



Afghanistan's Criminal Policy in Supporting Cultural Rights from the Perspective of Islamic Teachings and International Documents

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Abstract

Based on social reality, cultural rights are a branch of human rights which is of fundamental importance compared to their other sub-branches. Based on this fact, their religious and customary position is such that according to Islamic teachings, their provision is considered as one of the objectives of the mission of the Prophets, and at the international level, it is also part of many international requirements. Therefore, here, the question is what measures Afghanistan's criminal policy has taken to protect these rights, which are worthy of the position of cultural rights based on human needs, Islamic teachings, and international documents? Considering the lack of any theoretical and research activity in this field, the necessity of discussing this topic seems inevitable. Therefore, the present article examined the penal-cultural policy of this country (with inductive, citation, and comparative methods and according to Islamic teachings and international documents), from the aspect of criminalization and the way of criminal response to the violation of cultural rights and reached the following results: (1) What can be mentioned as the privilege of the legal system of this country, in relation to cultural rights, is that this legal system, in harmony with Islamic teachings and international documents, has tried to recognize major examples of cultural rights, both in the constitution and in ordinary laws and regulations. This is considered a positive step in protecting these rights. (2) Despite what was mentioned, according to the mentioned criminal policy, violation of some recognized examples of these rights is not criminalized either at all or transparently. Considering the "principle of the legality of crimes", this creates a problem in the way of protecting these rights, and it seems to be the weak point of this policy. In addition, determining the type, amount or method of implementing criminal responses is rather influenced by the international or economic considerations of the government not the degree of the ugliness of the act, the damage caused to the social and moral system, the type of criminal motive or the social and cultural attributes of this country. For this reason, the way to respond to crimes against cultural rights seems to be not very compatible with the "principle of justice and proportionality of crimes and punishments" nor effectively provides the purposes of the "utility principle of punishment" in criminal policy.

Keywords: *Criminal Policy; Rights; Culture; Cultural Rights; Islamic Teachings; International Documents*

Introduction

Acknowledging that cultural rights are a branch of human rights and after the right to life, they are not only the most basic rights belonging to humans, but many examples of them are considered as the basis for enjoying other human rights. Hence, observing and supporting them is one of the social necessities. For this reason, the public expectation is that the governments should support them, and to protect them against the invaders of these rights, establish effective implementation guarantees. Although these rights, following Islamic teachings and international documents, have been emphasized in the constitution and some ordinary laws and regulations of Afghanistan, what is the guarantee of these assignments and the criminal policy of Afghanistan, in terms of criminalization and criminal accountability, what measures has taken to force the responsible individuals and institutions to comply with the mentioned rights and perform their duties, will be examined and analyzed in this research. Therefore, this article aims to answer this question: According to Islamic teachings and international documents, how Afghanistan's criminal policy is evaluated in the protection of cultural rights?

On the one hand, since many human rights and freedoms are either in the set of cultural rights or require the implementation of cultural rights for their proper realization, we can say: Enforcement guarantee of cultural rights plays an irreplaceable role in the implementation of social justice and in addition to their high position in Sharia law, the specification of these rights in numerous international documents narrates of their customary and rational impressive status. On the other hand, according to the search that was carried out in various ways, there has been no discussion about their criminal enforcement guarantees. By understanding the necessity of research on this issue and considering articles 3 and 7 of the Constitution of Afghanistan, it was decided that the "criminal policy" of Afghanistan in support of cultural rights, from the perspective of Islamic teachings and international documents, will be examined.

The work in this research is done by inductive, citation and comparative method and the contents of this research, based on the nature of the topic and the necessity of the discussion, will be arranged in the form of three parts; (1) Lexicology, (2) the foundations of criminal protection of cultural rights and (3) protective-punitive measures of cultural rights

1. Lexicology

In this section, as necessary, a brief study of the most key elements that form the topic of the discussion will be done. These elements in the order used in the title of this article are: criminal policy, right, culture and cultural rights.

1-1) Criminal Policy

In Persian dictionaries, *seyasat* (policy) means ruling over the subjects, managing state affairs, governing, presiding (Moin, 2013, the word *seyasat*), managing citizens, keeping the limits of everything (Amid, 2010, the word *policy*), punishing and punishment (Jaafari Langroudi, 2011, vol. 3, p. 222). *Kaifar* (punishment) also means reward for good and bad deeds, penalty, punishment and legal punishment (Moin, 2013, the word *kaifar*) and the word of "Keifari" is an adjective formed of joining attributive "i" to the word of "Kaifar" and that time it means "Jazaie" (Ibid).when the word "seyasat" is combined by the word "kaifari" and the combination of "seyasat keifari" become existing, it means a set of criminal measurements and strategies (in opposite of security, social, economic and cultural strategies).

Therefore, criminal policy, in the term, is called a collection of scientific and experimental techniques, strategies, methods and policies which is predicted and regulated for the administration and improvement of the criminal system in terms of fighting against crime and preventing and controlling various issues arising from the phenomenon of crime with various judicial means at a specific time and

place and it is recommended to the legislator for the correct and accurate codification of the criminal law, to the judge for the fair implementation of the law, and to the prison organization for the correct and scientific implementation of criminal sentences (Imani, 2012, p. 302). On the one hand, the fundamentals of criminal policy regulation are the findings and data of criminology which is in charge of studying the causes and factors of delinquency (according to the human, psychological, economic and social aspects of crime) and methods of treatment and prevention and on the other hand, it is criminal law that studies the set of criminal laws and regulations in terms of the method of criminalization, criminal responding and criminal proceedings (Mazluman, 1974, p. 263). Therefore, the criminal policy is the result of the cooperation between the two sciences of criminology and criminal law and it means the set of penal measures that are adopted by the legislative body and applied to the criminals by the judicial body and implemented by the executive bodies in order to fight against the phenomenon of crime. Its most basic tools are: (1) criminalizing the violation of legal values and (2) determining social reaction or criminal enforcement guarantees.

1-2) Haq (Right)

Regardless of the literal meaning of right, this word has several meanings in the term: (1) right in the meaning of social regulations that is a system with guarantee of implementation and governs the individual and social behavior of the citizens of a society, (2) Right means wages and financial rewards and (3) right in the sense of credit matter, which has specific meaning and effects in each case. In this sense, the addition of the right expresses its specific credit concept in each case (Gharavi, 1425 AH, p. 10). In this article, this concept of right is intended. Therefore, the right is a validated thing by which the owner of the right deserves to benefit from something and appropriate it and others are also obliged to respect it (Mousavi and Haqirat, 2009, p. 129). The validity of the right in this sense for someone is reasonable if others are obliged to comply with it and otherwise, establishing of the right will be in vain because in this case, establishing of the right has no fruit. Therefore, right and duty are correlated i.e. if the right means a privilege for the benefit of the right holder, on the opposite, the duty is obligatory for others. Therefore, wherever there is a right, there is also a duty.

