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Rule of Darā' and Doubt about Expediency in the Enforcement of Criminal Judgments

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Abstract: *The effect of doubt and expediency on the enforcement of criminal judgments has long been considered by the* ***early*** *and late jurisprudents, and contemporary jurists and jurisprudents have also discussed it in their jurisprudential and legal books. The issue of doubt which has been raised in the rule of darā' is a common rule and is taken from the text and is widely used in criminal judgments, including Hudud (prescribed punishment), Qisas (retaliation in kind) and Ta'zir (discretionary punishment). It is also considered among the rules agreed by the five Islamic religions. Although famous jurisprudents believe that the provisions of this rule can be used in errors of fact (doubt about facts), according to the acceptance of this rule which is taken from narratives, it can also be applied to errors of law (doubt about law). In criminal law, doubt is sometimes about the legal element, i.e. legislative decree, and sometime, it is about the spiritual element or actus reus (wrongful act), which is the same as doubt about the realization of crime. The inclusion of the rule has also been accepted in these cases. On the other hand, "expediency" is also effective in enforcing criminal judgments even Hudud and can cause to delay, change and even stop the enforcement of the judgment. It seems that error (or doubt) is also effective in the stage of enforcing criminal judgments and can stop the enforcement; that is, execution of a judgment where social justice is not fully implemented is a matter of error (or doubt). Thus, along with the errors of fact and law, we also have probability of mistake and reluctance, doubt of the judge and the accused, probability of repentance and doubt about the enforcement of judgment, which are a new alternative of errors or doubts. In this study, semantic analysis of doubt and expediency in Islamic jurisprudence and the effect of doubt about expediency on criminal judgments, including Hudud, retaliation in kind, monetary compensation and discretionary punishment, have been addressed through a descriptive-analytical method.*

Keywords: *Doubt, expediency, criminal judgments, Hudud, retaliation in kind, monetary compensation,* ***discretionary*** *punishment, darā'*

I. INTRODUCTION

Truth of the rule of darā'

After discussing the documentation of the rule of darā' in comparative jurisprudence, including Shiite and Sunni, it should be clear whether this rule states a new point or is, indeed, another expression of the principle of non-existence and the principles like that.

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It might come to the mind that the rule of darā' does not state anything new because the decree of prescribed punishment (Hudud) is issued when the subject, i.e. the existence of a crime with prescribed punishment, is confirmed and as long as the existence of a crime is not established, the decree of punishment is not issued and if there is doubt about the realization of a crime, the principle of non-existence requires that no crime is realized and as a result, no decree is issued for punishment.

For example, in the case of a woman who has become pregnant without a husband but has not admitted to adultery and no witness has testified for adultery, no decree of punishment for adultery is issued since this decree is adopted when adultery is proved. But with the probability that pregnancy may be due to something other than sexual intercourse, such as the absorption of the sperm into the female womb, or because of mistaken intercourse or out of reluctance and compulsion, adultery is not proved. Now, non-execution of prescribed punishment (Hudud) can be attributed to the rule of darā' (Makarem Shirazi, 1997., vol. 1, p. 190) or "failure to prove the case" (Khouei, 1976, vol. 1, p. 178).

Further, concerning a woman who appears instead of the wife of another man and the man engages in sexual intercourse with that woman by mistake, punishment for adultery is revoked for the man. Now, the evidence for this opinion is considered by some to be the rule of darā' (Tabatabaei, 2001, p. 418) and by others to be non-proof of the subject of punishment (Mabani Takmilat al-Minhaj, p. 169). The words of some jurisprudents also indicate that the existence and non-existence of the rule of darā' has no effect on judgments (Karimi Jahromi, 1992, vol. 1, p. 24-25).

II. The scope of "doubt" in the rule of darā' from the viewpoint of comparative jurisprudence

Now, it should be examined what doubt and its scope in the rule of darā' are, how the enforcement of Hudud (prescribed punishment) is prevented by doubt and what disagreement exists in legal schools of Islam in this regard.

