Review of the Article 220 of Islamic Penal Code Act of 2013 (limits which were not mentioned in law)

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Abstract

One of the most important principles and infrastructure of criminal law is principle of legality of crimes and punishments that Iran legislator has accepted this principle in act 2 of Islamic penal code and also in principle 36 of constituents. But the adoption of the Penal Code enacted in 2013 in the context of the legislative material, is in stark contrast with the principle. In act 220 limits sentence is not mentioned and has extended the law to article 167 of constituents ,according which the judge is obliged to find the sentence of the case from legal issues in any way and do not refuse pronouncement with the excuse of briefness and/or silence of the law. This issue will damage the foundations of society trust and judiciary; because people should know their tasks in front of the rule. In this study which is done by a descriptive-analytical methodology and by library data collection , we try to recognize the non-mentioned limits in law by examining the principle of legality of the crime and punishments , as well as Article 167 of the constitution. Finally, the quantitative proposals will be expressed so that juridical and judges can issue an appropriate sentence and prevent chaos in sentences.

Keywords: Legality of crimes and punishments, legal sources, valid judgments, article 220 of Islamic Penal Code.
Introduction

One of the important and fundamental principles of criminal laws is legality of crimes and punishments which has been at the center of attention of law scholars in many eras and is always mentioned as a fundamental principle. Nature of this principle is that a behavior should have been criminalized in law to be able to punish a person according to it. Important Criminal principle in the Iranian constitution in Article 36 of the constitution and with the approval of the IPC, in 2013 once again, legislator in article 2 of the same law has mentioned: legality of crimes and punishments, and in article 12 of IPC about Security and Corrective Measures and necessity of applying this kind of punishments through law are mentioned. One of the articles in IPC enacted in 2013 is article 220, what comes from this article is that it is in an apparent conflict with legality of crimes and punishments. So that, this article is mentioned under the topic of limits and refers deciding about limits which are not mentioned in law to Legal certainties in accordance with Article 167 of the constitution. Although, there are many different views about this principle, what is apparent is that this issue causes conflict and different judgment in courts.

1- Legal criminalization

In every society, legislator has the problem of performing justice and preserving social discipline in social relations and conditions and many rules and principles are enacted in order to gain this important goal that one of these principles is legality of crimes and punishment according which social and legal security is made for people.

2- Contract of article 167 of constitution with legality of crimes and punishment

Article 36 of constitution has accepted legality of crimes and punishment and if article 167 of constitution also includes legal lawsuits, it requires to contrast with legality of crimes and punishment and foundation of legality of crimes and punishment is the rule No punishment Except in Accordance with the Law. Many other lawyers have said that their reason of opposition with article 167 of constitution to legal lawsuit is its contrast with legality of crimes and punishments (article 36 of constitution). About this basic problem in the legal view, the purpose of article 36 of constitution (that shows legality and rule of No punishment Except in Accordance with the Law) is to express punishments that Islam legislator has appointed and/or Islam jurists have expressed some punishments as inferring and issuing fatwa, he has answered as following:

Article 4 of the constitution implies that legislator of constitution considers that all the rules and laws are in accordance with Islamic standards; so, there is no need to refer to out of law frame and all the religious offences should be defined and determined in codified law, so that can be performed.

As article 4 of the constitution has emphasized, Qur'an and Sunnah and legal sources, not accepted sources of the judge should be referable sources for legislator in legislation, they are not within the law. Of course, they are basis and infrastructure of codified law and referring to them is authority of legislator not the judge. In the other word, leader of society has the competence to perform Islamic limits and Ta'zir; (Ta’zir is in leader’s hand).

In the current situation that for the lack of qualified judges for the first sentences, judges are permitted by the Guardian appointment, ironically, determining criminal titles and implementing
Islamic punishments and determining competence of the courts and the procedure cannot be put upon The custodians of the judiciary, who are appointed by Guardian because there guardian that is responsible for government (Habibzade, 1998). Opposition of some of the lawyers with including the article 167 of the constitution is not because of conflicting with Islamic jurists and rules, but it is because it is inferred from the spirit of the constitution that it has tried to codify religious standards by supervision of the legislature (as organizer of the three branches), but it has not tried to grant authority to many judges who do not have Islamic conditions of judging.

3- Implementation Problems of Article 167 of the constitution

As, Based on what is seen and due to confirmation of common laws by legislator’s meaning of the above mentioned article is a public meaning and includes legal and criminal lawsuits, should see that whether taking such a method that contrasts with: legality of crimes and punishments is expedient or not and basically, with which problems implementation of article 167 of the constitutions will face.