1-3) Farhang (Culture)

Farhang (culture) refers to a mixed, complex and systematic collection of knowledge, identifications, arts, beliefs, rights, customs, the origin of goodness and many things that man acquires from his society (Ashuri, 2002, pp. 32 and 71). In the world conference in Mexico City (1982), cultural experts of the world have defined culture: "Culture is a whole that is composed of different spiritual, material, intellectual and emotional characteristics that are the characteristics of a society or a group, And it includes not only arts and writings, but also life situations, basic human rights, value systems, traditions and beliefs..." (Babaei Talateppe, w.d, p. 21). According to the definitions above, its most important components are: (1) beliefs, (2) values, (3) lifestyle, (4) behavioral patterns (laws, customs, manners) and (5) the arts.

1-4) Cultural Rights

Despite the existence of various national and international documents regarding the protection of human rights, concerning cultural rights, until now, none of these documents have had a general and clear definition of it, other than stating the components of these rights (Universal Declaration of Cultural Diversity, Article 5). Nevertheless, thinkers in different fields have given different and numerous definitions for it. According to one example of them, cultural rights are a group of human rights that support the human right to participate in the cultural life of society, to benefit from scientific developments, to preserve ethics, to use fundamental interests in science, to acquire knowledge or art productions, to achieve education and to preserve cultural, linguistic, and customs identity (Tajarlu, 2013, p. 321).

Due to the fact that human being is a sentient being and the possessor of reason and thought, naturally, his main need, beyond responding to his natural instincts, is to acquire knowledge and respect his human dignity and this inherent need is that drives man to intellectual effort and gives his cultural rights a priority and a place beyond other needs and rights. However, these rights do not mean valuing any kind of freedom, crossing all conscientious, intellectual and religious boundaries, indulgence and desecration of human and moral values because there is no right for human without limit and border. In general, justice means the realization of everyone's rights as much as they deserve. In Islamic teachings, a limit has been considered for every right, and its transgression is considered injustice (Al-Baqarah, verse 229). In international human rights documents, limits have been considered for human rights in all its civil, political, economic, social and cultural fields. According to paragraph 2 of Article 29 of the Universal Declaration, all rights and freedoms considered for humans are limited to the rights and freedoms of others, public order, moral requirements and general welfare. The same limits and conditions are clearly stated in Articles 18 and 19 of the International Covenant on Civil and Political Rights, respectively, regarding freedom of thought, conscience and religion, and freedom of opinion and expression.

According to Article 26 of the Universal Declaration: "Education shall be directed to the full development of the human personality..." especially since, according to the documents above, cultural rights are rooted in the "inherent dignity" of humans (preamble to the International Covenant on Cultural Rights). So, these rights must be something that is proportional to human dignity because no common sense considers licentiousness and debauchery as a requirement of human dignity. Based on this, cultural rights mean those rights and freedoms that by having them, man can develop his intellect, conscience and human qualities and by using them, he can fulfill all his spiritual and physical needs and enjoy a life adequate to his inherent dignity.

Considering what was said, especially according to Article 5 of the Universal Declaration of Cultural Diversity and what was stated by some UN reporters, like Linda (1966), under the title of "cultural rights" the most important examples of these rights, specified in international documents and are consistent with Islamic teachings, are: (1) The right to education, (2) The right to creativity and innovation in creating scientific, literary and artistic works, (3) The right to work in scientific and research activities, (4) The right to protect the material and spiritual benefits of cultural achievements (scientific, literary and artistic), (5) The right to freedom of the press and public media, (6) The right to preserve cultural identity (in the case of ethnic, linguistic and religious) and (7) the right to have favorable environments for spiritual growth.

2. Foundation of Criminal Supporting of Cultural Rights

According to dictionaries, numerous meanings, like footing, base, bottom, origin etc. have been mentioned for the word of "mabani" (foundation). (Dehkhoda, 1377, the word mabani). In the idiom, sometimes it means "argument and evidence of proof", sometimes it is used in the meaning of "general principles" and in some cases, it also means thematic principles that tell about the origin of a matter (Qeyasi, 2015, p. 38). The meaning of this word in this article is the same as the third use i.e. the origin of the binding of this type of rights. Thus, the question that must be answered here is: What is the origin of the binding of these rights and the need to protect them?

To answer this question, if the international documents that their founders and inviters beat the stone of supporting cultural rights to their chests alone, are referred, it can be seen that the commitment to cultural rights and its criminal protection originates from the inherent dignity of human beings; As stated in the first paragraph of the preamble of the International Covenant on Economic, Social and Cultural Rights: "Recognizing that these rights derive from the inherent dignity of the human person". This theme has been also mentioned in the preamble of the International Covenant on Civil and Political Rights. The above cases show the fact that "human beings as human beings" and regardless of any distinction and

characteristic has value and dignity and because of this intrinsic value and dignity, he has rights worthy of his intrinsic value. Since these rights have an inherent origin, first, all human beings are equal in enjoying it and secondly, these rights cannot be removed. This issue is clearly reflected in Article (1) of the Universal Declaration of Human Rights. Therefore, according to the appearance of international documents, since human beings have inherent dignity, they have a series of basic rights and freedoms. According to the rule of "non-separation of right and duty", any obligation to observe and protect the right is also based on inherent dignity. When this statement is true in its entirety, undoubtedly, it is true to cultural rights and freedoms and for this reason, criminal protection of these rights is based on inherent dignity.

What can be said about the above argument is that being "dignity" the origin of human rights, including cultural rights, does not seem very reasonable because regardless of accepting or rejecting the inherent dignity and equality of all human beings in having it, it should be noted that dignity, along with life and freedom, is considered one of the basic human rights (Article 1 of Universal Declaration Human Rights) and those three rights have been interpreted and said as three fundamental, related and inseparable rights that the right to life gives life to man, the right to dignity gives meaning to life, and freedom is a way to ensure the meaning and quality of life (Saramed, 2015, pp. 28-39). So how can dignity, one of the human rights, be the origin of all human rights and freedoms, including the origin of cultural rights and freedoms?

But according to Islamic teachings, the protection of cultural rights has a natural and divine origin, because according to the justice and wisdom of the legislator, his orders (positively or negatively) are based on the existence of expediencies or corruptions in the subject of those orders; as it is narrated in a sahih hadith from Jameel bin Darraj: "I asked Imam Sadeq (a.s.) about halal and haram, and he said: No ruling has been made without a reason" (Majlesi, 1404, vol. 60, p. 110). It is also mentioned in a hadith of Imam Reza (a.s.): "All the things that God has permitted, it is because of the expediency and benefit in it, and everything that He has forbidden, it is because of the corruption and harm in it" (Hor Ameli, 2007, vol. 16, p. 165). Among Imamiyyah jurists, this issue is agreed upon, as stated by the first martyr: "Sharia is established based on expediencies" (Aamili (Shahid I), w.d, Vol. 1, p. 218). Therefore, the establishment of cultural rights and the obligation to respect and protect them, as part of Sharia rules, it is based on the expediencies of observing these rights and the corruption of violating them. Now the question is: what exactly are these expediencies on which cultural rights are based?