As previously stated, error or doubt is the mistake made by the obligated person as a result of the ignorance of the judgment or the subject of the judgment and confusion about Halal and Haram (permissions and prohibitions) and suspicion about permissibility and so on.

The important point in the provisions of the rule of darā' is the concept of "doubt" and the scope of its inclusion, according to many Sunni jurisprudents, generally comprises any factor and motivation causing hesitation in the execution of Hudud and the stages of proving the crime and characteristics and circumstances of the accused and doubt about the opposite being true and also retaliation in kind (Ibn Najim, 1983, p. 237) while in Imamiya jurisprudence, doubt is mostly assigned to cases of ignorance of the judgment, and the cases of doubt in evidence of proving the claim, such as testimony about the absentee and voluntary testimony, are considered outside the subject of the rule because doubt, in such cases, means lack of proving the crime, and insufficient evidence regarding the occurrence of crime is the cause of rejecting the punishment and there is no need for the rule of "no punishment in case of doubt" (See Khouei, 1976, vol. 1, p. 149; Naraqi, Bita, vol. 2, p. 572). For example, in the incidence of debauchery in witnesses after testifying and issuing an order, the principle of the ineffectiveness and

continuity (Istishab) of the order is sufficient unless the debauchery leads to doubt in former justice which in this case, nullity of the testimony is not related to the rule (ibid.).

Additionally, in cases of rejecting the punishment of the insane and the like, we cannot resort to the rule because without considering the rule, there is a specific reason for rejecting the punishment (ibid., p. 171).

It seems that doubt in the rule of darā' is general and includes error of law, error of meaning and error of fact (doubt about law, meaning and fact). But in another rule, such generality does not exist since the holy legislator of Islam has accepted ignorance of the religious law as doubt; that is, the offender can defend himself by virtue of ignorance of the religious law or doubt about necessity and prohibition or rational excuse and demand for cancellation of punishment. But in the statute law, ignorance of law does not eliminate the criminal responsibility. Although steps have been taken recently to make this legal assumption flexible in some countries (Stephanie, 1998, vol.1, p. 530-531), this amount of restrictions imposed on this assumption has not caused to say currently that the judge, with reliance on it, can apply the rule of interpretation of doubt in favor of the accused. So, the effect of this rule on legal issues is that the criminal judge is obliged to interpret doubt in favor of the accused in his interpretation of the criminal texts, and no more. It seems that the rule of darā' is the standard interpretation of the ignorant person's excuse and his exemption from punishment, and the rejection of punishment in cases of ignorance is expressed in two ways: First, the excuse of the ignorant person and second, excuse due to the doubt of the accused.

In various cases of jurisprudence and principles, the reasons for these two kinds of doubt and different orders about them are discussed. Those discussions are different from what is raised about doubt in criminal law.

In the following, the main research subject will be discussed as to in what cases doubt in Shiite and Sunni jurisprudence is realized so that the enforcement of Hudud (prescribed punishment) is cancelled.

Doubt in Shiite jurisprudence

The most important cases of doubt in Shiite jurisprudence, including error of fact, error of law, probability of mistake and reluctance, doubt of the judge and the accused, doubt about expediency and repentance, are mentioned below as two new alternatives of doubt.

Error of law

By error of law in jurisprudence and its principles, it means that the overall verdict of something is doubtful. Ignorance of law is due to either the lack of authentic texts or the brevity of the text or contradiction of texts; for example, as a result of lack of authentic ***texts*** in prohibition of act (like smoking), doubt is created. This case is the error of law; that is, we do not know whether in the legislator's view, this decree shows prohibition or permissibility. Therefore, in some cases, the ruler doubts that the act committed by the accused is a crime or not. Moreover, as to the topic of discussion, error of law is that a person is ignorant of the prohibition of acts on the part of the Islamic legislator and he commits the act with the assumption that it is lawful; for example, he does not know if drinking beer is forbidden or not and he drinks it as a result of his ignorance of its prohibition or he does not know that marriage with a divorced woman is forbidden in the days of edde and he marries her or he does not know that marriage with the sister of ex-wife who is in the days of edde is forbidden and he marries her. In all of these cases, the person committing the act is ignorant of its prohibition (Muhaqqiq Damad, 2010, p. 55-56). So,

whenever someone commits an unlawful act because of ignorance of law and prohibition, his act is an error of law; like the person who is ignorant of the law of adultery and drinking wine and does not know that a punishment has been considered for both of these acts and if he commits the act, his error causes to eliminate the prescribed punishment. This is called the error of law since the error and doubt is about the existence of a law and judgment.

