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The necessity of differential penal support of women in the family

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ABSTRACT

Women have certain physiological, mental, sexual and social conditions which expose them against more vulnerability due to criminality. In addition to cultural, social and fundamental initiatives to decrease situations prone to victimization, it is necessary to give importance to a differential penal policy for combating women victimization inside the family. Present paper only addresses the crimes that are related to family against women. Deceitful in marriage, not registering marriage or divorce event, home violence against women, refusing alimony, marriage with immature girls and so on need a certain penal policy since they relate to family. After mentioning the status quo and the way of criminalization as well as reaction against criminals, the legal and judicial deficiencies and challenges are studied and discussed below. Overall, Iranian Penal Policy has remarkable progressed in supporting women albeit we have not yet seen a total and comprehensive penal support in Iranian laws concerning current legal and judicial system and the procedures related to this field. There are gaps in criminalization and determining the punishments and, despite of the necessity of penal supports for women in families, one should not neglect its negative impacts on family stability and challenges confronting with improper penal supports.

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Introduction

Due to the certain biological and sociological factors, women have the grounds for being victimized. Based on criminological findings, potential offenders often select their victims from those people to whom crime commission has lower risks and costs. Therefore, women are desired targets for them since women are more vulnerable than men. Increasing the risk of crimes against women by promoting the ratio of exploration and prosecution and, as a result, increasing the penal costs of crimes can impact on the process of selecting them by offenders and can mitigate women's victimization ratio. Today, the reason to special attention by lawmakers to "victimized women" in devising legal penal policy is the results of criminological studies and findings. Victimization knowledge along with biological factors such victim age which often makes children, teenagers and elders more vulnerable as well as the mental weakness of some victims in such crimes as patients and crazies (psychological factor of vulnerability) and social position weakness of other people like religious and racial minorities which paves the ground for their more victimization and vulnerability asserts that "gender" is one of the most important factors of vulnerability which makes women more vulnerable than men. The grounds for women victimization can be studied inside or outside home. Outside the home, women may be exposed by physical and sexual violence due to their own biological traits which make them proper targets for potential offenders. Inside home, women vulnerability may be increased due to high black rate of offences in home violence (Zeynali, 2004, pp. 197 – 222). To the same reason and other reasons, a special penal policy for women is necessary and it can support them further. In present research, the main purpose is to increase the costs of crimes against women and to support them further by relying upon authors' findings and as well as using differential

and supportive penal policy toward women. In doing so, we need to answer the main question: what are the reasons of differential penal supports for women and by which tools can we achieve it?

Article 1: the basics for differential penal policy in supporting the family

The basics of any subject include its justified pillars and fundamental by which one can extract the reasons for the correctness of such subject or concept. Such justification shows that the basic of a subject is its philosophy in the first instance. In terminology, philosophy is defined as the reason (Anvari, 2003, p. 1667). The main basics of devising differential penal policy to support the family include:

a. The special situation of victims in family: a family consists of father, mother and children. Father and mother play the roles of both wives and parents. Due to their physical limitations and spiritual vulnerabilities, women and children need more penal supports. Due to the certain biological and sociological factors, women have the grounds for being victimized. Based on criminological findings, potential offenders often select their victims from those people to whom crime commission has lower risks and costs. Therefore, women are desired targets for them since women are more vulnerable than men. Increasing the risk of crimes against women by promoting the ratio of exploration and prosecution and, as a result, increasing the penal costs of crimes can impact on the process of selecting them by offenders and can mitigate women's victimization ratio. Therefore, it is necessary to adopt a differential penal policy through special criminological mechanisms and intensifying penalties against offenders whose victims are women (Zeinaly, 2004, p. 198). One component to formulate "differential penal policy" in the scope of penal laws for female victims is criminalization of some certain behaviors in this step. These are the crimes committed only due to the special features of the victims namely women

and are differed from general criminalization in criminal laws (ibid, p. 209). Considering certain courts in investigating such claims is a necessity regarded today worldwide. Such necessity roots from the importance of claim subject while it sometimes roots in its complexity. In familial cases, in addition to above reasons, the relationship between court performance and the final result and social interests to which the indirect result is crime and social hurt prevention makes it necessary to assign exclusive courts for familial cases (Assadi, 2007, p. 1). Differentially penal policy does not always mean hard punishments; rather, it means sometimes de-penalization and decriminalization and predicting noncriminal legal executive guarantees due to close and affective relationship among family members which is a kind of differential penal policy. It will become well clear in discussion on the extent of penal lawmakers' intervention in supporting the family because that necessity is a must for lawmaking in criminal law (Haji Dehabadi, 2010, p. 10). Therefore, one of the basics to use differential penal policy in supporting family can be the certain features and status of offences against children and women in both home and society.

