



The Relationship between Criminalization and Liberty in Islamic and Western Criminal Law

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Abstract

This study is organized to explain the relationship between liberty and criminalization in the two criminal law systems of Islam and the West, and seeks to examine, in a systematic manner, the fundamental question of the legitimate scope of criminal intervention in the domain of individual liberties. The central issue is under what conditions the legislator may remove human conduct from the sphere of permissibility and place it within a binding criminal rule, and to what extent such intervention must be governed by foundational principles, criteria, and constraints that limit penal authority. The findings indicate that in the Western system, liberty constitutes the primary normative foundation and the principal criterion for restricting criminalization, and principles such as legality, proportionality, and necessity play a regulatory role; whereas in the Islamic system, liberty is intertwined with duty and collective welfare (masalih naw'iyya), and rules such as "no-harm" (la zarar) and "removal of hardship" (raf' al-haraj), as well as the protection of the five essentials (daruriyyat khams), determine the legitimate limits of intervention. The conclusion is that although both systems avoid penal expansionism, their normative foundations and justificatory logic differ, and this divergence is reflected in the level of criminalization criteria. Accordingly, the present study emphasizes the need to develop a measurable framework for criminal legislation and to strengthen the standing of liberty within criminal policy.

Keywords:

Criminalization,
Liberty, Criminal
Policy, Civil Law,
Islamic Jurisprudence.

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Introduction

Criminalization, as one of the fundamental manifestations of criminal authority, is the process of identifying and penalizing behaviors that the legislator deems contrary to public order or to society's fundamental values. This process is directly linked to the limitation of individual liberties and the expansion of state coercion. From the perspective of criminal law, criminalization is not merely a legislative act but a normative act with profound effects on individuals' rights and fundamental liberties. The primary principle in contemporary legal systems is the liberty of human conduct, and criminal intervention, as an exception, requires further justification. Uncontrolled expansion of criminalization leads to criminal inflation and undermines the principle of liberty. Rostami, emphasizing the criteria of necessity and proportionality, believes that criminalization without a valid normative basis is incompatible with the logic of criminal law.¹ Therefore, criminal law should not be regarded as the primary tool for regulating social behavior. The distinction between moral disapproval and the need for a criminal response is an essential requirement of rational criminal policy. Criminal intervention is justifiable only in the presence of actual harm or serious risk; otherwise, legitimate liberties are unnecessarily restricted. Thus, criminalization always requires limiting criteria. The examination of these criteria constitutes the central focus of the present research.

This research adopts a Western criminal law analysis framework based on the Roman-Germanic legal tradition. This tradition, which has formed the foundation of modern criminal law in most continental European legal systems, emphasizes written and systematic legislation. The legal systems of Germany, France, and Italy are prominent representations of this legal model. Focusing on this tradition allows for a coherent analysis of the normative foundations of criminalization. The models derived from common law are excluded from this study due to the fundamental differences in the logic of criminal law sources. Additionally, the legal order of the European Union, as a supranational and independent structure, is not the subject of this research. The main analytical focus is on the theoretical foundations of criminalization within the civil law system. In this system, the theory of "legal benefit" plays a crucial role in justifying criminal intervention. According to this theory, the mere violation of a social norm is not sufficient for criminalization. The principle of minimal criminal law, as a tool to control criminal authority, plays a central role. The principle of legality and the predictability of crimes and punishments guarantee individual security and liberty. This conceptual framework forms the basis for the analysis of the Western section of the research.

The analysis of Islamic criminal law in this study is based on the foundations of Shia Islamic jurisprudence. This approach aims to establish a coherent and analyzable framework for the normative foundations of criminalization. The focus on Shia jurisprudence prevents confusion between different Islamic legal systems and general interpretations of Islamic law. In this jurisprudential tradition, the default assumption is that actions are permissible unless a valid legal prohibition is established. Therefore, criminalization requires the presence of real or predominant harm. Jurisprudential rules play a fundamental role in limiting the scope of

1 H Rostami, 'Criminalization and Penalization in Liberal Theory' (2012) 5(1) *Pazhuheshnāmeḥ-ye Hoquq-e Keyfari* 55, 57–60.

criminal authority. The principle of “no harm” (La Dharar) prevents the imposition of unjust harm through criminal coercion. The principle of “no difficulty” (La ‘Usr wa La Haraj) prevents the expansion of burdensome criminal obligations.¹ Public interest (maslahah), as a rationally accepted criterion in Shia jurisprudence, influences the legislative process in criminal law. The ultimate goal of criminal intervention is the preservation of the five essentials (khums). These mechanisms demonstrate the capacity of Shia jurisprudence to control the expansion of criminalization. Therefore, Islamic criminal law within this framework is not inherently expansive in its approach to criminalization.

The main objective of this research is to provide a comparative explanation of the relationship between criminalization and liberty in the civil law system and Shia Islamic jurisprudence. The research aims to compare and analyze the logic of limiting criminal authority in these two legal systems at a normative level. Accordingly, the main research question is: What similarities and differences exist between the legitimacy criteria for criminalization in the civil law system and Shia Islamic jurisprudence? The second research question focuses on the theoretical and normative foundations of these criteria in each system. The main hypothesis of the research is that although both legal systems seek to limit criminal authority and protect individual liberties, the logic and origins of limiting criminalization differ. The second hypothesis suggests that civil-law criminal justice limits criminalization on rational and institutional grounds, whereas Shia Islamic jurisprudence applies this limitation through jurisprudential rules and religious foundations. The research method is analytical-comparative, with analyses grounded in conceptual study and normative reasoning. The aim is not merely to describe the differences but to explain the legal logic governing them. The results of the research could provide a foundation for evaluating criminal legislative decisions. This evaluation aims to prevent the uncontrolled expansion of criminalization.

1. The Concept and Status of Liberty in Criminal Law

Liberty, in its general sense, is a fundamental concept denoting the human ability to determine one’s will and organize one’s behavior without external domination. At the primary level, it is defined as the ability to freely choose and perform actions based on independent will. In some theories, liberty is based on the idea of an individual’s release from external coercion and imposition, a concept known as negative liberty, which is defined by several thinkers as “the absence of external obstacles and hindrances in human action” and considered a condition for the flourishing of individual will.² In contrast, liberty in another sense refers to the actual ability of an individual to achieve goals, desires, and self-realization, and this sense is regarded as positive liberty. Positive liberty is based on an individual’s capacity to shape their own destiny and play an active role in social life. Liberty is also divided into “individual liberty” and “social liberty,” with both levels serving different functions in human life. Some perspectives have explained liberty through the duality of “liberty from domination” and

1 A Sharafi-Masouleh, A Ghorbani and P Zekaeyan, ‘Order and Public Interest in Criminalization’ (2023) 3(5) *Comparative Criminal Jurisprudence* 151, 155.