Error of fact

An example for this kind of error is the person who knows that adultery and drinking of wine are forbidden and punished but is led into error and thinks that such and such a woman is his wife or thinks that such and such a liquid is water or one of non-alcoholic beverages and as a result, the person engages in sexual intercourse with that woman or drinks that liquid and then, it is found out that the woman was not his wife and the liquid was an alcoholic beverage. This is called an error of fact which prevents the prescribed punishment (Hudud).

In connection with the ignorance of law, it does not matter whether this ignorance is due to negligence or fault.

gnorance due to fault

It means that a person can become aware of the law but commits a fault and does not seek knowledge and awareness. However, the prescribed punishment is eliminated for the ignorant person when he is not aware and does not think that the act he is going to do is a crime. But if he is aware of the fact that the act he is going to do is a crime and, on the other hand, he is able to ask and become aware of its nature but commits it recklessly and without asking questions and then, it turns out that he has committed a crime, his ignorance is not accepted and in Islamic law, the excuse of such individuals is not accepted and thus, the faulty ignorant person who is aware of the nature of his act is guilty and should be punished (Feyz, 2006, p. 183).

Ignorance due to negligence

It means that a person is in a condition in which he cannot gain access to the law and become aware of it; for example, he lives in a remote place where he has no access to informed scientific and religious centers. Such a negligent person may not exist in this age since mass media such as radio and television have linked different parts of the world so that the smallest news and incident in one corner of the world instantly and rapidly spread throughout the world. However, “doubt of the faulty person who is not aware” and “the ignorant person who is negligent” will cause the elimination of punishment. In “Tahrir al-Wasilah”, it is said in this regard that “adultery does not materialize with the existence of doubt, whether error of fact or law” (Mousavi Khomeini, 1970, vol. 2, p. 455).

Doubt about expediency

In studying the inclusion of “doubt” in the rule of darā', we address doubt about expediency as a new doubt in this topic. First, we should examine expediency in literal terms. Literally, expediency means what brings comfort and benefit. Expediency of livelihood and resurrection means the things that bring goodness for this world and afterworld (Dehkhoda, 1994, vol. 12, p. 18541).

In dictionaries, the term expediency has been defined with explanations close to each other and in most of these definitions, the element of "the negation of corruption and anti-corruption" can be seen, which means benefit and is applied against trouble and evil. In "Lisan al-Arab", its meaning is goodness, benefit and anti-evil (Ibn Manzour, 1988, vol. 2, p. 517) and it also means improvement and competency. The concepts of goodness, benefit and interest inferred from the word expediency can cover all human wishes and demands although there are differences and mistakes in their instances.

In Persian language, different equivalents_ with the same semantic root_ have been provided for expediency, including goodness, pleasure, enjoyment, interest, benefit, blessing, wisdom and cause. Among them, "benefit" may be literally considered as the closest equivalent for "expediency" according to Ghazzali in "Al-Mustasfa" (Ghazzali, Bita, vol. 1, p. 286-287).

With a glimpse of the definitions of the term expediency in principle books, it can be concluded that there is not much difference between its literal and idiomatic meanings. Although in this dimension, expediency has been analyzed with different interpretations and from various angles, the essence of the term expediency is one thing; whatever benefits human beings is called expediency and whatever is to their detriment and causes corruption is called evil and trouble. Accordingly, Ghazzali writes that expediency literally means gaining of benefit or disposing of harm and idiomatically means providing the goals and intentions of the religious law. Therefore, whatever satisfies the legislator's goals is considered as expediency and whatever causes the loss of the legislator's goals and intentions is regarded as trouble. Establishment of religious laws and judgments is based on expediency and trouble; that is, religious rules are established to provide and maintain the interests of people and eliminate troubles. The most important expediencies considered by the legislator in the canonization of orders include five issues: Preservation of religion, soul, intellect, offspring and property (ibid.). This division is unlimited and some have added the expediency of maintaining the system and public security and also preserving the dignity of individuals (See Gorji, 1996, vol. 1, p. 58).

