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# A review of judicial powers in various schools for determining punishment

**Atefeh Kousaripour[1], Mahmood Bavi[2*], Siyavash Shjapourian[2]**

[1]*Department of Law Science, Science and Research Branch, Islamic Azad University, Khouzestan, Iran*

[2]*Department of Law Science, Ahvaz Branch, Islamic Azad University, Ahvaz, Iran*

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## Abstract

The principles of securing justice and individualizing punishment can be likened to two sides of the same coin, mutually justifying the simultaneous existence of each other. With regard to determination of punishment, on the one hand, the principle of equality and consistency of punishment lacks the required efficiency in that it does not consider the specific personal and social circumstances of the criminal in individual cases, and this condition would justify the imposition of equality of punishment; and on the other hand, the principle of securing justice is itself the foundation stone of individualizing punishment. No doubt, legislation of fixed punishments by legislators resulting from their mistrust of judges, which itself results in equal/unequal treatment of criminals, would completely destroy any chances of individualizing punishment. However, by setting forth minimum and maximum punishments and recognizing the right of a judge to apply mitigating or aggravating circumstances, to suspend or delay a punishment, to pardon or apply conditional release, and to impose additional punishment, legislators have actually provided a judge with a certain degree of freedom to issue sentences in accordance with the criminal's specific characteristics as well as the specific circumstances of the crime. In this regard, Islamic Code of Punishment has taken steps to individualize punishment via considering limits for penalties (Taazirat) where particular importance is given to a judge's insight, and via recognizing repentance as a way of mitigating punishment.

***Corresponding Author:** Mahmood Bavi ✉ atefeh_2420@yahoo.com

**Introduction**

Punishment is typically defined in any dictionary as "the infliction or imposition of a penalty as retribution for an offence" (Moin, 1987). However, as scholars are not unanimous on the conceptual significance of punishment, the meaning of this term is always subject to change in accordance with various temporal and spatial situations. In addition, since different forms of punishment, corporal and capital punishments in particular, invoke more vivid mental images and feelings, these are more difficult to describe and evaluate objectively (Rahmdel, 2010). According to a lawyer, "Punishment is the imposition of a penalty on the person who has committed a crime. Punishment and suffering are inseparably linked. In fact, it is the very infliction of suffering which virtually distinguishes punishment from other disciplinary instruments such as driving fines, compensation, cancellation, and legal incompetence." (Aliabadi, 1989).

By adjusting punishment severity and predicting such judicial rights as mitigating/aggravating circumstances, deterring/suspending punishment, pardoning, conditional release, as well as applying additional penalties, a judge is given certain powers to deal with criminals proportionately with their specific characteristics and the specific circumstances surrounding each legal case. In this regard, the Islamic Punitive Code has taken steps to individualize punishment via considering limits for penalties (Taazirat) where particular importance is given to a judge's insight, and via recognizing repentance as a means of mitigating punishment. Obviously, as much as application of individualized punishment through offering legal powers to a judge is useful and even inevitable, undue application thereof can lead to judgmental inconsistencies as well as endangering the suspect's legal rights. For this reason, the Iranian legal system can learn from relevant legal cases experienced by judicial systems in other countries for the purpose of setting forth optimal solutions for its own legal proceedings. As the official reaction of society to crime, punishment is the most prominent instrument used in criminal court proceedings. Taking into account the traditional theories on punishment as well as jointly and anxiously seeking to serve justice, those in charge of criminal policies have endeavored to test many different methods and solutions.

At times, resorting to disputory techniques, they have pushed for fixed punishments in order to reduce the interaction between legislators and the Judiciary in terms of determining punishment, thus minimizing a judge's powers; whereas at other times, they have adhered to more flexible punishments by allocating more authority to Prisons Organization in an effort to limit judicial powers, thus causing problems in organizing current court rulings. Once the previous systems had proved inefficient, they again turned to imposing maximum and minimum limits for punishment to increase interaction between the legislator and the judge and pave the way for realizing individualized punishments to secure justice. Beccaria, a serious advocate of the principle of fixed punishments, believes legislators must, by setting forth fixed definitive punishments, eliminate any possible intervention by the judge regarding the type and severity of punishment. In his view, the rule of law principle prevents a judge from issuing partial judgments. Based on this principle, crimes must be enumerated in law, not discovered by a judge; and, imposition of punishments should be exclusively assigned by laws proportionately to crimes. Only legislators, namely, true representatives of their respective societies (which are formed based on a social contract) must be assigned the power to make rules and laws (Pradell, 2009).

