Change in the legislative approach to prostitution and adultery in 2013 Islamic Penal Code

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Abstract:

In order to provide an in-depth analysis of the issue of punishment, which is the main subject of the present discussion, in the Islamic Penal Code approved in 2013, and comparing and contrasting it with the Islamic Penal Code approved in 1991, it is necessary to follow the chain of implemented changes and varieties in legislative approaches. It is hoped that such a scrutiny would yield the scope and intensity of the flexibility of judgments issued by the jurists on various crimes. Therefore, with careful consideration in the content of these changes, it turns out that they are divided into two major categories. First, changes implemented in verdicts upon which jurists have consensus; i.e. the jurisprudents have issued sentences for the punishment of a crime that does not conflict with the nature of the punishment. Second, changes implemented in cases in which jurists couldn't come to agreement; the present study focuses on former cases. Regardless of the criteria and factors which have initiated such changes, the fundamental principle of accepting the change paves the ground for struggling further questions on the nature and process of the implementation of changes. Therefore, the present study was conducted to investigate the changes in the legislative approach to prostitution and adultery.

Keywords : punishment , Hudud , Islamic Penal Code , consensus sentences

Introduction:

The word 'punishment' has been used in four different senses: determination, sufficiency, judgment, and probation. However, research has shown that the principle significance of punishment is sufficiency, interpreted as 'bonus' in Persian which, considering final objective, is the best translation for the term (Sharifi, 2014). Islamic law categorizes crimes based on their proportionate punishment in specific divisions of retribution, Hudud, atonement, and sentences. In terms of penalties, Hudud, retribution, and atonement are fixed and non-revisable and the judge cannot verdict for more or less when the initial sentence is issued; however, sanctions include penalties which are determined by the judge for committing an act of haram or breaking an Islamic rule (Akhwat, 1998). Based on the definition of the term 'Hudud', it is the plural form of *had*, which literally means limit and boundary; therefore, a janitor is an applier of Hudud, because he can limit or grant entrance to people; in Arabic language, prison guards are called *haddad*, because they limit the prisoners and prevent their living the prison. Additionally, comprehensive and impede speeches are, sometimes, called Hudud (Mahmud Abdul Rahman Abdelmanem, 553). Similarly, according to Article 15 of the Islamic Penal Code approved in 2014, "Hudud refer to punishments the cause, type, severity, and quality of which are determined in Holy Scriptures".

Prostitution

Jurisprudential principles of prostitution

Prostitution is a Hudud crime upon which jurists have total consensus and major and minor jurists have the same idea about. Based on Ibn Idriss Helli's definition, prostitution is the facilitation or provision of a prostitute or sex worker in the arrangement of a sex act with a customer; if two witnesses testify to committing this act or the committer confesses twice in a status of total mental health, he should be punished by seventy-nine lashes; additionally, his head should be shaven and he must be made to wander around the city in

that condition. According to Shaikh Mufid and his book of *Nahaie*, exile is not rational as the first step of punishment for a procurer of sex workers; in the second step, the committer of such an act must be refused living in his own city. In case of women, the same sentence must be implemented in form of whipping and they won't be punished by shaving their heads and wandering them among people (Ibn Idriss, 1989). Allameh Hilli believes that prostitution is the occupation of women procurers and matchmakers between lovers and the beloved; for committing this act, he should be whipped 75 times; his head must be shaved and he must be made to wander around the city so that people get to know and stay away from him; if he commits this crime again, he must be exiled from the city, because the longer he stays, the more corrupted and immoral the people get and the higher goes the risk of criminal offenses; in case of a woman, her head should not be shaved and she should not be exiled. For the judges to be able to issue sentences, two witnesses or confession of the committer in a status of healthy mind is enough and necessary (2006). Based on The second martyr's definition, prostitution is the accompaniment of two agents in order to commit adultery, whether lesbianism or sodomy (1989). Therefore, in regard with jurisprudential principles, jurists are in total agreement about the punishment of prostitution; the public, also, accepts their verdicts and follows that they say.

A comparative study of the punishment for prostitution in 2013 and 1991 Islamic Penal codes

According to Article 242 of the Islamic Penal Code approved in 2013, prostitution can happen in three forms of adultery, sodomy, and lesbianism; this criminal act is easily diagnosed and one single time commitment of this crime necessitates the implementation of required laws and regulations. However, this issue wasn't expressed out in 191 Islamic Penal Code; Article 135, at the time, had stipulated that prostitution implied the accompaniment of two people for adultery or sodomy; the only 'necessary' in this sentence is in the word of jurists, which was formerly stated.

