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LEGAL CHALLENGES TO THE PRINCIPLE OF THE LEGALITY OF CRIME AND PUNISHMENT IN IRAN IN THE LIGHT OF THE PRINCIPLES OF ISLAMIC JURISPRUDENCE

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ABSTRACT

The most important objective of the principle of the legality of crime and punishment in the modern criminal law is to provide security and protecting the dignity of the accused persons until in the shadow of observance of this principle, in one hand, wouldn't be condemned without reason and due to a doubt, and in the other hand, their punishment wouldn't be sentenced by judges' oppression more than what they deserve, because punishment deals directly with individuals' freedom and if isn't limited by limitations and determining frameworks may lead to tyranny. One of these limitations is compliance with legality principle. Indubitably in the Islamic jurisprudence that is originated form the Book (Koran) and tradition of Prophet and Imams also there are signs of the principle in the form of Koranic verses and principles such as "Ghobhe eghabe belabayan, also the principle has been recognized in the criminal law of Iran, that of course has been ignored clearly in several cases particularly in the Islamic criminal law approved in 2013 and the regulations of the public prosecutor's office and the special clerical court approved in 1991, modified in 2005.

Keywords: legality, crime, punishment, protecting accused person's dignity, security of accused person

1. INTRODUCTION

The flow of human life unless in the light of peace and security is difficult or may be impossible, because human's desires and wishes will not be flourished without security, "security is inversely proportional with crime, in the other and, when it could be said there is security that crime reduces to minimum and to reduce crime that its compulsory outcome is security the crime has to be defined in a specified form for citizens" (Kalantari, 2002, p 1) therefore, until boundaries and criteria haven't determined for citizens they can't be defended against judges and rulers' aggressions and cruelty and their rights can't be protected from the dangers. "In fact enjoying personal freedoms require that citizens know already limitations and results of violating them. This principle has been provided to protect citizens against governments' flightiness and that individuals predict the result of exercising their rights" (Kreb, 2010, p2). This clarification of crime in fact is the explanation of the values governing on the society "criminal law with its executive guarantee state the value system of a society …" (Gussen, 1999, p 2), that is, legislators by stating orders and prohibitions determine that what behaviors are against governing values, now if punish individuals without any criterion and basis and just due to a guess and accusation that never has been defined for human, they can make the most intrinsic property of human that is the very freedom as toy of injustices and indulgence of seemingly legal executors, "the respect for human dignity judges that the limits of his/her freedom is determined and protected" (Ardebili, 2007, vol 1, p 129). Therefore, what is important regarding respect for human nature and dignity is the stating crime and in fact stating anti-norms that people have to avoid them, since based on the Ibaha principle that is itself one of the fundamental principles in Islam, performing everything is allowed unless it has been prohibited (Karaji, 1979, p 93) then prohibition requires specification. Thus, based on the principle of powers separation that is accepted by the vast majority of civilized communities the legislative authority is obligated and entitled to state anti-normative behaviors and values governing on the society explicitly, because according Beccaria judges aren't legislators (Beccaria, 2016, p 35) and they are just law enforcers or in the other word they are just the language [spokesman] of law (Montesquieu, 1993, p 306). The principle of legality of crimes and punishments play a very important role to control and prevent government authorities (institutions) from abuse (Cho, 2006, p 147) and ignoring it not only leads to bleeding and damages reputation, but in the past periods also lack of it has been a ground for limitless oppression such that every behavior of an individual could have a punishment as severe as death.

The principle of legality of crime and punishment today has been considered as a one of the fundamental principles or may be the most basic principle of the criminal law by criminal legislators, in the west countries this principles is displayed in a proverb called "Nullum crimen sine lege, nulla poena sine lege," that is, there is no crime and punishment without law (Kedya, 2014, p 1), while the principle existed in the old Rome as well, but since the rulers and following them judges in order to reach their ominous objectives and considered such principles a barrier on the way toward their objectives they have performed everything to make them forgotten, and have imposed punishments for miserable accused individuals that weren't entitled in no meas. Ignoring the principle not only in

nature but also in terms of form faced accused one with terrible torments, assumed "confession" and "divine test" as a sole reasons for proving and determined the destiny of accused person before trial (Kalantari, 2002, p 3). This gap namely the lack of a law to define sentence and stating its executive guarantee continued until 18th century in the Europe. It was in this century that liberal movements to achieve freedom and giving credibility to human dignity of the society members revolted against the time rulers and affected the people ideas by their writings. Publication of opinions and ideas of scientists such as Montesquieu, Jean-Jacques Rousseau and César Beccaria resulted in a spark to change cruel approaches and their tendency toward determining bases in a special form and in a one word directing rulers toward darting criminal laws, and it is since then, by joining to international treaties and accepting their provisions, countries have made the basic principle as their model in lawmaking, however, the principle in the international arena in some cross-sections was ignored from some countries including Soviet Socialist Regime and National Socialist Federal Government of Germany and also within the period after World War II and during Nuremberg and Tokyo Courts, but today throughout the criminal law of the world there is global consensus on accepting the principle that in many cases its justification and support may be human rights pressures from international organizations.

In the time that by rulers didn't come short of exercising any torture and torment, and by the time that children, animals and objects weren't immune from criminal pursuit, … that is, more than 14 centuries before now and 12 centuries before "Beccaria" and "Classic School", the Islam has recognized the principle of legality of crimes and punishments. Islamic jurists also have defended the principle under the name of "obscenity of punishment without statement" (ibid, 1996, p 263). Also in the criminal law of Iran since the earliest legislation in modern style and codifying criminal laws always following the Islamic jurisprudence this principle has been considered by legislators, but in the periods of legislation and in some of the criminal laws including 2013 Islamic Punishment Law and the regulations of public prosecutor's office and the special clerical court approved in 1991 a provision has been approved that is in a obvious conflict with the advanced principle of legality of crimes and punishments. Therefore, the questions that may be raised are that whether Iranian legislator has put law (approved by legislations) as the main source for judges to issue verdict or Sharia is one of the sources of decision making? Or the principle of assuming people aware of criminal laws that is an aspect of the principle of legality of crimes and punishments has been observed in the Iran criminal laws, particularly in the Islamic Punishment Law as the most general criminal law of Iran or not? Whether the conflict between article 2 and 220 of Islamic Punishment Law in 2013 is solvable? Is it possible that limitations not mentioned in the criminal law and in fact lack legal element is criminalized? Or if the principle 167 of the Constitution is a way to help judges to fill the gaps or a is a legal source to determine the crime and punishment, in the other word, Fatwas and valid Islamic resources are parallel to the criminal laws or a resource to escape from silence and a conflict in the criminal laws?