Some people of principles, following Ghazzali, have said that expediency means gaining of benefit and elimination of harm and trouble, and in religious terms, it means the protection of religious purposes and ideals and maintenance of Islamic values which are demanded by the Islamic legislator for all nations and all human beings, and the legislator has considered their preservation as his legislative prestige; they include religion, soul, intellect, offspring and property. Whatever contains these principles is expediency and whatever opposes them is evil and trouble and the elimination of trouble is expediency (Feyz, 2006, p. 253).

The most important religious purpose is the preservation of the five pillars mentioned in human life and the observance and maintenance of these purposes is among the necessities of Islam. By summing up the opinions raised concerning the idiomatic definition of expediency, it can be stated that from the perspective of Islam, expediency includes anything that is to the benefit of the individual and society in material and spiritual terms. Briefly, expediency is used both in the creation and enforcement of religious judgments, especially Hudud.

Assuming the necessity of executing divine provisions during the absence of Imām Zamān and the sufficiency of the evidence proving this issue and the related narratives in terms of document and signification, execution of Hudud is subject to certain conditions, among which is the absence or modification of the grounds for committing a crime in society. The narrative of the elimination of prescribed punishment (Hudud) in case of robbery in years

of famine and non-enforcement of prescribed punishment for adultery in case of urgency to commit it to satisfy the desire and marriage of a guilty person who is sentenced to receive punishment from public treasury indicate this issue. Otherwise, if there are many grounds for committing crimes in society and no serious action is taken to eliminate these grounds, the enforcement of prescribed punishment will be doubted with regard to the above narratives and the like. Here, according to the narratives indicating non-enforcement of Hudud in case of doubt, the prescribed punishment should not be executed since the existence of expediency for enforcing Hudud is doubtful. The reason is that the purpose of enforcing Hudud which is to defend public interest and eliminate corruption and spread of debauchery among people is not achievable. Third, in case of interference between expediency and enforcement of Hudud, particularly the penalty of prescribed execution and another disturbing expediency, if the contradictory expediency is superior to the expediency of imposing the penalty of execution, then the execution will not be carried out. The narratives related to non-enforcement of Hudud in the land of enemy, non-enforcement of Hudud in the Holy Shrine and non-enforcement of Hudud toward a man whose body has different wounds are all suggestive of this issue. Besides, as previously mentioned, Riyaz Sahib has carefully considered this issue.

Probability of repentance

The word repentance means return. In "Mu'jam Maqayis al-Lughah", it is stated that "توب، التاء و الواو و الباء كلمه واحده تدلّ الى رجوع، يقال تاب من ذنبه، أى رجع عنه، يتوب الى الله توبه و متاباً" (Ragheb Esfahani, 1972, vol. 1, p. 357). In "Lisan al-Arab", below the meaning of repentance, it is said: "التوبه الرجوع من الذنب" (Ibn Manzour, 1988, vol. 1, p. 233) and in "Al-Mufradat", it is mentioned: "التوبه فى الشرع ترک الذنب لقبحه و الندم على ما فرط منه" (Ragheb Esfahani, 1972, vol. 1, p. 76). In the book "Majma' al-Faedah val Burhan", it is written: "التوبه هى النّدامة و العزم على عدم الفعل لكون الذنب قبيحاً ممنوعاً و امتثالاً لأمر الله و لم يكن غير ذلک مقصودا" (Moqaddas Ardebili, 2000, vol. 14, p. 321). In the Holy Quran, repentance is expressed in two ways:

1- Penitence and return of the servant to God, such as in "يا ايّها الذين آمنوا توبوا الى الله توبه نصوحاً" (Tahrim: 8) in which by human repentance, it means return to God and remorse for the wrong acts of the past.