In regard with prostitutions' being an absolute or conditional crime, the Judiciary's legal department of the time had stated that," the

act of adultery or sodomy is not a condition for the commission of prostitution; therefore, prostitution is an absolute crime". According to Paragraph 1 of Article 242 of the newly approved Islamic Penal code, the commission of prostitution requires the realization of adultery or sodomy; otherwise, the agent has to pay an amount of money. This paragraph puts an end to disagreements among jurists by conditioning the commission of prostitution. The second paragraph of the same Article implies the simplicity of the crime and the fact that repetition of the act is not a condition for the fulfillment of a crime. Of course, accepting this case in the first category is somewhat problematic, because the jurists still have, to some extent, disagreement. Based on Khoi's (peace be upon him) and the above mentioned jurists' definition of prostitution, this crime is conditional, necessitating the realization of sodomy or adultery; he stated that "prostitution is the mediation between a man and a women for the commitment of adultery, a man with another man for sodomy, and a woman with another woman for lesbianism". If this inference is correct, then it should be said that this item is defined in the second category, and there is a difference between the jurisprudents in this matter and the newly confirmed Penal Code follows Khoi's definition. Regardless of the perception of the present researcher, this change happened in the Penal Code approved in 2013 and the need for such a change has been felt in the legal community and the legislator have recognized this necessity. However, discussing the factors and criteria resulting in this change is not included in the present study and it must be addressed fully somewhere and sometime else.

Adultery

Jurisprudential principles of adultery

Article 226 of the Islamic Penal Code of 2013 stipulates that adultery is applied to one of the following situations; a. when the man, despite being mature and in a constant marital relationship, commits an illegal sexual relationship with another lady and can establish this relationship as many times and as long as he desires; b. when the woman is legally and constantly married to a mature man and she can establish sexual relationship with any men other than her husband.

The description of the article has to be considered in order to explain the change in the perception of the legislator.

Explication of the Article: The term eshsan (the Arabic term for adultery) comes from the word hasn, a high place that cannot be accessed due to its high elevation. Another meaning of the term ehsan includes holding firmly (Dehkhoda, 1998). The second martyr states that "The Holy Qur'an also gives a variety of meanings for the term ehsan; and your good deeds shall protect thee against wars and misfortunes (al-Anbia); this interpretation is applicable to verse 14 of al-Hashr sure" (2002). The second meaning of the term hasn used in holy Quran is chivalry and freedom;" and by following commands of Allah you will receive freedom and chivalry" (Al-Nisa, 25). Marriage is another meaning of the term hasn used in holy Quran; "and you can perfect your faith by getting married with women" (Al-Nisa, 24). This terms has enjoyed several interpretations and significances in the book The Eras of Jurisprudence, as well. (Shahabi Khorasani, 1988)

Other meanings frequently attributed to hasn include being free and keeping one's promise. In regard with the semantics of the word hasn, The second martyr states that this term is used in two other senses in jurisprudence.

1. In adultery: if a couple, both of whom are reasonable and mature, are in a constant marital relationship and keep on having intercourse under the permission of Islam, they are fulfilling one of the meanings of the term *ehsan*; i.e. doing and functioning good.
2. Accusing an individual of adultery and sodomy: Ehsan (goodness) is the results of the gathering of reason, maturity, freedom, Islam, and chastity in one person; this meaning of the word ehsan is issues by jurisprudents and is not seen in the Sharia (Ja'fari Langroudi, 2008). Based on the definition of the first martyr for the term in discussion, ehsan signifies the gathering of a mature, free, rational individual decorated by the presence of a lady with whom the man can have intercourse any time of the day. (Bin Makki, 1996)

A comparative study of the punishment for adultery in 2013 and 1991 Islamic Penal codes

Article 226 of the Islamic Penal Code, several legislators and jurists have defined *ehsan* as the following: the status of a married man or woman who is in a constant relationship with his/her partners and can have sexual intercourse, without obstacle, any time he/she wants (Imani, 2003). Article 226 of the Islamic Penal Code study perspectives toward this issue by considering 1991 Islamic code and the change implemented in 2013 Penal code. Articles 83 to 86 of the Islamic Penal Code confirmed in 1991 discuss the condition of adultery and the conditions for the fulfillment of the law.

