



The Conflict of General Principles of Right with Approved Rules and Its Influence on Retributive Justice in Criminal Law of Iran

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ABSTRACT

Retributive Justice is the most important legal issues in different communities that legislator are require to implement in legislation. But usually according to the experience and basic rules, the law should be based on principles which accepted in community and recognized by constitution. If these principles are in conflict with each other, the legislation will be conflicting and make issuing order difficult. But more importantly it will difficult or impossible the administration of justice during investigation of criminal cases and severe damage will enter to the Retributive justice system. Conflict resolution of internal law is more important than conflict resolution of external law because the conflict of international law is more focused on civil rights and consequently failure to investigation has caused financial loss. But conflict of principles and internal law which exist in both civil law and criminal law, sometimes lead to death accused and will not be compensated. In Iran Retributive justice system there are conflicts between law principles and current law which solving them will help to fulfillment Retributive justice. In this paper certain cases of conflict of principles and law in Iran criminal law will be studied to pave the way for resolving the above mentioned conflicts.

KEY WORDS: Retributive justice, conflict of principles, conflict of laws, Decisive Oath, presumption of Clearance, legal assumption.

INTRODUCTION

Due to the Principle 156 of Iran constitution: The judiciary is an independent branch and supporting individual and social rights and is responsible for the fulfillment of justice. The other duties are considered the same principle and finally the executing of them must lead to justice. So the main purpose of establishing judiciary in Iran, like all countries, is justice. In the Principle 165 of the constitution is established that sentences and court decision must be substantiated and documented in principles and law materials which decree has been issued based on them. The result of these two principles study indicate that justice is achieved through the issuance of court decision and these decrees should be based on law and principles which accepted in Iran legal system. But when the courts have jurisdiction to investigate discussed issues, they will be able to vote and executing justice through it. Principle 36 of Iran constitution stated this rule in this way: The order for punishment and it execution is done through law and competent court (1). Article 54 of The Code of Criminal Procedure in explaining the abovementioned principle provided that: accused will trial in a court which crime is located in that area, if someone commit a crime in different places, it will investigated in a court which the main crime is located and if crimes are committed at the same level from the view point of punishment, it will investigate in the court which offender arrested on that area. If the crimes committed in different judicial areas and the accused was not arrested, the court which started to follow the issue has jurisdiction to investigate all the discussed crimes. (2).

The important problem is that there are principles and laws that are in conflict with each other and undoubtedly their execution would hurt the Retributive justice system. One of the most important bases in the legislative process is law principles and without paying attention the validity of enacted laws will flawed. On the other hand, during the judgment in domestic or international court, law principles are one of the basics of issuing vote in cases of silence or lack of law.

According to the Article 214 of Islamic Penal Code (like constitution law): verdict of the court must be substantiated and documented in principles and law materials which decree has been issued based on them. The court is required to found the order of each case in codified laws and if there is no law in the case, will issue order based on the valid jurisprudential resources or valid sentences. The courts cannot refuse to investigate to complaints and quarrels and refuse issuing verdict under the pretexts to silence, defect, conflict or ambiguity of codified rules (3). Mentioned sentences in this article are actually Doctrine or law scholars. Paragraph (C) of the Article 38 of

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international court of justice statute also has set one of the bases of issuing verdict as law general principles which accepted by civilized nations (4). These issues show that how much general principles of law in international and civil law systems are important and valid. However in Iran law systems some of the general principles of law are in conflict with each other and creates disorder in proceeding and issuing verdict and consequently failure in justice. Studies of such principles are a way to ameliorating this conflict and help to execute retributive justice. We will study the Conflict of laws and principles in Iran criminal law in two sections:

A) The code of criminal procedure

Criminal procedure which indicates the investigation and prosecution and trial of accused of various crimes has two heavy duties:

First – providing appropriate research methods to detect crime and identify the crime committed and restore the lost rights of crime

Second- respect the rights of accused during accusation investigation and facilitate the legal tools for defense.

Executing of these duties following two brilliant results which are maintaining public order and establishment of Retributive justice.