2- Repentance and return that is related to Allah, such as in "علم الله أنّكم كنتم تختانون انفسكم فتاب عليكم و عفا عنكم…" (Baqarah: 187) in which by repentance of God, it means the acceptance of repentance of human beings who are remorseful of their dark past and have returned from deviation and ignorance.

Hence, in the Holy Quran, wherever repentance of human beings is mentioned, it means regret and remorse over the past sins and wherever repentance of God is discussed, it means the acceptance of man's repentance and return to His mercy and forgiveness.

There are many verses and narratives in which repentance has been mentioned as eliminating the punishment and in the statute law, it has been discussed as one of the legal excuses for exemption from punishment. Both in religious text and in laws, when there is a mention of repentance, it is assumed that a crime has been committed and a person with criminal responsibility has committed a crime with all determined elements and conditions, but some social and individual interests require that the offender is exempted from the punishment.

One case of doubt that causes the elimination of punishment is the probability of repentance. That is, definitive confirmation of repentance is not needed, but the existence of the probability of repentance is sufficient for the

elimination of punishment while normally, we can rely on the continuity (Istishab) of non-repentance against the offender, but we do not resort to it and act based on the rule of darā' unless lack of repentance is confirmed, which is the obvious aspect of the criminal system of Islam and its dynamics. However, the rule of darā' can be relied upon in the probability of repentance and doubt in this rule can be extended to the probability of repentance.

Doubt of the judge

We can eliminate the ineffective features from some narratives related to the doubt of the judge and specific limits and extend their ruling to other cases. Now, if the judge becomes doubtful, he cannot order the enforcement of the prescribed punishment because the judge should prove the criminal claim without doubt and then pronounce a judgment. In this assumption, the judge can pronounce a judgment when he is aware of the commitment of the criminal act by the accused. Otherwise, if he has no knowledge in this regard, this case is among the cases of doubt. Here, even absolute suspicion_ not authentic religious suspicion_ is considered among the cases of doubt. In errors of law, the proof of the belief in the permissibility of the act on the part of the accused also eliminates the prescribed punishment since the holy legislator believes that ignorance of the religious order eliminates the responsibility in some cases. In the statute law, the rule of interpretation of doubt in favor of the accused is applied in legal affairs merely in the interpretation of the limits of criminal texts. But ignorance of law is no excuse although it seems that if the accused can prove his mistake in understanding the rule of law, he can be exempted from the punishment.

In errors of fact, the scope and implications of both rules are the same. The rule of darā' is general and since it embraces all kinds of punishment_ unless we have an indication of its opposite which is not true here_ it also comprises retaliation in kind and discretionary punishment. The rule of interpretation of doubt in favor of the accused is also general and includes all types of punishment.

According to the Islamic Penal Code, if doubt is not removed about all crimes, the rule of darā' is applied. Article 120 of this law stipulates that “whenever the occurrence of a crime or some of its conditions or any of the terms of a criminal liability are doubted and no reason is found to reject them, the mentioned crime or condition is not proved as the case may be”. Further, Article 120 of this law states that “in crimes with prescribed punishment, except for Muharaba, corruption on the earth, robbery and Qazf, the mentioned crime or condition is not proved merely by the existence of doubt and without the need for obtaining reason, as the case may be”.

Accordingly, in relation to the doubt of the judge, the legislator has also ordered the elimination of the prescribed punishment in some cases. For example, Article 223 of the Islamic Penal Code specifies that “whenever a person accused of adultery claims that he has had a mistaken intercourse, his claim is accepted without any proof or swear unless its opposite is proved by legal evidence”.

Finally, we should refer to Article 194 of criminal procedure law of Public and Revolutionary Courts in criminal affairs ratified in 1999, which allows the court to issue a verdict about the accused who has confessed to the commitment of a crime, provided that “his confession is explicit and causes no doubt and the evidence also indicates the same”.

In brief, in the new Islamic Penal Code, the legislator, instead of loquacity existing in the former law, formulated the rule of darā' in an independent article.