From Beccaria's perspective which stemmed from the chaotic judicial circumstances of his time including imposition of punishments, the principles of the rule of law and limitation of judicial powers should deprive a judge of all rights to interpret law, and limit such rights to legislators alone. In the same way that a judge is forbidden to be involved in any misdemeanor, he/she must be prevented from

indirect involvement in the same through interpreting regulatory laws. Wrong interpretation of law would lead to misjudgments in many cases, exposing the fates of the parties in a legal case to the judge's misinterpretations. Thus, similar crimes would be judged differently in the same court of law and different sentences would be passed for the same crime in different cases. The reason for such confusion is that judges would, in the above instances, rely on their own misguided interpretations instead of listening to the unchanging call of law. Also, a judge must not be assigned the authority to mitigate punishment or pardon the defendant since such acts are against the arbitration of punishment. The duty of a judge must be limited to establishing that the alleged criminal act has been committed by the defendant and subsequently imposing the correct punishment for the crime. Beccaria believes mercy to be a virtue well worthy of a legislator, but he also believes mercy should be reflected in law and not in specific verdicts (Mahmoudi Janaki, 2009). The adverse legal circumstances as well as the chaotic process of determining and imposing punishments of his time led Beccaria to resolve that a judge's powers should be limited and that speedy, strict, and indiscriminate enforcement of law should be imposed. In his view, any judicious or careless attitude towards imposing punishment as well as any promises of mitigation or clemency would render useless the very purpose of punishment as an effective and deterrent instrument. Beccaria believes the inevitability of punishment to be more effective than the severity thereof, and that legislation of milder punishments would be preferable to allowing judges flexibility in their rulings (Nobahar, 2010). He argues that it would be invariably better to impose a mild but effective penalty on the defendant than to frighten him of a terrible punishment that he might have some hope of escaping. The reason is that when it is impossible to escape punishment, even the mildest of sufferings would be greatly intimidating to human soul (Beccaria, 2006). Thus, Beccaria's main recommendations for limiting the power of a judge and preventing issuance of authoritarian and generally disorganized rulings by the same can be summarized as follows: strict adherence to the principle of legality of crimes and punishments (i.e. *Nullum Crimen Sine Lege* and *Nua Paena Sine Lege*), imposition of fixed and mild punishments, banning a judge from interpreting law, and denying a judge the power to mitigate the sentence or pardon the offender. However, in the long run, as the futility of fixed punishments in securing criminal justice, as well as their incompatibility with the principle of individualizing punishment had been revealed, the principles of *Nullum Crimen Sine Lege* and *Nua Paena Sine Lege* were gradually weakened and lost their binding power in favor of the judge (Delmas, 2002).

*Judicial Powers in Determining Punishments in the Classical School*

Charles de Montesquieu, Jean Jacque Rousseau, Cesar Beccaria, and Jeremy Bentham can be rightfully recognized as the founders of the classical school of Criminology. Their ideas revolutionized the foundations of criminal law, leading to the establishment of the classical school. Historically, the classical school goes back to 1748, the same year Montesquieu published his book, "The Spirit of the Laws" (Mohseni, 2003).

There is no unanimity within proponents of the classical school since there exists nothing but subtle differences among the authors. For this reason, it would be more proper to speak classical schools rather than a single classical school. Beccaria believed the legality of punishment principle reflected the legality of crime principle. Laws are the only means of attributing to each crime a consistent and proportional punishment (Pradel, 2012).

In reaction to the customary intractable punishments, i.e., punishments imposed by judges, Beccaria managed to extend the practice of legal punishment. He initially asked for fixed punishments to be imposed since, in his view, fixed specific penalties

would render the law more powerful; and, if in certain cases mitigation or exemption from punishment were required, it was the legislator's duty to determine such circumstances. Therefore, fixity of punishments would render impossible the mitigation of punishment by a judge. Beccaria also believes in less severe or mild penalties.

