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Juridical-Legal Study of the Criminal Policy of Iran Regarding Prejudicial to Public Decency Crimes with an Approach to the Ancient Laws

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Abstract

Iranian legislator has never presented a criterion for detecting crimes prejudicial to public decency, but instead of defining prejudicial to public decency crimes, the legislator has only stated prejudicial to public decency crimes. Because main purpose of this study is identifying concept of public decency crimes in the criminal code of Iran and ancient laws, their proper application regarding the changes of new Islamic penal code of Iran and its effectiveness on the decision-making of judges, based on the nature, scope and commentaries, this research studies the type and examples of prejudicial to public decency crimes in ancient laws. In addition, we will analyze severity and violence of punishment for these crimes. Challenging questions may raise in this regard, such as what is the type and examples of chastity crimes from ancient law view, Imamieh jurisprudence view and legal system of Iran? And how is the approach and response of ancient laws to chastity crimes compared to religious principles and punishment system of Iran's legal system? This research studies the history of chastity crimes in the jurisprudence teachings and identifies crimes prejudicial to public decency in the ancient laws and basis for accepting these crimes in legal system of Iran.

Keywords: Prejudicial to public decency, Criminal policy, Punishment, Public chastity, Ancient law.

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1- Introduction

From the view of Islam and religious scholars, ignoring and concealing was the main principle in preventing the dissemination of obscenity and protecting respect of people in the sexual issues. In fact, penal code contains principles which are governed on the behavior of human and accompanied with assurances to protect the human society (Ardabili, 2000: 208).

Today, some treatments of justice official for identifying and prosecuting defendant and legal conviction and preliminary investigations, issuing court's decision and punishment are against recommended procedure. It is clear that in treating sexual issues, we should not follow redundancy, which is neither logical nor religious and reasoned. Sometimes, sexual behaviors emerge as deviation and sometimes they seem criminal. It is worthy to mention that deviations mean tendency and returning which is interpreted as disobedience (Dehkhoda, 1994: 3483).

According to the divine commands, satisfying sexual instincts naturally is considered as healthy sexual behavior and every behavior out of this scope is considered as a sexual deviation. In Islamic society, behaviors which are against Islamic norms and values and also against human nature, are considered as a deviation (Husseini Dashti, 2000: 486). This is while this discussion relates to criminal sexual behaviors and prejudicial to public decency acts, not deviation in its non-legal meaning. Therefore, when an individual is labeled as criminal, there would be a little distance from small crime to the great crime (Clarkson, 1992: 235).

2- Evaluating prejudicial to public decency acts in the criminal law of Iran

Iranian legislator has not mentioned "prejudicial to public decency" in the substantial laws and even has not presented a special criterion and measure. Legislator does not define prejudicial to public decency crimes in order to indicate its instances to specify its definition. This method is called definition by instance and except general definition, it is comprehensive which is desired by scholars and it has various applications. In addition, recognition of the legislator is not limitative, but it is exemplary (Akhondi, 2003: 42). However, in the criminal law of Iran, prejudicial to public decency crimes in the criminal procedure are defined. In the note of article 306 of this act, prejudicial to public decency crimes are sexual crimes and also an illegitimate relation like kissing and copulation. On the other hand, in the Islamic penal code which is substantive code, only instances of this crime and ways to prove them are presented. Legal office of judiciary states in the definitions of these crimes that: these are crimes caused by illegitimate relations and out of marriage relations between man and women

and are ugly, bases on the customs and feelings of the society or those actions which are prohibited by holy religion and are prejudicial to public decency (Irani Erbaty, 2007: 282).

Therefore, regarding the legality of crimes and punishments which are respected by human communities and by lack of certain texts, considering some chastity actions as a crime is doubted. Actions like idolatry, cross dressing, loving animals, buggery, genital view, voyeurism, or ogle, sexual masochism, masturbation and etc. are out of criminal scope. Even actions like deflowering, prostitution, livelihood by prostitution, forcing people and youth to lechery and etc. have not certain criminal title. Legal authorities have considered these actions in some cases as forbidden act (haram) and determine punishment based on it. Of course, theoretically and regarding the necessity of interpreting criminal laws, performance of courts is not desired. Because this method is ignored by legality of crimes and punishments which are supported by human rights and religion.