2 RM Rosenberg, ‘Two Concepts of Liberty in Criminal Jurisprudence’ (2018) 6(2) *British Journal of American Legal Studies* 14.

“liberty for the realization of rational will,” considering these dualities as essential for a comprehensive understanding of liberty.¹ More recent social analyses describe liberty not only as liberation from restrictions but as a condition for the flourishing of human personality and the possibility of active participation in collective life. Philosophical ideas also consider liberty as the foundation of moral agency and human responsibility. In theoretical foundations, liberty is a multidimensional, composite concept encompassing psychological, ethical, social, and political dimensions. These dimensions facilitate a comprehensive understanding of liberty and prevent its reduction to a single aspect.

In its general legal concept, liberty is a normative state in which an individual’s valid will, within the bounds of binding rules, is recognized as capable of being exercised and producing legal effects, and no unjust domination or intervention without legal basis can undermine it. From the perspective of general legal theory, this liberty is considered a fundamental right with a dual function: stabilizing the legal order and limiting public power. The legal system is obliged to regulate the state’s sovereignty within the limits of necessity and proportionality, with the presumption of individual liberty unless the law explicitly restricts it. In this sense, liberty is not only concerned with the individual’s discretion in determining the course of their legal life but also serves as the criterion for controlling the legitimacy of public interventions. According to this principle, any legal restriction must be supported by a clear and reasoned normative justification. Restrictions on liberty can only be applied within the framework of public order, the essential interests of society, and legitimate constraints, and any further limitation beyond these boundaries is considered legally invalid. In theoretical discussions, liberty is introduced as the individual’s right to regulate their behavior within the framework of public order, and this recognition plays a determining role in shaping the relationship between the individual and the state.² Liberty, as a legal principle, affects all areas of law and underpins legislative, administrative, and judicial decisions. This position makes liberty not only the supreme principle of fundamental rights but also a criterion that strengthens the legitimacy of public authority. Thus, liberty, as a strategic principle, also determines the interpretive framework for other laws and regulations.

In the field of criminal law, liberty is recognized as the axis of the legitimacy of criminal authority and the normative basis for assigning criminal responsibility. A criminal analysis is not possible without understanding this position. In civil law systems, criminal law, because of the coercive nature of its sanctions, directly addresses the most severe forms of liberty limitation. Therefore, the legitimacy of criminal intervention is conditional upon proving the necessity and proportionality of such limitations. Any punishment inherently involves the deprivation or limitation of liberty, and its legitimacy is realized only when the severity and nature of the limitation align with the degree of fault and the social interests being protected.³ Criminal responsibility, particularly from the perspective of its mental element, depends on the existence of sufficient liberty of will in the perpetrator, and without the establishment of this element,

1 AJ Kolber, ‘The End of Liberty’ (2021) 15 *Criminal Law and Philosophy* 407, 408.

2 S Evans, ‘A Liberty-Balancing Approach to Crime’ (2024) 62 *American Criminal Law Review* 153, 160.

3 MS Moore, ‘Liberty’s Constraints on What Should Be Made Criminal’ in RA Duff and others (eds), *Criminalization* (Oxford University Press 2015) 122.

attributing criminal behavior lacks a normative basis. Contemporary theories regard the liberty of the will as a condition for the possibility of criminal reproach and ground responsibility in the individual's capacity to choose among behavioral alternatives.¹ Furthermore, Western criminal law views liberty as the outer limit of criminal authority and considers state intervention justified only when an individual's behavior presents a real and tangible threat to the liberty or security of others (the harm principle). The principle of necessity in criminal law dictates that the use of criminal tools must be limited to situations where no other legal means can achieve public order. Similarly, the principle of proportionality requires that the severity of punishment should not exceed what is necessary to achieve criminal policy objectives. Thus, liberty is not only the criterion for measuring the legitimacy of punishment but also an indicator for controlling criminal policy and the cornerstone of the criminal justice system. Ultimately, liberty occupies a central, structural position in criminal law, and the framework for analyzing criminalization, responsibility, and punishment is organized around it.

In contrast to the Western approach, Islamic criminal policy defines liberty not as an inherent concept, but as a divine gift and a tool for achieving higher goals. The basis of this view lies in the two fundamental principles of "the inherent dignity of humanity" and "the pursuit of perfection," which shape the direction of criminal policy.² In this view, liberty is a natural right granted by God to humanity, enabling them to choose their path of spiritual growth and perfection. Therefore, liberty itself is not the goal, but a means to realize the ultimate purpose of creation, which is human perfection. This natural liberty provides the foundation for the development of "duty" and the human responsibility toward God and society. Accordingly, Islamic criminal policy has a dual function: on the one hand, it supports legitimate liberties that contribute to individual and societal growth, and on the other hand, it restricts liberties that hinder human perfection and lead to individual or social corruption. In this framework, criminalization is not merely a reaction to violations of public order, but a pedagogical tool to preserve human dignity and provide a foundation for the moral development of society. From this perspective, Iran's criminal law approach to liberty of thought and religion should also be understood. While belief is free in the internal realm, its external manifestations are respected only as long as they do not harm the fundamental beliefs and ethics of the Islamic community. Therefore, Islamic criminal policy defines liberty within a coherent and purposeful value system, with the ultimate aim of protecting the path to human perfection.

In Shia jurisprudence, absolute and unconditional liberty is not recognized; instead, it is defined and limited within the framework of divine rules and values (Shariah). These limitations are not seen as negating liberty, but as guiding it toward the true interests of individuals and society. The ultimate goal is to protect "true liberty" for humanity, which means liberation from the bondage of carnal desires and the barriers to spiritual growth.³ Thus, liberty is supported as long as it does not conflict with foundational principles such as monotheism, justice, and ethics. For example, freedom of expression is allowed only to

1 TA Green, *Liberty and Criminal Responsibility in American Legal Thought* (Cambridge University Press 2014) 7.

2 MA Haji-Deh-Abadi and L Bostani-Pour, 'The Status of Liberty in Islamic Criminal Policy' (2021) 12(4) *Ma'refat-e Farhangi-Ejtemā'i* 77, 89.