In article 167 of the constitutions, some valid sources are mentioned. Two presumptions about these sources can be given. First, it means sources of deduction namely, the four evidence (written a book Saint Reason, consensus). This is its logic that in the final review of the constitution, first just refereeing to valid sources was recommended, then, one of the candidates suggest that since there might not be Mojtahed judge and he is imitator, so valid fatwas should be added. Therefore, fatwas are for imitator judges and sources are for Mojtahed judges. It is natural that the status of Mojtahed is deduction from the four evidences. The second possibility is that valid sources mean legal books like creeds, essence and laws. According to this inference, article 167 of the constitution is a brief statement and brief statement is not proof. Although the first possibility is nearer to reality (Aftekhar Jahromi, 1999).

About opposition of the adopted procedure by article 167 of the constitutions to: legality of crimes and punishments and rule of No punishment Except in Accordance with the Law which is the foundation of the mentioned article, it should be considered that article 167 includes four different forms; crime determination according to valid sources, crime determination according to valid fatwas, punishment determination according to valid sources and punishment determination according to fatwas. Absolutely, crime determination (Criminalization) based on valid fatwas in crimes committed before declaration of fatwa is in contrast with and rule of No punishment except in Accordance with the Law. Because in this condition, seek happens after the commitment of crime and during the inquiry of the case and the violator was not aware of the fatwa. Of course, the fatwa for the nest similar cases, is considered before the committing, but it faces with problem of not being informed. Because until now, there has not been any legal channel for announcing the mentioned fatwas. But, about determining crimes and punishment according to valid sources, if we see the four evidences as the mentioned sources, we are again faced with fatwa, but not with the fatwa of leading religious scholars, but with the fatwa of Mojtahed judge, and the former problem still exists. Because fatwas of leading religious scholars is somehow available to people, but fatwas of judge is not (Katouzian, 1995).

The recommended solution for the problem is that as much as it is possible, all the authorized religious offences in codified laws should be given in the form that people can be aware of them, so that the problem is solved. About the happened offences or offences deserving preventing
punishes a; the issued sentences should be gathered and take a legal form as soon as possible. And until before codification, at least, it should be announced in a newspaper and should refuse to make use of the new fatwa in lawsuits as criminalization before the issuance of the fatwa. In article 167 of the constitutions, valid sources and valid fatwas are mentioned next to each other, and in many instances we face with conflicts in fatwas, whether the conflicts are between the valid fatwas, themselves or conflicts valid sources with each other or conflict of fatwas with valid sources. Judge is free to rely on each of the legal verdicts, but this action leads to contradicted issuing of verdicts and people will be exposed to different and conflicting laws (Milani, 2008).

Over time, the legal Esteftaat will constitute a huge amount and will be next to laws. Since, Esteftaat are formed directly by judges and from different cities, many of them are unaware of the existing of the similar and sometimes contradicted Esteftaat which are in other cities or even in the branches of that city. Research center of judiciary (Imam Khomeini legal research center) to solve the problem asked judges to send all their questions to that center. But, this request does not make any legal obligation for judges so that they cannot ask their questions directly, and the direct and private process of Esteftaat is still continuing.

There is legal ambiguity about whether the criterion in fatwa is leading religious scholars, accuser, judge or Supreme Leader. In addition, no criterion is not presented as the criterion of being valid. Absolutely, fatwa of leading religious scholar is surely of the valid fatwas. But if a leading religious scholar is in opposition with government or his authority has geographical limitations, is his fatwa valid and if a Mojthahed is not a leading theologian, will his fatwa be valid? Does that mean legal validity, it means that is fatwa issued based on legal regulations or some other conditions were considered, too? Some of the conflicts in fatwas, in administration, exercise caution in getting to know the fatwa of the supreme leader (Yazdi, 1996). But as we know, Ijtihad is a condition of velayat-e faqih. Perhaps, a Mojthahed In certain chapters in practice has not inferred and has not have any fatwa. In addition, this inference does not have any legal basis.

