

Legality Principle of Crimes and Punishments

In Iranian Legal System

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Abstract

The Principle of legality of crimes and punishments (*nullum crimen, nulla poena sine lege*) refers to the fact that an act is not considered a crime and deserves no punishment, unless the Legislator determines and announces the criminal title and its penalty before.

The legality principle protects individual security by ensuring basic individual liberties against the arbitrary and unwarranted intrusion of the state. Thus, the criminal judge can't call the individuals' acts crime and assign punishments for them or exert punishments that are not prescribed by the Legislator without any letter of law. If an act is morally rebutted or socially is against the public order, it is not regarded as crime and the

Legislator is the only authority who can recognize some acts as crime and punish the actor.

In Iranian legal system, before the Islamic Revolution and also after it, the Constitution and ordinary laws have explicitly emphasized the observance of the mentioned principle. when there is no text or in the case of the silence or lack of law, the criminal judge is bound to issue the verdict of innocence.

In recent years, as a result of the great misunderstanding of the Art.167 of the Constitution, ordinary rules including s. 214 of the Criminal Procedure of Public and Revolutionary Courts Act 1999, and s. 8 of the Revolutionary and Public Courts Act 1994, allowed the criminal judge to refer to the Jurisprudence and religious decrees in order to assign the criminal titles and the related punishments, when there is no text or in the case of the silence or lack of law.

This paper attempts to verify this legal base. It refers to the history of the discussion and the articles of the Constitution and the jural sources to indicate that it's necessary to pay more attention to the aforementioned law and the legality principle, which in turn makes it possible to abolish or amend the contradictory laws.

Keywords: The legality principle, The Constitution, Individual liberties.

1. Introduction

The constructional foundations of the crime, including the *actus reus*, *mens rea* and legal base are discussed in the Criminal Law. In this discussion, the necessity of approving laws related to the criminal titles is emphasized, and this notion is introduced in the legality principle of crimes and punishments in Criminal Law. This principle is obtained from Latin phrase "*nullum crimen, nulla poena sine lege*".

Thus, no act whether immoral or against public interest or public order is not considered a crime, if it is not specified by law before. As a result, the criminal judge cannot construe the individuals' acts as crime and assign punishment, even if he proves that it is worthy and useful in respect of the social interests; because the Legislator is the only authority who is able to assign the criminal titles and predict the appropriate punishments as he is the representative of the community and is elected by the individuals of the society. If the Legislator is negligent or inattentive, we cannot let the criminal judge consider as a crime whatever he recognizes to be against the public interest or order, and he should not assign a punishment to it. Moreover, if he does so, he can't interfere with it within the scope of the minimum or maximum of punishment; so he is bound to exert the punishment according to the legal texts.

The second outcome is the necessity of the restrictive interpretation of the Criminal Law on the basis that the criminal judge should refer to the content of legal texts to assign the punishments and to identify the accusative titles, without resorting to analogy or adverse notion. The mentioned statements are coherent and connected phenomena in the Logic of Law. Therefore, the legality principle and its consequences are inseparable. One cannot accept a part of it and reject the rest. Even the Legislator, who provides the Criminal Law cannot deviate from this principle and its consequences, unless in exceptional cases. He cannot either apply his new laws and rules to the acts of individuals in the Past. This is confirmed in the Islamic law, and is based on the individuals' innate rights; in addition, the articles of the Constitution also approve it and make the ordinary Legislator and the Judges observe it.

2. The Historical Aspects of the principle

According to a French proverb, the penalties are subjective and willfully; while issuing a verdict, the judges don't have to obey the law and they have the authority to apply the law as they wish. In the past and even in the late 18th century, in all countries, the Rulers and judges did not obey any principle for the prosecution of those who were against public order or the criminals [1]. Although this view is the expression of a fact in the past governments, specially before medieval ages. Man's detestation before this method of trial is not confined to a particular period. Man has always objected to the Ruler's optional and autocratic judgments and has opposed to considering an individual guilty for the sake of the criminal act of his relatives. In fact, when man became social and formed the primitive society, the necessity of the private ownership and the establishment of governments became obvious, so he considered the provision of law and its implementation, and this idea gradually expanded as his thinking developed. After the period of personal revenge, instead of military expedition among different groups of people and tribes, fines were received and Royal courts were established, the primitive governments were formed which interfered with the social and individual relationship. This originated from the idea that the individuals' relationships should be based on law and the chief of the tribe or the appointed judge should not inquire and punish individuals arbitrarily. Philosophers have referred to this point in different ways in the past. Aristotle believed that each government should have three powers in order to settle down [2; pp. 176-177]. Before Rossoué, Socrates stated that the codification and provision of law wasn't by force, blood or racial

habits, it was rather based on an implicit social agreement that was approved satisfactorily by the citizens [3; p.43].