His writings reveal Beccaria to be a pioneering critique of criminal law; the basics of such critical view having been previously set forth by Voltaire. According to Beccaria, "Every citizen has the right to know when he is guilty and when he is innocent. A person's fate is not to be determined in accordance with a judge's favorable or unfavorable attitude." This statement guarantees two fundamental principles in Criminology: the principle of legality of crime and punishment, and the principle of non-criminalization of justice. It was for this reason that Beccaria advocated a judge's impartiality and beware the same of interpreting laws. In Beccaria's view, religious percepts are to be considered as a completely different category (Goudarzi and Broujerdi, 2001).

Filangieri can be regarded as a devoted advocate of Beccaria's and Voltaire's beliefs. By re-addressing Beccaria's ideas like proportionality of crime and punishment, division of crimes, denouncing torture and inhuman behavior, etc., he explicitly states that certain crimes must be decriminalized, including suicide, witchcraft, usury, and adultery. He also brings reasons for each case: one who commits witchcraft is a fool; therefore, her condemnation would be useless. Regarding usury, he states that punishing such an act is unfair since a person's freedom must be defended (Shami, 2013).

Jeremy Bentham, the English legal and political theoretician, is mostly recognized as a founder of Utilitarianism. He was a political reformist who also worked towards reforming court procedures and laws. The main questions asked by him were: What is the purpose of a certain law or institution? Is this a desirable purpose? If so, does the law or institution act in line with this purpose? How can a law or institution be measured in terms of efficiency? In Bentham's view, the criterion for measuring efficiency or usefulness is the extent of happiness it can bring to as many society members as possible (Atrak, 2008).

*Judicial Powers for Determination of Punishment in the Neoclassical School*

Gies and Joufrroy in France and Rossi in Italy tried to reconcile absolute justice and social benefit which had previously been criticized by Kant. The formula invented in the neoclassical school by Ortolan suggested a median way, " No more than that required by justice and no more than that deemed as beneficial." The first clause, i.e., "No more than that required by justice" is in line with the beliefs advocated by the proponents of justice including abolition of severe punishments and methods of torture practiced in ancient times. However, the second clause, i.e., "... no more than that deemed as beneficial." Not only points out that punishment is meant to benefit society, but also suggests that if punishment does not actually benefit society, then it would be useless to impose it even if doing so would serve justice. Thus, the classical school started its evolution and changed its name to "neoclassical school" (Mohseni, 2003).

Of those named above, Rossi presents a relatively scientific and proper criterion for Criminology. He maintains that although crime is defined as violation of a moral obligation, such violation cannot always be considered a crime. There are three kinds of moral obligations: obligation to God, obligation to others, and obligation to oneself. Obligations to fellow human beings must be criminalized only if they disrupt social order. Realizing that moral obligations and social order were two different subjects, Rossi argued that certain immoral behaviors should be decriminalized, reasoning that religious or natural sanctions had already condemned these behaviors and cautioned human beings against committing the same. Ultimately, he maintained, "Crime is a fault which requires be hearing and judging in the presence

of human beings. Since the possibilities and instruments of perception are either false or incomplete, therefore, common sense rules that where it is impossible to evaluate an action and the effects thereof on social order, we should decriminalize that action." Thus, Rossie succeeded in presenting a measure for crime, "Social power can deem as a crime only that action which violates a moral obligation to an individual or society, that is, an obligation which benefits the maintenance of the political system, and the performance of which is possible through criminal sanctions alone, and the violation of which can be processed via imposing humane justice" (Shami, 2013).

The neoclassics often speak of "well deserved or merited punishment" which, in their view, is a just punishment. However, from their perspective, punishment must also correct as well as heal, that is, it must be beneficial. Also, they consider the worst punishment to be taking away the offender's freedom. Rossi writes,"Depriving the criminal is the most causal punishment in civilized societies." Although he acknowledges that this kind of punishment has its faults, he also maintains that it is remediable (i.e. in case of a judicial mistake, the wrongly accused person can be released) as well as cautionary, leading to ultimate moral redemption of the criminal (Pradel, 2012).

