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RESEARCH ARTICLE

Investigating developments in the new Islamic punitive law about the evidence for proving criminal claims

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Abstract

Evidence in criminal procedures enjoys great importance; although the aim of criminal procedure is not proving evidence, it is without doubts a very crucial means of discovering the truth. There are several issues necessary to be discussed. Recent developments in the new Islamic punitive law reflect the necessity of a probe into the notion of evidence in Iran's criminal cases, the basics, reliable evidence and assessment system. A probe into the regulations pertaining to the system of punitive evidences in the new Islamic punitive law reveals that the lawmaker has prevented scattering of evidences in this area on the one hand, and on the other hand by predicting reliable evidences as well as a lawful assessment system focusing at convincing the judge tries to pave the way to do the punitive justice.

INTRODUCTION

Fundamental importance of evidence in criminal procedures reveals the necessity of a deep study of its underlying principles. Legal and criminal procedures are clearly different in such a way that many believe legal to be fake justice, whereas punitive procedure is the actual justice. Since the aim of punitive procedure is to discover the truth and identifying the real criminal although evidence is not the aim in Iran's punitive system, it is considered as a crucial means, because it helps the punitive court to discover the truth and do justice. Fundamental importance of evidence in criminal procedure in the two areas of discovering the truth and attributing the crime to the accused person person reflects the necessity of studying developments in the new Islamic punitive law in the area of criminal evidence proving. There is no doubt that analyzing the principles of evidence on the one hand and familiarizing the system of evidence assessment in the new law on the other could pave the way to better implementing justice. Thus, the present study using an analytical- descriptive approach based on library resources investigates developments in the new Islamic punitive law in the area of evidences to criminal proof. Accordingly, the present article is divided into two parts: the first part discusses the notion of criminal evidence, the basics and the duty of acquiring evidence focusing on the latest changes in the new law and the second part of the article discusses developments in the new law regarding reliable evidences and the process of evidence assessment in criminal procedures. Therefore, the article seeks to present a clear picture of developments in the new Islamic punitive law in the area of criminal proving evidence.

1. Identifying the notion, basics, and the duty of acquiring evidence in the new law

1.1 *Definitions*

Firstly, it is necessary to delve into the dictionary meaning of "evidence" using a dictionary following with its colloquial meaning. Dehkhoda Persian monolingual dictionary defines evidence as: leader, guide (Dehkgoda, 1992). Also, in Encyclopedia Britannica, evidence means "guide and sign" (Department of Law, 2013). However, it should be noted that there is not a single definition of evidence that is agreed by everyone; some lawyers has defined evidence as: any means whatsoever, which proves existence or non- existence of something or truth of a claim

(Ashuri, 2004). Moreover it has been mentioned that evidence is a light leading the judge to discover the truth (Madani, 2001). It is also defined in criminal cases as: any kind of means that proves existence or non-existence of something. Furthermore, in the realm of law, evidence refers to any means being predicted in the law that leads to convincing the court to the truth of the claimed issue ; and this discovering aspect of evidence always leads the opposite to be proved (Katouzian,2007). The Islamic scholars have also noted in Islamic law the features of "evidence" and have presented this definition: evidence clarifies the unknown and is employed to discover the truth and recognizing the real decrees or issues of decrees (Mohammadi, 2002). It is also said that evidence refers to something which leads human mind from unknown to known, whether it be certain or uncertain. Thus, it is obvious that there is no single definition of evidence. In various punitive laws two methods are usually followed. In the first method, lawmakers try to prove a crime or other phenomena and in the second method they attempt to conforming examples to the executers by providing a definition of a particular issue. The laws and results of investigations in the regulations of Iran's punitive system reveals that the lawmaker has avoided defining evidence in punitive cases and only has only defined evidence in the Article 194 of Principles of Civil Procedures as: evidence refers to something that the parties refer to it to defend. However, as can be seen, this definition is specific to evidence in legal and not criminal cases. The lawmaker in the new Islamic punitive law passed in 2013 in the fifth part of the first book, general issues has devoted an independent chapter to the issue of evidence and its clear expression of unreliable evidences. Although this measure taken by the lawmaker is to be appreciated because it prevents scattering of evidence for proof in criminal cases, on the other hand two problems arise: first, the evidences to prove a crime are placed in formal laws not natural ones; second, it would be better for the lawmaker to define evidence in punitive unreliable evidences. Therefore, with regard to the issues mentioned, the lawmaker in Iran's punitive system has not made any developments in defining "evidence".