Therefore, the liberal and humanitarian movements of the 18th century in Europe and the opposition of the great thinkers, such as Beccaria, Bentham, Rousseau and Montesquieu, to the violence and obstinacy of Rulers and their emphasis on the excellent concepts, such as justice, fairness and the necessity of providing people with general knowledge of the prohibitions, were not something and rooted in mankind's history. These philosophers relied on the public feelings and emotions to express their ideas in case of the necessity of the separation of powers and the proportionality of crime and punishment; they also stressed the execution of punishment through law and the settlement of Justice, so they explained, planned and presented the ideas of the past scholars as a legal principle. Beccaria announced that punishments are assigned to crimes by law and the Legislator has this special right, since he is the representative of a society that is established on the basis of social agreement. The judge, being a member of society cannot determine the kind of punishment that another member of the same society deserves. He further stated that if a punishment doesn't conform to the predicted rules of law, it is unlawful and is an extra punishment that is beyond what is assigned for this purpose. Thus a judge can't increase the punishment of a criminal citizen by claiming that it's for the sake of social interest [4; p.41]. This way of thinking indicates the search for Justice and the call of conscience that it reveals man's nature during the ages.

The clay plates, belonging to the Sumerian kings who ruled in the southern part of Mesopotamia in 6000 B.C. and those who have remained from Dungi period and other Isin dynasty in 2000 B.C. indicate that these people provided and announced laws to their citizens. There are 25 legal articles on this plate, which is in Sumerian language, six of them

deal with family affairs , 3 articles are in accordance with Hamurabian law and 4 articles are related to slavery rules. The adoption rules, the punishments related to those who prosecuted the pregnant, the harm caused by caws to pastures, the neighbors' obligations and the unjust accusations are discussed in these articles. Among the ancient laws, we can refer to the collection of Ashnuna law in Akdian language; it was written for the capital city, which was located between Akad and Elam. It was practiced two centuries before the collection of Hamurabian law was introduced. It was very similar to the collection and might have been adopted from it [5]. The most well-known Babylonian law was Hamurabian collection. It was written on a piece of stone in the center of Baby for every one to see.

In that law, accepted the personal responsibility of the criminals and he practiced Justice. Thus, the system of the legal evidence was adopted and all people enjoyed the protection of law; even the slaves had the right to resort to law.

Although the punishments were severe, in case of the personal crimes, they were based on Lextalion. During the Hittite Empire, judges practiced the Hittites law and rejected personal revenge. Moreover, in the 7th century B.C. the Greece paid special attention to the provision of the human regulation and Dracon, the Legislator of Athena, abolished the personal revenge and substituted it with retaliation and paying fine, thus by lapse of time, the general and special aspects of crime were separated. The senate of Rome in 454 B.C. provided the legal collection of 12 plates.

It was hanged in the cities' square to inform people. Many of the criminal titles were predicted in this collection such as slander, bribery, perjury, murder, stealing the harvest, setting fire, etc. By planning such a collection, the priest's exclusive authority became restricted [6]. Since

ancient times, the human society had taken into consideration the meaning and consequences of the legality principle of crimes and punishments. This principle has been the focus of all social measures in terms of the special and temporal circumstances.

Willdorant states: “In ancient Rome the penalty was assigned by law and it was not left to the judge” [6]. According to the Arab Jurists: the historical background of the principle goes back to the era of the republic in the ancient Rome. It then faced stagnation during the age of the Empire and until medieval ages it remained unnoticed. However, it was revived and flourished once more in 1215 A.D. In Britain Article 39 of the [John’s] collection of the regulations entitled “*Magna Charta*” was allocated to this principle and English immigrants later took it to North America. Finally, it was reflected in the declaration of human rights in 1747” [7].