In response to the question above, it should be noted that according to the teachings mentioned, human creation cannot be void and aimless; as the Holy Qur'an has specified by using negative interrogation: "Do you think that we have created you in vain and you will not return to us?" (Mominun, verse 15) or in another place, in relation to the whole system of existence, he says: "Lord! You did not create the earth and the heavens without a purpose" (Al-Imran, verse 191). Regarding the purpose of human nature, it is specified as follows: "I did not create jinn and humans except to worship me" (Dharyyat, verse 56). Worshiping also means submissive obedience and following (Sharqavi, ?) and the goal of obeying God is the salvation of man (Ahzab, verse 71) and attaining God's mercy (Al-Imran, verse 132). Undoubtedly, the perfect example of man's salvation is his closeness to the Lord, and the attainment of divine mercy is among its effects. Therefore, according to Islamic teachings, human creation is purposeful; it means that man has been created to achieve a supreme goal, which is nothing but obeying the Creator and achieving salvation through it and in order to achieve this goal, his knowing and creator has put a series of special talents and tendencies in his creation (Rom, verse 30) and for their growth and cultivation until it leads to the goal, he determined behavioral patterns in the real world (Motahhari, 1375, p. 149) and in order to discover them, he has armed man with external and internal prophets (Kolaini, 1407 AH, vol. 1, p. 16).

Since man, from the view point of Islamic teachings, in terms of creation, has a physical dimension and a psychological dimension (Hejr, verses 28 and 29), his inherent characteristics i.e. his

talents and inner tendencies are also of two types: (1) Material talents and tendencies, which material tendencies call for the development of material talents to meet the needs necessary to preserve the survival and continuation of the generation. Because these types of tendencies are a common element between humans and any other living being and are required by nature, they can be interpreted as natural tendencies. (2) Mental talents and tendencies, such as desire to know, desire to beauty, desire to art, desire to creativity and innovation, desire to spiritual survival, desire to honor, desire to freedom and ... which are like the power of thinking allocated to humans. These cases call for the growth and flourishing of spiritual talents. Such categories are embedded in the spiritual nature of human beings and they originate from his divine nature. For this reason, it can be interpreted as spiritual tendencies. The perfection of man, which is considered the goal of his creation, lies in the flourishing and actualization of these spiritual talents and tendencies. Therefore, cultural rights, its observance and its protection are required by spiritual nature and in line with the realization of human perfection, which forms the purpose of his creation. Such as every natural talent and tendency are the source of a natural right (Motahhari, 1375, pp. 148-149), every spiritual talent and tendency are also the source and origin of a moral right. Therefore, man has both natural rights and moral rights.

According to what was said, it is concluded that cultural rights and their protection have a natural and divine origin. Because God created man with the goal of achieving perfection and placed all the talents, needs and tendencies necessary to realize this goal in his creation. Any natural tendency like the tendency to knowledge, the tendency to beauty, the tendency to art, initiative, virtue and moral values, the tendency to spiritual survival, honor, freedom, etc. is the origin of a case of cultural rights. To say that human's natural talent and tendency to know and receive the truth is the origin of the right to education, scientific research, freedom of thought, searching and receiving and transmitting information. The sense of loving beauty and creation of beauty that is rooted in his natural perfectionism can be the origin of the human right to participate in artistic life, artistic developments, creating literary and artistic works, enjoying and benefiting from their material and spiritual benefits. Man's natural desire for virtue and moral perfection can be the origin of man's right to training of moral virtues, moral environment and facilities necessary for the development of these virtues and...

So, these rights are the requirements of the talents and tendencies that have been placed in the human nature by God, according to the requirements of wisdom and for the purpose of realizing the perfection of man. Based on the fact that the reason definitely perceives the ugliness of any violation of the rights of others and the goodness of supporting it, respecting and protecting these rights seems necessary and mandatory. With this statement, it becomes clear that cultural rights and the need of observing and protecting them derive from the divine nature of human and purposefulness of his creation.

3. Criminal Measures to Support Cultural Rights

After recognizing concept and cases of cultural rights and The foundation of supporting this type of rights, Now, Afghanistan's protective-punitive measures for these rights, From the perspective of criminalization and the way of criminal response and according to Islamic teachings and international documents, Under the title “Criminalization of Violation of Cultural Rights” and “Response to Violation of Cultural Rights” is examined separately.

3-1) Criminalization of Violation of Cultural Rights

As stated earlier, the most important components of these rights are: (1) the right to education (teaching and training), (2) the right to creativity and innovation in creating scientific, literary and artistic works, (3) The right to engage in scientific and research activities, (4) The right to support material and spiritual benefits of cultural achievements (scientific, literary and artistic), (5) the right to freedom of the press and public media, (6) the right to preserve cultural identity (in the case of ethnic, linguistic and religious minorities), (7) The right to enjoy favorable environments for material and spiritual growth

and... Now the debate is about which of these cases are criminalized and which ones need to be criminalized. In this way, it is better to organize the discussion under the title of "Criminalized cases" and "Cases needing criminalization".

3-1-1) Criminalized Cases

One of the cases of cultural rights is the "right to education". The infinitive noun of education comes from learning and means the act of learning and education (Dehkhoda, 1377, the word education). The right to education includes primary, compulsory and free education and access to technical, professional and higher education (Article 26 of the Declaration). One of the UN special rapporteurs on education says: The right to education is a part of human rights, which is included in both civil-political rights and economic, social and cultural rights, and includes elements of each. (Moazzami, 2008, p. 46) In the Holy Quran, human education is considered one of the objectives of the mission (Surah Juma, verse 2) And Hazrat Ali (pbuh) considered it as one of the rights of the subjects over the Islamic ruler (Nahj al-Balaghah (Sobhi Saleh), 1414 AH, p. 79, sermon 34) And Imam Sajjad (a.s.) also says in this context: "You are responsible for those whose guardianship is entrusted to you, for their good upbringing and guidance to God and his help in obeying His. ((Hor Ameli, 1409 AH, Wasael al-Shi'ah, vol. 15, p. 175). The Universal Declaration of Human Rights (Article 26), the International Covenant on Economic, Social and Cultural Rights (Articles 13 and 14) have emphasized it. According to the Constitution of Afghanistan, education, without any discrimination, is considered the right of all the citizens of this country to be provided by the government for free up to the bachelor's degree (Article 43 of the Civil Code). In addition, normal regulations; Such as Articles 3, 7 and 9 of the Education Law, Article 21 of the Law on Children's Correctional and Education Centers, Article 28 of the Law on Prisons and Detention Centers, etc..., has also emphasized the different aspects of this right. Now, the question is, what measures are foreseen in the criminal regulations of this country against the violation of this religious and customary right; If the general guardian (community management) or special guardians (parents and their legal guardians) in any way (either by negligence or creating an obstacle) violates this right, they will be considered criminal from the criminal point of view?

When referring to the relevant penal regulations for the purpose of answering the above question, the only case that is criminalized is depriving the child of this right; As Article 609 of the criminal Code of Afghanistan has stipulated: "A person who commits one of the following actions will be sentenced to short imprisonment or a monetary penalty of thirty thousand to sixty thousand Afghani: 1- Depriving a child of the right to education and technical and vocational training." Although in this legal article, "depriving a child of the right to education and technical and vocational training" is included in the legal ruling and the word deprivation refers to the act (creating obstacle) and omission (negligence) and likewise, the general and special trustees, but the point to consider is that children are not the only ones who are legally entitled to this right, but the law has granted this right to all citizens of the country (Article 43 of the constitution).