In this study it has been tried by analyzing several articles and books the principle of legality of crimes and punishments is reviewed in two dimensions of jurisprudence and law. The issues of the study, after an introduction, have been considered in the form of bases of the principle of legality of crimes and punishments and analyzing the principle in jurisprudence and statutes and analysis of the outcomes of the principle.

2. BASES OF THE LEGALITY OF CRIMES AND PUNISHMENTS

There are different theories in support of the principle of legality of crimes and punishments and each one answer to the questions raised in this regard, that in the following four important theories in this regard are referred.

a. Guarantee of personal rights and freedoms

Human being has been created free and also need a free life. But the living in a society requires accepting a set of limitations. In fact, people by sacrificing a part of their freedoms seek to utilize its remaining in peace and calm (Wold, Bernard, Snips, 2009, p 36) but the important issue is stating limitations and their executive guarantees until an individual in a specific area (law) and in the case of committing a particular behavior, is condemned to the determined executive guarantee, that through this individuals rights and freedom is ensured, because a being crime and its punishment unknown and lack of determining their instances can sacrifice individuals to judges' avarice, because judges by existing a law and its clarity will have no power to exercise their taste, therefore existence of the principle of legality of crimes and punishments guarantees the human kind freedom (Crisan, 2010, p 2).

b. Impartiality and justice in the criminal laws

Undoubtedly having equal rights for all human beings is a natural and undeniable, and differences haven't to cause prejudice, certainly in the criminal issues also in the criminalization of behaviors and actions and reactions, this equality has to be protected and exercising different punishments on individuals who have committed crimes in the equal conditions have to be avoided, the principle of legality of crimes and punishments provide that regulations contain a specific actions namely crimes and a specific punishment (reaction), so that is applied on the all people

irrespective of their differences, therefore, existing law in the criminal issues is a codified and specific way that prevent applying duality or multiplicity in the criminalization of actions and applying unequal reactions. “Hence, the principle of legality is one of the most important factors of legitimacy in the all criminal law systems” (Kreb, 2010, p 2) and its absence will be a basis of injustice.

c. Preventing social stagnation

If the principle is accepted, the individuals of society involve in the economic and political issues and other dimensions of social life more easily and attempt for excellence and progress of the society (Moosavi, 2014, p 9, Kalantari, 1996, pp 69-70), because human is a computational being and if there isn’t a law regarding criminalization and applying punishment takes caution and fear of punishments that isn’t known is result of his/her what action prevent him/her from entering into the life cycle in the all dimensions, that it has no outcome except for social stagnation.

d. Democracy and separation of powers

The theory of separation of powers has been presented throughout the history of human civilization by numerous theorists, was stated clearly by Montesquieu (1689-1755) the famous French theorist in the book The Spirit of Law [among the followers of social contract school] (Hashemi, 2010, p 6). Followers of this school concluded that the principle of legality arises from the theory of “social contract” (Kerb, 2010, p 2). According this theory only laws can determine a punishment for crimes, and legislator who is the representative of the whole community selected based on the social contract, is the only authority that is competent to do this (Beccaria, quoted from Wold, Bernard, Snips, 2009, p 36) and judges are only the law enforcers and in the other word, spokesman of the law. That is, duties and authorities of every branch is determined, the task of legislation branch is law making, and the task of judges (judiciary) is enforcing laws, therefore, judges have no right to involve in the legislating and criminalization and determining punishments, but the main task of a judge is that considers every behavior in terms of being criminal or not and if the action was a crime, apply a punishment, otherwise, issues the innocence sentence of the person.

3. THE PRINCIPLE OF LEGALITY OF CRIMES AND PUNISHMENTS IN THE IRAN POSITIVE LAWS

When it comes to talking about the positive laws it has to be considered that they mean the laws that support human values, therefore talking on the principle of legality of crimes and punishments is talking on criminal laws that deal directly with the values of people in society, and these laws are meant in the general meaning not just the special law that the Islamic Consultative Assembly establishes. Because although today’s societies have accepted the theory (principle) of separation of powers and the Constitution of the Islamic Republic of Iran also has accepted this principle in the article 57 of the constitution, but in the Islamic Republic of Iran system the approvals of institutions such as the Regime’s Expediency Council, specialized commissions of parliament (principle 85 of the Constitution) and the independent regulations of the ministers and the Cabinet of Ministers (principle 138 of the Constitution) also international treaties that according to article 9 of the Civil Code are ruled as the domestic law have to considered among the laws that are included in the determination of crime and punishment and, in the other word, the origin of the principle of legality of crimes and punishments, therefore, the theory of separation of powers that its main objective is to ensure individuals’ freedom and prevention from tyranny in the Islamic Republic of Iran regime essentially it doesn’t seem adaptable completely with the separation of powers existing in the other contemporary democracies (Hashemi, 2, 2010, 8), that is, in some cases a branch has interfered in the other branches’ task and has taken an authority that is intrinsic for the other branches.