3 Haji-Deh-Abadi and Bostani-Pour (n 8) 90.

the extent that it does not insult sacred beliefs, spread falsehoods, or promote corruption. This approach contrasts sharply with the Western basis for limiting liberty in criminal law, which emphasizes the “harm principle,” which focuses solely on tangible harm to others. In the Islamic system, in addition to material harm, “moral harm” and “social corruption” are also considered legitimate grounds for criminal intervention and the limitation of liberties.¹ Therefore, crimes such as apostasy or certain moral offenses are criminalized to preserve the ideological system and the moral health of society, even if they lack a direct victim in the Western sense. Ultimately, the fundamental difference lies in the fact that in the civil law system, liberty is an autonomous and inherent right that is limited only by the rights of others, while in Shia jurisprudence, liberty is a directed and responsible right that is given meaning and validity in the light of divine duties and the spiritual interests of society.

2. Foundations of Criminalization in Western and Islamic Criminal Law

The foundation of criminalization constitutes the normative substratum that, as the source of validity and the justificatory ground of penal prohibition, delineates the framework within which legislative intervention becomes defensible and articulates the relationship between criminal prohibition and the overarching aims of the legal order. The theoretical bases of criminalization in the Western criminal-law tradition rest on the normative premise that penal intervention is permissible only when the conduct in question amounts to a violation of the legal order, rather than merely reflecting social disapproval or moral deviance. Within this conceptual framework, individual liberty is recognized as a legally protected right, and its restriction—absent a clearly articulated and reviewable legal standard—is deemed normatively unjustified.² According to this view, the requisite criterion for transferring conduct from the sphere of legitimate liberty into the domain of penal authority is the occurrence of a legally cognizable disruption in the binding structure of the social order, and not the mere incompatibility of the conduct with prevailing moral expectations. In this way, the boundary between the state’s criminal jurisdiction and the domain of individual liberties is drawn by the criterion of “violation of the legal order,” thereby establishing the theoretical framework necessary to constrain penal authority. These foundations, by emphasizing the normative autonomy of law, prevent criminalization from becoming an instrument for imposing non-legal values or political preferences and thereby forestall expansionist tendencies in penal authority. Consequently, this theoretical system conceptualizes criminalization as a narrow, reviewable, and non-arbitrary rule, rendering its application contingent on the verification of a legally defined disturbance of public order.

The foundations of criminalization in the Western criminal-law paradigm rest upon an anthropological and normative structure in which the individual, endowed with autonomous will, constitutes the focal point for assessing the legitimacy of penal intervention, and in which the limits of penal authority are defined through the relationship between individual liberty and

¹ Rahimi and others (n 9) 241.

² TS Petersen, *Why Criminalize? New Perspectives on Normative Principles of Criminalization* (Springer 2019) 42.

the binding framework of public order. On this basis, conduct is capable of being transferred into the realm of penal prohibition only when it possesses the capacity to generate a legal disruption within the normative order of society, rather than merely representing moral disapproval or value deviation. Western theoretical analyses condition the legitimacy of criminalization on the establishment of juridical harm or a generalizable injury to others, and they define the necessity of intervention through the criterion of assessable harm.¹ Within the liberal tradition, the harm principle requires that criminal law be invoked only when the conduct in question poses a generalizable and attributable threat to the liberty or security of others, thereby justifying a restriction upon the offender's liberty.² The legal order, in this conceptual structure, is treated as an entity independent of moral judgment, whose function is to impose principled limits on penal authority regarding fundamental rights. The cumulative effect of these foundations is that criminalization in the West is formulated within a narrow, rational, and non-moralized framework, and human conduct becomes eligible for inclusion within the sphere of penal prohibition solely upon the establishment of a legally cognizable disruption of public order.

The foundations of criminalization in Islamic criminal law are grounded in a jurisprudential framework that conceptualizes human liberty in relation to religious obligation and within the binding norms of the Sharia. In this system, liberty is not an absolute right but a qualified competence that retains validity only insofar as it does not transgress divine limits or disrupt the value structure of the Sharia. Islamic anthropology rests on the premise that the human being is both autonomous and accountable, and this very accountability provides the normative basis for attributing penal sanctions. Accordingly, criminalization in Islam is conditioned upon the establishment of religious necessity, the preservation of human dignity, and the protection of the five essentials (*ḍarūriyyāt*).³ The principle of permissibility establishes that human conduct remains within the sphere of the permissible unless subject to a scriptural prohibition, and therefore does not acquire a criminal character. This principle signifies that restrictions on liberty are justified only when a valid religious ground for prohibition exists. Normative doctrines such as the rule of no harm, the rule of removal of hardship, and the principle of prohibition of unjust dominance delineate the legitimate scope of penal intervention by emphasizing the prevention of harm and the negation of unduly burdensome obligations. These foundations indicate that criminalization in Islam functions not as an instrument for imposing governmental will but as a mechanism for safeguarding genuine interests and preserving the legal structure of the Islamic community.⁴ The Qur'ānic verse "Indeed, We have shown him the way, whether he be grateful or ungrateful" (*al-Dahr*: 3) presents the human being as endowed with choice while situating that choice within the framework of divine responsibility and accountability. The implication is that, although liberty is recognized in Islam, it is not left without normative supervision. On this basis, conduct devoid of recognized harm remains within the domain of the permissible and cannot

1 RA Duff, *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press 2015) 113.

2 R Lippke, 'Fundamental Values of Criminal Procedure' in DK Brown, JI Turner and B Weisser (eds), *The Oxford Handbook of Criminal Process* (Oxford University Press 2019) 64.

3 Haji-Deh-Abadi and Bostani-Pour (n 8) 89–92.

4 Q Eslami-Nia, 'Anthropological Foundations of Criminal Law' (PhD thesis, University of Qom 2016) 99–104.

be subjected to criminalization. Consequently, the penal sphere is restricted to cases in which the necessity of intervention is established on religious grounds. This structure renders the foundations of criminalization in Islam grounded in purposive reasoning, obligation-centered normativity, and a disciplined framework of legal ordering.