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Reliance on the rule of darā' can be seen in the judgments of the courts and branches of the Supreme Court and also General Board of the Supreme Court. Study of the judgments of the courts and branches of the Supreme Court reveals that judges have relied on the rule of darā' and despite the fact that sometimes, the case apparently suggests the criminality and guilt of the accused, the judge cancels the punishment as a result of the slightest doubt.

Doubt of the accused

There are some narratives from which it is inferred that Hudud are confirmed and executed when the person committing a crime is "aware of the prohibition of the act" and as long as such an act does not exist and the accused is ignorant of the prohibition of his act, he deserves no punishment. Hence, the rule of darā' is also applied to the doubt of the accused.

Regarding the doubt of the accused, Note 1 of Article 82 of Hudud and Qisas law approved in 1982 did not consider simple ignorance due to fault as an accepted excuse. But this note was eliminated in the 1991 Islamic Penal Code. Now, it can be said that this ignorance is an accepted excuse, particularly that the legislator, in multiple cases, has considered the proof of punishment for adultery and wine drinking and robbery as subject to the offender's awareness of the law and fact. Articles 63, 64, 65, 166 and 198 are some examples in this respect.

Probability of mistake and reluctance

The point raised here is whether or not the rule under discussion embraces the probability of mistake and reluctance. That is, if doubt is raised between deliberateness (intentionality) and mistake, considering that the verdict of intentional crimes is different from that of pseudo-intentional and mistaken crimes, can the mentioned rule be used? Moreover, can the mentioned rule be applied in case of the probability of reluctance and lack of free will? Given the generality of the rule and the absence of a specific reason, it seems that if doubt is raised about the intentionality or unintentionality of the act committed by the offender, unintentionality of committing the act is adopted and the punishment for intentional crimes is eliminated. Additionally, concerning reluctance and free will, if the doubt is closer to reluctance, with regard to the generality of the rule, it can be stated that it also includes the probability of reluctance and as a result, the punishment for the committed act is cancelled (Muhaqqiq Damad, 2010, p. 58-59).

Doubt in Sunni jurisprudence

Many Sunni jurisprudents believe that doubt generally includes any factor and motivation causing hesitation in the execution of Hudud and the stages of proving the crime and characteristics and circumstances of the accused and doubt about the opposite being true and also retaliation in kind (Ibn Najim, 1983, p. 237)

Sunni jurisprudents have categorized doubt in a certain way, which is not applied by Shiite jurisprudents (Jaziri, Bita, vol. 5, p. 88; Odeh, 1982, vol. 1, p. 210). For example, Hanafi jurisprudents have divided doubt into two types, Shafi'I jurisprudents into three types and some Sunni jurists into four types. Here, for more information, we briefly refer to one of the writings of Sunni jurists about divisions of doubt. Muhammad Abu Zohreh, one of the Sunni jurists, divides the doubts eliminating the punishment into four types:

1- Doubt about the essence of the crime: Essence of the crime includes the prohibition of a certain act by the Islamic legislator, for which a punishment has been considered. Thus, if the prohibition of the act is doubted, this causes doubt in the essence of the crime. This doubt is similar to the error of law in Shiite jurisprudence.

2- Doubts about ignorance rejecting the criminal intent

3- Doubts about the stage of proving the crime

4- Doubts about the agreement between legal texts and instances (Muhaqqiq Damad, 2010. p. 54-55; See Abu Zohreh, Bita, p. 221).

All Sunni religions, like Shiite religions, have accepted the "rule of darā'" and adhere to it. Zahiri School does not accept this rule and believes that doubt does not eliminate the prescribed punishment (Hudud). In different Sunni religions, although this rule is accepted, there is disagreement over the instances of doubt, some of which are mentioned below:

One of the instances of doubt which has been mentioned is as follows: A man finds a woman in his bed and assuming that she is his wife, he engages in sexual intercourse with her. Here, in addition to Shiites, followers of Maliki and Shafi'i sects and Ahmed bin Hanbal also consider it as an instance of doubt eliminating the prescribed punishment. But Abu Hanifa does not believe in this doubt and says that sometimes, it might be that other people, such as the relatives of that woman or women visiting her, slept in that bed and thus, this doubt cannot be accepted.

