

## Mysticism and Jurisprudence

### Regulating and Correcting Laws to Comply with the Islamic Sharia<sup>1</sup>

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Historical formation and configuration of Islam can be considered in two stages: the first stage is related to the time that the Prophet (PBUH) was in Mecca and the independent Islamic society was not yet formed. Therefore, Islamic rules and commandments were limited to the expression of faith and moral issues that were spiritual teachings.

The second stage is related to the time that the Prophet emigrated from Mecca to Medina and a new society formed based on Islam. In addition to his duty of spiritual leadership, he had to administer this society by his executive presidency and management. So, by God's permission and on behalf of Him, he took the action to legislate and canonize legal and Sharia rules. Since he was forced to execute the divine commands, and establish justice and equity among people, he gathered together the three faculties of legislative, executive and judiciary in the presence of himself as head of the state. And since everything he did was according to God's commands, the Quran says about the prophet dignity and his states: "**Nor does he say (aught) of (his own) desire. It is no less than inspiration sent down to him**"<sup>2</sup>, it means that he did not speak at his own will and he did everything in accordance with the divine revelation and God's commands. Accordingly, it should be said that Islam has two classes of teachings; one class includes moral and mystical teachings. Another, let's say, includes the legal commandments. However, the spirit of the legal commands was the same as spiritual ones. On the one hand, it can be said that the difference is related to the difference between Sharia and Tarigha, or jurisprudence and mysticism in the mysticism definition, and on the other hand, it relates to the difference between law and ethics. When the Prophet was in charge of the presidency of Islamic government, Muslims were mainly divided into two groups that were in two extremes from the spiritual point of view. On one side, there were Ali (AS) and other particular Prophet's companions as Abu Bakr, who spent all his wealth in the way of Islam -though perhaps he lost the dedication of those implementations due to an error that he committed at the end of his life- he was one of the most loyal Muslims at the time of the Prophet (PBUH). On the other side, there were people like Abdulah-bin-Obay and Abu Sofyan who surrendered themselves to the Prophet just because of worldly and materialistic affairs and became Muslims. They became Muslims only to shallowly accept the citizenship of the government that administered by the Islamic law. So, they were not interested in the Prophet's spiritual teachings and perhaps they did not benefit from it. Based on spiritual teachings and moral rules, a man should train himself so that for example if he finds a

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<sup>1</sup>- Translated from Persian. Irfan Iran, Collection of papers, No.35, 36. Collected by Dr. Seyed Mostafa Azmayesh, Haqiqat Publications, pp. 5-13, Tehran, Iran (2010).

<sup>2</sup> . The Quran: Najm: 3-4: **وَمَا يَنْطِقُ عَنِ الْهَوَىٰ. إِنْ هُوَ إِلَّا وَحْيٌ يُوحَىٰ**

property that belongs to someone else and the owner is unknown and the finder knows that if he uses the property, no one will disturb him, does not do this and does not take over the others' properties. But, in the science of law, it is said that if you find, seize and use a property that belongs to someone else without the others' knowledge, if one fails to prove your wrong action, he will not deserve the punishment which is prescribed by law.

Generally, legal rules of Islam for welfare of the society prohibit those acts such as theft, betray and other immoral deeds and if one commits these crimes, he will be punished and this action is a deterrent side of committing crime but, the spiritual and ethical teachings of Islam train men in a way that they do not think of robbery and other crimes, and hate doing such wrongdoings from the heart.

So, the Islamic law taught the Muslims what is related to men's spiritual and moral training and also everything related to improve the society. And historically, what was dominated in Mecca in the years before Hijra was the first type of commands which the Islamic society and government had not been formed yet. But the second type of commands was in residency years in Medina related to the Prophet's (AS) management position, too.

But one hundred percent real Islamic government was just exclusive to the Prophet's government period in Medina and Hazrat Ali (AS) and Imam Hussein (AS) caliphate were very short. Of course, it can be said that at the time of Sheikha the appearance of Islamic rules were obeyed but with hardship and roughness and without paying attention to the deep faith of Islamic commandments. After the martyrdom of Imam Hasan (AS), the Islamic state was not working in real sense, but what was implemented through Islamic rules was executed as legal governing rules. Indeed, in this era, the Islamic law was ruling, not the religion of Islam.

In the discussion about Islam and its place, the cited preliminaries should be paid attention to. According to these preliminaries it can be said that the Islam religion is divided into two categories from the law point of view that one part of it is constant and unchangeable and it is based on the divine commandment. Because the Prophet (PBUH) is the last prophet who had communicated the divine commandment, these law rules are immutable. But the other part in the Islamic jurisprudence is changeable. This part allows Islam to resolve social changes in itself to maintain the constant legal aspect of Islam and also for survival of the spiritual aspect of Islam in accordance with the needs of society infers and ordain new rules (legislation). But since Islam after Imam Hasan (AS) did not have a true state, some legal aspects of Islam that should be in charge of government did not alter. Since the law is meaningful in the relations of humans, it will be altered during social-historical changes and until now all legal systems in the world accept the existence of these evolutions and they have endured it so that it has led to create new law ideas. But in the civil parts of Islamic laws, since this part relates to people's civil relations and these relations were not governed by the government, it had an independent aspect; this part has evolved automatically, so that today's Islamic jurisprudence rules in civil aspect are very progressive but, the criminal aspect of Islamic jurisprudence that the government should be in charge of, did not change. However, in comparison with the other parts, the Islamic criminal rules have not been changed, but the other parts have been changed to a great extent.