Another foundational basis of criminalization in Islamic criminal law is the concept of public interest (*maslaha*), which, in the principles of jurisprudence and Islamic legislative theory, serves as a legal-religious criterion for regulating the limits of liberty and the scope of penal intervention. In this sense, public interest is neither discretionary nor governmental, but rather a disciplined standard subordinated to the objectives of the Sharia, acquiring the capacity to ground criminal prohibition only within the framework of general necessity. Within this legal system, criminalization is legitimate only when a demonstrable and juridically cognizable relationship exists between the prohibition of a given act and the preservation of the fundamental values of the Sharia. The realization of a valid public interest is conditioned upon establishing religious necessity and the existence of a generalizable harm, and the legislator possesses no authority to restrict liberty in the absence of these criteria.¹ The Qur'ān, in the verse “He has not placed upon you in religion any undue hardship” (*al-Hajj*: 78), articulates a general rule that renders invalid any religious obligation or prohibition that imposes hardship beyond human capacity. This rule indicates that public interest in criminalization must align with the prevention of harm and the avoidance of unjustifiable burden. Moreover, the principles of presumption of innocence and permissibility establish normative mechanisms that prevent the unregulated expansion of penal authority and the encroachment upon legitimate liberties. These mechanisms ensure that criminalization occurs only when public interests, social order, and general security are genuinely threatened.² On this basis, public interest functions not as a tool for expanding state penal power but as a normative standard for limiting intervention and ensuring proportionality between prohibition and social necessity. Such an understanding renders criminalization subject to transparent and reviewable rules and prevents political motives or non-legal considerations from entering the legislative process. This structure also redefines the relationship between individual liberty and public order within the framework of Sharia-based criteria. Accordingly, any penal prohibition must be evaluated in light of religious necessity, foreseeability, and its consistency with the objectives of the Sharia. Consequently, public interest in Islamic criminal law operates as a legal-jurisprudential foundation that neither negates liberty nor renders it absolute, but instead directs it toward the preservation of fundamental values and the realization of social order.

In comparative perspective, the foundations of criminalization in the two systems of Western and Islamic criminal law rest upon two normatively distinct bases, each of which redefines the relationship between liberty and the scope of penal authority in accordance with its own internal logic. In the Western tradition, liberty—conceived as a legally protected right—functions as the basis for constraining penal authority, and the transfer of conduct into the realm

1 SH Alavi, ‘Foundations of the Minimalist Criminalization Approach in Islamic Criminal Jurisprudence’ (2024) 18(49) *Studies in Islamic Jurisprudence and Fundamentals of Law* 63, 63–68.

2 M Bagheri, ‘Criminalization in the Field of Citizenship Rights’ (PhD thesis, University of Kashan 2019) 45–55.

of criminal prohibition is contingent upon establishing harm or legal disruption within the normative order; thus, liberty constitutes the external boundary and the legitimacy-conferring criterion for penal intervention, and any restriction that exceeds legal necessity is regarded as normatively invalid. By contrast, the Islamic jurisprudential framework understands liberty in relation to religious obligation and within the binding norms of the Sharia, and conditions the legitimacy of criminalization upon the establishment of religious necessity, the existence of a generalizable harm, and conformity with the objectives of the Sharia; accordingly, liberty is not conceived as absolute liberty but as a qualified status governed by religious criteria. The result of these two structures is that, in the West, criminalization is organized around the rational structuring of the legal order and the principle of legal disruption, whereas in Islam the scope of penal intervention is defined in continuity with the purposive orientation of the Sharia and the preservation of genuine interests. Therefore, the relationship between liberty and penal authority in the former approach is grounded in the logic of limiting state competence and protecting individual autonomy, whereas in the latter it is founded upon the priority of religious obligations and the regulation of liberty within a framework of normative duty.

3. Governing Principles of Criminalization in Western and Islamic Criminal Law

Principles constitute the general and binding rules that regulate the process of legislation and the exercise of criminal law, determining the boundaries, standards, and modalities of penal intervention and providing the authoritative framework for interpreting and applying criminal norms. In Western criminal-law systems, the legal principles governing criminalization rest upon a set of mandatory criteria whose overarching purpose is to define the limits of legitimate recourse to penal sanctions within a normative legal order. Foremost among these is the principle of legality, which confines the criminal jurisdiction of the state to expressly enumerated and clearly articulated forms of conduct, requiring that no act or omission be incorporated into the sphere of penal prohibition absent an explicit statutory provision. This principle is complemented by the principle of strict interpretation, which prohibits expansive or conceptually elastic readings of criminal statutes and safeguards legal certainty against discretionary exercises of penal authority. The presumption of innocence reinforces these guarantees by providing that every individual retains immunity from penal intrusion unless and until criminal culpability is proven before a competent authority. Collectively—each oriented toward the protection of legal liberty—these principles restrict criminalization to cases in which a normative necessity for limiting liberty has been established.¹ In addition, the requirement of demonstrating a direct relationship between the conduct and harm inflicted upon a specific legally protected interest serves as a necessary condition for penal cognizability, ensuring that mere moral or non-legal disapproval does not constitute grounds for criminal intervention. The principle of proportionality further requires that the type and severity of penal sanction reflect the weight of the protected interest and that the extent of punitive response remain commensurate with the legal value at stake. The principle of foreseeability

¹ PH Robinson and JM Darley, *Justice, Liability, and Blame* (Routledge 1995) 39.

mandates that individuals must be capable of anticipating the penal consequences of their conduct and that the scope of criminal prohibition remain free from ambiguity or uncertainty.¹ Taken together, these principles organize the system of criminalization within a framework of binding, predictable, and normatively coherent rules.

The supplementary principles of criminalization in Western criminal-law systems operate in continuity with the logic of constraining penal authority and articulate the criteria of necessity, responsibility, and normative coherence in determining the scope of criminal prohibition. The principle of penal necessity provides that recourse to criminal sanctions is justified only when non-penal mechanisms are incapable of remedying the harm and penal intervention is employed as a last resort. The principle of personal criminal responsibility stipulates that punitive reaction may be directed solely toward the individual to whom the conduct can be attributed in terms of fault or intent, thereby precluding the applicability of strict or vicarious liability. This principle is complemented by the principle of voluntary agency in criminal responsibility, which makes liability contingent upon establishing the existence of free will and the capacity for behavioral control, and thus excludes criminal responsibility for acts lacking the element of volition.² The principle of certainty and uniformity in the application of sanctions requires that punitive responses be applied within a structured framework, free from discrimination, and grounded in objective criteria so as to prevent arbitrariness or unequal treatment in criminal enforcement. The principle of equality before the law further aligns the structure of criminalization with normative ordering and ensures that individuals subjected to penal response are treated under conditions of equality. The principle of minimal penal authority mandates that the scope of state intervention be confined to situations of genuine legal necessity and that the state's competence to restrict liberty not be expanded without justification. The criterion of the existence of a specific legally protected interest constitutes a foundational condition for admitting conduct into the domain of criminal prohibition and prevents the incorporation of behaviors unconnected with the protection of recognized legal interests into the penal structure.³ Taken together, these principles establish a normative and reviewable framework that regulates the application of penal sanctions as a narrow, clear, and predictable rule.