Somewhere else, he has been quoted that "whenever someone marries a woman from his maharem (with knowledge of its prohibition) and engages in sexual intercourse with her, it is a mistaken intercourse that has occurred due to the marriage contract and causes the elimination of the prescribed punishment.

Shiite religion does not consider this case as an instance of doubt and followers of Maliki and Shafi'i sects and Ahmed bin Hanbal have the same opinion and have said that as long as the woman is aware of its prohibition, it is not considered as doubt and does not eliminate the prescribed punishment.

To sum up, the existence of a marriage contract anywhere is considered as doubt according to Ahnaf (Odeh, 1982, vol. 1, p. 211) and in this case, even if there is an awareness of the prohibition, it is considered as doubt and the prescribed punishment is nullified; just like a man who concludes a marriage contract with his fifth wife and engages in sexual intercourse with her or marries a married woman or a woman in the days of edde or a woman married and divorced three times and have sexual intercourse with them; here, doubt can nullify the prescribed punishment in Abu Hanifa's opinion since the marriage contract has been concluded.

None of Shia and Maliki, Shafi'i and Hanbali considers the existence of a marriage contract as causing doubt. In case of robbery, Abu Hanifa considers as doubt the trivial property or property that originally belongs to no one, which causes to nullify the prescribed punishment, such as stealing water, stealing the prey and stealing soil, mud, plaster and milk and the like plus straw, bush, pipe, firewood and anything else that is not valuable (ibid., p. 210) while other religions and Shia believe that if any property, including valuable and trivial and belonging to no one, reaches a certain amount of a quarter of dinar, it eliminates the punishment. Below, the opinions of Shafi'i and Hanafi jurisprudents are stated:

Doubt in Shafi'i jurisprudence

Shafi'i jurisprudents have divided doubt into three types:

A) Doubt about the place: If a man engages in sexual intercourse with his wife who is in her menstruation cycle or is fasting, doubt about the place arises. Here, the man has the right to have intercourse with the woman, but during menstruation or fasting, he is deprived of this right. However, since in any case, the place of committing the crime is owned by the man, doubt is created and this doubt leads to the use of the rule of darā'.

B) Doubt about the doer: If a man engages in sexual intercourse with a woman assuming that she is his wife and then, it turns out that she was not his wife, doubt about the doer arises because the basis of doubt is the doer's suspicion and belief and he believed that he did not do an illegal act. According to this assumption, this person is exempted from the prescribed punishment.

C) Doubt about point of view: It occurs when jurisprudents are in disagreement about permissibility and prohibition. For example, when some jurisprudents consider temporary marriage as permissible and some believe that it is illegal and a person concludes a temporary marriage contract with a woman, "doubt about point of view" arises and this person is exempted from the prescribed punishment for adultery even if he believes in the prohibition of this act because as long as jurisprudents have disagreement over the permissibility and prohibition of this act, the opinion of this person has no effect (Odeh, 1982, vol. 1, p. 212).

Division of doubt in criminal law

Types of doubt can be expressed in another way that is more compatible with the standards of customary criminal law. This division is practically more useful and more efficient. We know that in customary criminal law, three elements have been considered for crime: Legal element, spiritual element and material element (wrongful act). With the absence of one of these three elements, crime will not be realized. Doubt may arise in one of these three elements, which are studied separately.

Doubt about the legal element

By doubt about the legal element, it means hesitation about whether or not the Islamic legislator has specified punishment for such and such an act. Just like that if a person marries the sister of his ex-wife who is in the days of edde (in irrevocable divorce), is this act unlawful and illegitimate and considered as adultery or is it permitted and legitimate? Or is smoking prohibited in Ramadan? Or is the marriage of a divorced woman in irrevocable divorce considered as adultery in the days of edde and deserves lapidation or is it considered as fornication and deserves the punishment of whipping? In such cases, doubt arises as to whether or not the committed act has been prohibited and deserves punishment.