They are some problems that article 167 of constitution is facing to be enforced. It does not look right to delete this article from constitutions because a great part of criminal law are received from religious orders and in any case, the judge will anyway face with some new theoretical opinions that referring to religious sources, whether valid books or valid fatwas, can solve the problems. Until before the victory of the Islamic revolution, because of adaption of Iran laws from European countries, judges benefited from the primary sources to interpret laws and resolve the ambiguities and this is the process which is still being followed in Arabic countries. Therefore, at the writer believes, there is no need to separate the codified laws from their root. But, the cases of briefness, ambiguity and silence of the laws should be decreased. Legislator should have a more active role and fill the legal vacuities, and in the case that there is no option but to refer to religious sources, should legalize this affair. In criminology, according to article 169 of the constitutions and rule of No punishment Except in Accordance with the Law, in happened and newfound crimes, being a crime and revere of the mentioned action should be said, and order related to them should not be retroactive and finally, utilizing religious sources should be organized correctly. In addition, the legislator makes use of them as a person who ordains the law, and also, should codify these rules and declare them to people. So that the principle of
Separation of powers is respected and legal regulations are not left unimplemented (Habibzade, and Ghiyasi, 2001).

4- Article 220 of penal code from the constitutions view

Criterion of criminalization in Iran criminal law is creating as criminal and sentencing for certain behavior in codified criminal law which is passed by reference legislation. The public interpretation of article 167 of the constitutions and extension of its authorization set forth in criminal cases, in terms of crime and punishment innovation, will also cause corruption. The eligibility of practice prohibited by Article 638 of the Penal Code done by the judge who goes through legal sources, because of the lack of a single and existence of different opinions and rulings and sometimes rules, leads to emanation of judges views and makes so many problems in administration of justice; because there is always this possibility that people who have committed a same behavior under the same situation, will be ruled out differently in different courts. Therefore, public interpretation of article 167 of the constitution because of its contradiction with The principle of equality under the law (Section 14 of Article 3), the need for judicial procedure (Article 161), the presumption of innocence (Article 37) and the principle of legality of crime and punishment (of 36 and paragraph 4 of Article 156 and 169 of the constitution) will bring the consequent corruption and it is in conflict with the spirit and goals of the constitution about administration of Islam codified penal code. According to the fourth paragraph of Article 156 of the constitution, regardless of the penalties specified in the religious law, saying it in "Islamic legal sources" to describe judiciary tasks, implementing Islamic codified penal code has been emphasized. And existence of the mentioned credits in the mentioned resources has not satisfied it. It is appropriate that if the legislator is going to criminalize unlawful actions, he stipulates its instances clearly in law. Therefore, in Iran law, the opinion that if the law is silent so religious jurisprudence sources and fatwas are like the verdict, is in contrast with Paragraph 4 of Article 156 of the constitution. On the other side, according to article 15 of the constitution, all the official texts should be Persian script and language. So, religious jurisprudence sources fatwas which are typically in Arabic cannot be a part of the law. Attention to Guardian Council comment about Article 2 legislative proposals of accession to the Revolutionary Courts of Justice, Islamic Republic of Iran, confirms this means: "because Forms of the Guardian Council are legalized under Article 2 of Tahrir al-Wasilah, therefore its Persian text should be legalized and its translation should be approved and as Tahrir al-Wasilah is not translated and has not been approved, so the problem of being in conflict with constitution still remains and should be solved. Science congestion in the law, be explicitly required. This comment suggests that legal sources or authoritative verdicts of the jurists, do not have the legal validity in itself. And thus the jurisprudence of Muharram, just as translated into Persian and approval by the legislature will be invoked (Mehrpour, 1943). Therefore, the eligibility of actions Article 220 of the Penal Code subject only to the law, to its narrow concept, is possible. The above-mentioned article is in conflict with the other mentioned principle because of its prescription to refer to sources rather than codified law. Due to the acceptance of the principle of separation of powers (Article 57) in the constitution of the Islamic Republic of Iran, granting eligibility of a forbidden act and sentencing them according to legal sources for judges, leads the judiciary to interfere with in the legislature tasks and is conflicting.
with the mentioned principle. On the other hand, based on what is inferred from principle 167 of the constitution and article 597 of Islamic penal code, judge cannot refuse to investigate the lawsuit, besides, it is never understood from the logic and concept of this principle that in the lack of clearness of the legislator to instances of acts of unlawful Impeding stipulated in the law, the judge, citing legal sources for ill-treatment stipulated in the law, can create a criminal title and determine a punishment for it. But, the duty of the judge in the similar situations is to verdict acquittal according to article 37 of the constitution. Article 214 of General and Revolutionary Courts Procedure Act (1999) does not give licenses to legal sources in order to identify a forbidden act and criminal cases. According to the mentioned article: ” court is obliged to find verdict of each case in codified law, and if there is no any law about the case, it should issue a verdict for the case according to legal sources, credible and authoritative fatwas. court cannot refuse to investigate the lawsuit or Complaints and verdict by the excuse of the silence of the law, or defect or briefness or conflict or ambiguity of codified laws. Legal assumption of normal legislative commitment to the principles of the constitution requires that article 214 is interpreted in a way that it is compatible with the principles of the constitution, which indicates the acceptance of the principle of legality of crime and punishment. Logical interpretation is that the determined permission in the mentioned article only supervises the eligibility of legal secondary issues and cases which are expressed in penal code unclearly or incompletely, moreover, it is not at all a permission to criminalize people behavior or determine punishment for unclear action in penal code (Shahri, 1994). Since the eligibility of unlawful action by referring to legal resources inevitably leads to the creation of criminal titles and innovation punishment that is the legislature's specific tasks; is incompatible With the spirit of the constitution and the tenets of criminal law, including the principle of legality of crime and punishment. Another issue raised is that although Article 220 of the Penal Code approved by the Council of Guardians, should this article be seen as compatible with the principles of the constitution? It should be said that according to all the former reasons, this article cannot be known as compatible with the constitution. We believe that predicting official control of laws as contrary to the constitution, does not negates the competence of the judges of the courts in determining the law governing the claim because the judge is obliged to follow the law, and law is both the constitution and the common laws. Undoubtedly, in the case of conflict of constitution and the normal laws, as the enforcement authority, the constitution is superior to the common law. Imagining that this preference on the part of judges, led to the intervention of the legislature’s to the judiciary duties, is a mistake. Because when the judge in case of conflict between the common law, has the right to implement the necessary legislation, then, in a fortiori in case of conflict between ordinary law and the constitution, he would have such an authority. In addition, pursuant to Article 4 of the Civil Procedure Code (2000) a judge will determine about each case specifically and individually. Generally, in no way, he has right to declare contrary common law to be invalid (Jabari, 2008).