Conditions required for the realization of ehsan according to 1991 Islamic Penal Code

Intercourse is legal as long as it occurs within the constant of permanent marriage; hence, temporary marriage doesn't help the realization of ehsan. Additionally, this goodness is not realized if it turns out that either the marriage is illegal or the intercourse is suspicious of being corrupt. As narrated by Eshaq Ibn Ammar, Imam Sadeq was asked whether a man with a non-permanent wife will be gifted with goodness; Imam Sadeq had replied that a man is solely gifted with goodness in a permanent marital relationship (Hor Ameli, 128). Intercourse must happen in conventional ways with the spouse. The late Saheb Jawaher disputes this condition and states that violating this issue doesn't generate the occurrence of adultery; however, keeping cautious in regard with this issue increases the safety of the situation, a point upon which jurists have consensus. (Najafi 272)

However, according to the Article 83 of the Islamic Penal Code approved in 1991, intercourse is an absolute prerequisite of attaining goodness and the abovementioned cautiousness is not considered necessary (Mousavi Khomeini, 412). This verdict has been somehow mitigated in the Islamic Penal Code approved in 2013 by integrating Saheb Jawaher's statement on the issue.

Sahib Jawaher states that if an immature individual establishes intercourse with his spouse and full penetration is realized, and then

he establishes this intercourse again when he has gotten mature, his former intercourses wouldn't bring goodness to him, because ehsan (goodness) is realized when the doer of the action is mature and rational although the marital relationship might have had been established before hitting maturity. If such an individual committed adultery, his violation wouldn't be considered the adultery of a married man (Najafi ibid; Mousavi Khomeini ibid; Mo'meni, 1). What Imam Khomeini mean by following cautiousness becomes clear in Saheb Jawaher's explication of his statement; since this condition is not supported by enough and absolute proof, Imam Khomeini has not given any fatwas and has kept wary on this issue.

Being able to use reason is necessary for the presence or absence of goodness in an action. This condition has escaped discussion in the majority of jurisprudential books; what has been discussed more is whether a lunatic commits adultery with a mature woman should be punished by whipping or not. Sheikh Tousi, Sheikh Mufid, Sheikh Sadooq, Ghazi Ibn Borraji, and Ibn Saied believe that if an unmarried lunatic commits adultery with a mature woman, he has committed crime but should not be whipped; but, if a married man establishes intercourse with another lady, his wrongdoing will be considered the adultery of a married man and he should be punished according to rules and Islamic teachings. Relying on annulment hadith, Mohaghegh, Ibn Nasre, and Ibn Idriss have stated that such an act wouldn't procure goodness. *In Exegesis of the Means of Salvation*, Imam Khomeini has stated that the presence of reason is required for the judgment of that specific action, with the reasons being the control of reason over what an individual does.

Necessary conditions must be provided for a couple so that they can try ensuring goodness for themselves and have intercourse as many times as they want; thus, if a man despite being in a constant marital relationship cannot have intercourse for different reasons, such as the wife's being away, in prison, or sick, the interference of other people, and rare opportunities, true goodness and gift of marriage wouldn't be realized for him.

A story narrated by Suleiman ibn Jabir Ibn Abi Ja'far (AS): I asked Imam Sadeq about who a good married person was; he said that whomever who can have intercourse anytime of the day provides himself the good of the world (Mousavi Khomeini, 415). This is applicable to women, too.

According to article 226 of Islamic Penal code approved in 2013, intercourse is realized in one of the following conditions for men and women;

a. In case of men, intercourse necessities being in a constant marital relationship with a mature woman; then, the couple can have intercourse in any way they want, accepted by law and Islamic teachings, any time of the day. Comparing Article 83 of 1991 and Article 226 of 2013 Islamic Penal codes illustrates that new definition of marital intercourse has conditioned this relationship in three other dimensions and aspects. (Tabibi, Habali, Athari, 2014)

First, the former Article insisted on the constancy of marital relationship, but the new Article required the maturity of the couples involved, as well.

Second, the former Article considered a man married only if he were reasonable during intercourse, while the new Article requires maturity for the realization of marital intercourse, as well.

Third, according to the former Article, mere intercourse was enough for the realization of marriage, while, according to the new Article, intercourses which happen in accordance with Islamic teachings and from the front bring about goodness and prosperity in marriage. Therefore, if a couple have anal intercourse, it doesn't bring them any good and is not included in the category of marital relationships.

The maturity of constant spouse, healthy reason of the spouse, and having intercourse from front are three conditions for changing the perspective of legislative authorities in regard with the issue of adultery. Prior to this code, there was no talk of maturity and healthy reason of the spouse and the mere fact of intercourse was enough for the inclusion of the issue of safety of intercourse.

