretionary punishment crimes which cause the increase of distance these two from each other.

With the aforementioned explanation, the distinctive features of religious punishments and customary law punishments can be grouped as follow:

1. The origin of legislation of religious punishments is the sources of Islamic law and jurisprudential ideas of the jurists.
2. The origin of the legislation of customary punishments is the customary laws and references of legislations.
3. In the system of customary laws from the viewpoint of intensity and weakness of the punishment, crimes are classified into three types of criminal, misdemeanor and petty offences.
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4. In the system of customary laws, the punishments have also been divided into five categories in terms of nature which includes the bodily punishments, punishments negating freedom, limiting the freedom, negating the rights and cash penalty too. ¹¹¹

But today, with the abolition of the bodily punishment and execution in particular in the countries of the European Union, these punishments have been reduced.

5. Punishments of customary laws which have been prescribed for the criminal acts in the criminal codes are divided into main, subordinate, supplementary¹¹² punishments whereas, there is no such as detachment in religious punishments. ¹¹³
6. In the Islamic jurisprudence, the bodily punishments have a dominant feature and have mastery over other punishments, but the bodily punishments including execution punishment has been annihilated and abolished in the customary law.

7. The customary laws punishments are not fixed and these institutions, i.e. discount, conversion, suspension, postponement of punishment, and conditional freedom are applicable, whereas the religious punishments are fixed and application of discount or negation of punishment depends on its conditions.

- **Decriminalization in Islam:**

Now, the countenance of religious punishments in the crimes of prescribed punishment, retaliation and blood moneys have been specified, but the reason that the subject of criminalization in Islam was discussed and that of religious punishments was due to their relations with the subject of decriminalization and ¹¹⁴ it must be specified," does the decriminalization have a concept and a position in the criminal law of Islam? Are there any examples in the history of Islam which indicate the existence of abolition of penalty or making decriminalization? Is it possible to implement decriminalization in the domain of crimes and religious punishments? Can other back-warding strategies such as de-penalization and diversion be found in the domain of religious crimes? And lastly, who is the competent official to make decriminalization in the criminal law of Islam?

As it was stated, the erasure of criminal title of an act or a behavior from the crimes of public ethic and chastity, religion and political affairs or denial of reaction from the penal system against these behaviors and/or removing of crimes from the set of penal codes by the legislator ¹¹⁵ which with the aim of modifying the titles or number of crimes is

considered as decriminalization and also, it was said that taking away (negation) or reduction of punishment from a behavior whose criminal title has been maintained and or the description of criminal title is converted from aggregative into a simple one, such as changing felony into misdemeanor and/or take caring, training and treatment reactions instead of penal reactions negating freedom and¹¹⁶ ... is called de-penalization.

On the other hand, using the traditional and penal classic alternatives by the officials who prosecute the crime (judges or attorney general) in confronting with crimes which are committed against the penal codes and the suspicious person is also sent out from the judicial and penal investigation procedure and the crime is investigated informally and through administrative¹¹⁷ authorities is called diversion. These mechanisms are practiced in the customary laws to abolish or correct the penal system.

In Islam, there are also mechanisms which cause abatement, conversion or negation of punishment and by reviewing the history of Islam on criminal jurisprudence, we face with the cases of abatement or negation of punishment through establishment of "pardon institution" which some of them are the examples of decriminalization in its specific meaning and some other are also examples of the cases of de-penalization.¹¹⁸ Before stating the historical examples, by observing the Book of Allah, [holy Qur-an], it is seen that the punishment of adultery in the beginning has been detention at home.¹¹⁹ But with the revelation of Verse of Jald¹²⁰, the punishment of life imprisonment for female perpetrator of fornication (fornicator) and disturbance of male perpetrator was abolished.

As we know, the jurisprudential resources of the public criminal law in Islam are divided into two parts:

Part One; including the Book (holy Qur-an) and Tradition of the Prophet (p.b.u.h.) which are the main sources of jurisprudence and

Part Two; Includes consensus, analogy,¹²¹ or reason in the jurisprudence of Shiah Imamiyah (comprising of rational independences¹²² and rational obligatory prerequisites¹²³), juristic preference¹²⁴ and considerations of public interest¹²⁵ have formed the jurisprudential secondary resources of the public criminal law.¹²⁶

Amid these, the criminal tradition and conduct of the Prophet of Allah (p.b.u.h.) which has a revelation-based root from the viewpoint of formation of government and implementation of criminal regulations in Islam during the period of prophecy are of specific importance. The method of the Rightly Guided Caliphs in criminal affairs also and their practicing mechanisms which are also the foundation of many religious and legal opinions of jurisprudents [Fitwas] are of the specific characteristics of the course of Caliphate period which will be dealt with accordingly:

- **Decriminalization and de-penalization in the criminal conduct of the Prophet of Allah (p.b.u.h.):**

1. A woman was moving towards mosque to do prayers in congregation. Using the darkness of morning, a man blocked her way and raped her by force. As a result of her request for help, another man arrived in the scene and attacked the aggressive man. The perpetrator of rape escaped. The population came to help, but they arrested the second man and brought him to the Prophet of Allah (p.b.u.h.). After the complaint made

by the woman and the testimony of the witnesses, the holy prophet (p.b.u.h.) issued a command to stone him to death. Before the execution of the punishment, the escaping perpetrator of the rape appeared himself and admitted committing rape and also escaping after committing the crime and asked the release of the innocent man. The prophet (p.b.u.h.) gave order to free both men and in response to those who asked him why he did not punish the perpetrator of rape who had admitted it? He stated, "He repented".¹²⁷ So that according to the discretion of the Islamic ruler and the repentance of the criminal, the prescribed punishment was negated.

2. The female slave of the prophet of God (p.b.u.h.) committed adultery. The prophet (p.b.u.h.) ordered Imam Ali (A.S.) to punish her and enforce the prescribed punishment. But the woman was in the period of vaginal bleeding and Imam Ali (A.S.) presumed that the implementation of prescribed punishment might cause her death, so he did not enforce the prescribed punishment and announced his decision to the prophet of Allah (p.b.u.h.). While confirming the decision, the prophet (p.b.u.h.) said, "Well done" and consequently, the prescribed punishment was not enforced¹²⁸, so that the period of vaginal bleeding caused the negation of prescribed punishment.

3. A person drank wine. He was brought to the prophet (p.b.u.h.). The man confessed and asked to be purified. The Hadrat said: Have you done prayers with us so far? He said, "Yes". The prophet (p.b.u.h.) stated, "Go, and God also forgave you the prescribed punishment". The individual said, "If I decided not to drink wine as a result of fear at present, until I live, I will not commit any action which would demand enforcement of prescribed punishment".¹²⁹

4. Despite the fact that the prophet (p.b.u.h.) strongly treated in the case of confrontation with the offender and the convicted person to the prescribed punishment of stealing such as the aristocrat woman or female slave of one of his wives, but at the same time the prophet (p.b.u.h.) stated in other conditions, "in the journey, do not cut (amputee) the hands of the thief" ¹³⁰ .So that , the trip made the negation of prescribed punishment.

5. Among the pre-Islam Arabs, basically, the household of the victim were not satisfied unless the whole members of the family of the murderer or the leaders of the tribes were killed.¹³¹ At the same time, paying the blood money was to some extent prevailing, and when the victim was from the "aristocrats", "the blood money of the kings" which was "one thousands camels" was paid to the avenger of the blood and in the case of the murder of the "ordinary individuals of the tribe" and from the noble race, the "clear-cut blood money" which was equal to "ten camels" being determined. If the victim was a "slave or from the non-noble race", "the oath blood money (allied) or blood money of the Hajin (child of a female slave)" equal to "five camels" were paid.¹³²

By fixing and approving the hundred camels by the prophet (p.b.u.h.) for the blood money of a life which had been laid down by Abd Al Motaleb, his ancestor, in addition to removing the discrimination in paying the blood money, the prophet also signed the issue of the Zeman Aqeleh (the liability in payment of the blood money by his/her male wise familial relatives of the perpetrator of murder) in the case of blood money payment of the murder by mistake and the conditions related to that. In this way, he issued an order to prohibit "the non-retroactivity of penal codes" and the investigation of the murders before the appearance

of Islam, even about (Ibn Rabiah) who was considered as one of the intimates of the prophet (p.b.u.h.) was also stopped and prohibited.¹³³

6. In the holy war of Bani-Al-Mostalaq, he gave up to kill Abdollah ibn Obai and against insist on hanging him, he said, "If I order him to be killed, they will say that when Mohammad frees from the war, he kills his soldiers".¹³⁴ Therefore, the interests of Islam and society and prevention of gap among the lines of the fighters caused the negation of prescribed punishment.

7. Two of the close friends of Mosailameh Kazzab [Mosailameh Kazzab who claimed to be prophet] came before the prophet (p.b.u.h.) of God and said "We testify that Mosailameh is a prophet". The trustworthy prophet (p.b.u.h.) said, "If I had killed the ambassador and courier of anybody so far, I would have absolutely cut your necks".¹³⁵ So, in accordance with the discretion of the ruler of the Muslims and in order to observe the ethic, the punishment was negated.

8. Though, the prophet enforced the prescribed punishment for the one who drank wine in Madineh and Honain which were the place of residence and resting of the polytheists, but he prohibited the enforcement of prescribed punishment in the war and stated, "It is possible that the enforcement of prescribed punishment gives rise to the anger or provoke an individual to join the enemy and losing a Muslim and his enjoinder to the enemy brings about greater corruption as compared with the delay or lack of implementation of a prescribed punishment".¹³⁶

9. According to the command of the prophet (p.b.u.h.), the act of stealing the war booties was not persecuted and the stolen goods were considered as the asset of God which has been stolen by His servant.¹³⁷

10. Cutting the trees of Taef region to protect the environment was a crime and subject to bodily punishment. But in Taef war, the prophet (p.b.u.h.) ordered that each soldier to cut five trees in order to annihilate the natural fortification of the polytheists.¹³⁸ Thus, in accordance with the interests and objectives of war and in order to remove the natural blockade and power of camouflage of the enemy, the punishment was negated and cutting the trees was allowed and moreover it became necessary.¹³⁹

11. The prophet (p.b.u.h.) threatened to set fire the houses of those who were not attending the ceremony of prayers in congregation and did not accept any excuse and even he did not accept the excuse of a blind person and ordered the blind man to mark from home to the mosque and not to abandon prayers in congregation¹⁴⁰ but the obligation of participation in prayers congregation was abolished and converted into emphasized recommended duty.¹⁴¹

- **Decriminalization and de-penalization in the criminal method of the first Caliph:**

Though, the period of caliphate of Abu Bakar Abi Qahafah (رضى الله عنه) was short, but one of the cases is presented:

Khalid ibn Valid, the commander of the army of Islam, after the execution of Malik ibn Novireh, due to the accusation of apostasy, married with his wife without spending the waiting period immediately. The marriage brought about the public objection of the army of Islam

and even the people, but while resisting, the Caliph stated that Khalid had made an individual reasoning [Ijtihad] and had made a mistake, but he is not entitled to be punished and I do not blunt a sword which has been sharpened by the God against the infidels and then the Caliph paid the blood money of Malik to his brother from the public treasury.¹⁴² And in this manner, the prudence of the First Caliph and on the other hand, ignorance towards the subject caused the removal the penal responsibility, exculpation of the convicted persona and negation of punishment.

