

Theoretical Fundamentals of Criminal Liability from the Viewpoint of Islam

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Abstract: Crime has been accompanied by punishment in its different forms as a behavior opposing to desirable condition of human and if we define criminal liability as toleration of punishment against a definite behavior in the simplest sense, we should acknowledge that this type of liability in human societies has been as long as crime and punishment because punishment is referred to an entity as human reaction which has been effective on emergence of crime. On this basis, theoretical fundamentals of criminal liability have been studied with descriptive method and it was concluded that criminal liability will not be practicable from the viewpoint of Islam until training, ethical, governmental, legal and judicial system is established based on Islamic knowledge and beliefs.

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Introduction

In the primary stages of social life, punishment was a reaction which was expressed only for removing pain and discomfort resulting from special behavior and they didn't distinguish between origins of emergence. This origin was considered in punishment and had criminal liability against the behavior which was effective on creation of pain whether it is human or animal or even inanimate. In more advanced stages, punishment was converted to a reaction against loss caused by a defined behavior. In this stage, human took a further step and defined criminal liability of an entity based on type and rate of financial or life loss which it caused. Liability or toleration of punishment against a definite behavior in historical stage had only material and concrete nature that is an entity was forced to tolerate punishment only because it was origin of pain or loss. Gradually human achieved a stage of ethical and social growth under auspices of heavenly doctrines and revelations of the divine prophets and social philosophers and Muslims so that he could separate criminal liability from their pure material and concrete nature and solidify it based on justice and ethical principles. On this basis, the present paper which was conducted in descriptive and analytical method seeks to answer the following questions: what is criminal liability? How are fundamentals of criminal liability in Islam? How can one execute real meaning and true concept of criminal liability from the viewpoint of Islam? On this basis, main hypothesis of this research is that criminal liability will not be practicable from the viewpoint of Islam until training, ethical, governmental, legal and judicial system is established based on Islamic knowledge and beliefs.

Definition and Explanation of Criminal Liability

Liability of which article has been given in Quran means desirability, responsibility or obligation to perform an affair or thing (a guarantee) which the human is requested to do and the liable person or requested person means a person whose obligation is significantly local and is performed by him. Liability is generally defined as state or attribute of a person which is liable to the action for which he will be punished. It has been also defined as chastisement, protest and penalty and commissioning of an action which causes punishment of the person who has committed it. Two other definitions than the first definition are not appropriate for liability in its general sense because punishment is defined as actual criminal liability not its general sense and it should be said about the recent definition that liability is not commission of act but the credited state and later and expected modes.

Literal Definition

In dictionaries, liability means something that is a hindrance or puts a human at a disadvantage and almost means duty, task and what the human shall perform. In Novin Dictionary, liability means being punished (Maluf, 2003).

Mofradat Ragheb has defined liability as question meaning demand, request and question and as it is said, means asking about someone's health or means they ask you about spoils. Liable also has been defined as punishable (Ragheb Esfahani, 1992). In any case, study of different meanings of liability clarifies that this word is accompanied by commitment and duty but this meaning alone cannot recite different concepts and various and idiomatic dimensions of liability. In order to understand expansive and various concepts of liability, other factors and conditions

should be considered in addition to the obligation and duty which are enacted by the competent authority:

First, legality of the competent authority or authorities who are entitled to enact any rule or duty seems reasonable and logical.

Second: the person who is legally important becomes aware of duty and statutory law and is able to act or omit it. In this regard, different dimensions of liability and its nature will be provided with the following factors:

- 1- The presence of legal orders
- 2- Legality of the legislator or the person who enacts a duty
- 3- Awareness of the person with rule and duty and finally ability to act or omit it.

Idiomatic Definition

Marc Ancel, the French lawyer, writes: new sciences of criminology and particularly criminal psychology prove that there is feeling of responsibility in nature of everyone even those who are not legally responsible. This feeling of responsibility is a human reality which should not be neglected at all. Waiving this intrinsic feeling of responsibility makes up far from reality and facts (Ancel, 1964). Dr. Langroodi defines criminal liability as: liability of perpetrator of a crime among the crimes expressed in law and liable person will be punished as stipulated in law. The community incurs loss resulting from crime unlike civil liability for which individuals incur loss (Jafari LANGroodi, 2009). As observed, the above definition in terminology doesn't truly indicate idiomatic meaning of criminal liability and is not adequate because it doesn't include all aspects and constituent elements and is criminally criticized. Penal lawyers of Iran study criminal liability from the viewpoint of different schools and analyzed its fundamentals in their writings without defining it. However, definition of this subject can be found in writings of many professors.