After the right to education, "the right to enjoy cultural achievements" is another right to be discussed. It means what today is interpreted as "right to intellectual work". And that is the exclusive right to use the invention and invention of intellectual matters in literature, sciences and arts, whether it is verbal or written or graphic (image, map or lines) or visualization and like that, also anything which is prepared with a scientific method, provided that it demonetary penaltys the intellectual character of the producer (Jaafari Langroudi, 2011, p. 1707). Although this right is created, it is accepted by Sharia; because these are the examples of the right, and the recognition of the examples is up to the custom, and Sharia and law are only expressing the ruling. Therefore, when the custom considers the material and spiritual benefits of cultural works as the financial right of its creator, the legislator also recognize those rights and consider violation of them as a crime. The international documents also accept the rights arising from scientific, literary and artistic works as a privilege for their owners (paragraph 2 of article 27 of the Universal Declaration of Human Rights and paragraph b of article 15 of the International

Economic, Social and Cultural Covenant). and in support of that, the World Intellectual Property Organization (WIPO) has been formed; The most important and comprehensive international document in support of this type of rights is the Berne Treaty, which was approved in 1886 and entered into force on December 5, 1887. In the legal system of Afghanistan, based on Article 47 of the Constitution, this right is recognized and the criminal lawmaker of this country, according to Article 742 of the Criminal Code has criminalized non-observance and non-respect for it, which does not need to be discussed further.

The right to have favorable environments for spiritual growth" is the third example of these rights. The meaning of this right is to provide all the necessary grounds and environments for the remonetary penaltyment and moral education of humans and the purification of the social environment; because home, educational centers and materials, mass communication media, society, etc. are all tempting factors towards moral sins. by saying that moral virtues and spiritual perfection are one of the natural things of man (Motahhari, 2012, pp. 78-80) and are rooted in the divine nature of man (Sura Rum, verse 30). According to Article 17 of Islamic Human Rights: "Every human being has the right to live in an environment free from corruption and moral diseases in such a way that he can develop himself spiritually. The society and the government should provide this right for him." International human rights documents have also paid attention to the spiritual growth and creation of human beings with virtues and moral virtues and providing the necessary context and environment for it (Article 26 of the Declaration). According to Article 17 of the Constitution, one of the duties and requirements of the government is to regulate and improve centers; like mosques, schools and religious centers that play the most important role in moral guidance and preparation of suitable environments for human education and spiritual growth. Similarly, according to Article 2, Article 18 and Article 22 of the Afghan Education Law, respectively, "Education of children, teenagers and young people as pious people and useful and healthy members of society", "Growth and development of moral, emotional, mental, physical and social moral talents of students", "Growth and strengthening of physical, mental health, Moral,..." And "teaching the religious, practical and moral principles, rules and rules of the holy religion of Islam" is one of the goals of this law and education. The health of the social and cultural environment is one of the very important issues that have been taken into consideration in the penal system of this country, and in order to prevent harming it, a wide range of behaviors have been criminalized (Articles 784 and 905 of the Criminal Code).

Today, the "right to survival of cultural identity" has been included in the collection of examples of cultural rights. Identity means the nature of an object or person, which includes its essential attributes (Omid, 2013, the word identity). Many types of identity can be imagined, which the cultural identity is the most important of them. According to the definition of culture, set of elements such as worldview, ideology, values, norms, myths, legends, customs, traditions, celebrities, symbols (language, flag, song, music, architecture, etc.) constitute the cultural identity of a group or society. Of course, this right is set forth more for minorities. Minority refers to a group of people different from the majority who have social power in a society, who usually have racial, religious or linguistic identity and characteristics. . In religious teachings, one of Ali's recommendations (peace be upon him) to Malik Ashtar is to serve all people; because they are either your religious brothers or similar to you in creation (Sobhe Saleh, 1414 AH, Letter 53, p. 426). In addition to the fact that this right has been generally emphasized in international documents (Articles 1 and 12 of the Declaration and Article 27 of the International Covenant on Civil and Political Rights), the right to survival and observance of national or ethnic, religious and linguistic identity of the minorities has been particularly emphasized in these documents too. According to Article (27) of the Civil and Political Covenant and Article (1) of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, countries have been considered responsible for ensuring the rights of racial, religious and linguistic minorities. In the legal system of Afghanistan, according to Article (2) of the constitution of this country: "...followers of other religions are free to follow their religion and perform their religious ceremonies within the limits of the law." and in the criminal system of this country, insulting religions, disrupting rituals and destroying their temples have been considered crimes (Article 323 of the Criminal Code) and Article 335 of the same law,

"persecuting and annoying any group or special body for political, racial, national, ethnic, cultural, religious,..." have been considered crimes against humanity.

3-1-2) Cases to Need for Criminalization

One of the examples of cultural rights is the "right to creativity and innovation". Creativity is the finding and producing an idea and innovation is the final product of creativity (Aali, 1372, pp. 59-65). The tendency to creativity and innovation is rooted in human nature (Motahhari, 1382, p. 83). The Holy Quran has described the surrounding environment and nature as the manifestation of innovations and has invited people to think about it (Fossilat, verse 53); Thinking cannot be separated from creativity and innovation; Because thinking means examining pre-existing ideas, existing ideas, and pre-made ones to reach a new result, a new idea and new and innovative structures (Muzaffar, 2014, vol. 1, p. 75). So without doubt, a call to thinking is a call to creativity and innovation. In paragraph (3) of Article 15 of the International Covenant on Economic, Social and Cultural Rights, the necessary freedom for scientific research and innovative activity has been specified. What was mentioned indicates the Shariah and international status of this right. However, in the penal regulations of this country, there is no legal text that criminalizes any creation of obstacle to the creativity and innovation of individuals or the negligence of the institutions responsible for supporting it.

The right to engage in scientific activities is another example of these rights. In the word, Employment means to be busy and to engage in business, etc. (Dehkhoda, 1377, employment) And what it means here is regular activity in exchange for receiving money; The right to work in scientific and research activities means the right to have a job and profession in scientific and research fields in the relevant centers. It is stated in the Holy Qur'an: "Man does not own anything but as part of the product of his efforts" (Najm, verse 39). This means that whenever a person acquires expertise and a profession through effort in one of the scientific fields, he has the right to choose a job and work in the same field, unless there is a Shariah prohibition in that field. In Article (23) of the Universal Declaration of Human Rights, the freedom of employment has been emphasized and this includes any type of employment including scientific, research and other. The International Covenant on Economic, Social and Cultural Rights requires member states to recognize and support the right to work and freedom of employment (Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights). According to Article 48 of the Constitution, "...the choice of job and profession is free, within the limits of the law." And according to Article 46 of the Constitution, "... the citizens of Afghanistan can, with the government's permission, establish higher education, general, specialized and literacy institutions..." However, if the government does not provide employment opportunities for people with scientific expertise or a person, whether real or legal, prevents the employment of these types of people in scientific fields; like having a professorship in a university or being a member of a scientific group, etc. What is the position of the criminal legislator, there is no answer in the criminal policy of this country.

