

## **Studying the Position of Religious Minorities Recognized in Constitution from the View point of Iranian Criminal Law**

Fatemeh Anahid, Sorayya Javan, Somayyeh Alinezhad, Samaneh Dardmand, Akbar Javan

### **Abstract**

Minorities as one the vulnerable groups and because of having their own characteristics, i.e. minority, are in need of legal support. Cultural pluralism that believes in the preservation of minority cultures and respect for cultural differences present in social groups in a country, is based upon the idea that equality before the law, is considered as the determining factor of the rights of minority groups. According to the principle of equality before the law, prevention of discrimination, in enjoying the rights because of having characteristics of minorities and protecting the special rights and cultural differences of minority groups should be taken into consideration. Therefore, in order to support the minorities before the law, governments should adopt supportive attitudes, and also, for the purpose of expressing the legal approach of support or exertion of discrimination against religious minorities in this section of legal system, the present paper has studied the rights of minorities from the perspective of criminal law.

**Key words:** minority, discrimination, criminal law, equality before the law, Christians, Zoroastrians, the Jews

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### **Introduction**

Pluralistic societies have different cultures that each one of them is a different system of values, views and traditions. Nowadays there are less countries Lack of ethnic, racial, religious or linguistic diversities. Cultural diversity is among the most important issues that counties are facing, and cultural minorities while interacting with the majority, call for the protection of their rights, freedoms and traditions. Although cultural diversity in most countries is an inevitable issue, its acceptance and making the desires of minorities practical on the bases of cultural rights, has become a challenging issue. Problems and difficulties of minorities especially in relation to the criminal justice system in domestic and international law are of particular sensitivity. On the one hand it is expected that governments follow the international documents and declarations, fully recognize and guarantee the rights of minorities in domestic law, and on the other hand, to refrain from discrimination and unfair treatment with minorities in legislative and judicial processes (KhoubrouyPaak, 2001: 26). Minority is an undefined, ambiguous and controversial term in international law (Azizi, 2006: 53). There are more ambiguities and challenges in offering a definition for "Minority". Literally "Minority" means " , being little, being low, partitioning, against the majority" (Dehkhoda, 1993: 2679). In international law, the terminological definition of "Majority" offered by "FranchskawKapoutourti" United Nations Special Rapporteur (1971) has been taken into consideration as the base definition. In a study conducted by him in 1977, he offered the definition for "Majority" as "Majority is a group that numerically is smaller than the rest of the population, has not the political dominance and its members - at the same time that are citizens of the country - have ethnic, religious or linguistic features that are different from those of other members of the country and they want to preserve their culture, traditions and languages" (Lesaani, 2003, 134). Religious minorities in Iran are of the two categories: The first one has been recognized as religious minorities including Christians, Jews and Zoroastrians. In Iranian constitution, in the two articles of 13 and 67 the phrase "religious minorities" has been used. According to the article 13 of Iranian constitution: " Zoroastrian, Jewish, and Christian Iranians are the only recognized religious minorities, who, within the limits of the law, are free to perform their religious rites and ceremonies, and to act according to their own canon in matters of personal affairs and religious education". Under the Article 67 of the Iranian constitution: "Members of the Assembly must take the following oath at the first session of the Assembly .... Members belonging to the religious minorities will swear by their own sacred books while taking this oath." The second categories of religious minorities have not been officially recognized. In this paper our discussion is dedicated to the rights of religious minorities who have officially been recognized.

### **1. Instances of Criminalization and Warranty of Support- Oriented Criminal Performances Concerning the minorities**

In Iranian criminal law in some cases Legislation for the purpose of protecting minorities against the law, has refused criminalization of what is permissible according to their religion and in some other cases, in line with the policy of positive discrimination, it has removed legal differences between Muslims and non-Muslims in order to protect minorities. Here, we study some examples of the protection of minorities in the criminal law.

#### **1.1. Offence of the One Who Drinks Alcoholic Beverages by Non-Muslim**

Drinking alcoholic Beverages is one of the crimes committed by non-Muslims that are not considered as a crime, because they believe in its permissibility. According to most scholars, Muslims and non-Muslims are equal in crimes punishable by hadd; and the only had that is not performed on non- Muslim is drinking the alcoholic beverages unless it is used by pretending to use (Toosi, 1972: 37; HorrAameli, undated, 471). Due to the Juridical

basis, in Article 266 of the Islamic Penal Code legislator has decreed: "A non-Muslim shall be sentenced to the *hadd* punishment only if s/he publicly consumes intoxicants. Note- "If consumption of alcohol by non-Muslims is not committed in public, but if the offender appears in public roads and places while s/he is drunk, he shall be sentenced to the punishment prescribed for openly committing a *harām* (sinful) act." In the new Islamic Penal Code, legislator has not knowingly pointed out to the issue of lawfulness or unlawfulness of Non-Muslim behavior; and in the Note for article 266, he has determined the "punishment for pretending to forbidden practice of the committed one". Hence, Ta'zir by virtue of the latter part of Article 638 is applied because of harrowing public morals and to maintain public order and considering the fact that "One of the causes of punishment is committing evil behavior and contrary to public order" (Habibzadeh, 2012: 18) imposing it on non-Muslims takes place in order to protect public interests.