The American Declaration of Independence 1776 and the French Declaration of Human Rights 1789, are indication and manifestation of human will and his historical wish, which is also revealed in article 11 of the Universal Declaration of Human Rights 1948. Later, this principle was discussed in the classic school in 19th century as one of the foundations of Criminal Law. At present it is accepted in the European Convention of Human Rights. It is also stressed by articles 9 and 15 of the International Covenant of the Civil and Political Rights approved in 16th December 1966 by the general assembly of the United Nations. This covenant has been signed by Iran in 1966. Following the Declaration of Human Rights and the International Covenant of the Civil and Political Rights, many governments have adopted the above-mentioned principle and they have confirmed it in their Constitutions. Plato has stated: “Daryoush was a Legislator whose law governed and protected the vast Iranian Empire” [1]. It is quoted from Cyrus that: “Justice should rely on

law and truth; if it deviates the right path, it will lead to tyranny and in justice. A just and fair judge is the one whose judgment is based on law and it is in accordance with truth [8]. “In History of Iran, besides Cyrus and Daryoush and the governments which were voluntarily or compulsorily impressed by Islam and its way of thinking, there has been absolute dictatorship and autocracy; thus the sultan’s decision was the only source of truth, justice and law”. [9]. The provision of Cont’s legal booklet and Malkom khan’s legal pamphlet during the reign of king Nassiriddin was the premise of the introduction of the new way of thinking of the European countries. In this way, the legality principle of crimes and punishments entered the Iranian law. It is mentioned in Mirza Malkom khan’s pamphlet that: “any breach of law or any crime or felony doesn’t deserve punishment, unless its punishment is specified by law before”[10]. When the supplementary articles of the Constitution were approved in 1946, the legality principle of crimes and punishment was also introduced in Iran. Consequently, the ordinary rules and regulations also considered this principle, which will be discussed later.

3. Discussion

Principle is the origin of anything, from which other things are derived. It may be rational or sensory [11]. Here, a permanent, general and consistent rule, which can be the basis of other rules, is meant by “principle”. Thus, the legality principle of crimes and punishments is the foundation of Criminal Law. It consists of different stages of investigation, prosecution, trial and the execution of judgment. Law refers to the enforceable provisions, which require the observance of special formalities. They are provided by the Legislative Power [1]. Therefore, the restrictive meaning of law is meant in the legality principle. In the legislative system of the Islamic Republic of Iran, the Islamic

Consultative Assembly is responsible for the provision of the ordinary law.

It compiles and provides the positive law according to the Islamic Law in accordance with the Art. 4 of the Constitution.

The Guardian Council of the Constitution, under the articles 94 and 95 of the Constitution, is in charge of comparing the approved laws with the Islamic law and Constitution.

The judges of courts on the basis of Art. 170 are obliged to refrain from enforcing the ratifications of the Executive Power, which are against the Constitution or the ordinary law or go beyond the scope of the power of this power.

Crime refers to any act or behavior, which disturbs the public order, so it is prohibited by the Legislative Power, and a punishment is assigned for those who commit it. Punishment refers to all criminal sanctions that are assigned and announced by the Legislator for criminals.

Thus, the legality principle of crimes and punishments means the indication of criminal titles and their proportionate punishments by the Legislative Power before they are committed, so none is considered a criminal and is punished, if the crime takes place before the assignment of punishments. The Legislator has the right to assign the limits of the legitimate and illegitimate behavior. Without enforceable provisions, the criminal judge can't consider an act as a crime and he can't punish the actor. The Legislator doesn't even have the right to include the individuals' acts in the past in the criminal title, which is recently introduced in the new law. Any behavior is permissible and is not considered a crime, even if it is immoral, or disturbs the public order, or is against public interest; unless it is announced by law, and a punishment is assigned to it. When no legal text exists, or in cases of silence or lack of law the criminal judge is bound to issue the order of discharge. This

principle expanded parallel of the development of societies and man's mental growth. It embraced all the discussions of Criminal Law even the different stages of procedure. Therefore, the Legislators of the civilized world were forced to predict this principle explicitly in the Constitutions.

