THE ISLAMITISATION OF CRIMINAL JUSTICE AND ITS DEVELOPMENTS IN IRAN

INTRODUCTION

The Background of the Islamisation Process in the Criminal Legislation in Iran. A Historical Examination

More than 2500 years of registered history of Iran with various kinds of governments and numerous kinds of criminal regulations are a wide spectrum for research. In addition, about 1380 years of dominance of Islam as the official religion of this country are another field of study. The analysis of previous regulations, decrees and other documents shows that during this long period, Islamic criminal law has never been strictly enforced, if governments were so-called Islamic or non-Islamic. As history shows us, generally, the orders of kings or governors and their governmental regulations whether or not in the name of Islam overruled Islamic criteria. In fact, the absolute authority of the governors was one of the most important causes of the people’s persistence to establish Parliament and to make written criteria as law, which finally led to the constitutional movement in 1284/1905. The new era of the codification of criminal justice in Iran dates from the establishment of the Legislative Council in 1284/1905.

The idea of implementing Islamic regulations, in accordance with the shi'a school of Islamic jurisprudence — shi'a being the official religion in Iran — has existed since early times of legislation.

"Under the 2nd article of the supplement to the 1st Iranian constitution of 1285/1906 it is necessary for all legislature for all times that the legislation should not be in conflict with Islamic precepts. Distinguishing what is not in harmony with Islamic rules is the right of the fully qualified Islamic jurist." This ideal has also been mentioned in the 1st article of the Iranian penal code of 1305/1916, which was heavily influenced by the French penal code of 1810. According to this article, the application of this
code could not be considered as an obstacle for the implementation of Islamic crimes and punishments, and therefore those crimes which are pointed out in Islamic texts — these are the Qur'an and sound sunna — were still applicable. This point is also emphasized in article 279 of that same code. In practice, throughout the Pahlawi-monarchy, these safeguards — primarily the 2nd article of the supplement to the constitution of 1285/1906 — were never taken seriously, and were indeed expressly repealed by the amendment of the criminal code in 1352/1973. Thus, it can be claimed that under the Shah regime the process of secularization of criminal justice, in the name of modernization, was completed.

It is necessary to mention that in this whole period, the concept of Islamisation was understood as "not conflicting with Islamic standards" and therefore no attention was paid to making enactments confirming Islamic precepts.

1 THE POST-REVOLUTIONARY ISLAMISATION

With the Islamic Revolution and the establishment of the Islamic government in 1357/1979 the Islamisation process remained one of the major objectives of the Islamic state. In this period, the goal of the Islamic government was not only to have laws "not conflicting" but rather to confirm Islamic precepts by law. But the most important question herein is not the question of ideals, it rather is the basis and methods of this ideal.

1.1 The Basis

According to Imam Khumaini's theory of wilayat-i mutlaqa-yi faqih (that is the absolute authority of a jurisconsult) which was constitutionalized in 1979, the major duty of the Islamic government is to apply Islamic rulings (shi`a Islam), which cover all parts of its activity including legislation, politics and so on.

Article 4 of the constitution of the Islamic Republic requires that all civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations be based on Islamic standards.

As it is expressed in article 4 of the constitution, it is the duty of the Guardian Council (shura-yi nigahban) to determine whether or not a given enactment is in confirmation with Islamic rules. This council consists of 12 persons, 6 jurists and 6 Islamic jurists (Ayatollahs). The most important responsibility of this council, according to the constitution, is to guard Islamic precepts and the constitution. According to the constitution, the enactments of the Iranian Parliament have no validity without the Guardian