### 1.2. Murder on the Non-Muslim

Deceased Murder on the deceased is among the crimes against the material and moral character of people. As the body and soul of human being is supported by Legislator in his/her lifetime, it is also supported in his/her time of death. Prophet Muhammad (PBUH) said: "Allah does respect for the deceased Muslim, as he/she is respected in life time" (Najafi, undated: 384). Jurisprudents have considered the crime and injury on the non-Muslim deceased a cause for diya, although they disagree on the amount of diya – such as the diya for crime on the Non-Muslims having the power of life; and the popular opinion has determined it less than the diya for the crime on the dead Muslims (the same, 389). In article 494 of the Islamic Penal Code of the year 1991, murder on non-Muslim dead lacked the warranty of criminal enforcement, but in Article 722 of the new law, because of deleting the word "Muslim", it can be concluded that by dead it is meant both Muslim and non-Muslim.

### 1.3. Equality of Diya

One of the Challenges in front of Iranian Legislative System was the difference of diya between Muslims and non-Muslims. In new canon laws, this difference has somehow been removed, but existent inequalities haven't yet been completely omitted. Concerning the diya of non-Muslims (Christians, Zoroastrians, the Jews) and safe-conduct holders there are some differences among the opinions of *Faqihs*. Some of them assume its amount equal to the amount for Muslims; and most of them have mentioned the diya of non-Muslims and safe-conduct holders different from that of Muslims (Zeidaan, 1408 AH, 223). On the basis of this fiqh related differences in opinions, the amount of diya of religious minorities was different from that of Muslims until 2003. Then, in 2003, by virtue of the governmental view point of leadership diya of religious minorities recognized in constitution was announced equal to that of Muslims; and in the single article act legislator also accepted the accession of a note to the article 297 of Islamic Penal Code enacted on May 25, 2003 concerning the equality of Muslims diya with that of recognized religious minorities in constitution. Now under Article 554 of the Islamic Penal Code: "on the basis of governmental supervision of Supreme Leader, diya of crime for religious minorities recognized in constitution of Islamic Republic of Iran is determined the same amount as that of diya for Muslims".

## 2. Instances of Criminalization and Warranty of Discriminatory Criminal Performances Against Minorities

In Iranian criminal law the greatest challenge to be considered is in relation with rights of religious minorities; because the feature of "being in minority" has explicitly been predicted in the laws relating to the origin of difference in provisions. With consideration of the Iranian penal code, it will be clear that there are two kinds of discriminatory criminalization against minorities. Sometimes legislator considers committing certain behavior as forbidden and punishable only when it is done by minorities, while committing that behavior by members of majority is permissible and authorized. In other words, there are some instances of the crimes in Iranian criminal law that despite their similarities compared to the majority and minority groups, their commitment is considered as crime only when takes place by the members of minority groups. Sometimes commitment of a behavior against Muslims and non-Muslims has been announced forbidden and permissible by legislator, respectively. In such cases, and in criminalization of a behavior, the legislator has only supported Muslim victims and hasn't included his protective umbrella for groups of minority victims. Therefore, it makes no difference whether the committed person is Muslim or non-Muslim, but the victims are only Muslims. This kind of criminalization not only ignores the rights of minorities as being human beings, but also is considered as factors which encourage crime against them (KhobrouyPaak, 2001: 59).

In the field of the warranty of criminal performances, most instances of discrimination based on law are related to the Hodud, Qisas and diyat section. Despite the general rule that Muslims with bringing Islam, non-Muslims through their own contract and safe-conduct holders by entering into the Islamic land that causes them to be safe, all of them are committed to Islamic rules. However, there are some crimes that jurists disagree about the conditions that must exist in the victim or the injured one so that the guilty to be punished. The following are some examples of criminalization and discriminatory criminal executive guarantees against minorities.