According what was said it can be argued that in the criminal laws of Iran the principle of legality of crimes and punishments has been accepted in the Constitution and common laws with a little ambiguity and contradictions. In this subject two main issues in the criminal law of Iran concerning the principle of legality of crimes and punishments, that is, documentations, ambiguities and contradictions have been addressed.

a. Documentations of the principle of legality of crimes and punishments

It seems that talking about a fundamental and natural principle has to be started from the Constitution, a law that is full mirror of individuals’ rights and freedoms that among them can refer to the principle of legality of crimes and punishments that guarantees freedom and dignity of people and protect them against the judges’ avarices. Several principles of the Iranian Constitution are directly or indirectly concerning the principle of the legality of crimes and punishments, among them can refer to the principles 22, 25, 32, 33, 36, 37, 159, 166, 167 and 169, of which the two principles of 36 and 167 may state the principle more clearly. Principle 36 of the Constitution states that: “sentencing for punishment and enforcing it only has to be through a competent court and in accordance with law” and the principle 67 states: “a judge is obligated to make attempt to find the sentence of every claim in the codified

regulations and if not found he has to issue a sentence based on the credible Islamic resources or valid Fatwas and can't avoid to deal with a claim or issue a sentence by excuse of silence or deficit or brief or conflict of the codified laws". Also some articles of Islamic Punishment Law of 2013 like article 2 states that: "every behavior including an action or not doing an action for which a punishment has been determined in the law is considered a crime". Article 1: "in the government regulations and systems the punishment and hedging and training action has to be in accordance with a law that has been provided before the crime occurrence and perpetrator of any behavior including an action or nor doing an action can't be condemned according a law later than the punishment or the hedging and training measures …", article 12: "sentence for punishment or a hedging and training measures and enforcing them have to be through a competent court, in accordance with a law and complying with the terms and qualifications provided therein".

Article 13 "sentence for a punishment or a hedging and training measure and enforcing them by case hasn't to be exceed the amount or qualification determined in the law or the verdict of the court and any damage incurred from this, if is intentionally of by fault by case cause criminal and civil responsibility and otherwise, the damage is compensated from treasury". And article 220: "about the limits not mentioned in this law it has to be acted according the principle 167 of the Constitution of the Islamic Republic of Iran" and other cases that will be addressed in the future discussions. Also the clauses 1, 2, 15 of the single article of the law of respect for legitimate freedoms and protection of citizenship rights approved in 2004 and also articles like the article 2 of the 2013 Code of Criminal Procedure explicitly have addressed to the principle of legality that of course because our discussion is about the substantive aspect of the principle of legality of the criminal law (Khaleghi, 2014, pp 23-24), the substantive laws are addressed.

Among the other documentations of this principle can refer to the international documents and treaties such as the Universal Declaration of Human Rights 1948 that in article 11(2) states: "no one will be condemned for doing an action or not doing an action that in the time of committing it isn't recognized according the national or international regulations a crime and the same way no punishment will be applied more severe than what was sentenced in the time of committing the crime" and international covenant on the civil and political rights 1966 in the article 15(1) provide that "no one because of doing an action or not doing an action in the time of committing that wasn't a crime according the national or international regulation isn't condemned and also no punishment more severe than what was applicable in the time of committing the crime will not be determined whenever after committing a crime the law provide a milder punishment for it the perpetrator will use it…" and also in the article 6(2) states that "in the countries that death penalty hasn't been abolished issuing the death sentence isn't allowed unless concerning the most important crimes according the law in force in the time of committing the crime …" that according the article 9 of the civil law that are treated as domestic law. Also in the future discussions the other laws that are somehow related to the principle of legality of crimes and punishments will be addressed.

b. Ambiguities and conflicts of the principle of legality of crimes and punishments

The most important ambiguities there are in the Iran positive law regarding the principle of legality of crimes and punishments relates to the Islamic Penal Code 2013 that in the article 69 provides: "perpetrators of crimes that their type or amount of their punishment hasn't been determined in the statue are sentenced to the alternative sentence of imprisonment" and article 220 of the Islamic Penal Code that was mentioned in the previous discussions and ambiguity related to the articles 18 of the regulations of the public prosecutor's office and the special clerical court approved in 1991, modified in 2005 provide that: "any action or not doing an action that according the statute or religious orders is punishable or requires hedging and training measures is treated a crime" and its note provides "actions that conventionally damage to the clergies and Islamic Revolution dignity, is treated a crime for clergies: and also article 42 of this regulations provides: "The verdicts of the courts should be reasonable and documented by the law and jurisprudence". And the note of the mentioned article states that: "in the exceptional cases for which a punishment hasn't been specified in the jurisprudence and law the judge can issue a sentence according his opinion".

c. Article 69 of the Islamic Penal Code:

Legislator in 2013 by approving the Islamic Penal Code in the article 2 provides: "any behavior including an action or not doing an action for which a punishment has been determined is treated a crime" and its opposite concept is that any action or not doing an action for which a punishment hasn't been determined in the law isn't treated a crime. And the principle 36 of the Constitution provides that "sentence for punishment and enforcing it only has to be through a competent court and according a law". And in the article 18 of the Islamic Penal Code also it has been emphasized on the legality of punishment, its quality, type and amount. It seems that the precision of some provisions isn't hidden from anyone that the authority of determining a crime and punishment only is law.