1.2. Bases of punitive proof evidences in the new law

The term "bases" is plural for "base" meaning the foundation of something (Moein, 1992). In legal terms "base" refers to a principle or a general rule on which legal system is based and legal regulations are legislated according to it (the office of cooperation between Hawzah and University 1997). What we seek in this section is the bases that the lawmaker has founded the system of punitive proof evidences based upon. There are two principles in the area of punitive proof: the first is the principle of freedom of acquiring evidence, and the second is the principle of freedom of assessing evidence. Punitive systems base regulations pertaining to punitive prove evidences on these two principles; the experts have mentioned public interest as a basis for the principle of freedom of evidence. In all countries the punitive system's duty is to maintain order to the benefit of the public. Hence, preferring the benefits of society over benefits of individual requires that crimes be discovered in any ways and real criminals be identified and punished for their shameful deeds. Therefore, this goal can be achieved only when the court has the freedom to acquire evidence in criminal cases. In the new Islamic punitive law it can be said about the principle of freedom of acquiring evidence that the lawmaker has not used any particular framework of evidence to prove crimes, thus it confronts the principle of freedom of acquiring evidence with some sort of limitation; following this limitation the principle have also been changed. In other words, the lawmaker in the new law has not preferred public interest over individuals' interests which reflects the right of individual's freedom in the light of the presumption of innocence.

Another base of the principle of freedom of acquiring evidence is justice. Islamic scholars have defined justice as: justice means a persistent carnal state in humans that prevents them from committing cardinal sins and insisting on minor sins and performing the Divine duties and causes refraining from doing acts incompatible with chastity (Tusi, 2008). What is being meant by justice as a base for the principle of freedom of acquiring evidence is social justice. (Heidari, Fat'hi, 2013). Thus, the lawmaker actually has changed the condition of creating social justice by limiting the principle of freedom of acquiring evidence. So, it can be concluded that though the principle of freedom of acquiring evidence does not defend interests of the society, the recent developments deserve gratitude since it supports individuals' rights for freedom by the presumption of innocence. The second principle based on which the regulations pertaining to evidences of prove are set is the principle of freedom of acquiring evidence. In the old Islamic punitive law, the lawmaker had identified the ways to prove a crime in some particular crime. In other words, the related evidences in these crimes were forbidden and the judge was obliged to grant a decree as soon as its proof. However, the lawmaker in the new Islamic punitive law has given more freedom to the punitive judge to enable him to assess the presented evidences and to grant decrees based on the results of assessment in such a way that even in the crimes provable by legal arguments, and the evidences are subjective, the judge can refer to them only when he gains knowledge. For example the lawmaker in the Article 161 of the new law states that: "in cases where penal claim is proved with Islamic law evidence such as confession and testimony, the judge grants a decree based on them unless he is aware of its contrary. Nevertheless, the judge's freedom in assessing the evidence follows certain laws and regulations which prevents the judge from tyranny in such a way that he is not allowed to

base his conscience convincing on whatever evidence even illegal evidence. In addition, the necessity of the granted decree to be well reasoned out could be considered as a condition on the judge's freedom (Heidari, Fat'hi, ibid, 2013) that can be inferred from the content of Article 212 of the new law. The lawmaker states in this article that in case that judge's knowledge contradicts other legal evidence, had the knowledge remains evident, those evidence are not reliable for the judge and he will grant a decree according to his own knowledge and other evidences.

1.3. The responsibility of presenting and acquiring the evidence

It was previously mentioned that judicial system's duty in criminal cases is to discover the truth and acting against real criminals, therefore it is essential that it has more options to acquire evidence. There is a rule in legal cases and in the area of evidence to prove civil claims named "prevention of acquiring evidence" through which the judge is prohibited to obtain evidence for or against the parties and he is to maintain his impartiality under any conditions. But in criminal cases the judge has to discover the truth and doing this duty requires provision of evidence. The penal claim parties include: the plaintiff, the accused person and the attorney general. But the court itself is regarded as a party though it has the duty of investigation (Madani, 2003). For instance, the lawmaker in the Article 171 of the new law states that: whenever the accused person confesses to the crime, his or her confession is valid; no other evidence is needed unless judge's investigation into the extrinsic evidence be contrary to the content of the confession; in this case the court does the required research and mentions opposite extrinsic evidence of confession. As it can be seen, in addition to the plaintiff and the attorney general who are obliged to provide evidence, the court in the new law also has to acquire evidence.