Although some lawyers believe that in practice, judge shall determine accurately the instances of prejudicial to public decency, but regarding great punishments which are held against most chastity crimes and because there are different perceptions of these crimes, it was better that legislator carefully determine and introduce all chastity crimes and declared them limitative or at least, it should provide a criterion by which, chastity crimes can be determined. It is clear that taking this action can answer many discordances in this field (Akhondi, 1993: 109). Based on this definition, the most important punishable chastity crimes are kissing and copulation between strange man and woman, sleeping two nude men under one cover, adultery of adolescence, kissing with lust and like. Importance of chastity crimes can be seen in the reaction to the chastity crimes and handing in the courts. As we know, the judge is allowed to act based on his knowledge and issue a judgment. But he should mention the evidence and document for it. In fact, for proving every crime in which knowledge of the judge is expressed or the law is silent about it, knowledge of the judge is part of evidences, but because in adultery, only admission and witness are expressed, knowledge of a judge is not considered (Akhondi, 2000: 134).

3- Criminal policy of Iran regarding chastity crimes

Legislators, before and after the Islamic Revolution, took different positions in relation to ethical issues and public chastity and using criminal leverages for preserving ethical and sexual principles of society and realities. Legislators of public punishment law, approved in 1925, in the fifth chapter of this article, provided certain criminal regulations under title "prejudicial to public chastity, public ethics and family duties" in articles 207 to 215, for

fighting against ethical corruption and violating public chastity which were binding on the courts until the Islamic Revolution (Validi, 2001: 40).

After Islamic Revolution, in the statutes, the title "adultery" and its related fields inserted again. Besides, other acts like buggery and pederasty became subject to the criminal code. Also chastity crimes other than adultery, including kissing and copulation and prejudicial to public decency acts and pretending forbidden act (cross dressing) are considered a crime and shall be punished (Shambiati, 2001: 467). Based on the article 102 of the penal code, investigation about chastity is forbidden and it is not allowed to investigate anyone. Forbidding investigation about these crimes related to the policy of concealing sin in the Islam; which is indicated in the Quran (Noor: 19) and tradition of prophet and saints. For example, prophet (peace be upon him) has said: conceal limits by doubts (Hore Amili, 2008: 32, Vol. 4).

Based on this, we will discuss about sexual actions and crimes in two different sections: sexual crimes subject to punishment and sexual crimes subject to chastising.

3-1 Chastity crimes subject to punishment

Crimes subject to punishment which are referred repeatedly in the Islamic penal code are adultery, buggery and lesbianism.

Punishment means forbidding (Mohaghegh Helli, 1993: 1846) and it is a certain punishment in the religion for an annoying person committed a certain sin that its amount and size determined by the legislator for all people like adultery and buggery (Vahidi, 1984: 11). These sexual crimes are directly considered as crime due to committing a sexual act and illegitimate relation. And in the discussion about sexual crimes, there is another crime which indirectly leads to a sexual crime.

3-2 Chastity crimes subject to chastising

In the penal code of Iran, in addition to the above-mentioned crimes, there are crimes which are classified separately due to the difference in their punishment which are called chastising crimes. Regarding sexual crimes that their punishment is chastising and by discretion of religious ruler, it should be noted that these kinds of crime are indirect sexual crimes; in other words, there is no direct intercourse in these actions, but these crimes expose people to sexual crimes (like adultery, buggery) and for this reason and other ethical reasons, legislator considers them as crime and sin and Iran's legislator, in contrary with western countries, has criminalized these crimes. In this regard, illegitimate relation has high sensitivity in the courts, because it belongs to that class of crime which does not need a private plaintiff for

investigation. In this crime, public prosecutor can investigate the crime based on the article 637 of the Islamic penal code, without being private plaintiff.