The important issue is that over years the governed regulations only has clarified crimes and hasn't referred to their punishments, while the principle of legality concerns the two dimensions of "crimes" and "punishments". Among these regulations can refer to the note 2 of the law of the insertion of a single regulation to the passport law

approved in 1972 or the articles 30, 31, 32, 33 and 36 of the Islamic Republic's referendum law approved in the 1999 that it has been criminalized but no punishment has been determined for them. In the articles like 25, 26, 28, 29 and 32 of the press law 1995 and its next amendments the religious ruler's opinion and religious punishment has been substituted for the legal punishment. In fact, in the mentioned regulation the principle of legality of crimes and punishments has been ignored, it's while that in the previous laws such as article 2 of the Islamic Penal Code 1991 also the point has been referred that only doing an action or not doing an action is treated a crime for which a punishment has been determined in the law. But by approving the Islamic Republic Code 2013 and the article 69 in fact the group of crimes apparently without punishment found a legal aspect. The notable point is that there may be a doubt about the conflict of this article with the mentioned principle that may be considered partly irrational by arguing some reasons: first, article 69 concerns the crimes after the entry into force of the Islamic Penal Code 2013 and regarding the cases committed before the enforcing this regulation it has to be said that the committed behaviors have been Mubah or permitted. Secondly, legislator in the article 69 has done a secondary invention meaning that according a later verdict has organized the former behaviors apparently criminal without punishment and has included in the criminal enforcement. A criticism that is suggested on the legislator's work is that in one hand, the explicit statement that is one of the main bases of legislators in writing laws hasn't been observed, meaning that laws themselves have to be explicit rather than another law remove their ambiguity and in the other hand, the substitute sentences for imprisonment provided in the article 69 is general and certainly judges in applying them on the different cases will be involved in split votes and applying different punishments for convicted individuals, that the important issue can be considered a reason for the violation of the mentioned principle for that it is in conflict with the dimension of being clear the principle of legality of crimes and punishments and also the bases of this principle. Judiciary law office in the theory no. 7/92/1405 dated 2013/05/17 has confirmed the article not being in contradiction with the principle of legality of crimes and punishments but by an inappropriate justification; by stating that legislator has clarified the criminality of an action without determining the type and amount of its punishment. That it has to be argued that when a behavior is named a crime that its enforcing guarantee is known as well. The counseling theory of the Judiciary law office no. 7/6381 dated 1991/03/09 also has stated in this regard that: "whenever a case is raised for which no punishment has been determined in the law, it must be said that it isn't a crime and isn't pursuable in the courts". Then it is concluded that when for a behavior a punishment hasn't been determined it isn't a crime and this statement of the legislator in the article 69 that "perpetrators of crimes that …" considering the above issues isn't without problem.

d. Article 220 of the Islamic Penal Law

article 220 of the Islamic Penal law provides that: "about the limits not mentioned in the law it has to be acted according the principle 167 of the Constitution of Islamic Republic of Iran" is explicitly violation of the principle of legality of crimes and punishments, meaning that legislator by stating the article has added another constraint (being religious), however only to the limits of the mentioned principle, to accept the mentioned opinion (object to the legislator opinion) can refer to some reasons including:

i. about the limits not mentioned in the law even if the principle 167 of the Constitution is generalized to the criminal issues, only in the thematic issues can refer to the Islamic resources and valid Fatwas, because the principle of legality of crimes and punishments that has been accepted more explicitly in the article 2 of the Islamic Penal Law and article 36 of the Constitution, has considered the law discrete of Sharia, because when it comes to law the purpose is a text that has passed the stages of approval, signature and communicating.

ii. to justify the principle of legality of crimes and punishments, in addition to that a law has to be existed and explained, also the possibility has to be existed that people become aware about it and it is supposed that people are aware of it (concept of the article 2 of civil law) the issue that isn't possible certainly for Sharia (resources and valid Fatwas), because not only ordinary people but also young clergies and freshmen of the religious schools also haven't sufficient understanding about the bases and the ability to recognize resources and valid Fatwa. And even among the jurists there is lot of controversy about the number of the limits. Also it isn't known what the purpose of valid Fatwa is. This work of the legislator is in contrast with the famous legal principle that "the law must be accessible and it must be foreseeable". In the other hand the article 220 has no special audience, even if we consider all the students and clergies aware on Sharia, again the criticism can be stated that why in the mentioned article there has to be a discrimination (difference of the regulations governing on people), meaning that individuals consider themselves obligated against the law (world responsibility) not against religious regulations. Then if people violate the limits provided in the article 220 this causes that unaware people become victim of the legislation deficits.

iii. In the other hand if the legislator opinion and the honored Guardian Council is that give a legal aspect to some other actions that belong to the Shara and enter them into the circle of law guarantee, there was what solution better than it that legislator also mentioned those cases in the penal law, the issue that is itself in contrast with the decriminalization policy and reducing the criminal titles that these days argued by lawyers and judicial authorities of the country.

iv. in the other hand given the legislative records in the country about the limits that have been limited to several known cases and also limiting the circle of freedom of people by expanding the criminal titles accepting the legislator opinion is very difficult.

v. another point is that despite of accepting the Universal Declaration of Human Rights 1948 and also the International Covenant on the Civil and Political Rights 1966 and that these regulations are treated like the domestic law (article 9 of civil law) and existing many evidence regarding that the purpose of law is merely the idiomatic laws, that is, binding rules that have passed the stages of approval, signature and communicating and exiting from its scope is exiting from and violating the principle of legality of crimes and punishments, there is no doubt that this action of the legislator has no outcome except for damage to the legislator's dignity in the domestic and international arena.

vi. in the other hand despite of the reference of the legislator in the Islamic Penal Law to the all limits no longer there is reason for referring to jurisprudence, in the other word, there are no instance for the article 220 of the Islamic Penal Law in the jurisprudence resources and even the instances mentioned in the Islamic Penal Law 2013 themselves somewhat are disputable, including the discussion on Baghi that in the jurisprudence books generally is suggested in discussing on the Jihad and none of the jurists haven't believed its being a limit and its being a punishment hasn't to be doubted" (Ahangarn, Saaidi, Orseji, 2016, p 250).

e. Article 638 of the Islamic Penal Law (punishments section)

Legislator in the mentioned article has provided that "everyone does an prohibited action in the public places, in addition to the punishment of the action is sentenced to imprisonment from ten days to two months or (74) lashes and …" as it is observed the instances of the prohibited actions in the Islamic Penal law or other common laws haven't been determined and even in the Islamic resources there are no consensus among the jurists in this regard (Habibzadeh, 2004, p 12), an action that undoubtedly results in the criminalization based on the Islamic resources without existing a legal support therefore one of the obvious examples of the violating the principle of legality of crimes and punishments is the mentioned regulation that individuals for long years by the excuse of quitting or doing a prohibited action (like breaking fasting) have been trialed and punished, despite the more than two decades governance of this regulation in the penal laws of the country it was expected that legislator in its legislating in 2013 abolish this regulation or amend it that unfortunately it still persists and the only action in accordance with justice in this regard is sentencing to the innocence by judges.