"The right to freedom of information flow" is also an example of cultural rights. Here, it means the right to freely seek, receive, transmit and disseminate information (Article 19 of the Universal Declaration of Human Rights). The tendency to seek the truth and curiosity is one of the natural tendencies of humans (Motahhari, 2012, pp. 71-91). In order to secure this right, God has provided man with the means of perception, reason and revelation, and by giving these blessings, he has given man the right to know and think, and has given him the responsibility of applying the resulting knowledge. The fact that God orders his prophet to ask him to increase knowledge (Zumar, verse 114) shows the importance of knowledge and awareness in human life. Also, God has required people to ask knowledgeable people about something they do not know (Nahl, verse 43). Similarly, the right of access to information and free circulation of news is one of the basic human and citizenship rights accepted in international documents (Article 19 of the Declaration). Before that, Resolution No. 59 of the United Nations General Assembly declared in 1946: "Freedom of information is a fundamental human right and... is the cornerstone of all the freedoms that the United Nations has dedicated itself to." According to

articles 34 and 50 of the Constitution and Article 4 of the Public Media Law, all citizens have the right to freely seek, receive and transmit information and ideas without restrictions and threats from government officials, and the legislator has put responsible for protecting, strengthening and guaranteeing this right to the government.

However, in the penal laws of this country, as a guarantee of the implementation of this right, what measures have been practically considered to force the government to perform this duty, there is no clear and effective answer.

So the result of the discussion is that there are examples of these rights; such as the right to creativity (Article 2 of the Education Law), the right to freedom of employment in scientific and specialized activities (Articles 46 and 48 of the Constitution, Article 27 of the Mass Media Law and Clause (1) Article 12 of the Education Law), the right to freedom of information flow (Articles 34 and 50 of the Constitution) and the right to religious freedoms and education in accordance with personal circumstances (Articles 32 and 34 of the Law of Prisons and Detention Centers), which, despite the Shari'a and customary infrastructures of those cases, in the criminal regulations, any assault, by trustees and government institutions on them has not been criminalized. In addition, there are cases where while they have been considered as the right of all citizen (such as the right to education in Article 34 of the Constitution), but only the deprivation of children has been criminalized (Article 609 of Criminal Code).

Therefore, the application of crime to such cases does not have a legal basis; Because Clause (2) of Article 8 of the Criminal Code clearly states: "Criminalizing and applying any type of punishment to an act that is not recognized as a crime in this law is not permissible." Therefore, in the criminal policy of this country, the violation of some examples of cultural rights has been criminalized and the violation of others has not been criminalized and they lack enforcement guarantee. While it doesn't seem logical to consider a case as a citizen's right, it lacks a practical mechanism and sufficient enforcement guarantee.

3-2) Response to Violations of Cultural Rights

The meaning of responding to the violation of cultural rights, here, is the type of legal response that the criminal policymaker has determined against any violation of these rights. For fluency, clarity and improving the quality of discussion, it is necessary, first, to identify the answers determined in this area and then evaluate them in terms of justness and effectiveness. Therefore, the discussion here is organized under the title of "types of response" and "evaluation of justness and effectiveness of responses".

3-2-1) Types of Response

According to Article 3 of the Constitution, the criminal regulations of this country must be determined within the framework of Islamic beliefs and rulings. Cultural values and rights in Islamic teachings include a wide territory in the dimensions of beliefs, tendencies and behavioral patterns, which assaulting them is not without response and guarantees of criminal execution; especially when these values take a public aspect and are embodied in the form of a belief and moral system, its observance will be considered as the rights of a religious society. In the penal system of Afghanistan, influenced by the penal rules of Islam, the responses to the violation of these rights can be classified into two types: (1) prescribed punishments (hudud) and (2) discretionary punishments (tazer). According to Article 2 of the Criminal Code, the prescribed answers are determined according to Hanafi jurisprudence and the discretionary punishments are determined according to the Criminal Code.

What is meant by prescribed punishment is a punishment whose cause, type, amount and quality of its enforcement are determined in the Sharia (Najafi, without date, vol. 41, p. 254). The Holy Qur'an has specified four cases of prescribed crimes, and these cases are: (1) the crime of adultery (Surah Noor/verse 2), (2) theft (Surah Ma'idah/verse 37), fighting and corrupting the earth (Surah Ma'idah / verse 33) and Qazf (attributing adultery or buggery to someone) (Surah Noor / verse 3). Therefore, these

punishments cannot be changeable and transformable. Among the crimes against cultural rights, the following crimes have prescribed punishment: (1) attacking the religious system and sanctities of a society, which the crime of apostasy (Amoli, without date, Vol. 1, p. 38) and insulting the holy things such as the Prophet (PBUH) and the imams (peace be upon him) are of its examples (Khoei, 1430 AH, vol. 41, p. 321). (2) Violation of moral values and public modesty; such as sexual crimes (the subject of articles 643 and 684 of the Criminal Code), The crime of Qazf (the subject of Article 673 of the Civil Code) and the crime of Qauadi (pimping) (the subject of Article 650 of the Civil Code), especially in the case where the title of spreading prostitution applies to them and (3) stealing of intellectual property (scientific, literary and artistic works) or cultural and historical works.

Punitive answers mean punishment for committing crimes whose primary and inherent title is prohibition, and in most cases, determining its type and amount has been left to the ruler (Zoheili, 1997, vol.7, p.522). These answers are determined based on the Criminal Code in Afghanistan's criminal system. This type of response to the violation of cultural rights, in terms of the subject, is either imprisonment, or a monetary penalty, or a choice between the two.

Imprisonment for crimes against these rights includes the following: (1) Medium imprisonment from three to five years for anyone who interferes with the education of a child (Article 618 of the Criminal Code) and imprisonment of two to three years for anyone who leads a child to moral deviance (Article 654 of the same), (2) long imprisonment for someone who embezzles a historical or cultural artifact and medium or short imprisonment for someone who destroys, wastes or loses a historical or cultural artifact (Article 734), (3) Medium imprisonment for anyone who insults or distorts the beliefs or rules of the holy religion of Islam, and short imprisonment for anyone who insults the followers of other religions through words, writings or other public means (Article 325 of the Islamic Law) and medium imprisonment for a person who insults Islamic religions or sects through the use of computer programs or information (Article 871 of the Criminal Code) and (4) long imprisonment for the crime of "persecuting and harassing any group" or a specific group for political, racial, national, ethnic, cultural, religious reasons... (paragraph (4) of Article 336 of the same law).

However, punitive responses to crimes against cultural rights are mainly of the type of money, as an alternative to imprisonment and the second option (...imprisonment...or monetary penalty...) and in few cases, as Independent punishment is determined; For example, if someone prints, distributes and publishes another translation, he will be sentenced to a monetary penalty of 30,000 to 60,000 Afghani (Article 743 of the Civil Code).