5- Conclusion
Given the complexity of social relations in modern times, the observance of the principle of legality of crimes and punishments, seems more necessary than before, because people can do their duties and affairs relaxingly and participate in social activities, the law must already alert its
citizens and audiences. It means that law must inform people about the forbidden affairs in the frame of laws and rules. So, people can adjust their relation with peace of mind and without any fear and tension, and also, engage in performing social activities. This is the psychological aspect of the principle of legality of crimes and punishments. In addition to people doing their own affairs freely, it also brings mental health and relief. The principle of legality of crimes and punishments is an inviolable principle that must be defended with precision and care, and this not possible unless by adopting clear, clear, transparent and unambiguous rules, keep it within the sanctity of the constitution and the rights of nations, limiting unreasonable criminalization and useless punishments that its result is just disappointing people from Implementation of ideal justice that if, at least as an ideal but as a real need does not be considered, the consequences will be very hard. Accordingly, as long as there is no law, the principle is the permissibility and any court will not pursue the criminals. Typically, Penal law is not retroactive and every law after approval procedures of approval, verification, endorsement, communication and publication will be indispensable and its effect is on the future. Determining the boundary between legitimate and illegitimate behavior is right but the duty of the legislator and criminal judge can assess people's behavior without law and declare it as a crime and determines a punishment opposite of what the law says. Even the legislator has no right include past actions of individuals to a new law that passes on offense punishment. Committing any behavior, even unethical or harmful to public order, is permitted, as long as the legislator is not prohibited. Therefore, when there is lack of text or silence of the law, judge is obliged to issue Acquittal. Because judge is the only speaker of the legislator and his duty is to comply instances with the law. Determining the Expediency of society and what behavior is in opposition with it, what kind of punishment for any crime is expediency, A which court with which method is competent to decide on the crime committed is outside the scope of duties of the Judiciary Judge authorities. This in itself is the best example of public order and taking any decision contrary to it, even if it is a law, is ineffective. The duty of legislator to determine the list of crimes and criminals and competence of the courts, has been especial to human during the history. Human, naturally, considers this right for himself to be aware of socially correct and forbidden behavior. If the society does not respond to this particular nature, people will be obsessive even in doing the correct behavior and due to the fear of possible punishment and lack of information about qualifications and methods tried by the courts, they will refrain from carrying out productive activities, punishing those who do not know the purpose of legislator about Prohibitions and qualifications is of No punishment Except in Accordance with the Law and bad. Is Evidence of abusing power, empowering the community to the authorities of the state administration and is led to make defiance and rebellion in people. It, also, undermines Sense of respect for the law and is a major obstacle for fulfillment of social security and order, and is a shield against growth and development in every aspect, especially in economic development. adoption of an effective criminal policy in order to achieve social security and order to achieve all-round development, it is appropriate the people of a society be aware of the freedom and legal prohibitions, the amount and method of punishments and competence of courts and security forces. And those involved in the judiciary and police training should be trained. In the legal system of Iran the main source of rules is law. Therefore, judge should try to find verdict of each lawsuit in the law but as Iran legal system is an Islamic system which is forged by holy legislator, and that Islamic government should be expander of
Islamic Jurisprudence and standards, and the Islamic standard should not be abandoned in this state, the constitution has permitted that in the case where there is no law and/or the existing laws are incomplete or brief, judge can refer to valid Islamic resources and fatwas and tries to claim right. Article 167 of the constitution was apparently general in the view its approvers and it is not just allocated to legal issues, it also, includes penal code issues. Relation of Article 167 and the article 36 169 is The relationship between ruler and ruled in called science of principles and there is no conflict between them, but, in article 167, legislator has mentioned expressions like briefness, conflict, silence and defect of the codified law, valid resources and valid fatwas as valid as legal resources and has tried to expand the instances of the law. According to this interpretation of article 167 and putting other principles of the constitution together, do not permit fatwa of Marja or a Mujtahid judges to be retroactive in the newly crime in the legislation (criminalization).