• **Decriminalization and de-penalization in the criminal method of the Second Caliph:**

1. The Second Caliph, Omar (رضى الله عنه) ordered not to enforce prescribed punishment in order to avoid any disturbance in the war affairs¹⁴³, because it was possible that this act to provoke the Satan of the self in the fighters and they join with the infidels.¹⁴⁴ And on the other hand, it might give rise of enemies against the Muslims.¹⁴⁵ Thus, factors such as the discretion of the Islamic ruler, lack of disturbance in the war, deterring the flee of the fighters and maintaining the Muslim interests caused the negation of punishment.

2. The Second Caliph ordered to take two times of compensation (cash penalty) from the thief and did not enforce prescribed punishment and announced that it is one of the authorities of the government¹⁴⁶ and also said to another perpetrator of stealing that since it is the case of "Am Al Majaah" [hungry needful], I do not cut his hand.¹⁴⁷ Thus, it was negated in accordance with the discretion of the ruler of Muslims.

3. A married woman confessed that she had committed adultery. The Second Caliph, (رضى الله عنه) ordered to stone her to death. Imam Ali (A.S.) stated, "Perhaps, she has an excuse". The woman was asked to narrate the case. She said that she was so thirsty in the desert. The man who was accompanying him accepted to give her water with the condition of sexual intercourse and she was forced to accept the request of the man to protect her life against annihilation. Ali (A.S.) stated, " فمن اضطر غير باغ ولا عاد فلا اثم عليه" and then the Caliph set her free.¹⁴⁸ Thus, the necessity made the denial of penal responsibility and negation of punishment.

• **Decriminalization and de-penalization in the criminal method of Imam Ali (A.S.):**

1. Imam Ali withheld to enforce the prescribed punishment for a woman who was convicted to that while she was experiencing the vaginal bleeding period.¹⁴⁹ A sick man who was not given prescribed punishment, due to the fact that the enforcement of prescribed punishment might possibly have caused his death.¹⁵⁰ After the Nahrovan war, he did not punish four injured individuals from the Khawarij [political and religious sect of early Islam] who were belonging to "Boqat" group [aggressing group against government] and set them free without any condition.¹⁵¹ Thus, with the discretion of the ruler of the Muslims, the punishment was negated for the woman who is experiencing the vaginal bleeding period or one who is sick or the injured person.
2. Concerning a woman who was pregnant or was feeding a child, he did not implement prescribed punishment and stated to her, "Go and grow up your child to enable him/her to protect himself/herself

against the danger, then return".¹⁵² In this way, the punishment was not enforced in the case of the pregnant woman and the feeding woman.

3. Imam Ali (A.S.) also did not implement the prescribe punishment in the territory of the enemy due to the possibility of mixing of fighters with the enemy.¹⁵³ That is to say that according to the discretion of the Islamic ruler and danger of the emergence of corruption, the punishment was negated.
4. Imam Ali (A.S.) was not executing the prescribed punishment on the cases of the lewd woman without husband who had committed adultery and forced them to marry. Then he stated, Imam of Muslims is dutiful to bound the free women by giving them to husband as the free camel is harnessed by the bridle.¹⁵⁴ In this way, according to the discretion of the Islamic ruler, the prescribed punishment of prostitutes was taken away and negated.
5. Whenever, the followers of Book, in the realm of the Islamic government commit a crime, they are subject to the law of Islamic punishment, like, the case in which the prophet conducted the prescribed punishment on a Jewish woman and man of Kheibar for committing adultery.¹⁵⁵ And if the followers of Book commit a crime beyond the realm of Islamic government, but refer to the Islamic Criminal Court, in that case, they will also be investigated and punished in accordance with the criminal commandments of Islam.¹⁵⁶ With regard to this introduction, a Muslim man committed adultery with a woman from the People of the Book in Egypt and Imam Ali (A.S.) ordered to punish the man and deliver the woman to the

religious authorities of Jews to decide about her in accordance with their discretion.¹⁵⁷ Thus, according to the discretion of ruler and distinction of interests of the Muslim society, the prescribed punishment of woman who belongs to the non-Muslim religions was negated.

6. At the time of Imam Ali (كرم الله وجهه), the cash money was increased and therefore he permitted to calculate and pay the blood money on the basis of Derham and Dinar.¹⁵⁸ Therefore, the type of punishment of blood money was changed and altered.

If appears from the history that in the prophetic conduct and the method of the caliphs, decriminalization and depenalisation have taken place in the realm of the authorities of the Islamic ruler to supply the interests and reject the corruptions from the Islamic society and the Muslims in accordance with the necessities and conditions, so that the issue of prevention and deterrence of crime occurrence or correction and training and rehabilitation along with collective intimidation and implementation of justice in line with the procurement of social interests to be materialized in a balanced framework and far from radicalism and violence.

- **The method of the decriminalization strategy:**

- a) **Dare tradition (حديث درأ):**

Another important mechanism of decriminalization in Islam is “aversion of prescribed punishment by doubts” which is a general principle in the Islamic law [Shariah].

The holy prophet (p.b.u.h.) stated:

"ادرو الحدود بالشبهات" according which the punishments related to the crimes of prescribed punishment, retaliation* and blood moneys are averted.

It has been narrated from Umar ibn Khattab(رضى الله عنه) who said," due to doubts I am in favour of stopping the prescribed punishments.¹⁵⁹

Amid this, irrespective from the fact that the concept of doubt in this noble tradition to be one of the following meanings:

That is to say, if there is a doubt about the perpetrator of crime it is permissible to ignore the prescribed punishment. It meant that if the judge is not certain about the occurrence of a crime and becomes doubtful about its occurrence, he should not apply prescribed punishment on accused.

Anyway, what is taken for granted and seems to be a fixed issue is that in case of lack of proving the crime, in accordance with the rule:

"الحدود تدرا بالشبهات", decriminalization of crimes of prescribed punishment and Retaliation and blood money is practically materialized due to the creation of doubt.¹⁶⁰

b) Rafe tradition (حديث رفع):

Of other factors which averts the criminal liability is the existence of as infancy, insanity, case of necessity, abhorrence, sleepness and ignorance of commandment which despite the existence of criminal titles and also the competency of the penal justice system, the perpetrator has become acquitted of criminal obligations.¹⁶¹ Due to each of these factors decriminalization can be materialized.

C) Conclusion:

We conclude precisely the aforementioned technical issues.

1. The philosophy of prevention of committing a crime in Islam is to protect the position and dignity of human and placing his/her in the correct way of evolution and also to maintain the public order and security.
2. Usually, the offender commits a crime voluntarily and on the basis of the free will. In Islam, the influence of various local and foreign factors which influence the human will, are considered for judging of the offender, Thus the existence of each of the conditions of minority, madness, lack of awareness on the commandment or subject, abhorrence, necessity, drunkenness and sleeping, the penal responsibility is reduced or abolished. Also, with the existence of the provability of the penal responsibility of the offender, if there is an obstacle in the way of enforcing the punishment, it will not be enforced.
3. The philosophy of formation of punishment in Islam, is to correct the individual and the society, to secure the public security and welfare, to fight against corruption and prevention of repetition of crime in the society, to implement justice, to maintain the ethical values in order to protect the life and fabric of the society and to guard the public interests and the worldly and otherworldly salvations of humans.
4. Maintaining the public interests of the society in a specific form has always been made by Islam. So that in order to materialize and

protect these interests and health continuation of the pillars and bases of the society, the Islamic criminal law has made necessary supports to these social interests by determining the fixed and absolute penal guarantee of implementations (punishments) within the penal mechanisms (prescribed punishment, retaliation and blood money).

5. When the importance of public interests and maintaining and protecting it are subject to the necessities and conditions of the time, the criminal law of Islam has not considered the fixed punishment as necessary and by maintaining the foundations and principles of Shariah (religion), it has shifted the responsibility of legislation of punishment under the control of the Islamic ruler.
6. The principles and foundations of the Shariah (religion) which should be considered in decriminalization towards a behavior are as follows:
 - i. to maintain divine law
 - ii. to maintain accepted ethical values
 - iii. to maintain the base of Shariah(religion)
 - iv. to maintain the human dignity
 - v. to maintain the interests of the society
7. Due to the necessity of adaptation of the religious commandments with the conditions of the day, the efforts and innovations should be placed in two directions. On one side, the alternative guarantee of penal implementations (alternative punishments) should be determined and on the other hand, the new mechanisms of

restorative justice (theoretical framework of restorative justice) should be employed.

8. The customary punishments of the present time, if being signed by the holy legislator of Islam as a customary issue and if they are not in contradiction with the principles and foundations of Shairah (religion) are acceptable.
9. Approaching the customary punishments is not also a goal. The superior objective is to show the merit and superiority of the legal face of Islam, its update status and its efficiency to meet the needs of the human society on the basis of the trend of changes and its political, social and economic complexities. Any kind of judicial development leading to decriminalization, training security measures, suspension and abolition of punishments, conditional freedom, should not be inconsistent with the principles and foundations of Shariah and its capability of productivity or survival should not be denuded. The foundation of practice is to pay attention to the orders of the Shariah (religion) which should not be doubted. The Qur-an also states:

"...افتومنون ببعض الكتاب و تكفرون ببعض فما جزاء من يفعل ذلك منكم الا خزي في الحيوه الدنيا و يوم القيامه يردون الى اشد العذاب و ما الله بغافل عما تعملون"¹⁶²

Do you believe in part of commandments, and have faith in it and do you become infidel towards the other parts? What would be the reward for those among you who behave against commandments but disgrace in the world and the otherworld? And finally on the Day of Judgment, they shall be consigned to the most grievous chastisement, for Allah is mindful of what ye, people do.