The punishment for violating cultural rights is imprisonment or a monetary penalty in the following cases: (1) Short imprisonment or a monetary penalty of three to sixty thousand Afghani for the crime of depriving a child of the right to education and technical and vocational training (Article 609 of the Civil Code), (2) Short imprisonment or monetary penalty from thirty to sixty thousand Afghani for the crime of encroaching on the material or spiritual interests of scientific, literary and artistic achievements belonging to another person; Such as infringing another's copyright or displaying another's work without permission (Article 743 of Criminal Code) and medium imprisonment of up to two years or a monetary penalty of sixty to one hundred and twenty thousand Afghani for a person who produces, keeps, sells, supplies, uses or possesses other scientific and industrial discoveries without the written permission of the owner (Article 745 of Criminal Code), (3) Short imprisonment or monetary penalty from thirty to sixty thousand Afghani for the crime of assaulting religious and cultural freedoms (Article 324 of the Civil Code), (4) Medium imprisonment or monetary penalty from sixty to three hundred thousand Afghani for the crime of violating the freedom of information (Articles 853 and 854 of Criminal Code) and (5) medium imprisonment of up to two years or a monetary penalty of five to sixty thousand Afghani for a person who attacks public morals and modesty through a computer or telecommunication system (Article 867 of the Criminal Code) and medium imprisonment of up to two

years or a monetary penalty of sixty to one hundred thousand Afghanis for a person who commits this crime through pornography (Article 874 of the Criminal Code).

3-2-2) Evaluating the Justness and Effectiveness of the Answers

Under the previous heading, the ways of the criminal system of this country to respond to non-observance or any violation of this type of rights were searched and identified. Here, the question is to what extent the measures and answers that the criminal policy maker of this country has provided in response to the violation of cultural rights and to protect it, seem fair and effective. The importance of the discussion is that the most important goal of criminal regulations, based on Islamic teachings (Hadid, 25 and Maeda, 38) and international documents (preamble to the Statute of the International Criminal Court) and based on criminal policy of Afghanistan (Article 3 of Criminal Code) is providing fair security in the society. Since every effective answer may not be fair and vice versa, it is better to separate the discussion of the fairness of the answers from the discussion of their effectiveness and prevention.

3-2-2-1) The Fairness of the Answers

The word "just" is related to the word "justice", which in the dictionary means equality, balance, fairness, justice, etc. (Dehkhoda, 1377, the word justice). Ali (a.s.), in explaining the concept of justice, said: "Justice puts everything in its place." (Sayyed Razi, Nahj al-Balagha (Sobhi Saleh), p. 553, Hikmat 437). In the words of the sages, also in its definition, it is stated: "Justice is putting everything in its place and giving the right to every rightful owner" (Sabzwari, 2014, p. 54). Justice in the realm of crimes and punishments means the proportionality of the punishment to the crime committed (Mantzari, 2013, p. 266); That is, there must be a reasonable proportion between the committed crime and the determined criminal response. For committing a small crime, the perpetrator does not deserve severe punishment; although it may have many deterrent purposes. Since the perpetrator does not deserve it, it is unfair to impose it on the perpetrator. Likewise, if the punishment determined for the crime committed is lighter than the crime committed, it will be unfair. In other words, since the threshold of people's tolerance for punishment is not the same and the purpose, motive and circumstances of committing a crime are not in the same situation, justice requires that both in the phase of legislation and in the phase of implementation, The mentioned circumstances should be taken into consideration. Therefore, the criterion of the fairness of criminal responses to the violation of cultural rights is that answers determined should be in proportion with the merit of the criminal, Based on the commission of the crime, the harm inflicted on the victim, the purpose, motivation, and the internal and external conditions governing the criminal, and the level of ugliness and reprehensibility of the act committed in society.

If, in order to achieve the above goal, the examples of cultural rights and their importance are studied once again, this article will draw attention to the fact that the examples, due to the difference in importance, ugliness, reprehensibility, and as a result, deserve to be punished Its violation is different; Sometimes the values and rights belong to the group or society; like the belief system, morality and public modesty are exposed to attack and sometimes an individual right. The crime committed is also different in terms of the quality of assault and damage. Observance of these differences determines the fairness of a criminal policy; as the legislator, in Article 208 of the Criminal Code, has specified the necessity of observing this matter in its judicial aspect. Now it should be checked the legislator himself, to what extent, has realized this idea in determining the response to the violation of cultural rights and its protection, in terms of legislation and in practice. Here, in appropriateness of circumstances and in order to avoid prolonging the discussion, it suffices to examine a few examples.

- 1) As mentioned in the previous discussion, according to Article 325 of the Criminal Code, the legislator has considered medium imprisonment for a person who insults or distorts the beliefs or rules of the holy religion of Islam. If he insults the holy things and beliefs of the followers of other religions, short imprisonment has foreseen.

The meaning of Islamic beliefs is all religious principles and the meaning of rulings is all jurisprudential orders (including jurisprudential requirements); because the same two words "beliefs" and "rulings" are used in the legal text, which imply inclusion due to their plural shapes. Therefore, the insult used in the above legal articles, in terms of ugliness, has different degrees and as a result, the consequences of it are different. Therefore, the title of insult includes the ugliest blasphemy, slander and insult to the Prophet (pbuh) and Imams (pbuh), as the title of distortion includes any distortion of religious principles and denial of the essentials of rulings. Based on the penal teachings of Islam, the ugliness of insulting Islamic holy things and any kind of distortion and denial in the essential rules is such that the penalty of taking life is considered for it (Zoheili, 1997, Vol. 7, p. 501). Nevertheless, Punishment of medium imprisonment (from one to five years) for the crime of insulting Islamic beliefs and distortion of Islamic rulings (including essential rulings) and short imprisonment (from three months to one year) (Article 147 of the Criminal Code) for the crime of insulting other religions, To what extent is it consistent with the ugliness of the committed act, the damage caused to the victim and its destructive social and international effects?

- 2) According to Article 867 of the Criminal Code, for anyone who attacks public morals and decency through computer or telecommunication systems, medium imprisonment up to two years or a monetary penalty of five to sixty thousand Afghanis And according to Article 874 of the same law, for someone who commits this crime through pornography, imprisonment of up to two years or a monetary penalty of sixty to one hundred thousand Afghanis has been determined.

Considering that morality and chastity are the most important values and protection of them, at the general level of society, is considered the most basic public interest, the crimes that are the subject of the mentioned two legal articles are one of the most obvious examples of spreading prostitution and creating corruption in the society, which disrupts the moral system and poses a serious challenge to social chastity. For this reason, it is stated in the Qur'an: "Those who like to spread ugliness among the believing people, for them will be a painful punishment in this world and the Hereafter, and God knows and you do not know" (Noor, verse 19). This way of expressing shows the dangerous level of this ugly act; by saying that if the first desire and interest in spreading prostitution that appears in the heart and has not yet reached the stage of action, has all these dangerous consequences and painful punishment in this world and hereafter, then, what kind of punishment will the commission of spreading prostitution deserve? Since "propagation" means any kind of publishing and spreading, the spread of prostitution has such a broad concept which includes all destructive programs of morals and public modesty like forming corruption and prostitution centers, showing sexy movies and spreading them in cyber space. Sometimes its psychological, cultural and family corruption is so great that the title of "corruption of the earth" may apply to it. According to Hanafi jurisprudence, the perpetrator of the crime of corrupting the land deserves to be killed (Zoheili, 1997, vol. 7, p. 517). According to Iran's Islamic Penal Code, which is based on Imamia jurisprudence, publication of obscene content in cyberspace may be recognized as an example of corruption on the earth and the perpetrator may be sentenced to the same crime, which is death.