### 2.1. Usury Charges

Literally "usury" means "surplus" and idiomatically it is referred to commutative or loan deal that legislator has prohibited it with certain conditions (Firs Martyred, (1403 AH: 437). According to the majority of scholars sanctions against usury is considered the oppression of another interest (Al Daaour, 1411: 52); also in the Holy Quran profit perceived due to the debt is considered oppression and oppression means taking something without having the right to do so and without natural permission even if you have a legal license (Motahari, 1989: 50).

In article 595 of law on Taziraat the legislator not only has considered the usury as criminalization but also has considered receiving usury from an unbeliever by a Muslim as a permissible act but the reverse is considered as a crime. According to this article "Any type of agreement between two or more people under any title such as sale, borrow, settlement, etc that conveys a property or goods in return of a property of the same type and amount and

with an extra condition, or receives money more than the amount paid, shall be regarded as usury and is a crime. Note 3- When the abovementioned contract is concluded between a father and his son or a husband and his wife, or if a Muslim receives usury from a *Kafir* [non-believer], it shall not fall under this article". According to Muslim Jurists, non-Muslims cannot take usury for Muslims and there is no doubt in this sentence (First martyred, 1983 AH: 440). But about receiving the usury by a Muslim from a non-Muslim, there is disagreement among them. Some scholars have considered usury-related transactions between Muslims and non-Muslims permissible if the receiver of the usury is a Muslim. In order to justify their own opinions they refer to a narrative from Imam JafarSadiq (AS) and also to Ijmaa that says: "There is no usury between Muslim and non-Muslim ... "(Khansaari, 1405 AH: 257). But most Shiite scholars believe the realization of usury a Muslim and non-Muslim; and they have considered the usury-related transactions between them as a forbidden act. They have limited permission for receiving usury from a non-Muslim to the hostile disbelievers (Najafi, undated: 383; Tousi, undated: 37). It must be said that if the basis for criminalization of interest according to the article 4 of constitution is Islamic criteria, then the lack of criminalization of receiving interest from a non-Muslim by a Muslim is unjustifiable; because most of Shia scholars believe the absolute proof of interest between a Muslim and a non-Muslim; and it is unclear why contrary to the Fiqh axioms, the legislator has not considered the interest (usury) between Muslims and non-Muslims as something that can be realized? Also in situations where according to most Islamic Jurists, the property belonging to the infidel (living in an Islamic country and paying tribute to Muslims) is respected and according to the paragraph 5 of Article 43 of constitution, trading interest has been announced forbidden and prohibited, consequently lack of criminal support for properties belonging to minorities, not only causes lack of feeling a sense of legal security among them, but causes an to commit crimes against them and this will spread corruption in the society. So if we still believe in the survival of the obligation contract and classifying the non-Muslims into the two categories of hostile and non-hostile in Iranian legal system, then according to the article 3 of the punishment law that has considered Iranian territory as the administrative rang for criminal laws and clearly a non-Muslim who has entered into the Iranian scope is either infidel, or Moaahed or safe-conduct holder, therefore the third exception for Note 3 of Article 595 of Tazirat must completely be omitted. Furthermore, in the current situations and requirements of time and place discussion about the infidels is excluded; especially, discussion of respectfulness of life and property of infidel (deserving to be fought against) in Fiqh, is dedicated to someone who is fighting and has revealed his hostility to Muslims. (HoseiniShirazi, undated: 133, Maaleki, 1990, 117)

## 2.2. Killing Non-Muslim by a Muslim:

In the criminal law of Islam, under certain conditions punishment for murder is qisas. One of these conditions is the equality of killer and the victim in religion (The second martyred, undated: 66). The general rule is that undermost in terms of religion experiences qisas before the topmost but the topmost in terms of religion doesn't experience the Qisas before undermost.

As a result, the majority of Muslim scholars of different religions believe that if a Muslim kills a non-Muslim (Zimmi), Qisas punishment shall not be imposed to him (Najafi, undated, 150). The reasons for this goes back to the verse 141 of Sura Nisa (Mohammadi, 1982: 65), a hadith of the Prophet (PBUH) that the faithful and the Moaahed will not be killed against Kaafir (non-believer) (ibid.), Narrated by Isma'il-ibn-e-alfazl from Imam Sadiq (AS) that said, if a Muslim kills a Zimmi man, Qisas punishment shall not be imposed to him unless he becomes accustomed to the killing of Zimmi (Sheikh Mufid, 1410 AH: 839). In contrast, some religious scholars such as Sheikh Saduq (HosseiniShirazi, undated: 119) and grand Ayatollahs such as Ayatollah Sanei, believe punishment of Qisas to Muslim against a non-Muslim (Sanei, 1385: 79).