In fact, the main cause for backwardness, disruption and degradation of the Muslims up to now, has been the lack of giving attention to the regulations of the Islamic religion. Abandoning the exact wordings of the Shariah by the rulers, ruling on the basis of sensual desires, lack of attention to the crimes which have been stated by the religious law, but they are not noticed in the canons and bills¹⁶³, the crimes for which, the Shariah has different opinion on them as compared with the customary laws¹⁶⁴ and the crimes which exist in customary laws but are in disagreement with the principles and exact wordings of Shariah¹⁶⁵, all these indicate the abandoning of Islam and its commandments by the rulers. So that the useful solution for eradication of the cause of backwardness is to return to the commandments of Islam and not to transmute in customary laws which God will not change our situation until we change our heart and believe in all commandments of Qur-an, because:

"ان الله لا يغير ما بقوم حتى يغيروا ما بانفسهم..."¹⁶⁶

And the promise of the God to those who put the Shariah as the standard of practice and follow the divine book is that:

"قد جاءكم من الله نور وكتاب مبين يهدى به الله من اتبع رضوانه سبيل الاسلام و يخرجهم من الظلمات الى النور باذنه و يهديهم الى صراط مستقيم" ¹⁶⁷

Now, there hath come to you from Allah a light and perspicuous book[legislating the realities of religion], wherewith Allah guide all who seek His good pleasure to ways of peace and safety and thus lead them out of darkness by His will towards the path of light and lead them in a straight path.

10. The determined religious punishments and the divine prescribed punishments can not be stopped with the view of maintaining the limit of divine law and certainty of its implementation. Thus, decriminalization, i.e. eradication of the criminal titles of a behavior (which exist in the customary laws) is not possible in religious punishments whose both type and degree have been fixed. It is unchangeable because its dominating feature is right of Allah.

But if the enforcement of religious punishment violates the intention and objective of holy legislator or other more important interests to be considered such as turning away of the people from Islamic religion, weakness of Islamic government. It has constantly been emphasized by the holy legislator the causes that Islamic ruler negate and take away the punishment in accordance with the necessities and conditions of time.

11. Decriminalization is not also possible in the punishments of retaliation and blood moneys, because the dominating feature is the right of people, so long as, the aggrieved party of the crime is not ready to give up his right. If aggrieved party of the crime is ready to overlook his right, due to the fact that discretionary punishment is the interest of the society, in that case, the Islamic ruler can enforce, or deny and negate the punishment at its discretion and make decriminalization.
12. In the penal law of Islam, factors such as childhood, madness, emergency, compulsion or abhorrence, ignorance of commandment and sleeping avert the criminal liability and cause decriminalization.

13. Decriminalization in the realm of discretionary punishments:

- A) Concerning the actions which have been prohibited in accordance with the direct wordings of the Shairah and there is an order to do discretionary punishment, the Islamic ruler should merely determine the degree of punishment in accordance with the foundations and principles of Shariah and enforce it and he can not abolish the punishment because they are considered crimes in each time. Even, in this very case too, if the implementation of a religious punishment violates the objective of its legislator and or important social interests and or cause corruption, the ruler can deny, negate and in fact decriminalize the whole or part of the punishment of the cases of commandment to protect the base of Islam in accordance with the necessities of conditions and time.
- B) If the authorities of determining the type and degree of punishment has been shifted to the Supreme Ruler of Islamic Government in keeping in view the public interest and repulsion of corruption in the society, the supreme ruler by observing the foundations and principles of Shairah, can give order to abolish the whole or part of its punishment. Thus, the ruler has made decriminalization.

4.2 Decriminalization in the Iranian criminal policy

The aforementioned materials made us familiar with the criminal policy of Islam and position of decriminalization. Now, we will deal with the position of the strategy of decriminalization in the criminal policy of Iran.

- **The history of criminalization in Iran:**

Before the discussion on decriminalization in the criminal policy of Iran, we will have a glance at the history of the customary criminal law system and background of criminalization in Iran which is divided into two general periods:

- a. The periods of royal system:**

It seems that fifty Principles of the Constitutions of the Constitutional Revolution which was approved by the then parliament in 1903 is the climax of the movement of legislation and change in the penal law of Iran. The new and modern legal system of Iran, after the occurrence of the Constitutional Revolution and compilation of the Constitutions in 1906 and its Supplementary Principles of 12, 73, 74,78 in 1907 on legality of crime , punishment , formation and determination of courts paved way for the approval of two important and basic codes of penal procedures in the year 1911 and the canon of public punishment in the January 1925 which was adapted from the criminal codes of Europe in particular France and Belgium.¹⁶⁸

The realm of the new criminal law of Iran was formed on the basis of the strategic principles which were provided in the supplementary of the Constitutions. Before the approval of the canon of public punishment, there existed two types of legal judgment in Iran.

"The judgment of the first type" was performed in religious courts. These courts were investigating the religious crimes in accordance with the religious rules and commandments under the jurisdiction of the religious authorities and jurists of the cities and were implementing the

religious punishments which included prescribed punishments, retaliations and discretionary punishments.

"The judgment of the second type" was in the customary courts which were investigating different kinds of crimes such as opposition against the government, staging a riot, refraining from paying the tax, relation with the foreigners, (espionage) and ... which in accordance with the Principles 73 and 74 of the Supplementary of the Constitution, they were under the supervision of the central government or the rulers of the provinces and according to the discretion of the rulers, harsh bodily punishments, long imprisonments, expropriation of assets, and sending into exile and... were implemented by these courts. ¹⁶⁹

During the approval of the canon of public punishments, for the purpose of removing the intensive concerns of the religious authorities and jurists , towards the survival of the religious courts and execution of punishments being prescribed in the religious law, the Article 1 of the Code of Public Punishment in the year 1925 reiterated, "the reiterated punishments in this Canon, from the view point of maintaining the national orderliness are prescribed and will be enforced in the justice courts and the crimes which are prosecuted and discovered in accordance with the Islamic regulations will be punished in accordance with the prescribed punishments and discretionary punishments in religious law" and thus, it guaranteed the execution of prescribed and discretionary punishments in the religious law.

The Pahlavi government began to impose, gradually, limitations on the authority of religious courts and simulteneosly the authority of Justice Ministry continued to expand. The power of the religious courts were

decreased and in practice, no opportunity was created to implement the religious punishments, but lastly, with the approval of the final amendment of the mentioned canon in 1973, the subject of religious courts was omitted from the canon and was generally nullified and abolished.¹⁷⁰

In addition to the mentioned canons, on legislative changes which had role and impact on the criminal policy of Iran in the periods of royal system, the following cases can be added:

1. The formation of a local board was made for dispute settlement, in the year 1953, to investigate the petty claims in the villages and spots where the district court had not been formed.
2. The Single Article of Canon on judicial affairs of tribes was legislated in 1958 to settle the disputes among the individuals of clans and tribes and also the canon of formation of Assize Courts was approved to investigate the civil and penal claims among the inhabitants of the far districts and moreover those outside the judicial domains which was not successful in practice for different reasons.
3. The canon of conditional release of the prisoners by maintaining the rights of the victim of offence, approved in 13 March, 1959 whose objectives of legislation were to reduce the number of the prisoners, to correct the convicted person faster.
4. The Children's Court was formed in 1959.¹⁷¹
5. The canon of security measures, approved in 1960. Three Chapters and 21 Articles laid down the Principle of Prevention as

an alternative for the Punishment and Penal Reaction keeping in view the protection of society against potential dangers effectuated by the offenders.

But, despite the importance and progressiveness of this canon, the policies of Pahlavi regime forced a situation in which the hospitals of the mad and mentally disturbed offenders, the agricultural and industrial working places, the centers for the treatment of addicts, the centers for correction, training and exile places, provided in this canon were not established or were established in an incomplete and limited form and this canon was isolated practically.¹⁷²

6. The canon of formation of House of Justice in the year 1965 was approved in order to investigate and settle the insignificant specific disputes and petty offenses in villages in accordance with the regulations of the Ministries of Justice and Interior and also in accordance with customary laws of the villages having power to impose punishment with cash penalty up to maximum two hundred Rials.
7. The canon of formation of Arbitration Council in cities was approved in 1966 with the aim of investigating all petty offenses and misdemeanors whose punishment was more than two months correctional detention or cash penalty of maximum one thousand and two hundred Rials.

Though, there is no information about the statistics of the performance of these two recent canons, but the view of a group of jurists towards the performance of Houses of Justice is positive.¹⁷³

b. The periods after the disintegration of royal system:

As it was stated, on 11 February, 1979 the royal and despotic regime was disintegrated in Iran and the Islamic Revolution made change in the foundations and standpoints of legislation. On this basis, the Islamization of canons was placed at the top of the list and led to the approval of the Constitution of the Islamic Republic of Iran on March 1979 with the majority votes of 98.2¹⁷⁴ percent and following that, the formation of the government of Islamic Republic of Iran on the basis of supreme theological mandate.¹⁷⁵

The Fourth Principle of the Constitution has also obliged that all civil, criminal, financial, economic, administrative, cultural, military, political canons and regulations and others to be in accordance with the Islamic regulations which dominates absolutely. It is the responsibility of the Council of Gaurdian¹⁷⁶ to see whether all principles of the Constitution and other canons and regulations are in accordance with the Islamic regulations.

The first aspect: That all canons should be based on religion.

The second aspect: That if the customary canons are not in contradiction with the principles and foundations of religious law, they are singed (confirmed).

The examples to this aspect are incorporation of different western institutions in the text of the Constitution which has been emerged within the framework of the Principles 57,62, 91, 101,112, 113,156,176,177,...¹⁷⁷, Also , with regard to prevention of crime and correction of the offenders in the criminal codes which is taken from

the title of congresses of UN (being held in every five years) have been mentioned in the Paragraph 5 of the Principle 156 of the Constitution and all indicate the attention and attitudes of the legislative experts **firstly** towards developing rules on the basis of religion and **secondly** in the cases in which there has been no contradiction with the religion, the customary laws has been given attention.¹⁷⁸

After the approval of the Constitution, the trend of the legislative experts of the principles of the Constitution has not been followed by other legislators and consequently, the principle of prevention and new findings of criminology, in the light of Paragraph 5 of the Principle 156 of the Constitution in the realm of penal system was not considerably noticed which its most important factors can be enumerated:

1. The feeling of commitment and conducting the historical and religious mission towards the implementation of religious commandments.
2. The lack of allowing delay and continuation of the implementation of irreligious commandments in accordance with the noble verse :

"...و من لم يحكم بما انزل الله فاولئك هم الكافرون ...، فاولئك هم الظالمون...،
فاولئك هم الفاسقون".¹⁷⁹

3. The existence of non-religious canons taken from the customary criminal laws
4. Consensus on the necessity of correction and change of the penal codes and replacement of the religious canons and commandments.

By all these, the set of criminal canons of Iran was initially approved to be implemented under the title of prescribed punishment , retaliation and blood moneys in the year 1982 and the canon of Islamic punishment in the year 1983 by the Commission of Judicial and Legal Affairs of the Islamic Parliament on the basis of the Principle 85 of the Constitution¹⁸⁰ experimentally for five years and even after the expiration of the experimental period, it was referred to by the judges too. Following that, the canon of Islamic punishment including the general articles (general criminal law) and parts on prescribed punishments, retaliation, and blood moneys in 497 Articles and 103 Notes were approved in the Parliament. But due to the dispute on its Article 5¹⁸¹, which occurred between the Parliament and Council of Guardians, it was lastly approved by the Expediency Assembly after reviewing and correction on 28 November, 2007. The enforcement of this canon was started and implemented for five years in experimental form since on 8 January, 1991 by the approval of the Commission of Judicial and Legal Affairs of the Parliament.