Protection of individuals' rights against the absolute authority of Governments and the limitation of the power of rulers and judges within the framework of certain legal principles, it helped individuals to safeguard their rights and fundamental freedoms so that judges couldn't chastise and punish them unreasonably and optionally. Practically, it also guaranteed the public order. Thus, the individuals who were informed of the legal prohibitions, controlled their behavior and before doing anything, They examined about it. In this way, a kind of Public intimidation was obtained. The introduction of this principle to the Constitutions of different countries, not only made judges issue the order of discharge in case of silence of law or deficiency of law, but also forced the ordinary Legislator to observe the individuals' rights and fundamental freedoms. Hence, the Legislator is supposed to provide people with a list of crimes and their punishments, so that individuals consider the legal obstacles in their actions.

In this way, the punishment of the individuals, who have been informed or the Legislator's point of view, but have committed the forbidden acts, is not only indecent, but also it is justified and reasonable.

4. The legality principle of crimes and punishments in Iranian legal system

The historical background of this principle in Iranian legal system goes back to 1946 when the supplementary to the Constitution was passed. Each of the articles 9 to 14 of it, refer to the concept and consequences of the previously mentioned principle.

The ordinary Legislator accepted the principle by approving s. 2 and 6 of the Public Criminal Law, Act 1920 and later by amending it. the principle of non-retroactivity of penal laws was explicitly introduced in the Iranian legal system in 1972.

After the victory of the Islamic Revolution in 1977, the development of the legislative system and the necessity of the observance of the Islamic law, caused the Islamic Republic of Iran's Constitution, which was approved by referendum in December 1979, brought the legality principle and its legal sense under discussion. According to one view, with regard to the fact that Islamic law was conveyed through the revelation of the Holy Qur'an (by God) and the expression of those rules by the Holy Prophet and his descendants (infallible Imams), the observance of this principle was rejected. It was believed that since the forbidden acts are assigned and annouced by the Islamic Legislator in the Islamic Republic of Iran, it is not necessary to support the acts which are against the divine law with the laws which are enacted by the Parliament. On the contrary, the others believed that the Constitution has predicted the principle of legality of crimes and punishments and its consequences in its principle, which will be discussed as following:

According to the Art. 4 of the Islamic Republic of Iran's Constitution: "all civil, penal, financial, economic, administrative, military and political laws, etc. shall be based on the Islamic standards; this article and also other laws and regulations shall be at the discretion of the jurists of Guardian Council". According to the Art. 71 of the Constitution, the Islamic Consultative Assembly can enact law in all cases which are confined to the Constitution; provided that, it is not against the principles and regulations of the formal religions of the country or contrary to the Constitution.

It is understood from the spirit of the Constitution and also by the clarity of its articles concerning the legislation (articles 71-92), specially with regard to the articles of the third chapter that law refers to the ratifications of the Legislative Power.

Therefore, in Iranian legal system, the positive law should be devised and enacted by a legislative authority on the basis of the Constitution, and it should be notified through special formalities to be put into effect. Thus, it is supposed that the jural sources and valid religious injunctions (decrees) are not law.

According to the Constitution, jural sources and valid religious injunctions should be the base and foundation of law for the Legislator, not for judgment by the judges.

Although sharia (religious law) has assigned and announced the Islamic punishment (Had) by the experts of Muslim law (Foghaha), Paragraph 4 of Art. 156 of the Constitution has emphasized the detection of crime, retribution, punishment, discretionary correction (Tazir) and the enforcement of the codified Criminal Law (Hodud) of Islam as part of the duties of the Legislative Power, it has not restricted itself to the aforementioned rules in the jural sources. Principally, the terms in the phrase indicate common meanings, but in legal usage, law refers to the ratifications of the Legislative Power. Therefore, there is no doubt that the Constitution doesn't refer to the rules and regulations of the jural sources, but it refers to the rules which are based on those sources and are provided, enacted and announced by the Legislative Power.