6- Suggestions
In criminal law, legislator uses punishment just when fundamental and vital values of the society are violated and other preventive measures and sanctions (civil and administrative) are inadequate. Therefore, legislator must beside complete attention to legal and religious standard which present the true way about it, completely consider criminalization measures. Attempting to criminalize according to stipulation of the various principles of constitution, like article 36 of the constitution, must be done just through its own legal paths. Therefore, it is recommended that Islamic Parliament does not pass the trial rules, especially in the field of criminal law. It is essential that as soon as possible, ”Islamic valid resources” and “ valid fatwas” will be explained by the Council of Guardians -as a reference for interpreting the constitution.so that, when there is contradictory ideas between jurists judge can issue an appropriate verdict, and chaos can be prevented. It seems that if the briefness of the article 167 of constitution is resolved, consequently, the opposition to the principle of legality of crimes and penalties also is ruled out. and, supposedly, it will not have any conflict with the articles of 36 and 169 of the constitution. otherwise, article 167 of the constitution cannot assume its lack of brief and conflict; because among the articles of the constitution, it is only article 4 that is of the absolute rule on the others, with the sanction of its own. But, the other principles have a relative credit.

Article 167 of the constitution enforcement authorities are facing serious problems including: Succinct definition of credible sources, ambiguity of credibility measure in resources and fatwas, Turmoil in the judicial Esteftaat, massive amount of credible fatwas, conflict of resources and fatwas with each other, lack of a legal channel to announce the mentioned fatwa to people and Judicial authorities and, finally, the supervising role of the supreme court in determining the credible fatwa and idea. But, anyway, deleting the mentioned article is not right, because can be helpful to courts in In recognition of issues and instances. But as much as it is possible, by adopting systematic policies, negative effects of this article should be reduced and practically, a policy should be adopted that in detection of criminal sentences, judges do not criminalize in accordance with this article. In this regard, the legislature should as far as possible develop religious orders in the form of laws and judges refrain retroactive criminalization of a new fatwa that has not been announced to people. Until the verdicts are formed in codified law and announced to the public. The problem of judicial request for opinion is properly organized.
and finally, a way should be determined to make unity between the cases in which the conflicting judgments are based on the conflicting fatwas. As it was mentioned before, according to article 137 of the constitution, about the concept “valid fatwas” that it is brief and unclear, therefore, it is possible that unfamiliar and dissimilar verdicts are issued in the criminal lawsuits, as a result, it will not be charged in the interest of the judicial system and individual rights, unless, a common legislator or Guardian council represents a distinct meaning for this concept of “valid fatwas” that there are many probabilities in it. Court is obliged to Sentence punishment and its execution is based on codified law and whenever, there is nothing is the codified law, he issues the acquittal verdict.
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