Lack of changes in criminal law is very important that the books written in this field are not different from the books written thousand years ago and meanwhile, in these thousand and some years, humanity has been changed a lot and from the impact of the current rules and law jurisprudence changes, just some rare cases can be seen and not more. For example today's

jurisprudence books mention issues such as “*Reghiya*” that means slavery, or even in some written laws there are traces of slavery. That is the problem of “*arsh*” (a type of blood money for slave and is determined by an expert) in “*diya*” (wergild) just means in slavery, bondman and bondwoman, but, in today’s world there is no slave. Or about “*kaffara*” (atonement), as punishment, that release of slave is done as atonement and since today there is no slave, so this part should be also changed as well. This means that when they say to release a slave it means the burden of responsibility, existence and identity of a person to be released. So, they should infer (“*ijthiad*”) and change it, of course not in such a way that they would want to remove “*kaffara*” or change the price for a human being.

Also for setting “*mehrolmota*” (dowry for the case that couple divorce before intercourse and no dowry has been determined in marriage contract) it has been written in ancient religious books that in some cases a bondman or bondwoman or some money be given as dowry. But as in the Quran, it just sufficed to state some general things about “*mehrolmota*” and generally commanded that: “**the wealthy according to his means, and the poor according to his means; a gift to divorced woman in goodness**”<sup>3</sup>. And since in the today’s world there is no bondman or bondwoman and giving horse or camel is unattainable, so some scholars have altered this part explicitly. As by late Sheikh Mohammad Bagher Ayatollahzadeh Mazandarani Haeri, professor of law school who was one of the great scholars of Shiite says about “*mehrolmota*” in Marriage and Divorce in Islam and other religions: “for the amount of “*mota*” (gift) the man’s situation from poverty and wealth point of view is considered.”<sup>4</sup> According to the explicit text of the cited verse, he should give a house, bondman or bondwoman or animal or exquisite dress and if he is rich; and if he is in a medium situation he should give fabric or a well-priced ring; and if he is poor, he gives things such as ring or fabric suitable to his situation. Obviously, the mentioned things that have been named in the narrations are just examples not for determining or restriction”.<sup>5</sup>

So, it is the author’s opinion that though these properties (servant or slave or animal) have been stipulated in narrations and old jurist’s books, but today, since the situation is different, it is not necessary to be observed.

Perhaps, if they were asked about blood money, they issued *fatwa* (judgment about a social issue from religious point of view) that since today, camel, cow, sheep, dirham, dinar, Yemeni “*holla*” (cloth) are not common, none of them can be considered as blood money. And the Quran only says: “**blood money is for his family**”.<sup>6</sup> It means that submitting the Muslim blood money to his family and even the type and the amount of blood money has not been mentioned in the Quran even vaguely. In such cases, the Quran just expresses the general view as it was expressed about *mehrolmota*. As I have written and expressed about blood money<sup>7</sup> according to some scholar’s opinion, the Prophet (PBUH) orders and speeches and to we; the Shiites, the infallible Imams’ (AS) expressions about blood money can be considered as government dominances. And

<sup>3</sup> . The Quran, Al-Baqara: 235: وَمَتَّعُوهُمْ عَلَىٰ أَلْسِنَةٍ قَدْرُهُ وَعَلَىٰ الْمُقْتَرِ قَدْرُهُ مَتَاعًا بِالْمَعْرُوفِ

<sup>4</sup> . Articles 1093 and 1094 of Civil Law are about “*mehrolmota*” and it is mentioned in article 1094: in determining “*mehrolmota*” man’s state is considered in terms of richness and poverty.

<sup>5</sup> . Pages 41-42

<sup>6</sup> . The Quran, Nisa: 92: دِيَّةٌ مُّسَلَّمَةٌ إِلَىٰ أَهْلِهِ

<sup>7</sup> . Juristic and Social Papers Collection, Tehran, Haqiqat Publishing, 1999. Papers: “Human Blood Money”, “Nemesis (“*Qisas*”) and blood money (*diya*)”.

due to necessities of location and time, the honorable imams determined the amount of blood money. And now if jurists would recognize, it could be changed due to necessities of the society. And as noted before, as the amount and type of the blood money is not noted in the Quran, Prophet (PBUH) and Imams (AS) stated that according to the necessities of the society in those days blood money is to be based on camel, dinar or dirham.