Notable point is that some scholars believe that referring to the valid resources and Fatawa considering the fourth principle of the Constitution is allowed and has no contradiction with the principle of legality of crimes and punishments (Sadeghi, 2010, 20-21) but it has to argued that the fourth principle of the Constitution in fact states that all regulations have to base on the accepted Islamic standards (not disagreement with Koran, tradition, reason and consensus), that is, legal texts neither be in opposition to religious standards nor in the every law in which there is a lack of sentence, judges of these sentences adopt them from the Islam Sharia rules. In fact, the fourth principle of the Constitution has emphasized that Koran, tradition and jurisprudence resources have to be the reference of legislator to codify the law, not a reference of judges. They aren't in parallel with law, but they are the base and underlying of the codified law that the competency of referring to them is authority of legislator not judge (Habibzadeh, 1998, p 32). Therefore, the mentioned principle hasn't issued a permission to refer to the Sharia orders, but only states the important issue that legal texts have to be consistent with the Islamic bases.

f. Articles related to the regulations of the public prosecutor's office and the special clerical court 1990

Article 18 of the mentioned regulations states that: "any action or quitting action that according the positive laws or Sharia orders is punishable or requires hedging and training measures, is considered crime" this article explicitly has considered an equal status for the law and Sharia orders for criminalization and determining punishment and in fact them parallel to each other. Therefore, there is no doubt that when Sharia orders are regarded at the same level with the law, it has no meaning except for ignoring the principle of legality of crimes and punishments. In the other hand, the note of the mentioned article has set the custom also as one of the criminalization resources", while the impact of custom on the penal law is limited to the recognition of instances and subjects of orders, and according to the principle of legality of crimes the custom can't prohibit an action that is according Sharia [of course

recognition of being crime or permitted is up to law] and law has been recognized as permitted" (Sadeghi, 2010, p 22). Therefore, custom and habit has no way into the criminal law (Ardebili, 2010, volume 1, p 140). For the reasons the mentioned article also is indifferent to the principle of legality of crimes and punishments. The article 42 of the mentioned regulations also since has set the Shariah standards among the judge's documentations to issue a verdict is problematic; because, first: such general and wide regulations are in contrast with the principle of qualification of criminal law that states that criminal laws have to possess three features of clarity, predictability, availability. Secondly, a law that in the first place has to be governing on the cases is a law having passed the stages of approval, signature and communicating, while resorting to the sharia orders according the principle 167 of the Constitution is in the second place of judges' documentations to issue sentences and in the exceptional circumstances.

The most obvious example of the principle of the legality of the crimes and punishments is the note of the article 42 of the mentioned regulation that provides: "in the exceptional instances for which a punishment hasn't been determined in the sharia and law the judge can reasonably issue a sentence according his view". This note not only has ignored the law but has given to judge an authority same as the legislator, because determining a punishment only is in authority of legislator and delegating this authority in addition to violating some principles of the Constitution (the principle 85 and 36, …) is in conflict with the bases of the criminal laws including the principle of separation of powers that is one of the bases of the principle of the legality of crimes and punishments.

The most important solution for the problems arising from these conflicts and ignoring the principle of legality of crimes and punishments is amending the mentioned laws that of course until they haven't been amended the honorable judges have to act with justice and consider such contradictions as mistakes of legislation and interpret the ambiguous texts following the basic principles of criminal law fairly, because the task of judges isn't just relaying on the words of legislator, but their interpretation must reveal the main purpose of the legislator. Of course, concerning the temporary laws such as the Islamic Penal Law 2013 that has been provided for five years, legislator has to remove these ambiguous regulations that violate the freedom of people from the punishment law that is a guarantee for freedoms of people.

4. THE PRINCIPLE OF LEGALITY OF CRIMES AND PUNISHMENTS IN THE ISLAMIC JURISPRUDENCE

In the criminal law of Islam also there are clear signs of applying the principle of legality of crimes and punishments that its origin as to be considered in the advent of the Prophet's (pbuh) and revelation. Islam appeared in a territory in which talking about legislation and legislator wasn't common, because not only rulers abused from the situation full of ignorance, but also people in their relationship with each other and also with rulers because of unawareness of do's and don'ts became victims of the anger of rulers and their around people, without the possibility of talking about right and justice in that time and such a way individuals' rights was violated more and more. The revelation of Koran was a beginning to put a difference between later and early individuals to God orders, meaning that everyone aware of the orders commit a behavior violating the legislator's (Mufti) orders and prohibitions is entitled to the world and after world punishment, and in the other hand, the almighty God has announced that individuals' former sins for which an order hasn't been issued will be forgiven. Documentations of this principle can be sought in the Koranic verses and traditions and rational documentations.