The principles governing criminalization in the Islamic criminal-law system rest on a set of jurisprudential–legal rules that legitimately constrain the exercise of penal authority and ensure that the legislative process conforms to the binding structure of the Sharia. At the outset, these principles rely on the principle of permissibility (*Ibāḥa*) and the principle of innocence, which stipulate that no conduct may enter the criminal domain absent a valid religious or legal prohibition—an approach reflected in Iranian law through Article 37 of the Constitution and Article 2 of the Islamic Penal Code. Within this framework, the principle of legality is not merely a procedural requirement but a substantive criterion for limiting state

1 Kai Ambos and others (eds), *Core Concepts in Criminal Law and Criminal Justice* (vol III, Cambridge University Press 2025) 22.

2 R Faani, 'The Foundations of Criminalization and the Scope of Discretionary Punishments' (2023) 2(2) *Interdisciplinary Studies in Society, Law, and Politics* 19, 23.

3 N Searle, 'The Criminalization of the Theft of Trade Secrets' (2012) 2(2) *IP Theory* 7.

power, preventing criminalization based on governmental discretion or subjective preference. Hosseini's analyses show that Islamic criminal policy recognizes penal authority only within the scope in which legal prohibition corresponds to the definitive interests of the Sharia, and that the legislator has no authority to restrict liberty beyond this domain.¹ Moreover, doctrines such as the rule of no harm and the rule of no undue hardship specify that no penal rule may impose unjustified harm or burdens exceeding human capacity, a requirement mirrored in Articles 36 and 40 of the Iranian Constitution. The principle of non-dominion further establishes that no institution may impose punishment without a valid religious justification, thereby requiring that criminalization rest upon decisive evidence, an authoritative scriptural text, or a demonstrable public interest. From a jurisprudential perspective, the principle of protecting the five essentials confines penal intervention to safeguarding religion, life, intellect, lineage, and property, thereby preventing criminalization from becoming an instrument of generalized social control. Eslami-Nia's findings indicate that criminal legislation in Islam is legitimate only when a demonstrable relationship exists between the legal prohibition and the necessity of preserving these foundational values, and that expanding the penal domain without such a relationship is inconsistent with Sharia-based foundations.² The cumulative effect of these principles is that criminalization in Islam is governed by rules of caution, necessity, and religious proportionality, and the legislator must in every instance provide a valid and assessable justification for any prohibition.

In Islamic criminal law, criminalization is not regarded as an absolute legislative power; rather, it is an institution bound by a set of jurisprudential-legal rules that structurally limit its legitimacy. The starting point of this system is the supremacy of the principles of innocence and permissibility, which means that human actions are immune to criminal labeling unless there is a legitimate, prior legal or Shariah-based prohibition. This logic holds that bringing an act within the domain of criminal sanctions requires establishing a compelling reason; mere governmental cost-benefit analysis is insufficient. The reflection of this principle in Iranian law is found in Article 37 of the Constitution and Article 2 of the Islamic Penal Code, demonstrating the substantive acceptance of this limitation within the legislative system. In this context, the principle of legality of crimes and punishments is not merely a formal rule concerning the primacy of law over the judiciary, but a substantive mechanism for restraining the state's criminal power and ensuring citizens' legal security. Hosseini's analysis emphasizes that Islamic criminal policy permits criminal intervention only when there is a legal prohibition based on clear and definite Shariah interests, and lawmakers outside this boundary lack the Shariah competence to restrict individuals' liberty.³ From this perspective, criminalization without a valid Shariah backing is not only illegitimate but also contrary to the philosophy of criminal legislation in Islam. Additionally, the principles of "no harm" (La Dharar) and "no hardship" (La 'Usr wa La Haraj) negate any imposition of unjust harm or excessive hardship, and this restriction is also reflected in Articles 36 and 40 of the

1 SMR Hosseini, *Criminal Policy in Islam and in the Islamic Republic of Iran* (SAMT 2015) 14.

2 Eslami-Nia (n 16) 99–104.

3 Hosseini, 2015: 14.

Constitution. Based on these foundations, criminal legislation in Islam is always regarded as an exceptional and limited act, not a tool for broadly regulating social behaviors.

On the other hand, the principle of non-authority further narrows the scope of criminal authority and conditions any imposition of punishment or expansion of criminalization on the existence of a definite legal or Shariah-based reason. According to this principle, no legislative or judicial body has the competence to impose criminal coercion without relying on a valid text or a legitimate public interest. In this regard, the principle of safeguarding the five essentials (religion, life, intellect, lineage, and property) limits the scope of criminal intervention to preserving these essentials, thereby preventing the criminal system from becoming an instrument of public control. Eslami-Nia's research shows that in Islamic jurisprudence, the legitimacy of criminalization is contingent on establishing a necessary, direct, and defensible relationship between the legal prohibition and the preservation of these fundamental values, and any expansion of the criminal domain without such a relationship is considered contrary to Shariah principles.¹ Complementing this analysis, Momeni's study on international criminal trials shows that the principle of legality of crimes and punishments is also recognized at the international level as a substantive rule to prevent broad interpretations, criminal analogies, and post facto application of force.² The experiences of the Nuremberg and Tokyo tribunals clearly demonstrated that deviation from this principle, even when justified by justice or necessity, weakens the rule of law and undermines the rights of the accused. This experience also confirms that the emphasis in Islamic jurisprudence on text-based rulings and certainty in criminalization serves a protective and advanced function in restraining criminal authority. Therefore, the outcome of the jurisprudential principles governing criminalization is that the legislator is obliged to clearly establish and justify the necessity, proportionality, and Shariah-based foundation of prohibition in each case. Otherwise, criminalization will lack Shariah and legal legitimacy.

The supplementary principles of criminalization in Islamic criminal law constitute a body of substantive and procedural rules designed to ensure the legitimacy of penal intervention and prevent penal inflation. One such principle is the principle of religious proportionality, which requires that the severity of the penal response correspond to the nature of the harm, the degree of injury, and the significance of the protected religious interest—an approach reflected in Article 18 of the Islamic Penal Code of Iran. In addition, the principle of general necessity stipulates that criminalization is permissible only when non-penal mechanisms—such as civil, disciplinary, or administrative measures—are insufficient to avert the harm, thereby reserving penal sanctions as a last resort. Research by Saeedi and colleagues demonstrates that adherence to this principle prevents the expansion of penal authority in the domain of legal acts and confines criminal legislation to situations involving a demonstrable and protectable religious interest.³ Furthermore, the principle of strict interpretation of criminal statutes, reflected both in Islamic jurisprudence and in Iranian law (Article 167 of the Constitution and Article 11 of

1 Eslami-Nia (n 16) 99–104

2 Mahdi Momeni, 'The Principles of Legality in International Criminal Trials' (2016) 33(55) *International Legal Journal* 159, 159–184.