One of the best definitions which included all aspects of criminal liability is the definition which has been given by Dr. Noorbaha. He says: criminal liability means ability to attribute punishable action or omission or interim measures of protection to those who are able to tolerate burden of punishment or interim measures of protection (Noorbaha, 2004). The Islamic jurists have not discussed subject of criminal liability as an independent subject and as mentioned in the law but have mentioned criminal issues in three sections of penalty, punishment and blood moneys by looking at it and according to the method which has been common in religious jurisprudence. However, this doesn't mean the absence of juristic meaning and concept of this term because although it apparently shows failure of the

juristic writers to give definition, study and deliberation of juristic sources and juristic works and writings indicate that it will be possible to achieve this result.

History of Criminal Liability

Lawyers have studied changes in theoretical fundamentals which justify criminal liability and punishment, penal regulations and effect of penal thoughts on justification of criminal liability and penal regulations within some periods. According to them, although there may not be strong evidence in all human societies regarding classification of changes in theoretical fundamentals of criminal liability and punishment, these changes cannot be studied as societies in three historical periods i.e. private wars, private justice and public justice (Sanei, 1974).

Criminal Liability in Ancient Periods

In ancient times, criminal liability had not the meaning which is used at present. At that time, material commissioning of the action subjected the person to punishment irrespective of the perpetrator's characteristics. If a person commits a crime, whether he is sane or not, he will be punished. Even in many cases, punishment for the unintentional crimes was similar to intentional crimes. "Majmaolghavanin Hamooraei" which is one of the oldest laws to which we have access confirms truth of this claim. In clause 229 of this law, it is stipulated that in case an architect builds a house for a person and doesn't consider its strength, as a result, the house will be ruined and it causes death of the owner. Such architect will deserve capital punishment (Saleh, 1969). At that time, the legislator has stipulated the same punishment for unintentional crimes as intentional crime. At that time, liability was ordinary liability and commission of crime caused him to be punished irrespective of the perpetrator's intention. Liability and punishment were not private meaning that not only perpetrator but also his relatives were not exempt from punishment and prosecution. In clause 230 of Majmaolghavanin Hamooraei, it is stipulated that in case son of the householder dies due to destruction of the house, son of the architect should be hanged in order to retaliate against death of the householder's son. According to Mr. Lavasor and Ambar, the reason was that basis of punishment at the old days was on firmness principles.

First, punishment (qisas) means that the society expects similar punishment for any action according to law of retaliation.

Second, causing fear or intimidation, means that the society expects to see access and fear in other people by executing punishment for the perpetrator and inhibit the potential criminals from committing crimes in the future.

Third, victim for the gods, meaning that the society has believed that anger of the gods caused by commission of crime is restrained by victimizing the people even innocent people. It is evident that criminal intention and ethical liability of committing crime have not been effective on such vision. For this reason, the insane, deceased and even animals were not exempt from prosecution and punishment.

One of the definite principles of the present criminal law is that prosecution and trial will come to a close after death of the accused. Article 8 of criminal procedure has regarded one of the cases for ending the prosecution is the accused or offender. But such definite principle was not applicable at the ancient days. For example, in ancient Greece, the important offenders might be prosecuted and tried even after death. For example it was stipulated that in case a person committed suicide, his hand would be amputated and buried at another place. Plato also believed that a person who committed suicide would be buried in a deserted, dry and hard place and without any ceremonies. In Medieval period, although formal religions tried to change concept of criminal liability, no change was made. Not only the dead and animals were tried, relatives of the offenders were not relieved of prosecution, trial and conviction. Judges were entitled to prosecute relatives of the perpetrator and also transfer liability to family of the perpetrator. Motlier pointed out in a book which he wrote in Medieval Period that in case a person committed an important crime against the king or crown prince, not only should he be tortured severely and condemned to death, but also his children should be executed. Aim of this action is to eradicate generation of the wrongdoers and their children who inherit infidelity and crime from their father. In archive of one of the prisons in France during Medieval Period called Sainte-Geneviève, there was a case in which the court judge ordered to arrest and jail wife of a criminal who escaped after committing crime. In Iran, the condition was the same in common crimes. A tourist called Antoine Jane Sain Kan who traveled to Iran in century 16 AD writes: those who are found by the king to be criminal will be severely punished with their children (Saleh, 1969).