It is worth mentioning that when it comes to the crime of adultery, getting caught red-handed and the absence of the scene of crime come, necessarily, to mind. If two people have illegal sexual relationship out of wedlock, it is considered adultery regardless of the details of the intercourse. This issue has undergone serious discussion in books of jurisprudence and the details have been much tried to get as clear and explicated as possible. As, formerly mentioned, in the *Jewelry of Speech*, " with the exception of one of the Imams' jurists, all famous books of jurisprudence, including *al-Nahaia, al-Mabsoot, al-Saraier, al-Jamea, al-Asbah,* and *al-Ghanie,* have consuensus in reard with the definition and conditions of the crime of adultery. However, Masnaf, in his book entitled *al-Nafea,* and several other books of jurisprudence of great scholars, such as al-Maghnea, al-Entesar, al-Khalaf, al-Tabian, and Majma'al Baian, have stated that for a crime to be considered adultery, the penetration must occur through front of a lady". (Najafi, 1980)

Having intercourse from back is not acceptable in Islamic teachings and necessary care must be taken; however, if the possibility of frontal intercourse is removed due to bleeding, sickness, or being on fast, that requires another discussion which is out of the range of the present study.

It seems that quoting famous or unknown jurists wouldn't be enough to put an end to the present discussion, because despite agreement on general principles, there are, still, several controversies over specificities, such as the details of intercourse, conditions for the realization of adultery, and many other stuff. The former and new Articles are, somehow, in disagreement, as well; for example, according to the former code, considers anal intercourse within the category of marital relationship, while the new code excludes this type of intercourse from the very definition of marital sexual relationship. This multiplicity of reasoning has been witnessed in discussions among jurists and Imam Khomeini has tried to resolve this conflict of ideas. However, according to the majority of jurists, penetration through front and back comes under the cover of marital intercourses, which is hard to believe because the very philosophy of intercourse is

reproduction in human beings; a wise jurists must be aware of this fact; additionally, the majority of Islamic teachings and hadiths condemn anal intercourse, thus foregrounding the discussion of famous versus unknown jurists and sources of hadith. In some hadiths, the very mentioning of the word 'front' ends the discussion be negating the possibility of anal intercourse. The majority of Articles mentioned in 1991 and 2013 Islamic Penal codes famous hadiths, accepted by the majority of jurists and the public, are considered the basis of fatwa; there has, also, been an attempt to explicate hadiths which are not clear or require interpretation, so that people have a reliable source to act based on.

The deceased Khoi states that the good a man is supposed to receive out of an intercourse requires two conditions; first, being free, meaning that he is not doing that act out of obligation; second, having a constant marital spouse, meaning that he can have sexual intercourse anytime and anywhere he wants, unless his wife is absent or in prison which cancels the necessity of the action at the moment.

It is, also, necessary for a woman to be free so that she can enjoy the good of intercourse allocated in Islam; so, if a married woman commits adultery, she will be banished. The point worth mentioning in Khoi's comment is his clear reference to the very act of penetration; despite other jurists' perfunctory mentioning of intercourse, he has clearly referred to the very act, a point which has helped legislators overcome several uncertainties and doubts in making laws.

Actually, not only the legislator considers such an offense as deserving full punishment of adultery, but also express his dissatisfaction with what the committers have done. This change, which has limited the range of punishment in comparison with 1991 Islamic Penal code, is a considerable progress in the domain of criteria and factors of the issue. Therefore, the current Article's omission of anal intercourse, according to the *Jewelry of Speech*, doesn't damage the discussion in any possible way, because maturity and healthy use of reasons are conditions accepted and expected by the public, as well.

Nonetheless, changing the attitudes of the legislature in the context of the concept can substantially provide a widespread support

from the perpetrator as one of the main grounds for criminalization in this regard. The researcher recommends that the legislator confines his determination of the punishment for both the men and women who commit crime to the presence of two conditions at the time of the crime, one being maturity and the other one being healthy reason. Additionally, he should pave the ground for the inclusion of unknown fatwas and hadiths which mig ht remove possible deficiencies in the current code.