3M Sa'idi, S Ebrahimi and MM Zarei, 'Foundations of Criminalization of Legal Acts' (2023) 10(19) *Pazhuheshnāmeḥ-ye Mazāheb-e Eslāmi* 523, 531–533.

the Islamic Penal Code), emphasizes that in cases of doubt, ambiguity, or uncertainty, extending the scope of criminal law is prohibited and liberty must be preferred. Alongside these rules, the principle of individual accountability mandates that penal sanctions may be imposed only when the conduct is voluntary and attributable to the agent, thereby preventing the introduction of objective or expansionist forms of liability. Studies by Najafi-Tavana show that these principles are binding not only in jurisprudence but also in Iran's legislative structure, obliging the legislator to reduce the scope of penal intervention to what necessity requires.¹ On the basis of these principles, criminalization must rest on valid evidence, an assessment of public religious interest, and a precise evaluation of social and legal consequences. Ultimately, these principles ensure that Islamic criminal law adopts a restrained and disciplined approach rather than an expansionist one, permitting penal intervention only where genuinely necessary and consistent with the definitive rules of the Sharia.

In comparative perspective, the relationship between the governing principles of criminalization and the concept of liberty in the two systems of Western and Islamic criminal law rests on two distinct normative foundations, each of which structures the limits of penal intervention and the criteria for restricting liberty according to its own internal logic. In the Western tradition, principles such as legality, strict interpretation, the presumption of innocence, proportionality, necessity, voluntary agency, and personal responsibility position liberty as a legally protected right and require that any restriction of liberty be permissible only upon the establishment of juridical harm, the foreseeability of prohibition, and the existence of normative necessity; thus, liberty functions as the external boundary of penal authority and as the overarching criterion for evaluating the legitimacy of all criminalization processes. By contrast, the principles governing criminalization in Islam—including permissibility, innocence, non-dominion, the prohibition of undue hardship, the no-harm rule, general necessity, religious proportionality, and the protection of the five essentials—conceive liberty as a qualified competence subordinate to religious limits, and condition the legitimacy of penal intervention on the existence of a valid prohibition, the establishment of a generalizable harm, and the possibility of assigning religious duty; accordingly, liberty is not understood as absolute liberty but as a status defined within the constraints of Sharia-based obligations and purposes. The outcome of these two approaches is that the principles of criminalization in the West ground liberty as the basis for constraining public authority, whereas the principles of criminalization in Islam regulate liberty in light of religious necessity and the preservation of fundamental interests, defining the boundaries of penal intervention according to the purposive orientation of jurisprudence and the discipline of normative order.

4. Criteria of Criminalization in Western and Islamic Legal Systems

In Western criminal law, criteria serve as normative tests for determining whether the necessary conditions for placing an act within the domain of criminal prohibition are satisfied, particularly regarding the necessity of intervention, the proportionality of the

¹ A Najafi-To'ana and F Mostafazadeh, 'Criminalization in the Criminal System of Iran' (2013) 5(8) *Studies in Islamic Jurisprudence and Law* 149, 157–160.

response, and the attributable disruption of the legal order. These criteria operate as objective and assessable tools that delineate the permissible boundaries of penal authority and seek to ensure that conduct enters the criminal domain only when a violation of a legally protected and substantively significant interest can be established. A foundational criterion is whether the harm in question is attributable to the conduct under review, thereby determining whether criminal intervention is warranted as the appropriate legal response. A second prominent criterion requires proof of an actual or potential threat to a legally protective structure that the legislature recognizes as worthy of safeguarding; this prevents the criminalization of conduct that is merely undesirable or controversial without possessing a defined juridical nexus. A third criterion centers on the foreseeability of the penal consequences of conduct, ensuring that individuals can evaluate the scope of penal intervention on the basis of accessible legal rules—an element integral to the broader system of legal certainty in criminalization.¹ These criteria also weigh the proportionality between the intensity of penal intervention and the significance of the protected interest to prevent unwarranted expansion of punitive authority. In addition, a rational relationship between the nature of the conduct and the degree of juridical risk it generates constitutes a necessary condition for its inclusion in the criminal domain. Further criteria include assessing the necessity of penal protection in comparison to alternative regulatory mechanisms, thereby preventing the substitution of criminal sanctions for non-penal remedies. The practical enforceability of the criminal rule likewise serves as an evaluative benchmark, prohibiting the enactment of norms that cannot be effectively implemented. Taken together, these criteria establish the legal method by which undesirable conduct is normatively assessed and serve as the principal evaluative tools for determining the necessity and limits of criminalization in Western criminal law.

In continuity with this approach, the supplementary criteria of criminalization in Western systems emphasize the justifiability of penal intervention in light of legal and institutional functions. One such criterion is the requirement to assess the effectiveness of criminal sanctions relative to non-penal alternatives, determining whether resort to penal instruments is necessary when compared to available substitutes. Another criterion of particular importance concerns evaluating the coherence of criminalization with the overarching structure of the criminal justice system so as to prevent the introduction of rules incompatible with its foundational principles; this involves examining the extent to which a proposed criminal prohibition aligns with general principles of responsibility and penal response, and whether its incorporation into the criminal framework would generate doctrinal inconsistency. A third criterion focuses on the explanatory adequacy of the criminal rule, determining whether the legislature has defined the conduct in a manner that permits consistent and uniform enforcement; this requirement rests on the necessity of workable, unambiguous definitions.² Another criterion emphasizes the assessment of whether sufficient institutional resources exist to implement the new rule, thereby preventing the expansion of norms that lack practical enforceability. Alongside these considerations, the examination of the

1 L Zedner and JV Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice* (Oxford University Press 2012) 2.

2 Nicola Cross, *Criminal Law for Criminologists: Principles and Theory in Criminal Justice* (1st edn, Routledge 2020) 30.

collateral effects of penal intervention on individual rights constitutes a crucial dimension of the evaluative process, ensuring that criminal prohibitions do not generate disproportionate or atypical consequences. The criterion of assessing the comprehensiveness of the penal rule is likewise applied to prevent the enactment of norms that would produce uncontrollable expansions of criminal liability. Moreover, evaluating the deterrent function of the proposed prohibition relative to the degree of penal intervention plays an identifiable role in this process. A further criterion examines whether a clear relationship can be established between the *actus reus* and *mens rea* in the proposed criminalization, ensuring that the conduct is compatible with the conceptual structure of criminal responsibility. Taken together, these criteria form a multi-layered evaluative system through which the necessity and feasibility of criminalizing particular behaviors are scrutinized, thereby playing a decisive role in delimiting the scope of penal intervention.