b. The necessity to protect family bound:

Protecting family bond is one of the aims of criminalization and even a unique court to support family. Non registering permanent marriage, divorce and return would lead into 1 year of conviction in accordance with Iranian laws. It shows the importance of the subject for lawmaker. Therefore, it seems rational to formulate a differential penal policy to protect family as the most important social unit which shapes the individual and society. To the same reason, the law on allocating some existing courts to Family Courts (in accordance with article 21 of the Constitutional Law) was ratified in 1987 and an important step was taken to execute this important article of the Constitutional Law) in order to make difference between family clams that have civic nature.

c. The necessity to protect privacy:

Privacy refers to a scope of beliefs, feelings, behaviors and traits of each family member not revealed for others or not satisfied on being revealed and reacting against the monitoring by other people (Naghibi, 2010, p. 13). There should be a differential penal policy to move in right route and use all the potentiality in lawmaking step and protect people's privacy professionally and by considering all unique attributes. It requires that lawmaker does not allow itself to interfere in the privacy of people to which the family is a full symbol and not to perform common tests and errors in lawmaking. Therefore, another aim of differential penal policy is to support family and to protect family members' privacy.

d. Public chastity and ethics

Criminalization of adultery with married woman, incest, killing the wife when observing her affairs with another man and marriage of a man with married woman are all considered as crimes against public chastity and ethics. To this end, lawmaker has criminalized them through a differential penal policy aimed at respecting and protecting public chastity and ethics. Since respecting public chastity and ethics is too important, its criminalization is in line with Islamic principles and values which demands a differential penal policy.

e. The necessities of familial criminology:

Criminologists have always pursued a special attitude toward family criminology since both women and children are vulnerable and are mostly victimized and they need more supports by lawmaker. Criminological instructions especially "family victimology" can be too effective. If there is a right and proper criminology and victimology in supporting the family,

then it will help to support family in criminalization and lawmaking. The question in criminology is that when crimes are happening against family bound? What are the proper guidelines to combat them? What initiatives should be taken on preventing such crime? Are criminalization and punishments which limit the freedom of criminals effective in crime prevention? Formulating a proper differential penal policy requires proper criminology. Therefore, one can find a differential penal policy in this way.

Article 2: crimes against women in Iranian penal law

a. Cheating in marriage

Authenticity in words and behaviors of both partners is a pillar for a right marriage because that they select each other based on initial information and orientations and cheating would vibrate family foundation from the outset. To prevent such dishonesty and cheating, the lawmaker has used criminalization to help the strength if family. However, such criminal description needs the realization of some condition and only dishonesty by one party is not seen as crime. In article 647 of Islamic Punishment law (1991), the lawmaker has clarified that: "if one partner cheats the another party with false claims such as higher education, wealth, social prestige, certain jobs, singularity and similar one before marriage, the offender would be convicted to six months to two years of conviction."

b. Coupling with married woman for oneself or other people:

The relevant punishment is reflected in general punishment law. Article 643 reads: "whenever, someone unites a man with a married woman, he will be punished to conviction from three months to three years or from 3 million to 18 million fine penalties and to 74 lashes. If the crime is committed by an official notary office, he will be dismissed permanently." And article 644 reads: "those ones who commit one of the below offences intentionally would be punished to six months to two years of conviction and/or three to twelve million cash penalties:

1. To unite a woman married with another man if not lead to sexual intercourse.

2. Anyone who unites a married woman if not lead to sexual intercourse."

c. Marriage with immature children without the permission of the guardian:

In ancient Greece, the official marriage age was 18 for girls and 30 for boys even though sometimes girls married when they were 15 years or lower. The law rarely intervened otherwise it was required by public order and old family laws (Behmanesh, 2011, p. 337). In Islamic jurisprudence, the maturity age is 9 years for girls and 15 years for boys. In law, marriage is transformed since 1931. According to article 3 of the law approved in 1932, law maker has criminalized for someone who get married with a person who lacks physical potency for marriage. The article reads: "marriage with someone who lacks physical potency is forbidden. If this happens, the offender would be convicted top prison between 1 and 3 years. Besides, he would be punished to pay 2000 to 20,000 Rials. The procedure should be conducted in certain courts whose formation and proceeding principles will be determined by the Ministry of Justice." However, some Imamieh jurists believe that the purpose of maturity in Islam for both girls and boys is that there are get perfected (Marashi, 2000, pp. 27 & 28).