Among the Sunni scholars, some scholars such as Ibn-e-Shabramah, Sour, Auzaaee and Shafi'i believe that Qisas punishment shall not be imposed to Muslim against the Zimmi (IbnIdris al-Shafi'i, undated: 38). Some of them such as Abu Hanifa, Abu Yusuf, Muhammad Zafaribn e AbiLeili and UsmanBaty believe that Muslim is imposed to be killed due to the murder of Zimmi (IbnQudama, undated: 341) and some others such as Maalik and Leis believe that if a Muslim kills an unbeliever in the form of terror, he will be killed, otherwise he will not be killed (IbnRushd, Al-Qurtubi, 1409 AH: 399).

Iranian legislator, has held the Qisas or lack of Qisas about a Muslim against killing a non-Muslim in silence, but according to the wording of Articles 301 and 382 of the Penal Code, it implicitly becomes clear that a Muslim is not imposed to Qisas for the sake of a non-Muslim. Although the vast majority of Muslim jurists have made their own opinions on killing a Zimmi by an addicted Muslim (MousaviKhoi, undated: 61), this view is not reflected in the Penal Code. Some argue that with regard to the interpretation in favor of the accused, it can be said that the Iranian legislator has accepted opinions of some jurists such as (IbnIdris, 1411 AD: 352), who do not absolutely consider allowable killing of a Muslim because of a non-Muslim (Ziraat, 2002:207). This view is not correct, because the legislative silence on this issue is based on pragmatism and criminal justice can issue the case of the warrant on the basis of Article 167 of constitution and by referring to authentic resources of Fiqh and famous fatwas. In cases where according to the Article 220 of Islamic Penal Code it has accepted referring to the Article 167 of constitution in Hodoud, if according to the view point of some Jurists we consider the killing of a Muslim concerning the killing due to addiction related to the Hadd (AllamehHilli, 1997: 335), then referring to this article and article 167 of constitution one can understand the provision of this issue.

Unfortunately, the lack of legislative support and discriminate against religious minorities in the field of crimes against persons, also violates the principle of equality before the law and is considered some kind of encouragement to commit the crime against them. Judicial procedure, based on the famous Fiqh related point of view and lack of predicting the Qisas by the legislator in case of killing a non-Muslim by a Muslim has ruled out the Qisas for the committed Muslim and sentences him to pay the money and tolerance. Lack of protection of religious minorities by the legislator, not only has caused imposing discrimination against them but has eliminated the deterrence purpose of the penalties. In some cases people belonging to the majority and aware of discriminations

based on the law, and that, in accordance with the law, if a non-Muslim kills a Muslim, Qisas punishment shall not be imposed to him, abuse the position of the victim and due to their previously made decisions commit the murder. In some judgments issued by the courts it has explicitly been stated that committing the murder due to the previously made decision by the accused person has been realized because he has been aware of the lack of protection of religious minorities before the law. For instance: "According to the contents of the classified file 89/71/0065 at Branch 71 that has been considered in Tehran Province Penal Court, an individual member of the Jewish minority – a 70- year old man – has been killed by a Muslim. After the end of proceedings, according to the verdict No. 8900414 dated Dec 06, 2010 although the victim's families have expressed their desires for revenging the killer, the court has invoked to the Article 207 of the Islamic Penal Code, where assumes the Qisas only when the victim is a Muslim, and has sentenced the killer to pay Diya and to be punished by Tazir (Habibzade and Hooshyar, 2014: 83). Also, according to the contents of the classified file 79/71/88 at branch 71 of Tehran Province Penal Court that has been investigated: "a Muslim has killed an individual from among the members of Jewish minority by a sharp thing because of the previously shaped differences" and the court taking the lack of religious fitness into account from the view point of Islam between the killer and the victim, has ignored the Qisas punishment. Therefore, rule-based discriminations against religious minorities, not only eliminate the deterrent effects of penalties, but the members of the majority group abuse this unequal legal position and plans for killing them. There are also some cases where families of non-Muslim victims because of awareness of the outcome of judicial proceedings and lack of equal access to the warranty of legal performances, withdrawal from the plan or continuing the complaints. Certainly, as long as there is legal inequality and discriminations based on the law between Muslims and non-Muslims in the field of the warranty for criminal performance of Qisas, it will be impossible to prevent inhuman and cruel consequences of the proposed contents.