The jurisprudential criteria of criminalization in the Islamic criminal-law system rest on the premise that the incorporation of a given conduct into the domain of penal prohibition is permissible only where a demonstrable, generalizable harm and a threat to one of the essentials of the Sharia can be established. Within this framework, the primary rule is permissibility and the absence of penal intervention, and elevating a behavior to the status of criminal prohibition requires either valid Sharia-based proof or a governmental justification grounded in general necessity. The criterion of the “existence of a legitimate harm” requires that the prohibited conduct produce definite or near-definite detrimental effects on the social, moral, or legal order, and that such harm be objectively assessable through authoritative evidence rather than conjecture or politically motivated interpretations. In the analysis of the jurisprudence of regulatory systems (*Fiqh al-nizāmāt*), any criminalization lacking a clear nexus to the disruption of the Sharia-based normative order or to a demonstrable threat to the public interest is deemed illegitimate.¹ The criterion of “non-contradiction with primary rulings” further stipulates that no penal rule may conflict with the fixed substantive injunctions of the Sharia, except in cases of normative conflict where the rule of priority between the more and less important is applied. The criterion of “elimination of undue hardship” likewise functions as a constraint on the scope of criminal law and prevents the imposition of onerous or disproportionate penal obligations. Alongside these, “disruption of public order,” as a recognized secondary title, can ground criminal prohibition only where a verifiable threat to security, public order, or the essential functions of society is established.² Collectively, these criteria are grounded in necessity, proportionality, and demonstrability and serve to prevent expansionist tendencies in the Sharia-based penal system.

Developments in international criminal law over the past century indicate that the shift from the “doctrine of absolute justice” to the “doctrine of legality” has been gradually accepted as a necessary condition for achieving fair and predictable trials. According to Momeni, the explicit acceptance of the principle of legality in international criminal documents and practices

1 A Arzhang, ‘Criminalization from the Perspective of the Jurisprudence of Governance Systems’ (2019) 27(104) *Feqh* 141, 153–157.

2 G Khosroshahi and A Ganji, ‘Interest-Based Criminalization in Iran’ (2019) 8(28) *Quarterly Journal of Criminal Law Research* 175, 181–185.

reflects the growing convergence of national and international criminal systems towards limiting the exercise of criminal power and guaranteeing fundamental liberties.¹ The criteria governing criminalization in the Islamic Republic of Iran are based on the Constitution's binding structure and statutory provisions that regulate the principle of legality and the restrictions on penal authority. Pursuant to Article 4 of the Constitution, all legislation must conform to the principles of the Sharia, and this requirement operates as the primary criterion of legitimacy in penal lawmaking. Article 36 of the Constitution and Article 2 of the Islamic Penal Code further stipulate that criminalization must rest upon an authoritative and foreseeable legal text, thereby making the criterion of "clarity and foreseeability" mandatory in the legislative process. The criterion of "legislative necessity" requires the legislator to establish the inadequacy or failure of non-penal mechanisms before resorting to penal instruments, and to enact criminal prohibitions only where alternative methods prove insufficient. The criterion of "coherence with the structure of criminal responsibility" likewise mandates that any new criminal prohibition be consistent with principles such as strict interpretation, the presumption of innocence, and the prohibition of imposing punishment without definitive legal justification. Within the domain of interest-based legislation, the criterion of a "demonstrable general public interest" requires that any appeal to public interest be grounded in verifiable and objective necessity rather than in political considerations or ad hoc expediency.² Additionally, the criterion of "practicability" requires that a criminal rule be enacted only when its enforcement is institutionally, socially, and judicially feasible and effective.³ Taken together, these criteria demonstrate that penal legislation in the legal system of the Islamic Republic is anchored in necessity, transparency, normative coherence, and enforceability, and they operate to prevent the transformation of criminal law into an instrumental or politically reactive apparatus.

The criteria governing criminalization in the Islamic Republic of Iran are based on the Constitution's binding structure and statutory provisions that regulate the principle of legality and the limitation of penal authority. Pursuant to Article 4 of the Constitution, all legislation must conform to the principles of the Sharia, and this requirement functions as the primary criterion of legitimacy in penal lawmaking. Article 36 of the Constitution and Article 2 of the Islamic Penal Code further stipulate that criminalization must rest on an authoritative and foreseeable legal text, thereby making the criterion of "clarity and foreseeability" obligatory in the legislative process. The criterion of "legislative necessity" requires the legislator to establish the insufficiency or failure of non-penal mechanisms prior to resorting to penal instruments, and to engage in criminalization only when alternative regulatory tools prove inadequate. The criterion of "coherence with the structure of criminal responsibility" likewise mandates that any new criminal prohibition conform to principles such as strict interpretation, the presumption of innocence, and the prohibition against imposing punishment without definitive legal justification. In the domain of interest-based legislation, the criterion of a "demonstrable

1 Mahdi Momeni, *The Principles of Legality of Crimes and Punishments in International Criminal Law* (Mizan Publishing 2013) 119–125.

2 Arzhang (n 32) 154–156.

3 Sa'idi, Ebrahimi and Zarei (n 28) 531–533.

general public interest” provides that any reliance on public interest must rest upon objective and verifiable necessity rather than political interpretations or situational expediency.¹ Additionally, the criterion of “enforceability” requires that a criminal rule be enacted only when its implementation is institutionally, socially, and judicially feasible and effective.² Taken together, these criteria show that penal legislation in the legal system of the Islamic Republic is grounded in necessity, transparency, normative coherence, and enforceability, preventing the transformation of criminal law into an instrumental or politically reactive mechanism.

The relationship between criminalization and liberty in Islamic and Western criminal law, although both superficially limit state criminal power, rests on two distinct logics: normative foundations and the justification model for criminal intervention. In Western criminal systems, individual liberty is presumed as a prior value within the legal system, and criminalization is accepted as a limited exception that requires narrow justification in relation to this principle. Therefore, criteria such as the violation of legal interests, criminal necessity, and proportionality serve as control mechanisms to prevent the unwarranted expansion of criminal authority and to protect individual autonomy. In this framework, any restriction on liberty requires clear legal specification, predictability, and rational oversight over the legislator’s decisions. In contrast, in Islamic criminal law, liberty is not considered an independent, unrestrained value but is defined structurally in relation to duty, responsibility, and the normative order of society. Accordingly, the criteria for criminalization in Islam focus on the existence of real harm and the necessity of criminal intervention to preserve fundamental interests, rather than solely protecting individual liberty as the starting point of analysis. The legitimacy of restricting liberty in this system is contingent on the alignment of criminalization with Shariah principles and rules, which themselves function as limits on criminal authority. Although the principle of proportionality is accepted in both systems, the basis for its evaluation differs: in Islamic law, proportionality must align with the substantive criteria of the Shariah order. In Western systems, liberty is primarily protected through statutory laws and formal guarantees, and criminalization holds an exceptional nature. In contrast, in Islamic law, the protection of liberty is achieved within the framework of the Shariah order and through regulating the exercise of criminal power. Despite these foundational differences, both systems share the principle that the absence of clear, measurable, and controllable criteria in criminalization puts liberty at risk and makes criminal authority prone to abuse. Thus, while the theoretical foundations of criminalization differ between Islam and the West, both systems ultimately lead to the regulation of liberty and the legitimate limitation of criminal power.