1.3.1. The presumption of innocence

The presumption of innocence can be regarded as a common legal heritage of developed countries. A review of historical records and emphasis on the importance of this assumption in punitive law particularly in the second half of the twentieth century on the one hand and its crucial effects on the other hand reflects the pivotal role of this presumption regarding evidence of penal proving. This principle guarantees individuals' rights and freedom according to which each person is assumed innocent unless it is proved that he or she has committed a crime. Hence, this presumption gains a proper place in punitive process and supporting the one accused of committing a crime (Khaleghi,2013). But there arises a question as in what ways the presumption of innocence defends the rights of the accused person. How it is possible to be innocent and at the same time a punitive writ be decreed? To find answer to these questions we have to review the effects of the presumption of innocence on the rights of the accused person people.

1.3.2. The effects of the presumption of innocence on the rights of the accused person.

The presumption of innocence defends rights of the accused person in two areas. First right of the accused person to defend and second, defends the accused person person's right of freedom. In the first area, the presumption of innocence requires the authority of persecution to acquire evidence against the accused person and declares that forcing the accused person to prove his or her innocence or confession or testimony against him- or herself is forbidden. The lawmaker states in the Article 169 of the new law that: "a confession being taken under pressure, force, torture or physical or mental harassment is not valid and reliable and the court has to inspect the accused person". In the area of the accused person person's freedom, this presumption defends him. The writ of temporary custody is one of penal writs. It is a security act in order to take freedom away from the accused person and imprison him during the time while the whole or part of the hearing is being implemented. The contradiction between temporary custody and the presumption of innocence and the presumption of innocence of the accused person before the absolute decree is granted besides its contradiction with some criminal and legal policies has led some criminologists and lawyers to focus more on this issue which is a threat against the accused person person's freedom based on the views of modern social defense school after world war 2(Akhundi cited in Tahmasebi and Golriz, 2006). This issue of custody before trial has been on the agenda of national and international conferences as well as the United Nations' forums and congresses to prevent crimes which convey its importance and the need to reach to helpful solutions in this regard (arjmand, 2006). Iran's judicial system includes the following considerations regarding the presumption of innocence: first, to take the accused person person's freedom it is necessary for the judicial authority to intervene i.e. this is only the judicial authority who by carefully observing formal regulations grants penal writs including writ of custody; this has been made clear in article 24 of Criminal Procedure Code. The lawmaker has based this article on that the executive has no rights to put the accused person person in custody unless this permission is clearly stated in the law in order to prevent intervention in judicial decisions and to respect individuals' freedom (Zeraat, Mohajeri, 2004). Moreover, predicting the right of the accused person person's

complaint against the writ of custody and a quick hearing of the complaint by an independent and impartial court (the content of Article 33 of criminal procedure code) is about this presumption.

2. Developments of the new Islamic punitive law about valid evidence and assessment system

An important issue in the area of evidence of punitive proving is valid evidence and evidence assessment system. To this aim, the second part of the study probes into this issue.

2.1. Reliable evidence in new regulations

By comparing the regulations for evidence to prove in penal and judicial system it can be seen that lawmaker has considered the evidence to prove. However, this is not acceptable in criminal cases since logic requires that we have to efficiently fight with criminals and this is only obtained where the judge in criminal cases has more freedom to acquire evidence and because of this the principle of freedom to acquire evidence is accepted in which the evidence is basically reliable hence both society and the accused person benefit from it. It might be objected that accepting this principle could endanger the rights of the accused person because judicial system may resort to inhumane ways to acquire evidence. Judicial systems of world usually define some limitations for this presumption to prevent resort to cruel ways and reliable criteria are set. In the same way, the lawmaker in Iran's new regulation of penal system is not an exception. Looking at penal regulations in the new and old law it can be seen that the lawmaker had only in Article 231 of the previous Islamic punitive law illustrated the ways to prove murder (Chatr-e-Danesh, 2003). This shows that the lawmaker in the former law had already predicted reliable evidence. For example, the Islamic punitive law regards proving of adultery to be possible with four confessions in the court (Article 68) to four just men's testimony or three just men's and two just women's (Article 74) (Ashuri, 2005). It seems as the lawmaker in the new Islamic law has accepted the presumption of freedom in acquiring evidence with much limitation. The lawmaker in the Article 160 of the new Islamic punitive law on the evidence to prove a crime states: "the evidence to prove a crime include: confession, testimony, compurgation and oath in legal cases and the judge's knowledge". Thus it can be stated that the development brought by the lawmaker in the new law in the area of reliable evidence has been to limit the presumption of acquiring evidence to a great extent because considering the term "crime" at the top of Article 160 of the new punitive law, the lawmaker has limited this presumption in all crimes to compensation, retaliation, God's limits and has recognized the proof of all crimes only through acknowledged evidence, therefore the reliable evidence is identified by the lawmaker itself and it does not recognize evidence acquired through by force.