a. Verses of Koran

The honorable verse of punishment (Asra, verse 15) meaning we don't punish anyone until send a messenger, therefore, the God's tradition is that doesn't punish anyone or nation without stating the last word and ultimatum (Gheraati, 2013, volume 5, p 31). This honorable verse is the clearest evidence of the principle of legality of crimes and punishments in the Islamic penal law and in fact one of the bases of legislation. The argument is explained such that sending the divine apostles is the foundation of propagating orders and God will not punish anyone before sending prophets and communicating orders, then the verse implies that if a person isn't aware on his/her task concerning an issue, the ignorance is a cause of his exculpation and although its sentence in fact and per se is another thing, isn't practical and his/her apparent sentence is exculpation from the task and lack of prohibition and obligation (Mohaghegh Damad, 2008, p 69). Based on the content of the verse it has to be hold that merciful God considers the "statement" and "communication" of the orders a condition for punishing the violators from his orders and prohibitions, that is, in addition to that regulations have to be stated, must have delivered by the God agents on the earth (prophets) to the people, that of course delivering the God message to the people is beyond the mere awareness from existence of the orders, meaning that content and concept of the orders have to be stated clearly and without any brevity to audiences. Another point is that the punishment provided in the verse contain both the after world and the world punishment, because the word (punishments) is absolute and there is no symmetry implying its constraint to the after world punishment or merely the world punishment (Atabaki, 1985, p 163). Of course Allameh Tabatabaee in the interpretation of this verse says that the stylistic appearance of the verse and its previous and next verses imply that the purpose of "punishment" is the world punishment and the desperation punishment confirming this probability is the negation style in the "we don't punish anyone" (Alame Tabatabaee, volume 13, interpretation of

verse 15 of surah al-Asra). According the verse, the unaware human has to be informed to the divine orders that are delivered by prophets and in this case is entitled for punishment.

b. The verse 286 of Bagharh

Meaning that God charges no one except to its capacity; as it is inferred from the verse the merciful God applies the task on those who have the ability to do it, that is, they can bear the task burden, undoubtedly one of the instances of the ability of the individual to bear the task is awareness of the task, that is, an individual who hasn't understood the task and the order and prohibition of the higher existence and has no understanding about it, naturally objecting to him/her isn't rational and such that the origin of justice, namely the excellent God has considered applying task (punishment in the world and after world) only allowed for those who are aware of the task, that itself is one of the obvious instances of the principle of the legality of the crimes and punishments in the Islamic criminal law; because the principle in addition to that has to be explained, it must be communicated to the obligated individuals in such a way that there is no doubt about their awareness on the task.

c. The verse 42 of Anfal

Meaning who was destined to perish might perish after finishing the proof. In this verse also God has stated that no one will be perished unless those who have received proof and signs (book and prophets) from him, undoubtedly in a short comparison we have to say that the proof mentioned in this verse is the same order and punishment (crime and punishment) that God has prescribed for his servants, meaning that God has stated the order and the executive guarantee of violating it together until people (obliged) have no excuse for their violation. Thus, it has to be argued that no one isn't punished (perished) unless crime and punishment (proof) has been stated to him/her.

d. The verse 7 of Talagh

Meaning that God charges no one except for the ability has given. In fact, not charging to what human can't afford is the tradition of God among people (Alameh Tabatabaee, vlolume 2, under the verse 286 of Bagharah). This verse also like the previous verses has set the main condition of individuals' task their ability to do the task, meaning that God considers an individual chargeable to the orders and prohibitions proportional to the ability that has given to him/her, therefore this verse is completely consistent with the principle of legality of crimes and punishments in the current criminal laws, because according the principle an individual is punishable if the ability (namely awareness of laws) has been given by the legislation branch, the person can't be blamed for not having (unawareness of laws).

e. The verse 4 of Hejr

Meaning that we didn't perish any nation except for in the given time (when the book revealed on the nation was violated). In this verse "the given time" is the sign of the time of stating orders and their executive guarantees, that is, God perish people with a previous warning and doesn't consider an unknowing man entitled for punishment without previous warning and other verses (such as Anaam: 119, 131, 145 and Anfal: 42 and Ghesas: 59, Maedeh: 90) that each somehow imply the issue that God doesn't apply his the world and after world punishment on anyone unless has announced his orders and prohibitions to the servants and they disobey.

Therefore, in several verses of Koran the principle of legality of crime and punishment has been accepted and the most of the verses emphasize that someone is punished that God's orders and prohibition has delivered to him/her and has the ability to do the tasks. In the all mentioned verses the essential condition for imposing punishment is the awareness of the people about the divine duties that the awareness has been stated in the words like "his ability", "what granted to him" and ….

5. NARRATIVES

a. Narrative obviation (Rafe)

This narrative (hadith) which has been quoted of Imam Sadiq (AS) from the Prophet (PBUH) (Kazemi Khorasani, v. 3, p. 336) reads: which means, nine things have been taken out of my nation: Mistake, forgetfulness, what they are reluctant to, what they do not know, what they do not have the ability to do, what will it be in distress, envy, jinx and tempting ideas about the creation, until has not said (Hurr Ameli, vol 11, p 295). According to this verse, what is now the subject of this discussion is the item of "What they do not know" which the Usulis disagree about, meaning that some of the Usulis believe that what is inferred from "What they do not know" is thematic ignorance and the issue of hadith is also the elimination of this ignorance (Sheikh Ansari, 1281, p. 195) and the

reason for these people is that they considered attached "what" as the must verb (Mohaghegh Damad, 2008, p. 74). Others believe that what goes obviation matter is legal ignorance (Akhund Khorasani, 1339 AH, p. 340). Some also believe that ignorance is the subject of this absolute hadith and includes both ignorance of the sentence and the ignorance of subject matter (Velaei, 2001-02 - Naeini, vol. 3, p. 344). The late Akhund Khorasani states that for everything, there is a ruling that neither the knowledge and the ignorance of the contributors are affected, nor the sentence can be resolved, because in this case the canoeing approval comes, but this real verdict, with the assumption of the ignorance of its obligation, does not exceed the rank of the composition and does not find certainty (meaning that only a verdict is expressed, and since it is not required to be communicated and informed, then it is ineffective on his part). Hence, the necessity of caution, in order to ensure adherence to the actual sentence was ruled out and consequently, the responsibility was not in place (Akhund Khorasani, 1417 AH, pp. 339-341). In other words, an indefinite assignment, whether in a hypothetical issue or in a legal uncertainty for gratitude of the Muslim nation, has been taken from them (Vaez Hosseini, 2001, v. 2, pp. 288-289). Therefore, what is deduced from the said part of "what they do not know" in the obviation hadith is that what humans are unaware of, or, in other words, an unknown assignment, will never be any cause for anyone to be considered responsible because what would be punished and reprimanded is known assignment. Therefore, the obviation hadith, inasmuch as it considers the accusation to those knowing the law, is the basis for the principle of the legality of crime and punishment, because this principle is also applied to those who know the law and order of the legislator, and, of course, this discussion that the assignment must be filed or issued or this discussion that both categories should exist for punishment is somewhat different in law and jurisprudence, which will be detailed in the next discussion.