In Imamieh jurisprudence, it is popular that female maturity is 9 years while two jurists have pointed out it as 10 years (Sheikh Toosi, 1984, vol. 1, p. 266). To the same reason, some great figures have claimed that such opinion is established in Imamaeh jurisprudence (Sheikh Najafi, vol. 26, p. 28). Since in Iran girls mature when they are 13 years – old (Marash, ibid, p. 27) and considering the fact that premature marriages

lead into serious physical and psychological hurts (Juyan, 1995, p. 88), there is a difference between their religious maturity age and their marriage age in the law. Therefore, article 1041 of the law was amended by Iranian Parliament in 2000. However, since Guardian Council was not satisfied, the approval by the Parliament submitted to Expediency Council and notified in 2002 as below:

“Article 1041 of the Civic Law under the article 24 of amending some articles of the civic law and its notes approved in 1991 is now amended as below: article 1041: uniting matrimony for a girl before arriving at 13 years – old and a boy before arriving at 15 years – old is only the permission by parent, provided that interests are respected and confirmed by a competent court.”

Article 646 of Islamic Penal Law reads: “marriage before maturity without the permission by the parent is forbidden. In the case that a man married an immature girl in contrary to article 1041 of civic law and its note(s), he will be convicted to six months to two years of prison.”

Article 66 of Islamic Penal Law clearly mentions a man who gets marry with an immature (13 years – old as legal marriage age) without the permission of parent and confirmation of the court.” Some believe that since the article 66 reads that “getting marriage is forbidden without permission by her parent” and it is reemphasized in article 646 of Islamic Penal Law, so if a girl over 13 years – old or a boy over 15 years – old get marry without the permission of the parent are subjected to such punishment. They argue: “the decree mentioned in the second part of article 646 of Islamic Penal Law in which a man gets marry with an immature girl without respecting marriage conditions is dominating”. In the meantime, they refer to the verdict by Supreme Court: “Reference and generalization of article 3 of marriage law that reads: “anyone who married with someone else who has not arrived at legal age in contrary to article 1041 of civic law” and considering the same article in which the legal ages are determined for both girls and boys include only a case in which the husband has not arrived at legal age and allocating such verdict to a girl who has not arrived at the legal age needs argument while there is not such agreement” (Matin, 2003, p. 14). In contrary, there is another opinion which claims the punishment mentioned in article 646 of Islamic Penal Law is not executable for a woman who has married with a boy under 15 years – old without the permission of the parent since the law is initially talking about a man who has united a -15 years – old girl and according to the description of the laws, the main aim of the lawmaker is to support a girl who has not arrived at legal age (13 years). Although marriage with an immature boy is illegal, article 646 of Islamic Penal Law is clearly adopted for a man who gets marry with an immature girl. To expand the scope of this article, we need an argument while we lack it. In the meantime, Supreme Courts has issued a verdict which reads: “the law has not clarified that those men who married while they have not arrived at 18 years – old are delinquent and can be prosecuted.”

Therefore, one should not that in a marriage which leads into matrimony, girls are more vulnerable and it is rational to accept that there should be penal support for such persons who have not come to legal age since such support also needs argument and one cannot criminalize to prevent any issue especially in holy family entity because that such flexible and sensitive entity demands lawmaking scrutinizes and we should try to mitigate useless penal supports and criminalization and do our tasks through civil guarantees.

d. Not registering marriage, divorce and return officially

Article 645 of Islamic Penal code reads: “to protect the bound of family, it is necessary to register permanent marriage, divorce or return. In the case that a man do permanent marriage, divorce or return without registering in a notary office, he would be convicted to prison up to 1 year.” This article is devised for social interest and it may have no jurisprudential backup. Due to the impacts of permanent marriage, divorce and return in today legal community, it is unavoidable to register such events.