*Judicial Powers for Determination of Punishment in the Positivist School*

Lombroso, Enrico Ferri and Raffaele Garofalo are acknowledged as the founders of the positivist school in Italy. According to advocates of this school, human being's will and freedom play no role in the occurrence of a crime. They maintain that crime is the result of two factors: first, internal factors caused by heredity as well as mental disorders and a criminal's physical as well as genetic structure; and second, factors like the weather, conditions in the offender's home and school, adverse economic conditions, etc. Followers of this school argue that criminality is deterministic and inevitable, and that a criminal bears no moral responsibility, so that fear of punishment would not deter him from committing crimes. This school maintains that a criminal acts under compulsion, and, therefore, no system of punishment based on moral responsibility would be acceptable. However, since a criminal poses a threat to society, certain punitive measures should be in force to prevent him from inflicting any harm. Thus, social responsibility and safeguarding/corrective measures would replace moral responsibility and punishment respectively. Rather than classifying crimes in terms of severity, criminals are categorized. Ultimately, criminal policy in this school involves not only punishing criminals, but also singling out those who might commit crimes in the future (Saki, 2009). Followers of the positivist school would rather discard the term "punishment", because they believed it was associated with such words as "fault" and "retribution". Instead of "crime" and "punishment", Ferri would use the words "attack" and "defense" respectively. According to the positivist view, a jurist must behave like a physician, ensuring that people stay healthy. Thus, a jurist must apply remedies to a criminal who is considered a socially unsound person in order to protect the health of society as a whole. In this regard, Garofalo believes that the classical principle of proportionality of punishment and crime must be substituted by that of "potential of a criminal for living" in an effort to set forth some kind of hindrance proportional to the offender's characteristics. In other words, punishment is not meant to merely inflict suffering on the offender as a retribution for the crime committed by the same; rather, it is an instrument for preventing the criminal from repeating the crime. On the other hand, the sanctions employed to serve this purpose must vary in accordance with the offender's characteristics in each case, just as different medical treatments are used for different patients. Of course, the sanctions proposed by Ferri and Garofalo are too extreme and harsh. The methods of capital punishment and permanent exile proposed by them are meant for securing the benefits of society alone with almost no consideration of the offender's situation (Pradel, 2012).

*Judicial Powers for Determination of Punishment in the School of Social Defense*

The combined school of social defense was presented by Adolf Prins based on the separation of the theories of determinism and free will. Prins believed that, forgetting the complex nature of human beings, advocates of the free will and determinism theories turn to simplistic solutions. It is true that we do certain things based on heredity and internal impulse, but we also possess a free will to react to the environment, as well as to enjoy various freedoms through our behavior. Such deterministic effects and behavioral freedoms are inseparable and human nature proves this fact. Therefore, if a judge overlooks human nature in the course of a criminal process and ignores the motives and reasons for the crime, he/she is not only unjust, but also renders the government helpless in dealing with unintentional crimes. For this reason, it would be better for us to discard old philosophical notions and focus instead on the dangerous side of a criminal since this is the only concept which can ensure strong sustainable social rules and establish social order. To realize this, the sanctions set for a crime must be free from limitations, so that all actions, from punishment in its most absolute form to safeguarding measures recommended in the positivist school, can be applied to criminals, particularly those who repeat their crimes (Shami, 2013).In Prins's view, since it is impossible to determine punishment based on a criminal's degree of responsibility, and since a person with the least responsibility can be potentially the most dangerous, the criterion of "dangerous attitude" must replace that of moral responsibility. For ordinary criminals, namely, those who are capable of "will power", he recommends punishments that are more intimidating. For dangerous criminals (the mentally unbalanced and those who repeat their crime), however, he proposes certain safeguarding measures for erasing the dangerous mentality in the offender and maintain order which is the sole purpose of justice. Such safeguarding measures must be based on the individual and maintain a regular and scientific manner. This type of individualized punishment is imposed by issuing an indeterminate judgment where a judge announces deprivation of freedom with a minimum and a maximum limit (Prdel, 2012).

*The International Society of Social Defense insists on considering an individual's human rights in the social defense school.*

In its program, this society points out, "For achieving this goal and the complete enforcement thereof, we must first make sure that human values are respected, and second, that correct methods consistent with current civilized norms are practiced. Otherwise, we can never expect people to behave in a blameless manner or be in compete harmony with the society. Criminal policies must take as role models humanized traditions originating from modern culture and civilization. Criminal laws must guarantee that human rights are observed when regulations and legal norms are enforced. The principles of freedom and legality resulting from historical developments of the modern society must be protected from all instances of aggression and violation." (Mazlouman, 1972).

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