### **2.3. Qazf of Non-Muslim by Muslim**

Legally, Qazf is defined as accusing someone of adultery or sodomy taking some circumstances into account (Najafi, undated: 402). The necessary condition for hadd punishment is that the one who does this act to be mature and wise and the victim to be a man (Najafi, undated: 413). But concerning the concept of "Ihsan" there are some disagreements. The word Muhsanaat is a literal word that conveys several meanings. It has been used in Qoran in the four meanings of (chastity, husband, single versus married, and Islam) (Maaliki, 1990: 47). Despite the verbal sharing in the word Mohsanat, according to the majority of scholars, in case of qazf crime Islam is a condition for Ihsan; therefore, if a Muslim commits Qazf on a non-Muslim, the Hadd for Qazf is not approved and the perpetrator is punished by Tazir (Mavrodi, 1406 AH: 229). Most scholars, including Malik, Shafi'i, Ahmad and Jurists of Imami Shia, does not consider Islam as a condition for Ihsan in committing the Zina, so they say, if Zimmi commits *zina* that the offender meets the conditions of *ihsan*, then he is being stoned like a Muslim (Horr-e-Aameli, undated: 351). The author of Javaaher despite the acceptance of literal association of Ihsan meaning marriage, Islam, freedom, etc., has considered the reason for acceptance of Islam as a condition for Ihsan in Qazf crime as (Najafi, undated: 417). In order to prove the hadd punishment for Qazf, Iranian legislator considers Islam as a condition for Ihsan. According to article 251 of Islamic Penal Code: "Qazf shall result in the *hadd* punishment when the person who is the subject of the *qazf* is pubescent, sane, Muslim, specified [by the offender], and it is not evident that s/he commits *zina* or *livat*." Given that *qazf* is among the crimes against the spiritual character and it insults the people's respect and reputation and causes human dignity to be the subject of the crime, thus there shouldn't be any difference in this sense among the human beings. Differences in religion among the human beings shouldn't be the cause for the lack of protection of human character.

### **Conclusion**

In some cases legislator for the purpose of realization of the equality principle before the law, has considered protective approaches for minorities and also, in other cases due to the neglect of this principle, discrimination has been composed upon the minorities. Failure to comply with equality before the law in relation to the minorities bears different reasons. For instance, dual approach to the issue of human dignity and some selective and discriminatory interpretations of the legal texts have been led to differences in individuals rights because of the differences in ideas and ideals and consequently, exclusion of some human rights of religious minorities. Thus, some of the inevitable necessities in front of the Iranian Legal System are as follows: filtering the criminal laws, especially laws that have created legal inequalities, principles of respect for human dignity, equality and social justice, humanitarian and new interpretation of religion, updating some of the jurisprudential view according to the demands of time and place, taking human needs into account for the purpose of making necessary changes in traditional jurisprudential discourse that leads to some legal differences among the individuals because of differences in ideas and ideals, and adopting the policy of positive discrimination in line with elimination of present unfair discriminations. Also, continuity of the subject of Zimeh contract in Iranian legal system certainly leads to the wasting the rights of religious minorities, especially those that have not officially been recognized; because based on this contract human beings are classified into three categories: Muslims, Zimmi non-Muslims, and non-Muslim non-Zimmies; and among these three categories the third one doesn't enjoy any rights. Regression of the legislator in new Islamic Penal Code and retrieving the debates on Zimmi and non-Zimmi because of traditional understanding of the legislator, are the reasons for ignoring the historical aspects of the peace agreements with non-Muslims, ignoring the realities of human beings' modern life and escaping from obligations of international law in the field of observing the rights of minorities. Today, in the field of international law, administrative power of the system of minorities' rights has left the borders behind it; and believes the rights originated from human rights for humans as humans. The realities of modern life have eliminated the Zimeh contract; and mutilation of people based on the acceptance or rejection of this issue is an unacceptable issue.

Hence, it is proposed that the title of Zimme contract and issue associated with it – that has been led to wasting the rights of humans to be eliminated from Islamic Penal Code. Legislator should be a safety net for minorities in the territory of the country; and now that, after many challenges, it has eliminated the issue of differences in diya as one the most important discriminations against non-Muslims, taking the foundations of human rights into account it should really establish the equality principle before the law among all of the citizens and using a modern approach keep aloof from fiqh-related classic viewpoints that relying on the differences present among the individuals also believe the differences in the rights among them.

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Fatemeh Anahid, Faculty Member of Islamic Azad University Ardabil Branch.

Sorayya Javan, Somayyeh Alinezhad, Samaneh Dardmand, Department of Law, Ardabil Branch, Islamic Azad University, Ardabil, Iran

Akbar Javan, Department of Law, Tasouj Branch, Islamic Azad University, Tasouj, Iran