It is considered as an immediate crime and a kind of relinquishment since it is committed upon not registering of such events. Not registering marriage is not considered as a continuous crime (ibid, p. 16).

In 1970, General Criminal Law Consulting committee asserted: “the material element of mentioned crime in article 1 of marriage or divorce is out of marriage/divorce official statistics which are seen as crimes upon marriage/divorce in offices rather than official ones. Consequently, they are considered as immediate and discontinuous crimes” (Morteza Mohseni & Morteza Kalantarian, 2010: 219).

They are absolute crimes which need no certain conclusion. Therefore, there is no certain bad intention. Concerning a marriage which not correct religiously and legally, it should be noted that not registering such event is not a crime since it cannot be registered at all and it does not mean marriage so that it can be registered.

The considered punishment in article 645 is one year of conviction. As we know, when the minimum level of punishment is not determined, the lowest unit of the same extent of punishment which will be 1 day in this case. In fact, the punishment is from 1 day to 1 year. According to article 3(2) of government receivables law, the court can convert conviction to fine penalty.

e. Home violence against women

Violence is the given action by individuals or certain groups against life or property or dignity of other people (Mohseni, 2000, p. 27). Home violence is physical, sexual and psychological misbehavior such as enforced seclude, belittle, depriving supports and threat to injure. Breaching the rights of proliferation is another example of home violence (Mertus, translated by Majidi, 2003, p. 226).

It seems that in all existing definitions, intention is a pillar of home violence and other ones include threat, persecute and injure. Some definitions have considered physical injuries while there also mental and personality damages in home violence. To this end, intention to pose physical and mental (one or both) damages leads into a violent behavior. The important point in all definitions is the intent to damage not realization of the damage since violent behavior may not result in explicit damage albeit it is again considered as a violent behavior. For instance, when a man throws something towards his wife but it does not clash her; explicit damage is not realized albeit it is considered as violent behavior. Undoubtedly, the woman will be hurt mentally. Definitions on violence involve such concepts: intentional and deliberated action, using force, and aggressiveness, conflict and attack others, persecuting others.

f. Refusing alimony

In Islam, husband is responsible for wife's alimony and expenditures. The aim of alimony is to support family so that man tasks to supply the expenditures of his wife and children and other individuals supervised by him (Civil Law, article 1999). In the case that he refuses, the religious judge can oblige him to pay alimony upon the requested by beneficiaries (civil Law, article,

1111, 1129 and 1196) and even he can judge on past unpaid expenditures (Civil Law, article 1206).

Such policy in Islam to support family indicate that a woman is not obliged to supply her financial needs in the presence of father or husband and it is a kind of respect for her personality and there is always someone obliged to pay her costs rather than exceptional cases (Civil Law, article 1199). Therefore, she should not concern it and it is better to focus on family educational and affective grounds and she should try to meet the educational, spiritual and affective needs of her husband and children. This the most complete and defensible proposed theory by different thinking schools.

On the other hand, concerning the physical, personality and spiritual traits of both men and women, it is clear that they should be responsible for the affairs proportional to them and their attendance in the affairs for which they are created would be more fruitful and influential.

As the final point, we emphasize that Islam and Iranian legal system confirm wife's financial support by husband; so that, there are legal supports so that a wife can see that her husband is obliged to pay her expenditures as well as lawmaker's will in realizing such financial right. However, it should be noted that when many claims enjoy legal guarantees, why they should not enjoy penal guarantees (Haji Dehabadi, 2010, pp. 23 – 24). Supporting family needs certain delicacies and more contingency in using more penalties.

Article 3: legal and judicial challenges in Iranian Penal Code in fighting against crimes against women in family

(a) Men's power in law

Some believe that women are not in equal conditions to men legally and the reflection of such inequality is emerged by violence in family. Among certain cases, one can point out the tutorship of children to men or very difficult steps should be taken by a woman for divorcement. Although defining clauses during conclusion of matrimony give some rights to women but when she demands divorce, she should prove hardship and fault. It is seen in our society that some rights are exclusive to men (even though there are serious reasons for them). In a family headed by man, there are no punishments for home violence (as far as killing). Concerning the men, punishments are milder and women are forced to live with men who beat them. There also cases that are never revealed. It should be noted that abusing the rights by some men should lead into a philosophy by which one can neglect the adoption of such rights and talk on absolute equality of rights since sometimes such inequality would yield into positive results even though it may not negate more men's power in law.