With this description, the compatibility of determining the punishment of "medium imprisonment up to two years or a monetary penalty of five thousand to sixty thousand Afghani" for the crime of assaulting morals and public decency with all its degrees (Article 867 of Criminal Code) And the punishment of "medium imprisonment up to two years or a monetary penalty of sixty to one hundred thousand Afghani" for committing the crime of "obscenity" (Article 874 of the Criminal Code) are not consistent with the "principle of proportionality of crimes and punishments".

- 3) According to Article 743 of the Criminal Code, for someone who displays another person's works of art, short imprisonment or monetary penalty from thirty to sixty thousand Afghani and according to Article 745 of the same law, for anyone who produces, sells, supplies, or takes possession of another person's scientific and industrial discovery, medium imprisonment of up to two years or a monetary penalty of sixty to one hundred and twenty thousand Afghanis has been

determined. The criminal policy maker, in these legal texts, has determined the punishment absolutely and without paying attention to the intrinsic value of the work of art or scientific and industrial discovery. While the creator of a work of art might spend a lot of time, energy and huge material and spiritual capital to create a work (such as a film) that has a high economic value. A scientific and industrial discovery (the discovery of a cure for an incurable disease) also has the same status and capability. Now the question is that how much the penalty of "short imprisonment or a monetary penalty of thirty to sixty thousand Afghani" for displaying such a work of art or the punishment of "medium imprisonment up to two years or a monetary penalty of sixty to one hundred and twenty thousand Afghani" for a scientific and industrial discovery of this type is proportional to the illegal acquisition of benefits and the damage caused to the victim of the crime? And to what extent, the criminal responses of this type seems punishing for the criminal, relieving for the injured, healing towards the wounding of public feelings and satisfactory to the public conscience? And isn't it better for the legislator, in such cases, to grade the value and the right that is violated, and consider the punishments according to it?

So according to the examples that were mentioned and despite foreseeing consolidated goals (in articles 3, 134 and 208 of Criminal Code), from the perspective of retribution and realization of criminal justice, it seems that the answers set for these types of violations do not provide the unified goal of the legislator; because considering the high importance of cultural values in many cases, social reactions of this type do not seem to agree with the principle of "proportionality between committed crimes and their punishment".

3-2-2-2) The Effectiveness of Answers

According to the view of utilitarianism, the reaction to the criminal phenomenon has moral legitimacy if its results can justify the suffering derived from it (Ardabili, 2009, Vol. 2, pp. 84-83). The most important result that the proponents of this theory pursue is the preventive power to reduce crime and if it is not achieved, it lacks legitimacy and basically the action will be canceled and fruitless (Sabzawari, 2014, vol. 3, p. 20). This preventive goal can be achieved through intimidation (both general and specific), rehabilitation and treatment, incapacitation and healing of the victim, which is not the place to describe it here. Here, the focus of the discussion is how effective and preventive the legislator's responses are in response to the violation of cultural rights.

In response to the question above, if we refer again to the criminal responses determined for the violation of cultural rights, these responses are, in terms of nature, prescribed punishment (limited by Sharia) in few cases and discretionary punishment in most cases. Based on Article 2 of the Penal Code, the prescribed punishments are determined based on Hanafi jurisprudence, which are from the type of deprivation of life and physical torture (Zoheili, 1997, Vol. 7, pp. 305, 504, and 515). Punitive answers determined based on the penal code (both original and conversional), in terms of the effect they will have on the criminal, in order of abundance, some of them target the freedom of the criminal (Article 732 of the Criminal Code) and others target the criminal's property (Articles 743 and 745 of the Criminal Code). In this context, there are also some measures that have a supplementary and precautionary aspect, such as the deprivation of some social rights (Articles 197, 199 and 285 of the Criminal Code) and the deprivation of honor and dignity (Article 746 of the Criminal Code).

Now of these criminal responses, the prescribed responses are usually physical (Zoheili, 1997, vol. 7, pp. 305, 504, and 515); that is, punishments directly imposed on the physical integrity of the criminal. Although all punishments will cause the offender to suffer relatively, the suffering caused by this type of punishment is physical. For this reason, in addition to its low-cost enforcement, the effective intimidation caused by it on the criminal (in preventing the repetition of the crime) and on others (in preventing the initial commission of the crime) is considered one of its advantages. especially with the assumption that prescribed punishments have been established by a knowledgeable legislator with

physical and psychological characteristics and tempting factors for human and he knows better and more precisely how and with what tools to control criminal motives. Therefore, it cannot be denied that Sharia solutions are more effective in protecting these rights.

According to the survey, a wide range of responses to crimes against cultural rights is imprisonment which is optional and accompanied by the alternative of a monetary penalty in most cases and in some other cases, it has been also predicted in a deterministic way and without any alternative. Now the question is that by paying attention to the economic, social and cultural foundations of this country, how successful will the prison sentence be in the fight against crimes against cultural rights? Considering that one of the basic indicators for evaluating a solution against the phenomenon of crime is cost-benefit measurement and on this basis, the benefit of punishment for the society must overcome the cost it pays. Now, from this point of view, how can imprisonment be evaluated?

Based on the logic of cost-benefit calculation, this type of response to the violation of cultural rights does not seem to be Affordable and effective because imprisoning people imposes a lot of costs on the society that is, on the one hand, society must bear the costs of committing a crime and on the other hand, it has to pay for the maintaining and administering the prison. In addition to that, imprisoning the criminal person deprives the society and his family of his services, as a human-economic capital. In addition to the negative economic effects of imprisonment, the personal, social and cultural consequences of imprisonment on the imprisoned person and her family in terms of livelihood, social relations, mental health, educational status and socialization, etc. cannot be denied. On the other hand, if the justification for predicting imprisonment measures is that imprisoned people achieve moral and behavioral reform while passing their sentence, Social reality and field research also do not agree with this hypothesis. Especially considering that the economic foundations and human capacities of this country are not at all favorable to the requirements of this type of response.

In monetary penalty, which is another type of response to the violation of cultural rights (deterministically or optionally and as an alternative to imprisonment), its persecution, especially for criminals who commit crimes with financial motivation, its economic efficiency compared to prison and prisoner costs and its prevention of prison overcrowding are from the advantages of this type of response and the vulnerability of the poor compared to the rich, imprisonment of the poor if they are unable to pay the monetary penalty and its deterrence scarcity towards the rich who commit crimes with non-financial motives are from the negative aspects of this response to the phenomenon of crime (Ardabili, 2009, Vol. 2, p. 168).