Once again, in accordance with the legal approval of the Parliament, on 2nd March, 1997, the experimental implementation of this law was extended for further ten years.¹⁸² The Fifth Part of this canon also from the Article 498 to 729 which are under the title of the Discretionary Punishments including the deterring punishments were approved within 232 Articles and 44 Notes by the Council of Guardian on 27 May, 1996. Thus, now, the canon of Islamic punishment of Iran, as an enforceable code, comprising of 729 Articles and 147 Notes and consisting of the public and exclusive criminal laws has been implemented in this country permanently.

- **Changes in the penal law and its factors:**

Many changes in the legislation were made relating to the crimes and punishments of stealing, fraud, bribery, overcharging, hoarding the basic goods, production, distribution, sale and purchase, smuggling the narcotic drugs, forging, dissimulation, smuggling foreign currencies, murder and similar crimes.¹⁸³

The important factors which made these changes become more effective in the criminal law of Iran include:

1. Isolation and lack of the implementation of the criminal canons of Islam in the periods of royal system.
2. The existence of great differences among the criminal law of Islam and customary criminal law, despite the fact that these differences are much less observed in the private law in particular in the main part of the civil law of Iran.
3. Expectation of people from the government to implement the foundations and principles of religion.
4. The broad and unprecedented changes in the political and economic system of the country due to the conditions resulting from the revolution.
5. The conditions of imposed war on Iran and obligatory immigrations resulting from that.
6. The irregular collective immigrations of the villagers to cities due to poverty, unemployment and access to social welfare.

7. Misuse of the freedom resulting from the revolution.

The total set of these factors made the occurrence of various crimes and the necessity of the more attention of the legislator to the criminal law of Iran.

By all these, the translation of the jurisprudential texts with slight changes within the format of law and hastily approval made some deficiencies in these criminal regulations. Whereas had these amendment not been made then the criminal law would have failed in many cases to fulfill the need of the time.¹⁸⁴

In addition, the existence of phrasal problems and contradiction of many of the articles with each other, the unjustifiable intensity of some punishments and without any reasons announcing that some crimes can not be pardoned, and lack of elaboration and decisions on crimes such as starting to crime, also the existence of some other cases which are not in harmony with the necessities of the time, may create ambiguities which can be problematic and these difficulties should be removed through the establishment of judicial procedure or judicial comment and perhaps even some legal amendments.

Anyway, it could boldly be considered as the best penal code law which has been approved after the change in the judicial system. Collecting the different discretionary crimes in a unit set and removing the deficiencies and difficulties of the former general discretionary canon which was adjusted on the basis of the Articles 60 to 288 of the former Public Punishment Canon approved in 1925¹⁸⁵ some articles¹⁸⁶ were either changed or omitted keeping in view the social aspect. Various punishments including imprisonment and cash penalty were determined.

Cash penalty was provided instead of lash¹⁸⁷. These changes are considered to be very positive aspect of the reform.

In the legislative criminal policy of Iran, in addition to the criminalized deeds and behaviors, the religious prohibitions have also been considered as subject to prosecution and penalty.¹⁸⁸ Thus, it created many opposing reactions among the scientists of law which shows the necessity of detachment between the two realms of legal criminalization and religious unlawfulness.

- **Background of decriminalization in Iran:**

As it was stated, after the disintegration of the royal system in the quarter of recent century, due to necessities, the penal justice system in Iran has been formed on the basis of the aggression or forward-moving strategy through the mechanism of criminalization, and on the other hand, the withdrawing or back warding strategy in the criminal policy in Iran does not enjoy an integrated and strong position because the existence of scattered manifestations of the cases of de-penalization or diversion.

Whereas, the present situation of the social changes and crises resulting from the radicalism in criminalization and the existence of one thousand and five hundred forty five criminal titles in the criminal law of Iran indicates the necessity of employing the back-warding strategy and its mechanisms besides the classic policy of criminalization. The penal policy is the most evident obstacle in using the mechanism of decriminalization, de-penalisation and diversion in the criminal law system. The studies show that over 105 titles in the canon of punishment can be merely considered as petty offenses and could be referred and

shifted to the Council of Arbitration or Boards of Administrative Offenses and or even to the law enforcement references (the police). Even some of them, if not being considered as offense at the present time, they do not create any problems. The decisions of governmental organizations and bodies create waves in the society and adoption of such decisions is facing trials and errors and "this trial and error" is repeated successively.¹⁸⁹

- **The situation of decriminalization mechanism:**

The Judicial Branch has been thinking about decriminalization since a long time for different reasons. Thus, at the end of the year 2001, under the order of the Head of the Judicial Branch of the I.R. of Iran, the early studies were started and the results were announced on 29 July, 2002. Following that, the respective expert boards were formed in order to review and complete the studies on this important and critical project.

In addition to the mentioned measures, to some extent, the views of 70 judges, technicians and technical connoisseurs in criminal sciences and also the thinkers and scholars of law were used in various issues of criminology, governmental commandments and non-litigious matters. The continuation of the job was also shifted to the Center of Supreme Council for Judicial Development.¹⁹⁰

- **The criminal titles in the penal law:**

The report of the Committee of Studying Decriminalization in Judicial Branch of the I.R. of Iran has divided the present criminal titles in the criminal law into four categories:

1. The titles whose criminality are certain and since they are among the religious prescribed and discretionary punishments or are considered as the examples of making serious disturbance in the public order of the society should be investigated in the judicial body.
2. The titles whose criminality are certain but due to the fact that they are of a less importance, it is possible to investigate them by the centers like Arbitration Council and so on.
3. Certain titles should be removed from the realm of criminal code may be investigated under the title of petty offenses.
4. Some titles which should be removed out from the realm of criminal code having regard to the present conditions as they are less significant issues, or occur rarely and can not cause any public disorder.

This Committee, in the continuation of its studies identified 105 criminal titles and suggested to the Judicial Branch to erase them from the circle of the penal justice. Also, the report recommended that some of the criminal titles may be placed in one group and some others in other groups, so that this division should also be conducted.¹⁹¹

- **Mechanism of de-penalization mechanism:**

Amid these, the mechanism of de-penalization (incomplete decriminalization) has a longer record in the criminal law of Iran. The Canon of Public Punishment in 1925 has paved way for the institutions of forgiveness, abatement or suspension of punishment and conditional freedom and such set of the law of Islamic punishments was approved

on 27 May, 1996,¹⁹² some of these institutions can be observed in the realm of the mechanism of legislative de-penalization in Iran:

1. Mechanism of forgiveness:

Article 24,¹⁹³ Article 727 approved on 27 May, 1996, the subject of forgivable crimes, abatement of punishment or relinquishing the prosecution of the culprit and also the legal bill of the public forgiveness of indicted and criminal individuals approved on 4 September, 1979.

2. The mechanism of abatement or conversion of punishment:

A) In the realm of prescribed punishments:

Articles 71, 72 and 81 on adultery, Articles 125 and 126 on sodomy, Articles 132 and 133 on lesbianism, Articles 181 and 182 on wine drinking, Article 194 on resorting to arm to frighten people and Article 200 on stealing.

B) In the realm of discretionary punishments:

Article 22,¹⁹⁴ Article 507 in the crimes against local and foreign security, Article 521 on crimes of forging the coins, Article 531 on forging and hypocrisy crimes and Note 2 of Article 719 in the crimes resulting from the driving offenses.

3. Mechanism of suspension:¹⁹⁵

Article 25¹⁹⁶, Note 2, Article 139 and Article 213, Canon of Criminal Procedure,¹⁹⁷ provides mechanism of suspension.

4. The mechanism of conditional release:

The corrective Article 38, dated 17 June, 1998.

However, the set of these effective measures in canons which have been legislated for implementation of the de-penalization policy is considered as strong points of criminal regulations of Iran and should be implemented by the judges in a broader form, but as it was stated, that the change in policies and correctional procedures is necessary issue and it is essential that by developing and promoting the level of these advanced measures. The non-suppressive withdrawing strategy may regain its position in an outstanding form in the criminal law system and in this manner, the deficiency of the penal policy of Iran to be removed.

These measures can be such as: the institution of controlling suspension, multi-stage imprisonment, quasi-imprisonment, imprisonment at home or at the end of every week, doing public utility service, using electronic monitoring instruments or releasing with the promise of dignity for accepting responsibility by the offender and prevention of repetition of crime by giving opportunity to the victims of offense to present views. Before the issuance of punishment decree the victim should have an effective interference in the process of investigation to improve the process of determining the punishment, observing the basic principles of fair judgment and maintaining the defensive rights of the accused person in accordance with jurisprudential regulations and international documents and also reviewing other grounds of using the mechanisms of decriminalization, de-penalization and diversion and for the purpose of making these mechanisms effective,

Thus it can be said that in the criminal law of Iran, exceptions in criminal obligations have given rise to decriminalization. These cases are:

Childhood, insanity , compulsion or abhorrence, practicing the order of the law commander if it is not in contradiction with the Islamic law, doing the action to implement a more important law, measures taken by parents or legal guardians and guardians of underage and incapacitated individuals in order to correct and protect, doing surgery operation or lawful medical operation, with the individual's consent or guardians and or superintendents or their legal representatives and by observing technical, scientific regulations and governmental systems, incidents resulting from sport operations provided that they do not violate the respective rules and lack of contradiction of these rules with the religious regulations, defending the self, reputation, honor or one's assets and that of the other and or freedom of one's body assembly of the related conditions.¹⁹⁸

- **Diversion mechanism:**

The formation of the Organization for Governmental Discretionary Punishments is an incomplete example of "legislative diversion" in Iran. However, the competency to investigate some of the prohibited behaviors has been shifted to the system of administrative law and simalteniously many specific punishments of penal system (such as imprisonment) have also been maintained. The result of this measure has caused the mixture of the system of penal justice and administrative laws in governmental discretionary organization.¹⁹⁹

This issue, [in addition to repugnancy with the Principles Thirty Sixth, Thirty Seventh and One Hundred and Fifty Ninth of the Constitution; with regard to the type of the structure of the governmental discretionary organization and the method of investigation on claims in it, in which the guarantees related to the rights of convicted person and culprit are not seen], seems to be very much dangerous for the rights and freedoms of the citizens.²⁰⁰

Thus the revision and correction of the canons and regulations is a necessity.

The omission of the punishment, such as imprisonment from the realm of competency of investigation in order to and limit of the penal justice system and providing the victim of offense more effective interference in the process of investigation, maintaining defensive rights of accused person.