b. **Hadith of liberation (Etlagh)**

Hurr Ameli, 1416 AH, p. 18, Hadith 60 meaning that everything is permissible as long as it is forbidden (Mohammadi, 2003, p. 303). When it comes to denial, it is undeniably forbidden against the rules, and because it prohibition in principles is prohibited by majority of Usulis, and implies the prohibition of action (Qafi, Shariati, 2009, vol. 1, p. 141), therefore, the circle of inclusiveness of this hadith is uncertainty of legal sanctions (Mohaghegh Damad, 2008, p. 77). Therefore, hadith of forbid needs the specification of legislator, and as long as the verdict does not restrict the behavior of humans (forbidding matter), the principle is that humans can do anything, the point of sharing this hadith and the principle of the legality of crimes and punishments is that of human behavior as long as is not considered by the legislator as a crime in law, humans will be allowed to do them, therefore, the criminalization of a behavior and the imposition of a penalty for an act is not permissible until it is prescribed in legal texts.

c. Hadith of hiding (Hajb)

Hurre Ameli, 1416 AH, p. 18, hadith 28, that is, what Allah has made hidden of his servants is taken from them (Mohaghegh Damad, 2008, p. 75). According to this hadith, the most important element for consider people responsible, knowledge or awareness about the assignment, which in the principle of legality of crimes and punishments is also a late element to the rule of law, and in fact complements the existence of the law. This means that the principle of the legality of crime and punishment when it finds its true meaning and identity that people are aware of it. In fact, it can be deduced from the term "what to withhold" that the expression of an ambiguous ruling means a lack of law and being hidden and the result is not be accountable.

d. **Hadith of being lawful (Ebahe)**

It means that everything is always lawful for you, unless you're sure is prohibited. Therefore, the hadith of the recognition of sanctity requires explicitly statement of prohibition. Indeed, on the basis of this hadith, until verdict for being forbidden is not stated, is lawful (Mobah) and the person is not accountable for such things. This is the same meaning today for crimes and punishments can be inferred.

6. RATIONAL DOCUMENTATION

Ghobhe eghabe belabayan means punishment without the express provisions (prohibitions) is bad and ugly, and since the attribution of the abominable act to God is impossible. Therefore, the Almighty God will not take any responsibility for committing acts that their prohibition and necessity for servants is unknown (Mohaghegh Damad, 2008, p. 79). There is no doubt that this principle regardless of legal arrangements and principles solely of independent rationales, meaning that the mind of every human being, regardless of cultural and economic, scientific and ... differences considers it improper and bad, without expressing it, therefore, it is true that in the principles of jurisprudence and principle, this principle is most closely resembles the principle of the legality of crimes and punishments, of course, if the phrase (being bad of obligation of without statement) is added to the above statement. An important point that may be the difference between the rule and the principle of the legality of a crime and

punishment is that "Expression" in said principle not merely meant to illustrate and create punishments or sentences (prohibitions), but in addition to explanation and creation of rules this rules must be transmitted (communicated) to religiously accountable. In other words, "expression" must be issued and filed (that is, communication to the obligated and his awareness of the assignment), while this principle is accepted in the contemporary criminal law principle (ignorance of law is not defense) (Article 155 of the Islamic Penal Code) and it is assumed that the people of the community are considered to be aware of the verdict after the publication of it (relative to the rules) (Article 2 of the Civil Code), unless science education is unusual for him or being unaware to the rules is religiously considered an excuse (Article 155 of the Islamic Penal Code). But the above principle has essentially considered the ignorance of individuals, and individual's awareness must be proven. In fact, the difference between this rule and the principle of the legality of the offense and the punishment is the shift of the principle and the exception to awareness of the rules. Therefore, according to this principle, we conclude that the sentence must be communicated in addition to the description, and the individual is aware of it, then the penalty will not be false.

"The permissibility Principle" a rational principle means that if we doubt in lawfulness or sinfulness of something, the principle is that it is not forbidden (Mohammadi, 2005, p. 298). In fact, this principle means that being lawful and forbidden, being crime and not being crime, the principle is to be lawful and not a crime.as long as the ruling (law) does not come about. Therefore, the whole concept and meaning of this principle is in this phrase that all behaviors and actions are prohibited and are not crime and punishable until a ruling is made and the conduct is prohibited and illegal (Milani, Khalili Somoni, 2015, p. 21). So the relation between this principle and the principle of the legality of crimes and punishments is quite clear. In fact, the concept of this principle is applicable to the Hadith of being lawful and Hadith of liberation, which was discussed in previous discussions.

Therefore, since in the jurisprudents of the great scholars, they put their research around the line of command and the noble cause of God and do not want to pass the new regulations and they believe that every affair (decree) can be found carefully in the divine teachings of God, which is the Holy Qur'an. Therefore, these rational principles and hadiths have all been in line with God's word, and in fact, all were following the word of revelation, therefore, that all the imposition of punishment is deemed appropriate when the duties are expressed and given to the obligated.