Criminal Liability in Contemporary Periods

In late century 18, crime was gradually regarded as a phenomenon which disrupted interests of the society based on penal thoughts and beliefs of scientists such as Rousseau Beccaria and Bentham and basis of all punishments was social advantage and prevent or intimidation. Publication of this thought left considerable effect on change of criminal laws and policy at that time and this change caused "classic" school of criminal law and the subsequent changes

and emergence of newer schools in the field of punishments and criminal policy. Careful study of the law history shows that criminal law has been affected by social changes and achievements of human sciences and emergence of new philosophical and political thoughts like other parts of law in the Occident and France. Meanwhile, effect of political-philosophical thoughts at late century 18 AD may be more important than any other factor causing considerable change in conceptual fundamentals, principles of criminal issues, emergence of classic school of criminal law and reformist movement in criminal laws. On this occasion, some criminal lawyers believed that origin of criminal law classic school is publication of book" Montesquieu :De l'esprit des lois" in 1748 AD. In order to reinvestigate criminal liability, scientists decided to use judicial facts and human advanced sciences such as psychology, psychoanalysis and criminology as their guide instead of following prejudices and obedience hypotheses and deal with this issue based on science and experience. In these scientific efforts, most of the psychologists and psychoanalysts and judges found that there is responsibility feeling in any crime even for those who are not criminally liable so that Edward De Graaf, contemporary Belgian criminologist has mentioned that this internal responsibility feeling causes to prove his personality and freedom as the offender believes. Edward De Graaf adds: this responsibility feeling appears in the ordinary, mentally deficient and insane people by all means (Ancel, 1964). In order to deal with this fact, one cannot accept views of the school which regarded human as a puppet of internal and external criminal factors. After French Revolution and emergence of modern criminal law, many changes were made in concept of criminal liability. Subject of "material liability" and "criminal liability of other people's actions" were removed and philosophers of century 18 who caused French evolution and finally had made arrangement for enactment of modern criminal law and the revolutionary men of France believed that because the human beings who are not able to protect themselves against natural disasters alone, they had to gather and enact social contract. The society which was created in such manner is able to enact some regulations for protecting themselves. Now, if a person violates these regulations for protecting health of the society is considered liable and society is entitled to punish him for this reason (Rousseau, 1895). Society is entitled to punish only those who are involved in conclusion of social contract and violated it with power of understanding and common sense. Therefore, objects and animals which are not involved in conclusion of social contract and the deceased have lost their power of understanding due to death and the insane people

who are unable to understand their duties due to lack of common sense are relieved from liability. Historians have studied issue relating to reformist movement in political, social and legal foundations which have started since century 18 as contemporary period. Generally, it is neither a new effort nor old effort to think better about criminal principles and laws in order to observe rights of people in collective life because social life and manifestations of collective life have faced many problems in criminal affairs since life story of human started and human has tried to find an answer for them. It is not an old effort because changes of criminal regulations are affected by its factors phenomena like other social institutions in the form of life and society and in case human faces a new fact; he has to review the previous theories and analyses.

Study of law history shows that reformist movement in principles and rules of criminal law had some proponents since beginning of human civilization history and this main change has started in attitude of liability in Europe since century 18 AD. In this century, attitude to support personal rights and freedoms has been promoted and some activities have started to reform criminal laws and regulations. Some scientists such as Beccaria have criticized the available legal institutions and severely criticized criminal study dominant at that period so that they have made major changes in criminal legal system in Europe at that time by publishing their works. One of the most important legal works which has been written in emergence of reformist movement in criminal law is book of crimes and punishments written by Beccaria, Italian scientist which was published in 1766 and considered by the revolutionists. Views and beliefs of this scientist about principles of crimes and punishment and criminal liability of the criminals have been reflected in criminal law of France, 1791 which is known as evolutionary law. Declaration of Human Rights, 1789 legalized and popularized principle of equality and individualization of criminal liability and as a result of these changes, attitude of the past generations to liability and trial of bodies and animals, transfer of criminal liability to the criminal's relatives has been eliminated. On the other hand, publication of book "Social Contract" written by Jean-Jacques Rousseau and views of other philosophers, scientists and revolutionists have created new attitude for analysis of laws legality. It means that because humans are not able to fulfill their requirements and protect themselves against different natural and social events, therefore, they gather to use their reason and wisdom and draw up social contract.