Without strict enforcement of principles and rules of the code of criminal procedure Act, none of the above will be achieved and the criminal courts will not be able to issuing order that fulfill the above objectives. As a result public opinion will be cause to doubt the authenticity of the judiciary

Doubt on the administration of justice and inability of criminal courts to find the truth lead to instability of courts and fail the criminal justice system. As a result crime victims are encouraged to get personal revenge. On the other hand personal revenge causes chaos and failure in public order and imposing financial and human costs on society to restore order and public rights and private rights of individuals. To avoid such a situation in different law systems, various solution have been developed which their most famous is review and appeal process and restore legal procedure. They are already identical in most of the legal systems. In addition, some of legal principles and rules are established which are complementary of above mentioned solutions and use for preserving the court's votes and resolve claim quickly. These legal instruments are varying in different countries. The most important of these principles and rules is the validity of the closed, jurisdiction principle and the court where the crime is fulfilled.

Approximately, the validity of the closed which is “EXCEPTIA REI JUDICATAE” in Latin has been accepted in all criminal law systems. It has also accepted and institutionalized In Iran code of criminal procedure. Based on the Article 6 of Iran code of criminal procedure approved on 1999:

Prosecution of criminal matters and execution of punishment which started based on the law shall not be suspended except in the following:

First – Death of the accused or sentenced in personal penalty

Second- forgiving by plaintiff in pardonable crimes

Third- those who are amnesty

Forth – abolishment of legal penalty

Fifth- validity of closed

Sixth- lapse of time in deterrent punishments

According to the Article 3 of Iran Islamic Penal Code, criminal laws apply to those who commit a crime in the territory of land, sea and air of Islamic Republic of Iran unless other orders prescribe by the law. Last part of this Article has paved the way to approval an Article which is in conflict with that and contrary to the rule of law in Article 7 shows that:

Every Iranian people who commit a crime outside Iran, will be punished based on Islamic Republic of Iran Criminal Laws. Conflict in execution of legal materials cause issuing sentences which are in conflict with both principles closed rules and rule of law where the crime was committed. In addition, as already mentioned based on the Principles 36 of constitutional law, issuing order of punishment and the order of its execution should be based on competent court and law. In Article 54 of the code of criminal procedure stated the criteria of court competent in various cases which the content of the Article 36 of constitutional law and the Article 54 of procedure law are clearly in conflict with the Article 7 of Islamic punishment law. We see the result of this conflict as following:

In the fight of H.M against R.J which both of them were Iranian and living in Germany. Complainant stated to Munich court, the accuses which was his employee has been committed embezzlement and malversation for amount 253000Mark.

Munich Prosecutor in written judgment dated April 19, 1955 stated: Further investigation show that no evidence has been obtained that accused embezzling money and for these results, proceeding declared to be closed. (5)

After uncertainty of the above mentioned vote, accuse came back to Iran and complainant came back too and again stated his complaint against accused in Shiraz Administration of Justice. Branch 17 of Shiraz General Court based on the verdict No. 1579, 1580 sentenced defendant to jail and restoration of money. (6). So based on the Article 7 of punishment law, court again sentenced and condemned someone who accused before and proved his innocence in Munich Prosecutor and this verdict is in conflict with the closed rule and the rule of the location of the crime.

All Iranian Right Scholar like their colleges in other countries recognize the validity of the closed. Dr. Mahmoud Akhondi, famous Iranian lawyer believe that: when criminal fight investigated and the final order issued, can no longer be trialed or prosecuted the defendant for the same offence. In other word, if there is final order, so we can not prosecute or trial defendant. Because when the problem was investigated and had valid of closed, it is assumed that the investigated in best deal and the result is optimal in terms of judicial (7). As we said before, rule of law where the crime committed is accepted based on the Article 3 of Iran Islamic Penal Law and General Board of Supreme Court has also emphasized that. (8). Rule of the closed also has been accepted in the Article 6 of the same law and has been considered as one of the cases of stop the prosecution of criminal cases. According to the Article 20 of the international criminal Court Statute, no one can be prosecuted and trialed because of crime which was committed before and accused or become innocent. The most effect of this rule is that to emphasize on jurisdiction of the court which the crime is commit on that area. This principle is one of the principles which are accepted in international law and almost all the domestic law systems follow it. Rule of closed also is one of the principles which have been accepted in all criminal law systems and the basis of this is that we cannot prosecute or accused defendant who accused or become innocent before for the same offence. To reach this principle should observe these objects: unity of the fighters, unity of the subject of fight, unity of the cause of fight. Accordingly it should be stated that the validity of the criminal closed rule means that the competent court investigated a crime based on the competent law and issued an order and according to the accepted rules and principles issued law and the cited order executed during the legal formalities and procedures. Such an order must be respected and credible by the authorities, Institutions and people. The final result of this view is that we cannot again prosecute and trial the defendant of the above mentioned order.