7. THE EFFECTS OF THE LEGALITY OF CRIMES AND PUNISHMENTS

Of the algebraic effects of this principle can be cited as turning to the non-compliance with the penal codes and the narrow interpretation of the criminal law (Accused acquitted in doubt situation).

a. Lex Praevia

This principle means that the effect of criminal law is on the future and does not have a retributive effect, in other words, criminal laws do not include events occurring before it enters into force (Baheri, 2002, p. 1). In Iranian law, this principle is expressed in Article 169 of the Constitution and Article 4 of the Civil Code. In Iran's criminal law, Article 10 of the Islamic Penal Code 1392 (2013) explicitly accepts this rule, and states that, "In government regulations and procedures, punishment and measures for the provision of education and training should be in accordance with the law that was prescribed prior to the occurrence of the crime, and any person conducting any act of committing or refusing to commit cannot be condemned under a later law to a punishment or sentenced security and corrective measures. However, if, after the offense, a law is passed to reduce or refrain from exercising punishment or taking care of a person in a manner that is more favorable to the perpetrator, it is effective against former crimes against that law until a final verdict is issued. As it can be seen, the principle of criminal law "is not be retroactive". But exceptionally, if the later law abuses or removes the penalty for the commission of acts, or is in a more favorable way to the offender will be "retroactive". In the criminal law of Islam, Jab rule, expresses this principle, this means that with the advent of Islam, the sins committed by a person before Islam and in a state of disbelief will not be considered (Savlani, 2013, P 67).

Some authors have used phrases "prohibition of retroactive offences, prohibition of retroactive penalties" as the interpretation and translation of the principle of the legality of crimes and punishments and to state that criminal laws do not have any effect on the past (A. Schabas, 2000, p. 522)! This principle has been accepted in some international documents that have addressed this issue, including: Article 15(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 and Article 6(2) of the International Covenant on Civil and Political Rights 1966 that have stipulated: In countries where the death penalty is not abolished, the death penalty is not permissible except in respect of the most significant crimes under the law in force at the time of the commission of the crime…"; and also Article 8 of the 1789 French Declaration of Human Rights which have stipulated that: "No one can be punished except under a law that was set up before the crime was committed and lawfully instituted"; Article 11 (2) of the Universal Declaration of Human Rights (1948) that deals with this issue.

b. Interpretation restrictive de la loi penale

The purpose of interpreting the rules is to reveal the meaning of the terms of the law and phrases that appear to be vague and complex (Ardabili, 2010, vol. 1, p. 148). The question that arises here is whether judges can interpret by their sole discretion? No without a doubt, because when we accept the principle of the legality of offenses and penalties, we must admit this important work that to clarify the meanings of the words and the general terms, we also must not exist the scope and territory of the law (the purpose of the legislative). In fact, the interpretation of these phrases should be to clarify the meanings, not to create new meanings and to legislate. The judge has the right to interpret it as far as the legislator is concerned, and undoubtedly the most important means for a fair interpretation in line with the principle of legality, attention to legislative records in cases of ambiguity, precision in the details of the negotiations of the Parliament and the Guardian Council, also, referring vague cases to the Parliament to remove ambiguous from them. Therefore, it can be concluded that the narrow interpretation is nothing but revealing words and phrases in the context of law and in line with the will of the legislator. It should be acknowledged that a narrow interpretation of the rules of the law means that, in cases of doubt, judges should verdict for acquittal because they are prohibited from the extension of the law and also prohibited from reasoning by analogy (Noorbaha, 2016, p. 155) because the translation of the principle of the legality of crimes and punishments is a ban on the use of analogy (Hall, 1937, P.172). In the 2013 Islamic Penal Code, Articles 120 and 121 state this. In Islamic law, the rule of "Dare" is the basis for imposing a verdict for acquittal in cases of doubt. Indeed, in Islam, legal and thematic uncertainty causes the punishment to be removed. Therefore, since, in accordance with the principle of the legality of crimes and penalties, we have no crime or punishment without law, so if we doubt in some cases whether it is a crime and deserves to be punished, we must resort to the principle of innocence and not to criminalize the principle and do not commit the offense, because one of the important dimensions of the legality of crimes and punishments is that its examples are clear and unambiguous. Otherwise, because people are not aware of the prohibitions, there is no way but their acquittal.

8. CONCLUSION

Considering the issues discussed in this paper, we can deduce the following results
:

i. In Islamic law, the principle of the legality of crimes and punishments in the form of verses, narratives and various rational principles is clearly and indispensably accepted in its most progressive form.

ii. The principle of the quality of criminal law, which incorporates three essential features of being clear, predictable, and accessible to the law should be considered by the legislator, because the security of the people of the society can be damaged, in the absence of law as much as existence of obscure laws.

iii. Undoubtedly, the principle of the legality of crimes and punishments, which serves no purpose other than securing and liberating individuals, is ignored by the deliberate and unconscious actions of the Iranian criminal law, especially in the Islamic Penal Code of 2013 and the Rules of the Prosecutors' Office and the Special Clerical Courts of 1990.

iv. The most important way of accepting this rule is to rely on the progressive principle of "separation of powers"; When the legislator clearly states all the orders and deceit, and the judges only enforce these orders and deceit, there will be no other outcome but to secure people's freedom. Therefore, if any of the governmental institutions in Iran perform their duty efficiently, there will be no assault on human dignity. This means that, firstly, the legislator will lay down precise rules. Secondly, the Guardian Council refuses to approve laws that allow the creation of an assignment, in other words, equal status to a judge in lawmaking. Thirdly, judges should, as far as possible, interpret the laws fairly and in favor of the accused.

v. The basic dimensions of the principle of the legality of criminal law can be stated as, firstly, all limitations must be in the form of law (in accordance with the principle of separation of powers through the legislative division). Secondly, the acts that the legislator enters into the circle of the law can justify the principle that it is accompanied by a guarantee of execution, and in other words, there is no crime without punishment. Third, although in most criminal laws in the world, it is assumed that people are aware of the rules, but in cases where a person can prove that he was unaware, depending to the case, there is no alternative to issuing a prohibition or prosecution, because ignorance for such people is a lack of law for the raised case. Fourthly, the Penal Code affects the time of creation and the later and it cannot be extended to its previous cases, that is, the past period of lawlessness (lack of law) cannot be covered by with late legislation, because the result is imposing punishments on people who have never been aware of restrictions, and this is rationally disproportionate.

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