From the interaction of two parameters of time and place in the Islamic rules and regulations in such a way that by preserving the Islamic nature of government, it is in its best shape at present and is publicly accepted. Not only is this method against the goals stated in the Constitution, which require the observance of Islamic rules, but also confirms the claim that

the Islamic rules and regulations are applicable to all situations and practicable forever and anywhere. The Legislator has taken this method into account while observing this principle. Although in our jural sources this principle is not stated in legal terms, the Constitution has pointed to its observance in different articles. For instance, in articles 22 and 25 which are concerned with the prohibition of violations to individuals' right; also in Art. 32 in regard to the legality of individuals' detention, and in Art. 33 in case of the legality of punishment or compulsory residing in a special place. Moreover, Art. 36 has explicitly accepted the doctrine of statutory trial and lawfulness of the punishments. Art. 37 also confirms the legality of trial and thus predicts the doctrine of presumption of innocence. On the whole, articles 34 and 39 obviously denote the legality of punishment and the doctrine of statutory trial. Furthermore, principle 169 has emphasized the non-retroactivity principle (*No retro actiurite deslois Penalco*). Considering these articles and paragraph 4 of the Art. 156 and also the spirit of the Constitution, there is no doubt that the permission included in Art. 167, which allows the Judges of the tribunals to refer to the valid Islamic sources and popular injunctions in cases that lack documents or in case of silence or deficiency of law, is specified to legal affairs. Since Art. 167 is too general and is not suggested to be applied to special cases before minute research and investigation.

Thus, articles 36, 169 and paragraph 4 of Art. 156 are special states and they exclude the generality of Art. 167 and allocate it to legal affairs. In addition, the term "only" is used in the principle, which denotes the limitation, which is specified to the verdict of punishment and its execution only through the codified law; otherwise it would be against the Constitution.

This conclusion is drawn from the background of the subject.

If the criminal judge refers to sources besides the codified law, in case of lack of document, silence or deficiency of law, other principles of the Constitution, which were discussed before could not be put into effect and this is not in accordance with the common legislative manner.

We give priority to this view, to observe the public interest. The experts of the Constitution have also paid attention to it. The representatives of the experts' assembly have been attentive to the prevention of chaos and have been heedful of the legality of the criminal titles. They haven't restricted themselves to the fact that the Islamic rules were enacted and announced 1400 years ago. So, it is up to the Legislator to provide and announce the principles of the jural sources in form of the positive law.

The acceptance of this view in s. 2 and 6 of the law of the Islamic Punishment, Act 1361 and s. 2 and 11 enacted in 1370 confirms that the observance of the legality principle, which is based on the Islamic law, is approved in the law of Iran, otherwise the Guardian Council wouldn't have approved the aforementioned articles. Therefore, the enactment of regulations opposite of The Principle is not only contrary to the Constitution, but also in contrast with the principles, which are enacted by the same legislator. In other word, "the generalization of Art. 167 to the other criminal affairs nullifies the executive ground for other principles.

5. The principle of legality of crimes and punishments in the Islamic law.

It must be said that, by contrast to positive legal systems which did not embody the legality principle until the end of eighteenth century, Islam established this principle some fourteen centuries ago. Its existence under Islamic Law is shown by the following passages from the Qur'an:

1. "We never punish until we have sent a Messenger".¹
2. "Every nation had its Messenger raised up to warn them..."²

Thus, the Qur'an, the principle source of Islamic law, established the principle that no one accused of a crime can be punished unless he has been forewarned of the criminal nature of his conduct. The legality principle also can be understood from the tradition, and some of the Islamic rules and principle, that the content and the consequences of this principle have been intended and performed by the Islamic Legislator.

From the jural point of view, the principle of allowance of application of acts or things is the basis. The commission or omission of an act is permissible, so long as there is no verdict for it; it doesn't deserve punishment or chastisement either. But as soon as a verdict is assigned and announced by the Islamic Lawgiver, one should regard and observe it.

As the doctrine of permission in doubtful prohibitions, when there is no reason for the prohibition of an act, it is permissible. On the other hand, the criminal responsibility of the individuals is secondary to the expression of the regulations. In cases that no verdict is stated or when the verdict is unavailable, one is not responsible for his acts which may actually be against religious law. In addition, reason is the most important proof to the doctrine of the presumption of innocence in Islamic law and the Punishment.

According to the mentioned rule and also the religious rule (i.e. No retro actiurite deslois penalco), if an apostate converts to Islam and becomes a Muslem, he won't be punished or chastised for his irreligious acts, which were committed when he had been a pagan. In other words,

¹ . Surat Bani Isra'il XVII: 15.

² . Surat al-Fatir XXXV: 25.

the newly announced law is not related to the past, since it hasn't been expressed before.

Generally, the rational rule of the doctrine of (*lawEx- post facto*) and the religious rule (that Islam ignores the individual's past sins) indicate that the Legislator should explain the verdict prior to punishment.