B)- Islamic Punishment Law

In fact this law is Iran criminal law based on the Islamic criminal law and after establishing Islamic Republic System in Iran; it has been replaced general criminal law and with a variety of reforms is running in Iran. There are some conflicts in this law that we will point one of them.

Conflict of presumption of Clearance with Decisive oath

Presumption of Clearance is one of the important principles in criminal law. This principle is based on legal assumption whereby no one is guilty unless her or his crime proves in competent court. This principle has rooted in Latin law thoughts and its Latin is “*Ei incumbit Probatio Qui dicit non Qui negat*” and it means that no one is guilty unless proven his or her guilty in a court. Also Presumption of Clearance is one of the important principles in Islamic Law. Based on Islamic Jurisprudence about confirming clearance: presumption of clearance is in human and in case of doubt, it can be confirming it. So whenever the court doubts that someone is guilty and no reason existence for his or her culpability, should confirm their clearance.

Presumption of Clearance is one of the important principles of civil, international and Islamic right which is important and useful tool to the accused for defend themselves against no reason claim and if restricts the implementation of this principles, would deprive defendant of a legal and legitimate right to defend itself. Beside the presumption of Clearance, there is a rule in Iranian Criminal law which is known as Decisive oath.

These two principles are in conflict with each other. The conflict of the presumption of Clearance with Decisive oath in this Law Systems in many issued opinion cause the accused has been executed. Another important principle in criminal Law is that criminal law is not explainable and if we need to interpret should be interpreted in favor of the accused. This principle also is in apparent conflict with Decisive oath rule. In execution of decisive oath, the court does not execute based on certain reasons but based on suspicion and the reason will be executing of the accused. Execution of the presumption of Clearance is the responsibility of the prosecutor or criminal court. Because the presumption of Clearance is the principle that everyone is included. Principle 37 of Iran constitutional law observes this subject and prescribes that: the presumption of Clearance is the main issue and no one is guilty unless can prove his or her crime in competent court. So if prosecutor accuse someone to commit a crime, it has also the task of proving because the action is opposite of principle and

proving the claim that is contrary to the principle is the responsibility of the claimant. But decisive oath is established in criminal law and it execute when there is no definite reason against murder but based on suspicious , they sentenced the defendant to commit murder that he or she denied it and there were no reason for accusation. This rule is in conflict with the lack of interpretation of criminal law and the presumption of Clearance. The result of this rule can be seen in the following cases:

Injury leading to death with knife reported to the police station on September 25, 2004 According to the local residents, Hamid A has been committed a murder. Accuse which introduced himself to officials, announced that he is unaware of the murder. But in subsequent research he has been accepted the conflict with the victim and his murder. Forensic medicine said, the struck of sharp object to the lower right of chest is the cause of death. One of the local residents as evidence claim that , about an hour after midnight has passed near the site of involvement and has seen the defendant with the state of fear and anxiety while the thing like a knife is in his hand. No one else witnessed the incident except him or her. The defendant has been denied committing a murder and also has been denied his previous remarks in next stage of investigation. The court after a long investigation and based on suspicious by accused, know the subject as throw out indictment rule and by executing decisive oath, issued the verdict of retaliation. Issued verdict has been revised but the branch 33 of Supreme Court has confirmed it. (10).