4- Position of chastity crimes in the Islamic jurisprudence teachings

One of the most important resources about given subject is juridical sources (book, tradition, consensus and reason). By considering Quran verses, we can say that the Quran has talked about the limits of sexual crime, especially adultery, including second and third verses of Noor Sura. Regarding other sexual acts, other than adultery, by looking other verses and by using an analogy, we can infer the decision for these actions. For example, verses 30 and 31 of Noor Sura, say: “O, prophet, tell the believers to protect their eyes and organs that this piety is suitable for you and of course, God is aware of what you do; and tell the women believers to protect their eyes and organs and do not reveal their makeup, except what is common”. Regarding what has said, documents for forbidding chastity crimes other than adultery in jurisprudence sources are studied.

Consensus: before citing the opinion of jurists, we should consider that consensus is evidence when there is no other argument. Regarding this issue, the argument of jurists is the *ravayat*; therefore, we cannot consider it as an independent argument but it can confirm the issue. By studying opinions of the scholars and jurists, there is a conception that because chastity crime other than adultery is considered, they cited this issue by following provisions of *ravayat* and similar words are cited in the different juridical books that we refer to some of it in the following. Mohaghegh Helli has said: in kissing and copulation under the blanket, i.e. sleeping under one blanket and cloth, there are two punishments, one is whipping and the other is less. Sheikh Mohammad Hassan Najafi (1988: 289) has stated: kissing and sleeping in a bed, for example, embracing each other and like which is known pleasure without using vagina, there are two opinions: those who considered 100 lashes and the other has considered slighter punishment. Ibn-Zohreh wrote: regarding preliminaries of adultery and buggery, i.e. sleeping under one blanket, embracing, kissing and like, chastising will be implemented, i.e. 10 to 99 lashes (Mohaghegh Damad, 2002, vol. 4, 205).

Reason: we should note that first, religious decisions shall follow good and bad and when there is no discretion, the legislator does not make it binding and if it was not corrupted, the legislator would not prohibit it. Second, a reason can understand these interests and corruption, although interests of some decisions are not known due to the incomplete human knowledge. Third, there is a relationship between religious decisions and reasonable decisions. With this introduction, the question raises that whether the reason confirms the corruptive nature of illegitimate relations and prejudicial to public decency. It is clear that the

reason confirms various corruptions in the illegitimate relations between man and woman or considers these actions undesired bad and obscene. Which right mind ignores the collapse of the family, sexually transmitted disease like gonorrhea, syphilis and Aids, doubt about the parentage of people, increasing murder and other crimes in the society which are the result of prejudice to public decency crimes and illegitimate relations and have not inherent obscene. Regarding above-mentioned and first and fourth arguments, it seems that illegitimate relations, like prejudicial to public decency act are haram from the juridical point of view and its punishment is chastising that its severity depends on the judge.

5- Prejudicial to public decency crimes in ancient laws

In ancient laws, among prejudicial to public decency, crimes like adultery and buggery are considered more than other crimes. The code of Hammurabi cylinder was excavated in 1901 by an expedition group of Jacques de Morgan in Shoosh, Khuzestan. Shotrok Nahonte, king of Elam in the 12th century brought this cylinder from Sippar to his city (Pirnia, 1991: 120-125). In this act, prejudicial to public decency crimes were considered. Hammurabi was the sixth emperor of the Babylon from 1792 to 1750 B.C and during this time, he expanded Babylon to Mesopotamia and conquered many of his neighbors.

Law of Hammurabi includes 282 articles that 35 articles are wiped and there is incomplete information about them. Although articles in the law of Hammurabi include civil, business and criminal codes and regulates the relationship between husband and wife to adoption conditions and lease and etc., but an important part of this code relates to the criminal aspects which determines the punishment for those actions which are criminalized, even today, but also it has ensured the implementation of punishments for many actions that our day is allowed or even have legal enforcement assurance (Ashori, 1997: 115).

During Hammurabi reign, chastity crimes were divided into three important classes which we will study them separately in following. It is worthy to mention that the Hammurabi code contained 282 articles that 35 articles were wiped and there is no information about them.