The society which will be created based on theory of social contract has to enact different laws and regulations such as criminal laws in order to

manage affairs and survive and will put them into action. Now, if a person violates these laws and regulations with his criminal act which have been enacted for establishing order and supporting society and person, he will be regarded liable and the society is entitled to prosecute and punish him and regards him liable due to violation of statutory systems. Of course, right of society to prosecute and punish the criminal is not boundless, but it can only prosecute those who were involved in conclusion of social contract and then opposed to social systems and violated laws with their science and awareness and using their rational abilities and make them liable. Based on this analysis and such theory, the dead and bodies which have lost their power and ability or the insane who are unable to understand their social duties due to lack of common sense and discernment and the animals which don't interfere in conclusion of social contract are relieved from criminal liability and consequently, the relatives of criminal who have not been involved in violation of laws resulting from social contract cannot be prosecuted and punished, because all of these affairs are contrary to the social contract. As a result of reflection of Jean-Jacques Rousseau and other authorities' views in criminal law of 1791 after French Revolution and other criminal laws and the countries which have been affected by criminal law of France in contemporary periods, attitude of the past generations toward liability has changed and principle of legality, proof of ethical liability and individualization of criminal liability of the criminal's relatives were abolished.

Criminal liability in Islam

Islam studies human in two separate section: in the first stage, human is dependent on inheritance, environment and social and historical conditions, has not reached conscience, has not felt himself and has not reached awareness.

This stage is stage of childhood, infancy and stage before puberty. In this section, Islam looks at training environment, training forms and training factors and instruments in order to train child and thinks about factors effective on his physical and mental structure even before birth and conception. It has paid attention to all of these cases and not ignored them and issued necessary orders for physical and mental health of the family and plans all of them. In the second stage, the human who has reached puberty age knows himself because he has entered the final element of his personality far from the instincts, emotions, feelings, imagination, illusion and thought and element of reasoning has been formed in him. The human will not be perfect (mature, wise, aware, obliged and responsible) until he doesn't reach this stage even if he is thoughtful and discerning. The

human will be endowed with spirit and divine breathe after puberty, reasoning, selection and belief. This is what baby reaches in mother's womb and is not divine breath (Safaei Haeri, 2009). Perhaps the story of human and creation of man which has been told in Quran is very different from the attitude. Spirit blowing is mentioned after stage of balance of creation and being worshiped follows stages of blowing of spirit and balance of creation. Balance of creation of human occurs at time of his intellectual maturity and formation of reason element in him. Child will not be mature and wise person and his spirit will not blow until all of his talents are formed. It should not be imagined that this spirit which is blown in stage of balance of creation and full creation is the motion of baby in age of four months in mother's womb. In any case, according to Islam, human will become human after puberty and reaching this stage of balance of creation and full creation. Human reaches freedom by combining element of reason and achieves consciousness. Such mature and wise human knows and tests ways and goals (good and evil, good and bad) and is released from all predeterminations of inheritance, environment and instinct and reaches freedom and liability. This freedom doesn't arise out of the awareness comprising of instinct, imagination, thinking and reasoning. Therefore, the human who has been accompanied by a set of senses, reflections in his mind, imagination and mental ideas, curiosity, feelings, emotions, thought, deduction, generalization and abstraction reaches element of reasoning in his maturity period. This element complements his personality by measuring the ways presented by learning, religious training or guidance and measuring goals based on rank and size of human and brings him to a position which he can tolerate burden of trust, duty and different canonical, divine, legal and criminal liabilities. After this stage, such human can be recompensed and punished. Criminal liability is based on such bases and foundations from the viewpoint of Islam's anthropology.

Sociological Fundamentals of criminal Liability in Criminal System of Islam

In sociological fundamentals, criminal liability can be introduced. Humans are combination of predeterminations and factors none of which are original. Origin is achieved only by combining them and this combination is the wholeness which comprises society, history, reason, instinct etc. Community is also a generality, parts of which are humans. Story of the "part and partial" and "wholeness and whole" is mentioned here. This point explains difference between this fundamental insight and superficial and one-dimensional insights. Society and history are part of a human wholeness and are

effective on him not dominant on him. Human includes society and history and such human and his personality are rooted in the entire society and history. Major needs of human lead him to community and social contracts and relate them in society. In society, there are relations and trades which are inspired by human needs. These relations bring up necessity of strategy and order of policy of social life, an adjustment which is harmonious with the existence system and a strategy which is harmonious with combination and talents of human because what is not harmonious with these two cases cause pain and destruction of society and human. In sociological fundamentals of Islam, we can easily set many social and political schools and systems aside with this criterion because they don't pay attention to their harmony with existence and human in such adjustment and strategy (ontological and anthropological fundamentals) while human has relation with the entire existence even in his simplest needs, even in a morsel and a clothes. As a result, there is no way for human but to face it and take advantage of the awareness which controls the entire existence and knows all relations. Such awareness is available because it is necessary. As human believes, there are fuels for him due to necessity (Hashemi, 2005).