- **Necessity of decriminalization:**

The adoption of radical suppressive penal policies and the expansion of the arms of criminal law through the mechanism of criminalization creates other problems. The manifestations of indifference, lack of obeying of some rules, imposing of personal settlements, secondary deviation and repetition of crime may result from the increasing interference of the system of penal justice and consequently disorder and expansion of chaos in the society may result.

Mixing the border between sin and crime and also unlawful criminalization, whereas in everyplace, the religious unlawful act is not considered a crime and even in some cases, considering the religious

disapproved act as a crime²⁰¹ Lack of border line between the legal criminalization and religious unlawful consideration have made the mechanisms of legalizing ethics and beautifying the virtue, which encompasses all great and minor sins lose its efficiency. The philosophy of punishment, more than having the correction of the convicted individual and serving as a good example and usefulness for the society, has built grounds for the creation of crime and has brought about reverse results.

Undue extension of penal policy has created crises and problems in the Judicial Branch and consequently has lowered the quality of investigations, and also the reverse effects of the imprisonment punishment which on one hand has converted the righteous people into unrighteous people in many cases and on the other hand it has brought the corruptions resulting from the unsupervised condition of families of the inmates.²⁰² These unfavourable effects overshadow the public security and order of the society.

Amid these, the long term imprisonments not only unconsciously direct the judges of interrogation and interrogators to issue the arrest warrant, it has also compelled the legislator that in a broad spectrum of crimes to tend towards the obligatory temporary detention whereas ,this action is in opposition with the jurisprudential regulations and in contradiction with the international documents provide for just and fair investigations and also despite the prevailing procedure in other countries,²⁰³ These factors have made the conditions become more complex.

Some old rules and also the bulky volume of the set of Criminal Codes bring about spending much time of the judge to find the respective law

if existed at all. Also, some other cases the accumulation of the volume of the criminal codes due to criminalization of each offense by the governmental organizations within the framework of imprisonment punishment which are enforced in order to intimidate the violator. There is a scope using the experiences of others like the advanced industrial countries, developing countries and or some African countries who are using alternative measures. The lack of detachment between de-normative with crime in the society about some criminal titles that gave rise to this questions that basically why crime? Why punishment? And then why detention? Isn't it possible to put other measures in place for penalty in case the criminality of a title is confirmed? ²⁰⁴

All these, are parts of the most important factors which have made the punishments lose their preventive and deterring effects and cause the degradation of the system of penal justice.

Thus, it seems that compiled the penal rules, without a systematic and governmental look, has classified punishments and has put violations and rebellion in the spectrum of penal punishments and submitted to the government. The government has also had a supportive attitude towards these regulations and has submitted it to the Parliament accordingly. The parliament also without having a comprehensive and systematic view and it is likely with the instruments outside the expertise reviews has approved those regulations. ²⁰⁵

As it is understood from the above mentioned materials, all these penal policies which are observed in the Constitution and regular canons need the necessity of developing an integrated criminal policy and also revision and filtration of punishments with an inclination towards

withdrawing (back warding) strategies by employing mechanisms of decriminalization, de-penalization and diversion along with the advanced tradition of criminalization. A group of criminologists today and they recommend that in order to confront with the extensive penal provisions and prevention of secondary deviation and to reduce crimes, the enforcement of "minimum of decriminalization", i.e de-penalization, and diversion in the fields of economic, social or traffic,...crimes should take place.²⁰⁶

If in criminalization, which is considered as the position of defending the interests of society, radicalism prevails, then it will cause chaos and disorder in the society and endanger its survival and continued existence.

The lack of paying attention to the enforcement of other instruments of criminal policy, by achieving their effectiveness in accordance with the rule "whatever is commanded by the reason is commanded by the religious law" [ما حكم به العقل حكم به الشرع] is not repugnant with religion?

• **Results and suggested solutions:**

From the conducted reviews and analyses by the Committee on Reviewing Decriminalization in the Judicial Branch, I.R. of Iran, the following results and solutions can be obtained:

1. The objectives of the criminal law of the Islamic Republic of Iran include:
 - A) to maintain interests and Islamic regulations
 - B) to maintain social order

- C) to implement penal justice
 - D) to correct and train culprits
2. The objectives of penalty also include; to protect:
- A) self
 - B) religion
 - C) chastity
 - D) reason
 - E) asset
3. The rules and regulations which are legislated in the criminal system of the society aiming at creation of order depends on the type of understanding of the public conscience of the society, beliefs, ethics and change of events , necessities and ruling conditions on them. So in each society the concept of public order is different.
4. In addition to the prescribed punishments, retaliation, blood moneys and religious discretionary punishments which are based on book, tradition and creditable Islamic resources, some other regulations in the criminal law of Iran like other customary laws systems have been legislated which are subject to punishment.
5. The legislated criminal regulations in the course of the last century have been in accordance with prevailing the conditions, necessities of time and the needs of the society. But if a behavior loses its importance of criminal description due to the passage of time and change in the conditions and necessities, then these criminal titles

should be identified and should be either removed from the realm of the penal law or should be treated to the petty offense grade.

6. Investigation, trial and conviction is done by following a procedure and principles of natural justice. It requires a sufficient amount time an extensive number of crimes would certainly require multiplied amount of time and results in prolongation of the whole process and due to huge number of cases the judicial branch appears to have been paralyzed. Taken together it present an image of "crime-rising society" of an Islamic society.
7. Criminalization of certain acts and behaviour which are committed by individuals intentionally and unintentionally are of a grade not greater than the level of petty offenses. Due to the adaption of suppressive penal policy, committing crime becomes regular and even the important crimes are not dealt effectively. Thus, the objective of the punishment is annihilated and criminalization, by itself cause disturbance in the social order.
8. Therefore, due to ever-increasing scope of penal code and enforcement of policies of prevention of crime, the necessity of change of the criminal policy of Iran with the attitude to "two-way criminal policy" should be conducted, a necessity which due to the diversity of social changes and alterations of the conditions encompasses both domains of "criminalization" and "decriminalization".
9. Many ministries and governmental organizations resort to criminalization for the purpose of implementation of codes of the respective organizations and finally have it approved by the

legislator even in very insignificant crimes. The judicial organization is confronting with already conducted action and those rules have obliged it to investigate and enforce punishments.

10. In order to legislate the essential criminal regulations of ministries and organizations, initially, the suggestions should be presented to the Judicial Branch and after their adaptation with the criminal policies and coordination with other penal regulations to be submitted to the Parliament as the supplement of the criminal laws by the Judicial Branch.²⁰⁷
11. Investigation on crimes in the realm of the governmental discretionary punishments is not necessarily limited to the domain of Judicial Branch, but it can be shifted to the administrative Branch after obtaining the permission from Supreme Ruler of Islamic Government and qualified jurists.²⁰⁸

Some regulations, deal with the offenses of guilds, employees, workers and members of different centers. This method can also be extended to other similar cases.

References

1. The Qu-ran of Mohammad (p.b.u.h.), Surah Anam, Verse 57.
2. The Qur-an of Mohammad (p.b.u.h.), Surah Ale Emran, Verse 18.
3. The Qur-an of Mohammad (p.b.u.h.), Surah Hadid, Verse 25.
4. The Qur-an of Mohammad (p.b.u.h.), Surah Ensheghagh, Verse 6.
5. Motahhari, Mortaza, Divine Justice, p.238.
6. Odeh, Abdolghader, Criminal Law of Islam, Vol.1, p.40.
7. See: Helli, Jamal addin, Commentary on Tajrid.
8. The Qur-an of Mohammad (p.b.u.h.), Surah Haj, Verse 39.
9. Madkoo, Mohammad Salam, مباحث الحكم عند الاصوليين, p.140.
10. Davalibi, Mohammad Maarooof, المدخل الى علم الاصول الفقه, p.438.
11. The Qur-an of Mohammad (p.b.u.h.), Surah Ale Emran, Verse 19.
12. The Qur-an of Mohammd (p.b.u.h.), Surah Maedah, Verse 47.
13. The Qur-an of Mohammad (p.b.u.h.), Surah Maedah, Verse 48.
14. The Qur-an of Mohammad (p.b.u.h.), Surah Maedah, Verse 49.
15. Tabatabaee, Mohammad Hossein, Almizan fi Al Tafsir Al Qur-an, Volume 1, p.235.
16. The Qur-an of Mohammad (p.b.u.h.), Surah Baqarah, Verse 190 and Surah Haj, Verses 39, 78.
17. The Qur-an of Mohammad,(p.b.u.h.) Surah Al-hejr, Verse 94.
18. The Qur-an of Mohammad (p.b.u.h.) Surah Noor, Verse 2 and Surah Nesa, Verse 15 and Surah Esra, Verse 32.
19. The Qur-an of Mohammad, (p.b.u.h.), Surah Nahl, Verse 67.

20. The Qur-an of Mohammad (p.b.u.h.), Surah Maedah, Verses 45, 32 and Surah Esra, Verse 33.
21. The Qur-an of Mohammad (p.b.u.h.), Surah Maedah, Verse 38.
22. The Qur-an of Mohammad (p.b.u.h.), Surah Maedah, Verses 33,34.
23. Uдах, Abdolghader, op.cit. p.153.
24. Ibid, Quoted from the Usul al Fiqh, Abd Alvahed Khelaf, p.74 and also for further information, See: Jafari Langroudi, Mohammad Jafar, Legal Schools of Islam.
25. Ibid, The jurisprudents of Shia Imamiyah believe that the legislated commandment is a non-obligatory dutiful commandment and they do not allocate that to a specific case.
26. Dehghan, Hamid, The impact of time and place on criminal law of Islam, p.111.
27. Ibid, p.112.
28. Ibid, p.106.
29. Mohaghegh Damad, Mostafa, Analysis and Review of Hoarding From the Viewpoint of the Jurisprudence of Islam.
30. Dehghan, Hamid, op.cit. p.104.
31. Ibid, p.109.
32. Ibid, p.110.
33. Ibn Sina, (Avicenna), Sheikh al Reais, Abdollah, Alshafa al Elahiyat, Volume 1, p.254,
34. Almakarem, Al Shirazi, Naser, Anvar Al Feqahah, Volume 1, p.501 and Alsafi, Algolpayegani, Lotf-Alah, Alahkam al Shareiyah Sabetahoo la Tataqayyar, p.20.
35. Dehghan, Hamid, op.cit. p.154.
36. Alfeiz al Kashani, Mohammad Mohsen, Al Usul al Asliyah, p.84.