2.2. The place of judge's knowledge in the new regulations

There has always been discussion among Islamic scholars about judge's reliance on his knowledge as evidence to prove a claim. Some scholars believe that the judge can act based on his knowledge in all crimes whether they be people's right (private right) or God's right, while others contend that he cannot do this and still others assumed a distinction between God's right and people's right (Yasrebi, 2006). However, most countries now do not accept judge's own knowledge as an evidence like others and they rely on a rule according to which it is "not possible to be both a judge and a party at the same time" to prove their opinion (ibid, 2013). The lawmaker in the former law has recognized judge's knowledge as an evidence to prove crimes such as murder, sodomy and lesbianism and in Article 120 states the general decree regarding proof of all crimes resorting to knowledge. Thus, in Iran's laws, the judge's own knowledge is not counted as forbidden evidence (Ashuri, 2008). In the new Islamic punitive law, the lawmaker regards judge's knowledge very highly and in Article 211 states that: "judge's knowledge includes certainty resulting from clear evidence in a case presented to him. In cases where the decree is reliant on judge's knowledge, he has to state clearly his extrinsic evidence in the decree. This measure taken by the lawmaker is acknowledged.

Since the lawmaker considers convincing judge's conscience as a general principle in assessing reliable evidence and in order to obtain this convincement, it regards his knowledge reliable. It also has assured the accused person that judge's knowledge has a framework and a criminal judge cannot grant a decree based on mere inferred knowledge which normally does not lead to certainty.

It is worth mentioning some points about judge's knowledge. First, in case the judge relies on his knowledge as an evidence for proof, he necessarily has to clearly state in the decree extrinsic evidence which have brought knowledge for him. This means that if these evidences are not clarified, the knowledge is not reliable. The second point in this connection is the knowledge gaining measure. In other words, the question arises that in order to create knowledge in a criminal case whether personal measures or objective tests are needed. By personal measures it is meant that whether extrinsic evidence has to create knowledge only for the judge or for all people. The lawmaker has recognized the objective test to prevent judges from being opinionated.

2.3. The system of evidence assessment in the new Islamic punitive law

Evidence in criminal cases has two applications: first, the criminal judge intends to make sure whether the crime has been committed. The second application of evidence in criminal cases is whether crime is attributed to the accused person. Practically, the criminal judges face evidences that are generally contradictory. In this case the question arises that which evidence is true and which one is not. Therefore, it is necessary that the court evaluates the evidence presented in the case. What criteria are there to assess evidence in criminal cases? The lawmaker in the new Islamic punitive law has followed the criteria of legal evidence system. In the legal evidence system, the lawmaker identifies the acceptable evidence and their proving value of each or all of them in advance and requires the judge to grant decree in case of presenting evidence despite personal beliefs. In cases where no any evidence required by the lawmaker the judge has to acquit the accused person and has no rights to rely on any other evidence (ibid, 2008). In other words, in this system the evidence is subjective. Based on what we said and according to the regulations related to criminal cases, in punitive crimes the lawmaker in Iran's new Islamic punitive law has not followed this opinion.

The system of non –material evidence is the second system which is also called convincing judges' conscience. In this system, judge's internal decision is the criteria for judgment. The judge assesses the evidence in total freedom and feels free to admit or reject them and is not restricted by evidence pre-specified by the lawmaker. Accordingly, the judge has to analyze and evaluate the quality of information and proving evidence and reach conclusions from his conscience judgment (Peyman, 1977). What is inferred from the laws regarding the evidence of proof in criminal cases is that though the lawmaker in the first chapter: "general content of fifth section of the first book of the new law" has enumerated the evidence to prove a crime, they are not accepted since this evidence is only reliable when it convinces judge's conscience. The content of Article 162 of the new Islamic punitive law clearly states this.

Conclusion

The results of this study reveal that proof evidence in criminal cases is applied in the area of discovering the truth, but in most cases the collected evidence are contradictory. There are two basic methods to recognize the evidence the first of which relates to the system of legal evidence and the second pertains to the system of convincing judge's conscience. As the aim of criminal procedure is to discover the truth, Iran's criminal lawmaker has devoted a certain chapter to the evidence to prove crimes and has predicted reliable evidence in the new law. However, the important point is that although it has predicted these evidences, they are not accepted, i.e. it is only binding for the court when it hears the call of its conscience about the truth. Consequently, the new Islamic punitive law has taken some useful measures. First, it has prevented dispersion of the related content by devoting a separate chapter to criminal evidence. Secondly, although it has introduced reliable evidence, it has omitted the feature of subjectivism and has given the feature of objectivity to it and has instructed the criminal judge to grant a decree only when his conscience has been convinced according to the law.

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