The legal and juridical justice also suggest that prohibitions should be declared to the individuals, otherwise the punishment of those who are not informed of the verdict is not only against reason and religion, but also it is an intolerable duty.

When the verdict is unavailable, binding the individual to observe the prohibition is an unfavorable request. Since the Islamic rules and regulations are simple and easy, and they are not difficult, in the cases that the verdict is not enacted or explained to the individuals, they don't have any responsibility for it. There is also a rule (i.e. the punishments are not executed when the judge is uncertain), which prevents us to punish or chastise a person who is not informed of the verdict or the subject. The ignorant individual who is guilty won't be punished.

Thus, in most rational and jural rules confirms the view that if an individual is ignorant of the verdict and he isn't aware of the prohibition or obligation, either as a result of lack of document, silence or deficiency of law or the verdict is unavailable then the innocence is to be presumed and the individual has no responsibility.

So, the punishment of an individual who is ignorant of the verdict or subject, except the forgetful ignorant who is aware of the crime is against justice and it is considered indecent.

With regard to these strong and clear reasons, which have been discussed by the Islamic Jurists (Foghaha) and the methodologists (the experts of the Islamic law) it is doubtless that the principle of the legality of crimes and punishments has been accepted to the Islamic law.

All the great Islamic jurists, unanimously concord that the retribution of an individual for a prohibition, which has not been explained, is indecent. This rule is rational independent. Wise people and the scholars of different nations have had consensus during the ages. The jurists have had also resorted to this rule to prove the legality principle of crimes and punishments, which has been the expression of man's inborn demand in different situations. Man's need for the expression of law, including the rules of prohibitions is intrinsic, and crucial to justice. Law prohibits violations of individuals' rights in personal interactions; similarly, it prevents Kings and Rulers to violate individuals' freedoms and provides individual and social security.

The Islamic Legislator, who is the wisest man, acknowledges and performs the rational rule that law is essential to determining the criminal titles and the scope of punishments. Particularly, he believes that during the absence of the infallible Imams, the Rulers may be erroneous and selfish. Therefore, if people are not already familiar with the prohibitions and the forbiddens, the Rulers may oppress them. Not only the Almighty God appointed the Prophets to notify the divine rules, but also the Islamic Rulers and leaders have to provide the people with law and announce them in order to settle justice, which is crucial to the survival of the Islamic government. In order to settle justice, it is inevitable to enact equitable law and announce it to people. This is not specified to a single subject or a special time and place. It belongs to all subjects, every time and anywhere, specially in case of crimes and punishments. According to reason, the Islamic Rulers and administrators should enact the law and regulations and announce them to people.

The rules should be based on religion, and the Guardian Council is responsible for them. They should be enacted and announced according to the requirements of the situation, the interests of the government and

society, and within the framework of the fourth principle of the Constitution.

So, in the Islamic Republic of Iran, where the separation of powers is an accepted fact, the provision of law is done by the Legislative Power. The individuals' behavior is not considered just by reasoning from the jural texts or popular religious injunctions, one cannot prove that an individuals' behavior is crime, so he is not punished.

As a result, the Constitution of the Islamic republic has entrusted the duty of providing and announcing the rules consisting of Hudud and Ta'azirat to the Legislative Power (Art. 156).

It isn't content with merely expressing those rules in the jural text. The non-observance of the legality principle of crimes and punishments is not only contrary to certain Islamic rules and principles, but it is also inconsistent with the way of the infallible Imams.

6. The effect of the legality principle on the crimes of Ta'azir (discretionary punishment is awarded by the judge)

It must be noted that concerning crimes of Ta'azir, the Islamic law is to apply the principle of legality in a somewhat more limited manner. The application of the principle in this fashion can rarely result in a false incrimination and in that event it bars the imposition of penalty.

In general, Ta'azir cannot be imposed except in cases of disobedience, namely where an action is prohibited per se according to Islamic law. Nevertheless Islamic jurisprudence recognizes an exception to this general rule such that Ta'azir may be imposed for actions which are not prohibited per se if the general good so requires.