37. Maraashi, Mohammad Hassan, A New Attitude towards the Criminal Canon of Islam.
38. Sadr, Mohammad Bagher, Our Economy, pp.343, 348.
39. Dehghan, Hamid, op.cit. p.153 onwards.
40. Tabatabaee, Mohammad Hossein, op.cit. Volume 2, p. 43.
41. Moosavi Imam Khomeini, Rooh-Allah, Guardianship of a competent jurist over the people [ولایت فقیه], p.129.
42. Alhashemi Alshahroodi, Mahmood, Bohoos fi Elm al Usul, Volume 4, p.246.
43. The Qur-an of Mohammad, Surah Maedah, Verse 38.
44. Alnamr, Abdolmonem, Alijtehad, p.10.
45. See: Qazali, Abouhamed, Mohammad ibn Mohammad, Al-mostasfa Men Elm Al-Usul, [المستصفی من علم الاصول].
46. The Shia Imamiyah considers at least three other crimes as part of the crimes with prescribed punishment, i.e sodomy, lesbianism and panderism too. Some other also have added the crimes with prescribed punishment as insulting the prophet, magic, claiming prophecy and apostasy to them and have enumerated up to 18 cases. For further information See: Khoiyi, Abolghasem, Foundations of Takmelah al Menhaj, [تكملة المنهاج], Volume 1, p.166. In addition, Abdolrahman Aljaziri in the book, "Alfiqh Ala Almazaheb al Arabaa" [الفقه على المذاهب الاربعه] expresses the views of other Sunni jurisprudents as follow:
 - A) Hanafi jurisprudents consider five cases as subject to prescribed punishment (adultery, stealing, wine drinking, gambling and accusation of unlawful intercourse)
 - B) Shafei jurisprudents consider seven cases as subject to prescribed punishment (wounds such as retaliation of self and members of body and its blood moneys, revolt, apostasy, adultery, accusation of unlawful intercourse, stealing and unlawful drinking)

- C) Maleki jurists also consider the cases subject to prescribed punishment in eight subjects (revolt, adultery, stealing, apostasy, accusation of unlawful intercourse, resorting to arms in order to frighten people and wine drinking)
47. The creation of the principle of legality of crime and punishment which is of the basic principles in Shariah and Islamic criminal law has a record since the revelation of Qur-an in the Islamic religion which indicate the existence of progressive and advanced codes of the criminal law of Islam. This principle has had impacts on all crimes including prescribed punishments, blood moneys, retaliations and discretionary punishment and should be enforced in all crimes. But their implementation is not the same and is different in terms of type of crimes. In Shariah, the determined punishments in the realm of prescribed punishment and retaliation negates any kind of freedom in the selection of type and rate of punishment from the ruler. His duty, in the case of provability of the crime, without giving attention to the conditions of crime and criminal is merely to enforce the punishment. But, the Shariah, in the discretionary crimes has not enforced it as it has exerted in the crimes of prescribed punishment, retaliation and blood moneys and it has not restricted and bound it and it has expanded its implementation in these (discretionary crimes), because the nature of discretionary and public interest is expansion-seeking one and since the judge has option on executing the punishment or intensification or discounting or suspending it, so this expansion has taken place on the basis of punishments and in the few cases in which the crime has not been determined fully in the exact wording, but it has been mentioned in general form, this expansion has been taken place on the basis of crime. The customary laws, since the end of 18 century and after the Great Revolution of France, learned the importance of this principle and for the first time, Baccaria, in 1764 published and defended it in the famous treatise of crimes and punishments and then, in 1789, it was included in World Declaration of Human Rights and it was transferred from the French Law into other laws. Therefore, the customary laws have not presented any new things and gifts in relation with this principle and only have practiced the innovations

made by the Islamic religions. For further information, See: Udah, Abdolghader, Criminal Law of Islam, Vol.1, p.159 onwards.

48. Qiyasi, Jalal Addin et al, Islam and Positive Law, Vol.1, p.123.
49. In the definition of the customary criminal law, different definitions have also been presented including criminal or penal law which includes a set of rules which prevails the reaction of government against the anti-social actions that through threat to punishment or its enforcement or security or training or correcting measures of the mentioned counter-social deeds to establish prevention and relative justice, order and security. For further information, See: Bouza Pier and Penatel, John, Criminal Law and Criminology, Vol.1, p.1, Merel and Vito, Treatise of Criminal Law, p.93, No.85 and Katouzian Naser, Generalities of Law, p 277.
50. Goldooziyan, Iraj, The Essentials of General Criminal Law, p.12.
51. Almavardi, Al-Ahkam al-Soltaniyah, p.192 [الاحكام السلطانيه]. According to Shia Imamiyah jurists, [محظور] prohibited means the practice of an unlawful act and forbearance from an obligation is not unlawful, because , obligatory is something which the holy legislator has commanded its practice for a necessary interest of the society and unlawful has been prohibited by the holy legislator because of its intensive corruptions and abandoning an obligator act does not necessarily bring about corruption, so that a broader concept should be considered for the crime and that is the term sin, because crime is a sin and doing an unlawful act is also sin , so that abandoning an obligation is also a religious sin.
52. Gorji, Abolghasem, Scientific Report of the Conference on Implementation of Law of Islamic Penalty and its Impact on the Fighting against the Crimes, p.126.
53. Udah, Abdolghader, Quoted from Al-Ahkam Al-Ammah Fi Al-Qanoon Al-Jenayee, Ali Bak Badavi, vol.1, p.39.
54. For further information, see: Udah, Abdolqader, op.cit. p.104 onwards.
55. Goldooziyan, Iraj, op.cit. p.15.
56. Pad, Ibrahim, Special Penal Law, vol.1, p.20.

57. Rahami, Mohsen, Customization of Punishments in the Penal System of I.R. of Iran, pp.26, 27.
58. Ibid, p.27.
59. Udah, Abdolqader, Quoted from Badaye Al Sanaye Fi Tartib Al Sharaye, Vol.7, and Ala-ad-Din Kaasani, First edition, Jamaliyeh Printing House, p.63.
60. Qiyasi, Jalal-al-Din et al, op.cit. pp.123, 125.
61. Udeh, Abdolqader, op.cit. p.171.
62. Those crimes and sins come under the realm of God's right whose punishments have been determined as discretionary or prescribed punishments and by repentance, if done before the provability of crime, its punishment and penalty is negated and forgiveness on the side of individual or the people will not acquit the criminal and these kinds of punishments have been legislated in order to maintain the interests of the society and to support it either crime is done against an individual or a group or against order and social security.
63. Prescribed punishment, In its legislative concept means prohibiting, so that the gatekeeper is also called [حداد] because it deters the arrival of people. In the science of logic, a definition which encompasses the comprehensive of individuals and deters strangers is called [حد], because it contains all meanings of the word and object and deters of arrival and other things in that word and object. The religious punishment and penalty is also called [حد], because it is an instrument to deter people of doing crimes and sins which people abandon that action due to fear of punishment.

جواهر الكلام فى شرح [حداد], Vol.2, p.432, (مسالك الافهام الى تنقيح شرايع الاسلام)
المبسوط, Vol.9, p.36, [شرايع الاسلام], Vol.41, p.254.
64. Udah, Abd-Alqader, op.cit. pp.106, 132, 134.
65. Esrafilian, Rahim, Forgivable Crimes, p.170 onwards.
66. Aljaziri, Abdolrahman "Alfiqh Ala Almazaheb Alarbaa-Aljoze al-Khames" p.191, [الفقه على المذاهب الاربعه – الجزء الخامس] This theory

has been attributed to Hanafiyeh, Shafeiyeh and some of the Hanabelah.

67. Ibid, p.191, This theory has been attributed to Malekiyeh and another group of Hanabelah.
68. Alhelli, Abolghasem, Sharaye al-Islam, Aljoz al-Rabe p.178 [شرايع الجزء الرابع [الاسلام، الجزء الرابع] and Alnajafi, Mohammad Hassan, Javaher al Kalam, p.550.
69. Alqamedi, Abdollah Atiyeh, Asbab Soqoot al Oqoobah, p.122 onwards.
70. Uдах, Abdolqader, Altashri al Jenayee Al Eslami, Aljoz al Sani, p.484 onwards.
[التشريع الجنائي الاسلامي ، الجزء الثاني]. This theory has been attributed to the most jurisprudents of Hanafi and two words of Imam Malik and also the word of Imam Ahmad.
71. Alqamedi, Abdollah Atiyeh, op.cit. p.126.
72. Esrafilian, Rahim, Narrated from Ministry of Pious Endowment and Islamic Dignities of Kuwait, Second Edition, 1990, 1986.
[وزاره الاوقاف و الشؤون الاسلاميه الموسوعه الفقيهيه ، الطبعة الثانيه] This theory has been attributed to Imam Malik.
73. Esrafilian, Rahim, op.cit. p.179.
74. Ibid, p.178.
75. Uдах, Abdolqader, Criminal Law of Islam, Vol. 1, p.171.
76. Concerning the false accusation of unlawful intercourse at wife by her husband, some jurisprudents of Shiah Imamiyah believe that wife has no right to forgive.
77. Those crimes and sins are in the realm of right of people in which the repentance of the criminal for the committed crime is not acceptable and the satisfaction of God from offender is merely possible via forgiveness of the holder of right from his/her own right. For further information, See: Uдах, Abdolqader, op.cit. p.125.

78. Criminal indemnity for defect or indemnity of the government is part of the self blood money which is obligatory for the criminal to pay against the murder of a free human in accordance with what is determined by the government. (Quotation from Mohammad Hassan Najafi, Javaher al Kalam, Vol.42, p.2)
79. Though, blood money is considered as punishment, but in fact it is the compensation and damage which in harmony with the inflicted bodily damage is paid to the victim of offense or his successor by the criminal or the third persons such the wise man and male relatives of blood kinship in terms of classes of heritage and or the ruler of the public treasury of the Muslims. Whereas, the recent individuals basically have no interference and responsibility in committing the crime and thus, the principle of "personalization of punishment" in some cases on the case of "blood money punishment" is not observed.
80. Uдах, Abdolghader, op.cit. p.134. It is added that the Shiah jurisprudents consider the discretion of interest by the ruler of the Muslim as the condition and standard for the execution of discretionary punishment.
81. Esrafilian, Rahim, op.cit. p.200.
82. Alzoheili, Vahabah, Alfeqh al Eslami va Adelatahoo, part 6, pp.291-292 [الفقه الاسلامى و ادلته]
83. Uдах, Abdolghader, Altashri Al Jenayee Al Eslami, Aljoz Al Sani, pp.183, 184 [التشريع الجنائى الاسلامى - لجزء الثانى]
84. Alzohayli, Vahabah, op.cit. pp.312, 313.
85. Esrafilian, Rahim, op.cit. p.198.
86. Sahah al-Loqah, Vol.2, p.744.
87. Nehayah, Ibn Asir, Vol.3, p.228.
88. Lesan al-Arab, Vol.4, p.561.
89. Raqeb Isfahani, Hossein ibn Mohammad, Almofradat, p.345.
90. Lesan al-Arab, Vol.4, p.562.