Additionally, Article 82 of the former code is, with minor reforms, has been repeated in Article 225 of the current code; however, the criminals for whom exile and stoning are determined as punishment is not clearly demarcated. However, based on Article 229 of Islamic Penal code conformed in 2013 stated that if a man committed adultery, he had to be punished by stoning, a sentence which has changed into whipping and exile nowadays. But nothing has been stated for the adultery of a married woman and the legislator has preferred to keep silent. It cannot be claimed that the punishment of a married lady committing adultery is whipping because Article 229 of 2013 Penal code states that the punishment of an unmarried lady committing adultery is not whipping, unless it is clearly expressed by the constitution; however, if the constitution says nothing, the judge can refer to the fatwas of jurists and does what they have told the public to do.

Conclusion:

Based on the division of theories and foundations of punishment, deterrence, rehabilitation, reconciliation, maintaining the morale of the law and, in terms of contemporary trends in criminal policies and programs, the neo-cultural approach, the neo-utilitarian approach, selective empowerment, and restorative justice have become prominent in recent criminology. (Shaker, 2010)

On the other hand, a comprehensive overview of legislations on prostitution and adultery in the Islamic Penal Code approved in 2013 indicates that there is no specific logic dominant in choosing the legislative approach and the criteria for choosing fatwas on various

issues are not clear. In some cases, punitive penalties have been removed from the law or have been subject to silence. Certain offenses such as sodomy have been subject to changes in regard with the punishment considered by law and it seems that the legislator's concern was to reduce executions. The legislator has not limited himself to exile as a punishment, but the word has come in three places, especially in Article 220. When no talk of the issue has been stated, the judge refers to Article 167 of the constitution or the fatwa of the supreme leader. In another place, it has been mentioned that punishment is a social phenomenon; thus, being deprived of social rights is, by itself, a punishment. A closer analysis of 2013 Islamic Penal code indicates that the legislator focuses on the corrective approach and specifically refers to corrections in supplementary sentences; punishments are known as supplementary, corrective, and security actions, all of which presuppose the violation of a specific rule. When it comes to explaining punishments, the emphasis is on the need to reform, that is, the judge should blame the culprit and consider him/her deserving punishment; however, at the same time, there must be a corrective approach and the legislator has both considered and predicted the scientific and theoretical criminal law. The problem is that sometimes there is a possibility of conflict between the foreseen approaches and in such cases the legislator can help by determining the basis.

Generally speaking, the Islamic Pena code has determined the conditions surrounding the accused person and the offender, offenses punishable by the religious law, the condition of punishment for the perpetrator, and the imposition of punishment on the offender, and bearing responsibility until the punishment is punishable. (Bayrami Erbatan 2016)

Therefore, studying the jurisprudential principles of the criminal law of adultery indicated the principle of the change in the nature of these crimes, but what remains to be seen is whether the tendency towards jurisprudential opinions is in the deliberate and purposeful setting of laws. A positive response to this challenge gives birth to a new questions; i.e. using jurisprudential sources and recognizing the necessity of the effect of the jurisprudence's views on the laws of the country.

تغيير النهج التشريعي للمتشرع في الجرائم الجنائية والزنا في قانون العقوبات الإسلامية وفقا لسنة ٢٠١٣

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الملخص:

من الواجب للمزيد من قراءة القسم المتعلق بحدود في قانون العقوبات الإسلامية المصوبة بتاريخ ١٤٣٥ التي هي المسألة الرئيسية في هذا المقال، امتثالا لقانون العقوبات الإسلامية المصوبة في١٤١٣ هدفا في البحث عن النهج التشريعي للمشرع، أولا إحصاء مجموع التغييرات التي أجريت ثمّ دراسة فقهها. ثمرة هذا الاستعراض تحصل علي مدى وحدود مرونة الأحكام الصادرة من الفقهاء حول الجرائم المختلفة. لذلك بالتدقيق في محتوى هذه التغييرات يتضح أنّها تنقسم إلي قسمين، أولها: التغييرات التي أجريت في أحكام الفقهاء التوافقية أي أن الفقهاء أصدروا أحكاما لمعاقبة جريمة لا يتعارضون في نوع العقوبة وحدودها. ثانياً: التغييرات التي تم إجراؤها في حالات الفقهاء الخلافية وفي هذا المقال يدرس القسم الأول. بغض النظر عن أنّ هذه التغييرات تابعة لأي معيار ومقياس قد حدثت. مبدأ قبول حدوث التغيير سوف يكون أساسا للإجابة على أسئلة أخرى كدراسة عن عناصر التغيير في العقوبات. و هنا تدرس مبادي الجرائم الجنائية و الزنا كنموذجتين من هذه الجرائم.

الكلمات الرئيسة : القعوبات ، الحد ، العقوبات الإسلامية ، الأحكام التوافقية .

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