(b) Men's power in supervising organizations

If the men are supposed to supervise on the behaviors by other women, it would be more likely to kill daughters, sisters and wives due to suspicions. Light punishments for such behaviors are an encouragement to increase violence in both society and family (Javanmard, 2011: p. 10).

However, one should note that in our today society, women enjoy a special situation and the procedures of social, cultural, religious and legal supports and aids to women are changing and modifying and they are playing important role in the society which shows a freedom – oriented attitude toward them. However, the barriers of biased attitude toward women should be remedied so that one can adopt and execute correct multilateral supports. Obviously, using penal support should be conducted by considering its delicacies in order to prevent its side effects in the society. If differential penal supports are dominated in women's penal support, they can be useful concerning the differences

mentioned on their need to special supports. Day by day, the ideals of a justice oriented society and healthy families who would breed next generation will be realized.

(c) Lack of penalty alternative guidelines

As mentioned in detail, sometimes one can use non-penal guidelines to prevent an abnormal behavior to support women and families. Even in some cases, prison punishment for alimony refusal should be converted to a more proper alternative to achieve real support of women rather than facing the family with damaging effects by punishing the man. It needs a realistic attitude toward real supports.

(d) The necessity to prioritize types of support

In any field where lawmaker has taken political support, it is normally necessary to prioritize in term of types and rates so that it can be conducted effectively and rightly. Sometimes, support policy is a penal one and it is certain that using penalty is the ultimate way due to its effects and consequences. Basically, penalty – oriented approach should be considered when there is no other guideline to support and it is the most fruitful and effective way. It prevents unnecessary criminalization while makes it possible to use alternative guidelines. Even, sometimes preventive guidelines are prioritized followed by non-penal ones such as civic executive guarantees and finally retributive supports. It is due to the fact that supportive approach pays attention to family in which the most important element is a woman (both as a wife and mother) which demands its certain delicacies because of her sensitive tasks.

(e) Punishments disproportional to aims and basics of supporting women

There are aims and basics to support women by which one can provide a proper support rather than moving in opposite direction by improper criminalization. Punishments that restrict the freedom such as prison conviction for which we should spend all out energy to prove its effectiveness and necessity in committed offences should not be used in those crimes that prison conviction may lead into negative impacts. Therefore, committed crimes proportional to punishments is, *inter alia*, a requirement to support women legally.

(f) Deficiency of women penal support differential:

In above discussions, the necessity of a differential penal policy to support women was clearly explicated albeit we have not yet observed a full differential penal support in Iranian legal system. To realize such aim, it is necessary that lawmaking and judicial entities use just – oriented experiences and rationalities to modify and foster women's penal supports.

Conclusion

The necessity to adopt a proper differential penal policy to support women in family is undeniable especially in societies like Iran where family is highly important. In present paper, we achieve this insight that Iranian penal policy has remarkably progressed in supporting women albeit there are yet some gaps in criminalization and determining the punishments which not be neglected. On the one hand, one should say that both lawmaking and judicial entities should play a vital role in adopting and executing an integrated and effective penal support and by creating a proper differential support, they can mitigate challenges in establishing a professional attitude toward women's penal issues. Basically, women's differential penal support is too important due to such reasons as women's physical vulnerability, the necessity to protect family bound, the necessity to keep privacy in the family, respecting ethics and chastity, women's special criminology, protecting women against their potential risks, resolving family problems and more well – being

of the society. On the other hand, other challenges include the power of men in law, their power in monitoring organizations, conviction – oriented of predicted policies, punishments disproportional to committed offences, punishments disproportional to aims and basics of supporting women and family, deficiencies of differential women penal support, unprofessional penal procedure system concerning all crimes against women and family and not predicting preventive laws to decrease crime rate. Therefore, it is suggested to prevent posing the power of men against women – related issues in a rational and Islamic manner and also to prevent negative impacts of such penal support by a proper balance between punishments and committed crimes and determining punishments homogeneous to aims and basics of supporting women and family as well as full difference between lawmaking and judicial policies especially on proceedings and adopting the laws so that one can attempt more to make penal policy more preventive in order to support women clearly.

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