In fact, doubt is about the judgment of the act. In other words, doubt about the legal element of the crime is the same as error of law in jurisprudence, and the inclusion of the rule in relation to this kind of doubt has been discussed.

Doubt about the spiritual element

By the spiritual element, it means having the criminal intent and by doubt about the spiritual element, it means to have doubt about the criminal intent of the accused. In order to realize the spiritual element, i.e. having criminal

intent, it should first be ensured that the offender has intentionally committed the act and second, it should be proved that the offender has been aware of the prohibition of the act.

If the arising doubt is about the existence of criminal intent on the part of the accused, the punishment is nullified since penalty is considered for people who are aware of the nature of the act and those who commit an unlawful act out of ignorance cannot be punished. However, if the existence of criminal intent has been proved but the offender has not been aware of the prohibition of the act, this case is regarded as ignorance of law, which is of two types: Ignorance of law and ignorance of fact.

Indeed, the same discussion of the past about errors of law and fact on the part of the accused is raised; that is, in case of ignorance of fact, the offender is absolutely exempt from punishment and in case of ignorance of law, if his ignorance is due to negligence, he is exempt but if it is due to fault, his ignorance is not accepted as an excuse.

Based on the foregoing, it is clear that doubt in the spiritual element of the crime causes to eliminate punishment in various ways: First, doubt in the spiritual element in terms of ignorance of fact; second, in terms of ignorance of law and third, in terms of intentionality in crimes whose orders are different based on intentionality and unintentionality .

Doubt in the material element

It refers to the cases in which due to lack of evidence to prove the claim, the occurrence of a criminal act on the part of the accused is not proved and consequently, the ruler doubts whether or not this act has been done by the accused. Just like the cases in which witnesses are not enough to prove the attribution of adultery to someone or four witnesses are present to prove the adultery by the accused, but their justice is not established. In such cases, the material element (wrongful act) of the crime is doubted.

It seems that given the applicability of doubt in these cases and generality of the rule of darā' and its reasons, the accused is exempted from penalty. Moreover, punishment is the result of the crime and when there is a doubt over the cause of the crimes and its attribution to someone, it is not logical that the result (punishment) be considered as definite. Here, error of fact is raised for the ruler as to whether or not the offender is the same as the accused. In such cases, if doubt arises, the accused should be exempted from punishment. In the end, we refer to a jurisprudential instance:

In connection with this issue, if a woman is accused of adultery and four witnesses testify for the commitment of adultery on the part of the woman but she claims that she is a virgin and four women testify for her virginity, the woman should be exempted from the prescribed punishment according to Muhaqqiq Hilli (Hilli, 1969, vol. 4, p. 157) while a number of jurisprudents such as Saheb Jawaher in Jawaher al-Kalam, Sheykh Tusi in Al-Mabsout, Shahid Sani (Ameli, Bita, vol. 2, p. 343), Tabatabaei (Tabatabaei, 2001, vol. 2, p. 472) and Imam Khomeini in Tahrir al-Wasilah believe that the prescribed punishment should be eliminated for this woman based on the rule of darā'.

III. CONCLUSION

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Overall, based on what has been mentioned so far, it can be understood that the rule of darā' can be applied in both error of fact and error of law. We also have doubt of the judge and the accused, probability of mistake and reluctance and doubt about the three elements of crime, which can be extended to the punishments other than Hudud. But in this research, other doubts have also been addressed. One of these doubts is whether or not it is expedient to punish a person who has committed a crime deserving penalty. Here, according to the rule of darā' and the scope of its inclusion, a new doubt arises which is doubt about expediency and requires that the punishment should not be performed. Based on the arguments and evidence provided, it can be stated that if the execution of penalty is not expedient, the Islamic ruler can prevent its execution based on the rule of darā'. This can be seen as a general rule and be applied in all punishments. Besides, another doubt was also discussed which is the probability of repentance and punishment can be eliminated with reliance on the rule of darā' in case of doubt about its achievement. These doubts can be extended to Hudud, including right of God, right of people, Qisas, Ta'zir and even atonement (kaffarah).

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