Conclusion

The present study demonstrated that liberty occupies a central and structural position within the architecture of criminal law, functioning as the external boundary of penal authority. The conceptual analysis of liberty conducted herein revealed that liberty is not merely a value-laden proposition but a binding normative condition that obliges the legislator to formulate

1 Arzhang (n 32) 154–156.

2 Sa’idi, Ebrahimi and Zarei (n 28) 531–533.

all penal decisions in light of it. The findings showed that liberty constitutes the foundation of valid volition and the precondition for attributing criminal responsibility; in its absence, penal blameworthiness lacks any normative grounding. The research further established that liberty performs a dual role in criminal law: it operates both as a protective shield against expansionist penal policies and as the principal criterion for assessing the legitimacy of coercive intervention. The comparative analysis indicated that liberty, in both legal systems examined, shapes the structure of criminal responsibility and constrains the scope of public intervention. The study demonstrated that liberty, as an individual right, imposes obligations on the legislator, requiring that any restriction be justified exclusively through substantiated necessity. It also clarified that liberty, as a foundational value, must be safeguarded throughout the criminal lawmaking process and cannot be subordinated to preferences or non-normative considerations. The analysis showed that liberty constitutes a prerequisite for the mental element of crime and that, without the existence of choice and free will, criminal responsibility cannot be attributed. Ultimately, the study established that liberty in criminal law is not merely an individual entitlement but an institutional mechanism for stabilizing the legal order.

The foundations of criminalization in Western criminal law rest on principles that delineate the conditions under which penal intervention is legitimately warranted. In this system, criminal intervention is justified only when the conduct in question disrupts the legal order and poses a threat to public security or the rights of others. Put differently, Western criminal law requires that penal intervention be grounded in a clearly articulated legal rationale and proportionate to the degree of threat generated by the conduct. The principles of legality, proportionality, and necessity operate as the principal criteria governing penal intervention and ensure that no criminal sanction is imposed absent a reasoned and legally cognizable justification. By contrast, the foundations of criminalization in Islamic law are anchored in the preservation of public welfare and adherence to religious obligations. In this framework, liberty is conceived as a qualified concept that must be regulated within the bounds of Sharia-based duties and the protection of collective interests. Penal intervention in Islamic law is legitimate only when the conduct threatens public welfare or the essential interests of the Sharia. The normative structure of Islamic law insists that criminalization must align with the objectives of the Sharia and that no penal intervention may exceed what is necessary to safeguard these objectives and the public good. These foundational divergences have led to the understanding that, in Western law, penal intervention functions primarily as a mechanism for maintaining the legal order and public security, whereas in Islamic law it operates principally to protect the five essential interests of the Sharia and the broader public welfare.

The governing principles of criminalization in Western and Islamic criminal law play a decisive role in defining the legitimate boundaries of penal intervention. In Western criminal law, the principles of legality and proportionality constitute two foundational pillars, requiring that criminal intervention be employed only when the conduct in question poses a serious threat to social order or the rights of others. The principle of legality entails that no penal intervention may be imposed without an authoritative legislative text, and that all crimes and punishments must be explicitly defined by law. In addition, the principle of proportionality

requires that the severity of penal intervention correspond to the gravity and nature of the threat posed by the conduct. This principle functions as a safeguard against expansionist penal policies, ensuring that criminal sanctions are imposed only when necessary and in the least intrusive manner possible. In the Islamic legal system, the governing principles of criminalization are grounded in religious and ethical norms. The principles of the prohibition of harm, the elimination of undue hardship, and the protection of the five essential interests of the Sharia define the permissible scope of penal intervention. Under the prohibition of harm, no criminal sanction may inflict unwarranted or unnecessary harm on individuals or society. Likewise, the principle of eliminating undue hardship stipulates that no criminal obligation or punishment may place an individual in an intolerable or excessively burdensome situation. As a general rule, all penal intervention must fall within the bounds of public welfare and the essential objectives of the Sharia and must be justified by genuine religious and social necessity. Moreover, proportionality also operates as a principle of criminalization in Islamic law, requiring that the degree of penal intervention correspond to the harm or threat produced by the conduct. This principle prevents the overexpansion of penal authority and ensures conformity with Sharia-based constraints, emphasizing that no criminal intervention may be imposed without a valid legal and social justification.

The criteria governing criminalization in Western and Islamic criminal law plays a fundamental role in delineating the legitimate boundaries of penal intervention. In the Western legal tradition, criteria such as foreseeability, necessity, and proportionality serve as central benchmarks for assessing the legitimacy of criminal intervention. Foreseeability requires that individuals be able to anticipate and understand the penal consequences of their conduct, thereby functioning as a safeguard against disproportionate or unjustified criminal measures. The criterion of necessity further mandates that criminal intervention be employed only when non-penal mechanisms are incapable of addressing the underlying problem effectively; accordingly, penal sanctions must constitute a measure of last resort. The criterion of proportionality requires that the severity of criminal sanctions correspond to the nature and degree of the threat posed by the conduct, thereby preventing the imposition of penalties exceeding what is required to preserve public order and the rights of others. In Islamic criminal law, the criteria of criminalization are anchored in the normative framework of the Sharia and the preservation of public welfare. The prohibition of harm, as a principal criterion, dictates that no criminalization may result in unjustifiable harm to individuals or society. Similarly, the elimination of undue hardship functions as a limiting criterion, stipulating that criminal intervention may not impose excessive or unnecessary hardship upon individuals. In Islamic law, penal intervention must advance public welfare and safeguard the essential objectives of the Sharia, and no act may be criminalized without a valid religious and social justification. These principles operate to prevent expansionist penal policies and the imposition of disproportionate or unnecessary sanctions. In essence, the criteria for criminalization in both legal systems emphasize the need for measured, justified, and proportionate penal interventions to prevent the unregulated expansion of punitive authority and protect individual liberty from unwarranted encroachment.

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