In other case that has been in Branch 5 of Fars Province criminal court, Mr. H.K is accused of intentional murder of M.F. After investigation by court based on the available reasons, majority of board of judges voted on the retaliation and minority of them have argued that: because there is no reason that murder was done by defendant and has not confessed to the murder in criminal court sessions and no witness did testify on murder and there are no reason that indicate the defendant is present at the place of murder and statements of accused and deputies were in primary investigation and also because the murder claim has not been presented any legal and religion reason about the claim and since the defendant in primary investigation confessed to the murder, it seems that the case is one of the throw out indictment cases (11). There for on the basis of minority of judges, there are no reasons for the accusation in this case and verdict of acquittal should be issued based on the presumption of Clearance. But the majority considered retaliation and minority considered Decisive Oath. Now we should see what the basis of issuing the above mentioned verdict was.

Article 231 of Islamic Punishment Law said that the ways of proofing murder are as following: 1- confession 2- witness 3-Decisive oath 4- judge's knowledge.

Because confession was not in front of judge and defendant claimed that at first he confessed because of physical and psychological pressure that police officers brought to him in investigation step in public prosecutor office and court, the court did not rely on confessions and testimony of witnesses. Based on the content of the Article 232, the confession is valid when confessor has wisdom, maturity, option and intends and due to the condition of the above mentioned case, intend and option of defendant has been ignored. Testimony of witnesses also based on the Article 237 of the same Law, intentional murder will proof by witness of two just men which in above mentioned case just one person witness the presence of the defendant around the place of murder and did not see the crime scene. So his witness was not enough to proof the murder. Available witness and reasons in case were not sufficient for court member. So one way remain for proofing the crime and it is decisive oath.

Decisive Oath

In jurisprudence, decisive oath has two meaning 1- swears 2- Jurants

Establishing of this criminal law that has rooted in Islamic law entered to Iran Criminal Law after Iran Islamic Revolution and legislation of new rules based on the Principle 4 of constitutional law. According to Iran Islamic punishment Law , the case will be known as throw out indictment case when judge suspect of committing murder by accused by existence indirect evidence or any other way consist of evidence or personal presence with crime effects in place of murder or presence of murder in the place or resident of certain persons and etc.

So the basis subject about throw out indictment is not the judge certainty to commit murder by defendant but the basis and court decisions is based on the suspicious who achieved through documents and indirect evidence not legal reasons. Throw out indictment which is the basis of Decisive Oath is indirect evidence that causes to appear suspicion. So the indirect evidence and suspicion are the basis of execution decisive oath and decisive oath is the cause to attribute defendant to intentional murder that based on it defendant will be sentenced to death. Based on the Article 248 of Islamic Punishment Law: intentional murder in throw out indictment cases will prove through 50 swears and jurants should be one of the relative of the accuser and they also should be male. Due to the Article 251 of the same law : jurants must have knowledge of committing

murder and take an oath with dogma. Swear on suspicion is not enough. So jurants must have the following conditions:

- 1- Should be one of the consanguine family of the complainant
- 2- Should be man
- 3- Have knowledge about murder that committed by the accused
- 4- Take an oath by dogma and confidence
- 5- Be 50 persons

The important point is that the court, itself issuing the verdict based on the suspicious of decisive oath but doesn't accept the swear of jurants based on suspicious.

Difference between witness and Decisive Oath

In testimony the witness must himself or herself see committing crime or actual event but in decisive oath it is not necessary and having knowledge that has been achieved in any way is enough.

RESULT

Retributive justice is the basis of criminal law that courts will issue an order and execute the justice based in these rules. If the vote issue on the condemnation of accused, they will offset the losses and if they issue presumption of Clearance, they will drop the innocence of the chimerical accusation. Whatever the verdict is, will cause to execute the justice and strength of public order, peace and ensure about the appropriate legal mechanism in society. But undoubtedly the basic condition for achieving such a situation is the well legislation and the lack of conflict with each other and with the principles that criminal systems organized based on them. In this research would not want to prefer principles or legal materials to another but the aim is introducing principles and law which are in conflict because we want the legislations solve them.

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