91. Almaghribi, op.cit. p.236 and Qazi, Aboo Ali Mohammad ibn Alhosein Alfarra, Ahkam Alsultaniyah, p.279.
92. Ibn Qodamah, Abou Mohammad Abdollah, Almoqni, Vol.10, p.347.
93. The Sunni Jurisprudents, in Taazir, have not considered bodily punishment limited to the quantity of perscribed punishment and even in Tazir, they consider killing the criminal as lawful. For further information, See: Alzohayli, Vahabah, Alfiqh al Islami va Adelatohoo, Vol.4, p.287. Some of the Shiah jurisprudents believe that in Taazir, the quantity of bodily punishment is lees than the perscribed punishment. For further information, See: Saafi Golpayegani, Lotfollah, Altazir, Anvaohoo va Molhaqateh, p.33.
94. Aljaziri, Abdolrahaman, op.cit. p.400.
95. Sin: Doing or abandoning affairs which have been made unlawful or obligatory by the Shariah.
96. Uadah, Abdolqader, Criminal law of Islam, Vol.1, p.172.
97. Ibid, p.171.
98. Ibid, p.175.
99. The principle of Taazir (تعزير) in these acts which includes the prohibited acts and abandoning the obligations is agreed collectively by all jurisprudents. But concerning the permission of practicing discretionary punishment towards doing the disapproved or abandoning the recommended ones, there is different opinion. Some believe that doing disapproved acts or abandoning recommended acts is subject to punishment. Some believe that it is in lack of punishment. Some of those who consider the permission for punishment refer to the act of the second Caliph, (رضى الله عنه) who was passing by a slaughter. He had laid down a sheep for slaughtering and was sharpening his knife. Omar (رضى الله عنه) whipped him (lashed him) and said: Why didn't sharpen your knife earlier? (Abdolqader Uadah, quoted from Mavaheb al Jalil, Volume 6, p.320)

100. Ibn Qayem Aljoziyah, Abi Abullah Mohammad ibn Abi Bakr, *Aalam al Movaqaiin* [اعلام الموقعين], Vol.2, p.221 and Ibn Roshd , *Almoqademat* [المقدمات], Vol.2, p.251.
101. Concerning the legitimacy of discretionary punishment for the public interests, some jurists refer to the act of the Second Caliph (رضى الله عنه) who was strolling in Madinah and heard the voice of a woman who was saying "Is there any wine to drink and have access to Nasr ibn Hajaj". When Omar heard this voice, asked to bring Nasr ibn Hajaj to him. He found him a handsome man. So he had him cut his hair, but he become more handsome. In order to prevent the deception of Madinah women, he exiled him into Basrah. Despite the fact that he had not committed any unlawful act, but his exile punishment was a discretionary punishment in favor of the interests of the society. (Abdolqader Uдах, *Criminal Law of Islam*, Vol.1, p.198)
102. Sadr, Mohammad Baqer, *op.cit.* p.344 and also Alshaarani Alshafei, Abdolvahab, *Almizan*, Vol.1, p.75.
103. Uдах, Abdolqader, *op.cit.* p.177.
104. It is a kind of bodily or financial punishment in the jurisprudence which is enforced on criminal. Abdolghader Uдах, in the book "Criminal Law of Islam" considers the prescribed penance for the affairs which is not sin as pure prayers for example feeding the responsible person who has an acceptable excuse and can not fast and for what is sin, it has considered it as pure punishment such as penance in the unintentional murder which is in fact a kind of criminal punishment. For further information, See: Ibn Qayem Aljoziyah, *Aalam al Movaqein*, Vol.2, p.221 and Ibn Roshd, *Almoqademat*, Vol.2, p.251.
105. Alqamedi, Abdollah Atiyeh, *op.cit.* p.145 onwards.
106. Alamer, Abolaziz, *Altaazir Fi Al-shriah al-Islamiyah*, p.432 onwards.
107. Esrafilian, Rahim, *op.cit.* p.105.
108. Uдах, Abd al-Ghader, *Criminal Law of Islam*, Vol.1, p.171 and *Al-Tashrie Al-Jenayee Al-Islami*, Al-Joze Al-Sani, p.776.

109. For further information. See: Moosavi Imam Khomeini, Rooholah, Tahrir Alvasilah, Vol.2, p.125 and Udah, Abdolghader, Criminal Law of Islam, Vol.1, p.174 and Aljaziri, Abdolrahaman, op.cit. Vol.1, pp.455-466, Vol.3, p.387.
110. Today, the difference between the misdemeanor crimes and criminal crimes has been abolished in the criminal law of England and the concepts of crimes which are apprehensionable whose punishments have been determined by the law and the non-apprehensionable crimes have been replaced with them. These crimes might take place without the detention writ of the convicted person.(See: Public Criminal Law, Part One, Classification of Crimes)
111. Sanei, Parviz, Public Criminal Law, Vol.1, p.338, and Vol.2, p.223.
112. Ibid, Vol.2, p.214.
113. Rahami, Hassan, op.cit. pp.24, 25.
114. Here, by decriminalization, it means decriminalization in its general sense (to eradicate the criminal title and to reduce or negate the punishment)
115. <http://www.ncjrs.org/txfiles/crimdom.txt>
116. Mehra, Nasrin, An Introduction on Decriminalization, De-penalization, Diversion, p.208 and See: <http://www.druglibrary.org/schaffer/misc/nz-can.htm>. p.6.
117. Najafi Abrandabadi, Ali Hossein, Hashem Beigi, Hamid, op.cit. p.141.
118. In the Islamic jurisprudence, the institutions of "repentance" and "forgiveness by the victim of offence or his/her successor", with some conditions are effective on negation of prescribed punishment and on the other hand, the rule of "Dare" [درا] and factors "which meet the criminal liabilities" also with some conditions cause shortage or negation of punishment. For further information in this case, See; Davalibi, Mohammad Maroof, Almadkhal Ela Elm al Usul Alfihq, pp.416, 419, 420 and 421. Abou Zohreh, Mohammad, Aljarimah val Uqoobah, pp.416, 419, 451, 504, Udah, Abdolqader,

Altashri Aljenayee Al Eslami, Vol.2 , pp.431, 433, 565, 566 and pp.582, 583, 590 and Yazdi, Mohammad Kazem, Hashiyeh Makaseb, pp.110, 115, 116 , Mousavi Imam Khomeini, Roh Allah, Tahrir al Vasilah, Vol.2, pp.13, 14, 455, 478, 479, 514, 523, 552, 554, 561, Moosavi Khomeini, Rooh Allah, Albeya, Vol.2, pp.56, 57, 62, 66. It must be said that the rule of "درء" on the basis of the famous phrase of "IN DUBIO PRO REO" in Latin has been accepted in most of the countries in the world. The High Court of France has considered the broad interpretations of many of its legal articles through analogy as discarded one. Because, it is in conflict with the philosophy of deter from the spread of crime to another act on the basis of the principle of restricted interpretation. so that, if someone, after spending a meal in a restaurant expresses his/her incapability to pay the cost or refuse to do it, can he/she be considered through analogy subject to to the Article 379 of the Criminal Canon of France on stealing? {i.e. the fraudulence stealing of the other's asset (La Soustraction Frauduleuse De La Chose D'autrui)} (Narrated from Public Criminal Law, Vol.1, Mohammad Esmaeel Afrasiyab)

119. The Qur-an of Mohammad, (p.b.u.h.), Surat Nesa, Verse 15.
120. The Qur-an of Mohammad (p.b.u.h.), Surat Noor, Verse 2.
121. Whenever between two subjects, the decree on one subject is determined and that of the other is not determined, because of the commonality of the cause of decree between these two subjects, analogy occurs. In other words, the same cause which causes the decree on the determined subject, the same reason also cause the decree of the undetermined subject.
122. The rational independences are commandments which reason commands without the interference of religious law such as justice, benefaction.
123. Rational obligations[Rational Obligatory Pre-Requisites] or Rational Non-Independences are cases that reason commands on them after receiving the commandment of religious law and with this discovery, partly it causes the necessity of the preliminaries of an obligatory issue for which the holy legislator has issued a decree. Because, the holy legislator does not have a direct narration towards introduction, Such as the obligation of prayers for a

responsible person which demands the necessity of its preliminary (i.e. ablution) or the necessity of Haj rites for a responsible person which demands the necessities of its preliminaries (i.e. paving the way and distance).

124. Jurist preference means to infer and extract the decree of the issue if it does not exist, or is precise or there is a legal ambiguity in the texts by resorting to the idea and rationality of judge or jurisprudent which are parts of the sources of Hanafi and Maleki.
125. Consideration of Public Interests means something which is in favor of the public interest, but the sacred legislator has been silent towards and has not given notice to its observance provably or in disproving from such as coinage of coin, (minting), imprisonment and other. Consideration of public interests includes three conditions: adaptability with the objectives of holy legislator, rationality and eradication of injuries and difficulties which from the religious point of view are necessary to remove them.
126. For further information, See: Uda, Abdolghader, *op.cit*, p.212.
127. Ibn Qayem Aljoziyah, Mohammad Abi Bakr, *Altoroq al Hokmiyah fel Siyasah al Shareeyah*, p.68.
128. Ibn Qodamah, Abou Mohammad Abdollah, *op.cit*. Vol.12, p.329.
129. Horre Ameli, Mohammad Ibn Hassan, *Vasael Alshiah*, pp.332, 329.
130. Albeihaghi, Ahmad ibn Hossein, *Sonan-e Beyhaghi*, p.104.
131. Alrazi, Alfakhr, *Altafsir Alkabir*, Vol.20, p.203.
132. Canon of Blood Moneys and the Necessities of Time, Center for Strategic Studies, Presidential Office, p.71.
133. Dehghan, Hamid, *op.cit*. p.29.
134. Ibn Hosham, *Conduct of the Prophet of Allah*, Vol.2, p.778.
135. Alnajafi, Mohammad Hassan, *op.cit*. Vol.21, p.77.
136. Ibn Qayem Aljoziyah, Mohammad Ibn Abi Bakr, *Aalam al Movaqein*, Vol.3, p.19.