Position of Fundamentals of Criminal Liability in master Plan of Criminal Policy of Islam

We should say about criminal policy of Islamic society that Islam starts with training –ethical system and epistemic foundations in order to fight against criminal phenomenon and crime effectively in the Muslim and Islamic society and enters Islamic society after formation of knowledge and religious thought and emergence of Islamic belief and ethics in person and designs its social system. After establishing nation and religious society based on knowledge, tendency and belief in religion, it is time to design political –governmental system. After establishing government in such dynamic and targeted society (nation), it is time to implement economic system of Islam based on its special principles. After establishing economic justice and distributing facilities fairly, it is time to establish and implement legal, judicial and criminal systems of Islam. In this stage, problems of criminal system establishment are minimized and prevention of crimes, pathology and mental health of person and society has been really organized considering the previous systems and the mentioned fields (Motahari, 1998).

Conclusion

It seems that criminal liability will be given meaning with human independence presumption. Such

human shows his bad intention by selecting criminal behaviors freely and for this purpose, it is reprimanded. Therefore, he should accept criminal consequences of his actions. On this basis, human is able to distinguish between bad and good actions and select one of them and in case he has lost ability to select freedom of action committed by him, it will not be reprimanded for the bad behaviors which he performs. Therefore, concept of criminal concept is not socially separated from concept of blame and punishment of the criminals is indicative of general blame. On the other hand and since there are different forms of the absence of will; it is not possible to determine evidences of the cases which obviate criminal liability and it is better to study effects of these factors not these factors in order to recognize the factors which relieve criminal liability by considering will and power as criterion. In other words, what is regarded as basis of determining criminal liability or the absence of criminal liability for the persons is quality and extent of the effect which special condition has on will and power of person and one should not rely only on recognition and consideration of factors and evidences of such states and conditions to determine criminal liability of the persons. From the viewpoint of Islam, it seems that criminal policy of the Islamic society is not completely followed and it will not be successful until training, ethical, governmental, legal and judicial system is established based on Islamic knowledge and beliefs and statistics of crimes will not be lowered. In our view, criminal liability will take its real concept and correct basis in criminal system of Islam in such space and with such major criminal policy. Without these foundations and without this master plan, one cannot reduce effects of crimes only with coarse or mild critical policy. It seems that this master plan of religious society and religious government (which starts with religious monotheism and knowledge and has created link between people and social institutions based on justice, magnanimity not oppression, sin and enmity in Islamic society) gets ahead of all criminal schools of civilized world (minus religion) and is not comparable with them because subject of criminal phenomenon is not one-dimensional and without strong basis and has followed a principled, multilateral and comprehensive criminal policy.

Criminal liability plan of human (the balanced, wise, adult and conscious human) in such

society which has started its religious invitation with evidences, revelation, training and guidance of humans (with mental language of the public and common language of all humans in all eras and generations with book and balance) is a plan with strong and firm bases.

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References

1. Ancel, Mark, (1964), Criminal Liability from the Legal And Judicial Viewpoint, International Journal of Criminology and Scientific Police, France.
2. Hashemi, Seyed Mohammad (2005), human rights and fundamental freedoms, Mizan Publications, Tehran, Iran.
3. Jafari Langroodi, Mohammad Jafar, (2009), Terminology of Law, Ganj e Danesh Publisher, Tehran, Iran.
4. Maluf, Luwis, (2003), Novin Comprehensive Dictionary (Arabic, Persian), translated by Ahmad Sayah, Islamic Publisher, Vol. 1, Qom, Iran.
5. Motahari, Morteza (1998), a course in Nahjolbalaghe, Sadra publication, Tehran, Iran.
6. Noorbaha, Reza, (2004), Public Criminal Law, Mizan Publications, Tehran, Iran.
7. Ragheb Esfahani, (1992), Vocabulary in a strange Quran, Darolqalam Publisher, Damascus, Syria.
8. Rousseau, Jean-Jacques, (1895), *Social Contract*, Swan Sonnenschein & Co, UK.
9. Safaei Haeri, Ali, (2009), Human in two chapters, Laylatolqadr Publisher, Qom, Iran.
10. Saleh, Alipasha, (1969), History of Law, University of Tehran Publication, Tehran, Iran.
11. Sanei, Parviz, (1974), Public Criminal Law, National University of Iran Publisher, Tehran, Iran.