Despite of that, the legislator has not only limited punitive responses to imprisonment and monetary penalty and has not used from physical responses, but also by justifying the lack of compliance conditions, existence of suspicion and other causes of suspicion and another causes of collapse, without determining these conditions and causes, has taken action to change Haddi punishments which are usually physical to the punitive answers of the type of imprisonment and monetary penalty (Articles 644, 673 and... of Penal Code). Now the question is that which basis and logical reason is this action of the criminal policy maker based on?

If the legislator has removed bodily punishments from the penal policy of this country, acknowledging that it contradicts the "principle of human dignity", this acknowledgment does not seem to be without flaw; because any bodily punishment is not equal to the violation of human dignity i.e. there is no doubt that human beings have dignity and its violation is intellectually abhorrent and prohibited by Shari'a. But it is not acceptable that any bodily punishment violates human dignity. In other words, obscenity and the prohibition of defamation, as a general perception, is an obvious matter and one of the rational facts and there is no defect or exception in it. That in Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, inhuman and degrading punishments have been prohibited, according to Article 24 of the Afghanistan Constitution,

human dignity should not be violated, And according to Article 29 of the Constitution and Paragraph (1) of Article 12 of the Penal Code, punishment against human dignity is prohibited, is the expression and representation of the same rational ruling. But to determine which punishment is a violation of dignity is not a rational matter, rather, it is a psychological and customary matter that fluctuates from one society to another. So it is true that in this argument, the prohibition of punishment against human dignity is certain. But that, determining which punishment is against human dignity is a relative matter and depends on the recognition of the prevailing custom of the society.

Although this perception that bodily punishment is against human dignity may exist in a western society, in an Islamic society where public conscience and custom have been formed based on Islamic beliefs, values and norms, bodily punishment based on the “principle of proportionality of punishment with the crime and harm caused”, based on social values and meritorious justice, is not regarded violation of human dignity, because the Islamic society and the Muslim people have accepted that they must obey the laws that God Almighty has established with full knowledge of the talents, needs and other physical and mental characteristics of humans and he has used bodily punishment in response to the violation of these rights and to protect them and if this type of measures were against human dignity, without a doubt, it would not have been included in the Islamic Sharia, which is in accordance with human nature and creation. The fact that in the Islamic society, punishment, even if it is severe and physical, is considered purification from sin and the criminal himself demands the enforcement of punishment (Aamoli, 2007, vol. 28, p. 103), tells about this fact.

So, in a short statement, the prohibition of violating human dignity is obvious. But the criterion for determining the example in it is collective conscience and custom, which can be different from one society to another. In this way, on the assumption that the criminal has dignity, distinguishing the bodily punishments that have been established and enacted by the legislator with awareness of individual and social interests and for the purpose of realizing justice and protection of human rights, as acts that violate human dignity and sanctity, in an Islamic society, it does not seem like reality. Therefore, removing physical responses from the penal system not only it is not considered respecting human dignity, but it is considered abandoning one of the effective tools and measures in the fight against delinquency without a logical reason.

While the legislator, in Article 208 of the Penal Code, has emphasized the "principle of individualizing punishments" from the judicial aspect, he has neglected to observe this principle in its legislative aspect. This is despite the fact that due to the numerous examples of cultural rights and the variety of motives for violating them, to support and protect it various solutions are necessary that are appropriate to the motive of aggression and the level of danger of the aggressor. Based on cost and benefit calculation, the considered cost should have features that can suppress the motivation of aggression. Undoubtedly, non-physical criminal measures and responses cannot create deterrence against all criminal motives and especially against high-risk offenders. It seems unlikely to be possible to prevent violating the belief system, the moral values and the sanctities of a society by setting a monetary penalty or imprisonment because for some violators of such values, paying a monetary penalty is considered an easy matter, and for others, imprisonment is considered to provide food and shelter. So in order to rehabilitate and prevent such people from committing crimes, other penal measures adequate for their circumstances are needed.

Result

Cultural rights are not only an important branch of people's rights, but also the basis for providing other sub-branches. And its shari'i and customary position is such that the holy religion of Islam considers its provision as one of the goals of the Prophet's mission, and at the international level, it has also become the subject of many binding documents. According to Article 3 of the Afghan Constitution, Islamic

teachings govern all the laws and regulations of this country, and according to Article 7, compliance with international regulations is also necessary. Therefore, the criminal legislator should adopt a policy in support of these rights consistent with its high position, based on Islamic requirements and international documents.

In the field of criminalization, the proposed criminal policy does not seem comprehensive, because despite the fact that some examples of these rights are recognized in the constitution; Like the right to education (Article 34 of the Constitution), the right to freedom of information flow (Articles 34 and 50 of the Constitution) and the right to freedom of employment (Articles 46 and 48 of the Constitution) or have been predicted in normal laws; such as the right to creativity (Article 2 of the Education Law), the right to freedom of employment in scientific and specialized activities (Article 27 of the Mass Media Law and Clause (1) Article 12 of the Education Law) and the right to religious and educational freedoms (Article 32 and 34 of the Law on Prisons and Detention Centers). In the criminal regulations, any violation of such cases has been not criminalized and these cases have no criminal enforcement guarantee against government institutions and trustees. According to paragraph (2) of Article 8 of the Penal Code which clearly states: "it is not permissible to regard any type of punishment to an act that is not recognized as a crime in this law and to apply it" there is no legal obligation to criminalize these cases. This seems to create a problem, in the way of protecting these rights and it is the weak point of this policy.

In the field of criminal responding, crimes against cultural rights are prescribed or discretionary. Responding to prescribed cases that include attacks on the religious system; such as the crime of apostasy, insulting the holy things like insulting the Prophet (PBUH) and violating moral values and public modesty (the subject of Articles 643, 673 and 684 of the Penal Code), especially in the case that the title of spreading prostitution applies to them, based on Article 2 of the Penal Code, it is assigned to Hanafi jurisprudence, which is usually of a physical type. Since the legislator of the penal code, justifying the lack of conditions of implementation, suspicion and other causes of collapse, without determining these conditions and causes, has converted it into punitive measures such as imprisonment and fines (Articles 643, 644, 673, etc. of the Criminal Code), this type of response has become so weak that its applicability has been doubted.

However, in determining the criminal responses based on the Penal Code, (both original and alternative punishment), while the legislator, in Article 208 of the Penal Code, has emphasized the "principle of individualizing punishments" from the judicial perspective, he neglected to observe this principle in its legislative aspect and determining the type, amount or method of implementing criminal responses to the violation of cultural rights is more influenced by the international or economic considerations of the government not the degree of ugliness of the act and the damage caused to the social and moral system or the type of criminal motive and the social and cultural coordinates of this country. The removal of physical responses (both haddi and punitive) and the substitution of imprisonment or a light monetary penalty indicates this fact. For this reason, the way to respond to crimes against cultural rights seems to be not very compatible with the "**principle of justice and proportionality of crimes and punishments**" and it does not provide the objectives of "**the principle of utility and prevention of criminal policy**".

Resources

➤ Holy Quran

➤ Nahj al-Balagha

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