The principle of legality also has been applied to acts of disobedience to Islamic law. Such offences are defined in the Qur'an and in the Tradition of Prophet. The only significant exception to the principle of legality is

that of the offences against the public welfare or public order. Such offences are not explicitly designated in the sources of Islamic law but are determined on the basis of their presumed negative impact on the general welfare. If, in the discretion of the Muslim Ruler or judge, no such adverse effect can be attributed to a given act, then it is not prohibited. The exercise of discretion is subject to several limitations. First, the action must in fact threaten the public welfare or public order. Harmless conduct cannot be deemed a crime. The Ruler or judge must not be motivated by prejudice, and his decision must be consistent with the objectives of the law, without under infringement on the rights or freedoms guaranteed by Islamic law [12].

Nowadays, in the great majority of Islamic countries such as Iran, discretionary punishments are explicitly specified in criminal codes; thus, the discretion of the Ruler or judge with respect to the penalty also is limited.

7. Conclusion

With regard to the spirit of the Constitution, and the necessity of the provision and announcement of law and the explicitness of articles 32-39 and 169 and paragraph 4 of Art. 156 of the Constitution, the necessity of observance of the Universal Declaration of Human Rights, which Iran joined to, in 1957, the undeniable principles of the Islamic law including "the doctrine of the permissible" and the doctrine of "the presumption of innocence, the doctrine of indecency of "punishment prior to expression of law" and considering those verses and traditions, which confirm the above-mentioned principles, the observance of the legality principle is accepted in Iranian legal system. Referring to the jural sources and authentic religious injunctions, which are in Arabic, is contrary to the Art. 15 of the Constitution and in contradiction with the social interests and

observance of individuals' rights and freedoms. However, the Legislator can't refer to these sources. He has to enumerate all the prohibited behaviors in the specified list of crimes and assign the extent of punishment for each of them, and announce them to the public; otherwise, he hasn't fulfilled his duty. In emergency cases, when the judges are not specialized in Muslims' law (Mojtahed), the assignment of punishment is done by the Islamic government and the Muslims' Ruler. If the allowed (Permitted) judge is empowered more than the recited authority in the Constitution, it may lead to contradictory ordinances, which are inconsistent with the real aim of the formation of the Judicial Power that is, the establishment of a unified procedure. It is also in opposition to the undeniable jural principles and is against the explicitness of different articles of the Constitution.

Thus, s. 29 of the Law of Formation of the Criminal Courts Act 1989 (1 and 2), s. 214 of the Criminal Procedure of Public and Revolutionary Courts Act 1999 and s. 8 of the Law of Formation of Public and Revolutionary Courts Act 1994, when they give such an authority to the permitted judge, are against the Constitution, and the suggestion of the Guardian Council in revising s.2 of joining the Revolutionary Courts to the Administration of Justice, which allows the Revolutionary Courts to refer to Imam Khomeini's book "Tahrir ul-wasileh" and impose a sentence, is contrary to the Constitution; this is because, this book is Arabic, and according to the Art. 15 of the Constitution, the formal language of the country is Persian and all the formal texts should be Persian. Thus this project should be reconsidered and revised so that it includes "the legality principle" as well.

7. Reference

1. Mohseni, Morteza, *Criminal law*, Melli University, Iran, Tehran, 1976.
2. Ghazi, Abolfazl; *Constitutional law*, Dadgostar Publishing, 1st ed., 1996.
3. Ghorbani, Zeinalabedin; *Islam and Human Rights*, 1st ed., 1992.
4. Beccaria, Cesare; *Crimes and Punishments*, Translated by Dr. Mohammad Ali Ardebili, Shahid Beheshti (Melli) University Publisher, 1989, p.41.
5. Saleh, Ali Pasha; *History of law*, Tehran University Publisher.
6. Willdurant; *History of civilization*, Translated by Ahmad Aram, Tehran University Publisher, 1994.
7. Alghahogi, Ali Abdolghader; *Public criminal law*, Beirut, 1988.
8. Hojjati Kermani; Ali; *Traveling of judgment in various Periods of History*, 1990.
9. Ravandi, Morteza; *Shield of Law and Ministry of justice in Iran*, 1919.
10. Damghani, Mohammad Taghi; *One hundred ago*, shabgir Publisher, 1928.
11. Dehkhoda, Aliakbar; *Loghatname*, 1994.
12. Abd-el-Malek ai-Saleh, Osman; “*The Islamic Criminal Justice System*”, Edited by M. Cherif Bassiouni, Occana Publications Inc., pp.54-56.