Another significant point is that if we consider the narrations that are the basis for determining the type and the amount of blood money, we understand that they often used *Maskook* (currency coin of the time) as base of blood money. But, because the economic style of transaction of that time was often in barter and without exchanging money, and basically the currency was less common, the Innocent (AS) allowed the questioner to use camel, cows and etc. as payment for blood money. And he stated that: “**cameleer: camel, cowman: cow and Yemeni: ...**”<sup>8</sup> According to this, any person can pay the blood money from any goods that is found in his living place. But firstly, as there is no Quranic and narrative stipulated explicit script that restricts blood money type to above items or their amounts, secondly, the things that designated for blood money such as dirham and dinar Yemeni cloth are not common in the today’s world and may exist just in museums for researchers studies, or there might be no cow or camel in places such as Alaska, Siberia, Sweden, Norway and elsewhere. Thirdly, we believe that Islam is the last divine religion which its commandments will not abrogate until the resurrection and in all times and places and cases, its rules and its regulations are operational and is in accordance with the religion characters<sup>9</sup> of pardon and easy.<sup>10</sup> Here, this question appears: What should be done for determining the type and the amount of blood money today?

God says in the Quran to the Prophet: “**Take counsel with them in the matter and when you are resolved, put your trust in Allah**”.<sup>11</sup> God says: take counsel with them but you decide yourself and do not let final decision making to them. But, this issue was special for the Prophet (PBUH) and in the Quran, in Surah of Shura, it is said about believer’s characters that “**their affairs are by mutual consultation**”<sup>12</sup> that is their work is based on consultation with each other. According to this verse, believers consult with each other about the issues that arise and legislate a contract that is to approve regular laws. Accordingly, in such cases, *mojtahids* (scholars) and jurists should comprehend the conditions of the community and identify the necessities of society and for example specify the amount and type of blood money. This issue can be extended to determine the type and amount of *mehrolmota*.

Another example is about the way crimes are sentenced. Basically, the issue that should be kept in mind about the Islamic rule is from the law point of view. The Quran is the constitution of Islam, and it mentions some sins and crimes and specifies some of their punishments. But in many cases, the ways of proving some crimes are not mentioned and only in specific cases such as adultery and sodomy, it is mentioned how to prove them and has made proving them difficult

^ أهل الإبل إبل و أهل البقر البقر و أهل اليمن ...

<sup>9</sup> - Quran: Ale-Imran: 159: “**It was by that mercy of Allah that you (Muhammad) dealt so leniently with them. Had you been harsh and hardhearted, they would have surely deserted you. Therefore, pardon them and ask forgiveness for them.**” فِيمَا رَحْمَةٍ مِّنَ اللَّهِ لِنْتَ لَهُمْ وَلَوْ كُنْتَ فَظًّا غَلِيظَ الْقَلْبِ لَانفَضُّوا مِنْ حَوْلِكَ فَاعْفُ عَنْهُمْ وَاسْتَغْفِرْ لَهُمْ.

<sup>10</sup> - Juristic and Social Papers Collection, Tehran, Haqiqat Publishing, 1999. Paper: “Nemesis (“*Qisas*”) and blood money (*diya*)”. P. 97.

<sup>11</sup> - Quran: Ale-Imran: 159: وَشَاوِرْهُمْ فِي الْأَمْرِ فَإِذَا عَزَمْتَ فَتَوَكَّلْ عَلَى اللَّهِ

<sup>12</sup> - Quran: Shora: 38. وَأَمْرُهُمْ شُورَى بَيْنَهُمْ

according to special testimonies of four witnesses -moreover in a special way- or confession of the accused that if its sharia conditions were fulfilled, the punishment (*hadd*) will be executed. Thus, it is strict enough to prove these crimes that the extramarital crimes cannot be proved easily. Because it is rarely happens that an adulterer does this unchastely action in the sight of four people.

Another striking thing here is that, at that time, since the reason to prove a crime was limited to testimony, it could be said that approximately it was not possible to examine without witnesses' testimonies. For example, as noted in the proof of adultery, four witnesses for theft and two just witnesses' testimonies are the evidences required to prove these crimes. So, in cases where the proof of the crime is specified in the Quran, in addition to considering its wisdom- that is a crackdown to prove adultery and suggests denouncing the comment of **“those who love (to see) scandal published broadcast among the believers”**<sup>13</sup> and show that such crimes should not be disclosed and even today in all legal systems they say that the trial should be closed - it should be noted that is it possible to access other reasons according to the progress of science that categorically shows about guilt or accused innocence.

It should be mentioned here that, as at Reza Shah's time, one of the clauses that was enacted in the first Criminal Law, was that the provisions of this law is to punish violations from social discipline and to maintain social order. Moreover, sharia offenses are punishable after being proved, according to sharia law in sharia court. Such clauses and rules should be approved in today's current laws.

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<sup>13</sup>. The Quran: Noor, 19: إِنَّ الَّذِينَ يُجِبُونَ أَنْ تَشْبَعَ الْفَاحِشَةُ فِي الَّذِينَ آمَنُوا لَهُمْ عَذَابٌ أَلِيمٌ فِي الدُّنْيَا وَالْآخِرَةِ وَاللَّهُ يَعْلَمُ وَأَنْتُمْ لَا تَعْلَمُونَ