137. Albeihaqi, Ahmad ibn Hossein, op.cit., Vol.9, p.221.
138. Ibid, p.83.
139. Alvaqedi, Mohammad ibn Arabi, op.cit. Vol.2, p.973.
140. Horre Ameli, Mohammab ibn Hassan, op.cit. Vol.9, p.100.
141. Moqniyah, Mohammad Javad, Alfeq Al-mazaheb Al-Khamsah, p.133.
142. Ibn Asir Alsheibani, Ali Ibn Mohammad, Al-kamel fi Al-tarikh, Vol.2, pp.358, 359.
143. Alseyooti, Jalaludin Abdolrahaman Ibn Aboubakar, Tarikh Al-Kholafa, p.141.
144. Ibn Qayyem Aljoziyah, op.cit. p.17.
145. Alnamr, Abdolmonem, op.cit. p.90.
146. Moosavi Sharaf Aldin, Abd-al Hossein, Al-nass val Ijtehad, p.257.
147. Ibn Qayem Aljooziyah, op.cit. p.22.
148. Ibn Qayem Al-joziyah, Al-toroq Al-hokmiyah Fi Al-siyasah Al-Shareeiyah, p.64.
149. Ibn Qodamah, Abdollah ibn Ahmad, op.cit. Vol.12, p.329.
150. Toosi, Mohammad Ibn Hassan, Estebsar, Vol.4, p.212.
151. Belazari, Ahmad ibn Yahya, Ansab Al-Ashraaf, Vol.2, p.374.
152. Horre Ameli, Mohammad Ibn Hassan, op.cit. Vol.18, p.378.
153. Ibid, p.318.
154. Altoosi, Mohammad Ibn Al-hasan, Tahzib, Vol.10, p.154.
155. Shahabi, Mahmood, Advar Fiqh, [Periods of Jurisprudence], Vol.1, pp. 252, 253.
156. Horre Ameli, Mohammab ibn Hassan, op.cit. Vol.18, p.338.

157. Ibid, pp.415, 416.

158. Ibid, p.148.

159. Udah, Abdolqadr, ibid, p. 286

160. Dare rule is consensus of the Islamic jurisprudents , but the Zaherieh jurisprudents believe that aversion of prescribed punishment by using doubts is not permissible.

161. رفع القلم عن ثلاث : عن الصبى حتى يحتلم و عن النائم حتى يستيقظ و عن المجنون حتى يفيق

And also , in addition to this tradition , another tradition has been narrated by Sunni and Shiah jurisprudents from the holy prophet (p.b.u.h.) which reads,”

رفع عن امتى تسعه اشياء ، الخطا و النسيان و ما استكرهوا عليه و مالا يعلمون و مالا يطيقون و ما اضطروا ماليه والطيره و التفكير فى الوسوسه فى الخلق مالم ينطق الانسان بشفته .

For further information , see: Feyz, Alireza, ibid, pp. 97 and 218

162. The Qu-ran of Mohammad (p.b.u.h.), Surat Baqareh, Verse 85.

163. Such as eating the meat of corpses or blood or pig meat and interest-based sales.

164. Such as the crimes of usury, gambling and betting.

165. Such as legitimizing and legalizing adultery through formation of brothel or wine producing, sale and presenting it.

166. The Qur-an of Mohammad, (p.b.u.h.), Surat Raad, Verse 11.

167. The Qur-an of Mohammad (p.b.u.h.), Surat Maedah, Verses 15, 16.

168. See: Ashoori, Mohammad, Criminal Procedures, Vol.1.

169. Rahami, Mohsen, op.cit. p.22.

170. The Canon of Public Punishment included 288 Articles which from Article 1 to Article 169 of it was approved on 13 Jan.1926 and from Article 170 to 280 was approved on 27 Jan. 1926 and from Article

281 to Article 288 was approved in July 1931 and included four chapters on criminal law: misdemeanor and felony harmful to public interests, misdemeanor and felony towards individuals and also offenses affairs and their punishments.

171. The first Children Court was formed in Tehran after seven years from the approval of the law on 17 November, 1966.

172. Taken from Noorbaha, Reza, *A Law in Solitude*, p.23.

173. Sheikh Aleslami, Abbas, *The Position of the Criminological Findings in Changes of Penal Legislative System of Iran*, p.484.

174. *The First Principle of the Constitution of I.R. of Iran*.

175. See: *Introduction on the Constitution of I.R. of Iran, Discussion on Islamic Government*.

176. According to the Principles 91, 92 of the Constitution of I.R. of Iran, the Council of Guardian is a council comprises of 12 people. Six members are just jurisprudents who are aware of the necessities of the time and day's issues and their selection is done by the Supreme Leader and six jurists in different legal fields which are selected by the Head of Judicial Branch and with the approval of the Islamic Consultative Parliament for six years to guard the commandments of Islam and the Constitution from the viewpoint of lack of inconsistency of the approvals of the Parliament with the Islamic commandments.

177. Principle 57: Divisions of Branches, Principle 62: Formation of the Islamic Consultative Parliament, Principle 91: Formation of the Council of Guardian of the Constitutions, Principle 101: Formation of the Supreme Council of Provinces, (In order to prevent of discrimination and attract the cooperation in compiling development and welfare plans of provinces and to monitor their smooth implementation). Principle 112: Formation of Expediency Assembly, Principle 113: Presidency of the Executive Branch and implementation of the Constitution, Principle 156: Formation of Judicial Branch, Principle 176: Formation of Supreme Council of National Security and Principle 177: Revision in the Constitution.

178. Sheikh Aleslami, Abbas, *op.cit.* p.484.

179. The Qur-an of Mohammad (p.b.u.h.), Surat Maedah, Verses 44, 45, 47.
180. Principle Eighty Fifth reads, The parliament, in the necessary cases can shift the authority of legislation of some of the rules by observing the Principle 72 to its local commissions. In that case, these canons, in a period which is determined by the Parliament, will be implemented in experimental form and their final approval will be by the Parliament.
181. According to this Article, each Iranian or foreigner which outside the realm of sovereignty of Iran commits one of [the following crimes] and to be located in Iran or to be returned to Iran are punished in accordance with the canon of the punishment of Islamic Republic of Iran. [The mentioned crimes are] taking action against the government, security and territorial integrity of the country, forging a command, script, seal and sign of the Supreme Religious Leader or using it, forging the official writing of the president, speaker of parliament, head of judicial branch, council of guardian, head of the assembly of experts, deputies of the president, head of Supreme Court, General Attorney or each of the ministers and using them, forging the currency bank notes or banking documents, documents of treasury, government bonds or guaranteed by the government, simulation and any kind of falsification in the currency coins.
182. Set of Canon of Islamic Punishment, I.R. of Iran, Summer 2002, p. 235, Footnote, No.2.
183. Dehghan, Hamid, *op.cit.* p.7.
184. *Ibid*, p.8.
185. Keshavarz, Bahman, Annotated Set of Canon of Discretionary Punishments approved in 1996, p.3.
186. Canon of Discretionary Punishments, I.R. of Iran, approved in 1996 is an adoption from the Articles of the former past public punishment canon, the amended form of former discretionary canon in addition to articles within the format of miscellaneous canons such as the law of marriage, to cause trouble to women and carrying the knife and cold weapon.

187. Ibid, p.6.
188. Hosseini, Mohammad, *The Relation of the Religious Concept of "Sin" and Legal Concept of "Crime" and...*, p.647.
189. Adoption from Niyazi, Mohammad, *op.cit.* p.57.
190. Report of the Committee on Studying Decriminalization in the Judicial Branch, pp.63, 64.
191. Ibid, p.71.
192. Paragraph 1, Article 11 of the Islamic Punishment Canon reads, "If an action had been considered as a crime in the past and to be considered as a non-crime in accordance with the new Law, in that case, the certain decree will not be enforced and if it is in the process of enforcement, its enforcement will be prohibited and in these two cases and also in the case for which a decree had been enforced in the past, no penal effect will be applied on them and these regulations will not be enforced for the canons which have been legislated for a certain period and specific cases" which based on them, the adoption of withdrawing (back warding) strategy and employing their mechanisms are imagined in some examples. Also Paragraph A, Article 130 (Decriminalization of Criminal Codes), Paragraph B, Article 130 (Subject of Alternatives for Imprisonment Penalty), Paragraph A, Article 132 (Developing the Centers for Corrections and Training), Paragraph B, Article 132 (Supporting the Family of the Inmates), of the Chapter 11th (Developing the Judicial Affairs) , Act of the Fourth Economic, Social and Cultural Development Plan of the Islamic Republic of Iran (2005-2009) which has been published in the Official Newspaper of the I.R. of Iran No.17375 dated on Wednesday 21 October 2004 (pages 1-26) have created good grounds to use and employ the mechanisms of decriminalization, de-penalization and diversion in the criminal policy of Iran.
193. Article 24: Forgiveness or abatement of the punishment of convicted individuals within the limits of the Islamic regulations upon suggestion made by the Head of Judicial Branch is the responsibility of the Supreme Religious Leader.

194. The Part One of Article 22 reads; The court can abate the discretionary or deterrent punishment and or convert it into other types of punishment which are more appropriate for the accused persons in case of achieving the abatement aspects.
195. On 27 March, 2001 , The Head of Judicial Branch of I.R.of Iran, via circular No. 74/80/1 asks all the judges to give attention and practice the Articles 25 to 36 of the Canon of Islamic Punishments in implementing the incidental offenders decrees and those who repeat the crimes- and in the process of judicial procedures, by preparing the conditions to enforce the suspension of the penalty and with regard to inappropriateness of the implementation of the whole or part of the punishment in the discretionary and deterring convictions by using the competencies in the canon in the same conviction decree and for a period which has been permitted by the canon, to suspend the penalty and issue necessary order and make the convicted person aware of the consequences of breaching the suspension decree in this period.
196. Part of Article 25 reads; In all discretionary and deterring convictions, the ruler can suspense the implementation of the whole or part of the punishment from two to five years by observing some conditions.
197. Set of Penal Judicial Procedure, I.R. of Iran, Vol.1, Winter 2002.
198. For further information, please see: Law of Islamic Punishment of the Islamic Republic of Iran, Articles 49 to 62.
199. Zeinali, Amir Hamzeh, Ahmadi, Ali, Organization of Governmental Discretionary Punishments, From Diversion to Depenalization, p.248.
200. Ibid, p.248.
201. Izadpanah, Abdolreza, (Deputy for Social and Information Affairs, Judicial Branch, I.R.of Iran), Decriminalization of Canon (Panel), p.48.
202. Ibid, p.43.
203. Ashoori, Mohammad, Decriminalization of Canon (Panel), p.50.

204. Niyazi, Mohammad, op.cit. p.46.
205. ZadPanah, Abolreza, (Deputy For Social and Information Affairs, Judicial Branch, I.R. of Iran) , op.cit. p. 48.
206. Pradel, John, op.cit. p.127.
207. See: The text of Fitwa by the late Imam Khomeini which reads; From now on, the discretionary punishments will be shifted to the of Expediency Discretion Assembly and if it deems it advisable, it can shift it to the government to any extent which it desires. It was announced to the then Prime Minister via letter on 6 September, 1988 and also See: The approval of 11 October, 1994 by the Expediency Discernment Council of the System, I.R. of Iran.
208. For further information, See: The Report of Committee on Reviewing Decriminalization in the Judicial Branch, p. 66 onwards.