1) adultery: in these cases, nothing has been said about the adultery with a brother or sister and it is not possible that eliminated cases (66 to 99) have referred to this because prejudice to chastity crimes are regulated in article 154. Regulating crimes based on the topics has been observed in the Hammurabi act.

First: relation of man with his daughter: it seems that article 154 has considered every illegitimate relation of father with daughter against the social order and its punishment was exiling father from the city.

Second: relation with daughter-in-law: these relations have more severe punishment. But the law has differentiated articles 155 and 156 and held that when a man enters the bed of his daughter-in-law, if the daughter-in-law had not yet intercourse with the son of that man (her husband), father shall pay half silver to the daughter-in-law and article 156 indicates that this girl has not the right of intercourse with his husband and she shall return to her father's home. In the second case, if son of man had intercourse with his wife and then his father had intercourse with his wife, the punishment in article 155 for father is drowning in the water.

Third: relation with the stepmother: if the relation of a son with his stepmother occurs after death of father, if that woman has brought a child from his father, according to the article 158, this son will be exiled from his father's house for ever.

2) rape: marriage certificate is necessary to consider a woman as the legal wife of a man. Therefore, if intercourse occurs without a marriage certificate, capital punishment enforces for the man. Article 130 considered four conditions for this: 1) the woman shall be engaged with another person; 2) she shall live in her father's home, 3) man has raped her, 4) both of them are arrested during crime that punishment of man is capital punishment and woman is exempted from punishment.

3) relation of a married woman with another man: enjoyment has been recognized along with formal marriage in the code of Hammurabi (article 137). In the ancient law, in contrary with Islamic jurisprudence that punishes adultery with capital punishment, two punishments exile and death are seen that at first look, it seems that there is no understandable relation between exile and death. The code of Hammurabi considers less severe punishment for father, because it considers daughter as the property of the father. Although this criterion cannot accepted in the exile and capital punishment for adultery in the law of the Hittites, because the penal code of the Hittites are not clear for us in the obtained documents (Theofile, 1997: 48-65).

Among sexual behaviors condemned during the history is adultery. As seen from the historical background of these crimes, this crime is caused by humiliating treatment by the woman and this is the right of the husband in the adultery. But in ancient times, adultery against man was committed by his unfaithful wife, but adultery, was a sin which had divined punishment (Najafi Abrandabadi, 2004: 91).

According to what is seen from ancient laws, sexual intercourse with a married woman with a man other than her husband was adultery, but if a married man had intercourse with a woman other than his wife, it was not adultery, unless the woman was married. Also, if the husband was consent of his wife's behavior, adultery was not considered as a crime against the

husband. For example, if it became clear that the husband has forced her wife to prostitution, it was not adultery in Assyrian laws.

Also in the article 20 of Assyrian law, the punishment of buggery was neutralizing punishment, including buggery with criminal and castration. Some researchers have said that this strange punishment was for differentiation between sodomy agent and subject, because it belonged to the lower classes of society and there is not such distinction in the holy book (Najafi Abranabadi, 2004: 77).

Conclusion

Prejudicial to public decency crimes are specific cases which are referred into in the Islamic penal code, including adultery, buggery, lesbianism, panderism and etc. which some of them are less considered in the ancient laws. The criminal policy of Iran's law relative to prejudicial to public decency crimes includes certainty and having strategy and general framework for treating the crime and its limits; however, implementing lashes is ignored in some cases. Expediency is a permanent factor for implementing punishments and it is somehow mitigating the religious response. The findings of this research show that thoughts governing chastity crimes in the ancient laws and basics of ancient religions indicates unity in multiplicity. The study of ancient acts which are first regulations of the human and teachings of religions before Islam, indicates an inherent tendency of humans to regulations and limitations in sexual relations which are supported in ancient human regulations and religious teachings. For this reason, comparative study of ancient regulations and religious teachings indicate widespread similarity between values of social life in chastity crimes. The findings of the study showed that sexual limitations and criminal valuation for violating social norms in this field in ancient laws is consistent with the nature of human. Meanwhile, the criminalization and goals of punishments in the sexual crimes may differ in laws and religions.

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