The status of Dora Rule in Islamic Punishment Law

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Abstract

One of the most important rules in Islamic Punishment Fiqh accepted by Emamieh and Ameh faqih is Dora Rule admired clearly in Islamic Punishment Law (2013) by which the judge can implement a perception which more favorable for the accused in the cases of silence, ambiguity and conflict of laws. Although the document of this rule is concurred by faqih in all religions, there are disagreements in the scope and benchmark between faqih so research on this rule is necessary. Right perception of such rule supports judicial courts in executing justice and defending the rights of the accused and prevents unfavorable contemplations. Changes in Islamic Punishment Law on Dora Rule are considered in present paper.

Keywords: Dora Rule, mistake of law, mistake of fact, hodud, retaliation, taazirat, blood money
Introduction

It is an important applied rule in penal verdicts in the benefit of person subjected to hodud, retaliation or tazirat and one can say the by descriptive rules not similar to common crimes to prove criminality or innocent in all condition and the evidences to determine the crime should studied fully. In common law it is said one should respect suspicious in the benefit of the accused always and basis of description is the legality principle of crime and punishment since it is believes that if thousands of criminals escape justice it is better that mistake in punishment as Imam Ali (PBUH) says:

إذنوا الحذود عن المسلمين ماستطعت فان الإمام لان يخطى في العفو خير من ان يخطى في العقوبة

(Imam Ali, 1401: 399). Islam is the leader of justice in the world centuries ago respected it and dora rule is provided by Prophet with paramount applications (Klein, 1988: 174). There is no doubt that is fruitful by certainty. Present paper attempts to refer to well – known jurisprudential books and compare the changes made in Islamic Penal Law by jurisprudential rules. Noteworthy, some papers are composed by different authors but they have not compare the status of this rule in Iranian penal laws and Islamic Punishment Law.

Rule evidences

The most important evidences in Emamieh and Sunni narratives include:

1. Emamieh

Narratives

General narratives:

Imam Ali (PBUH): defeat hodud by doubts (Sadoogh, 1401: 399)

In Emamieh great scientists believe in evidences obviously as Sheikh Sadoogh writes:

كنا جليلًا، حافظًا للاحادیث، بصيراً بالرجال، ناذاً للاخبار، لم ير في القوییي هثلَ فی حفظَ و کثشٍ علوَ

(Toosi, 1406: 256). Ebn Edris recalls a narrative in which people are concurred without any dispute (Ebn Edris, 1407: 475). Sahib Riaz has used explicit context for this narrative (Tabatabaei, 1404: 613).

Narratives on excuse of ignorant

There are many evidences on ignorant like Sahiheh Abi Obeideh

الف, صحيحه ابي عبيد هده: قال

أبو جعفر(ع) لو وجدت رجلًا كان من العجم أفر بجمله الإسلام ولم ياته شيء من التفسير زنى أو سرق أو شرب خمرًا، لم أقم عليه الحد إذا جهله، الا أن تقوم عليه البنية إذا قد أفر بذلك و عرفه (Ameli, 1404: 323).

B. sahiheh Abdulsamad Bin Bashir:


Other reasons:

Furthermore, there are other reasons in Imamieh on Dor rule.

Companions confirmation

All Emamieh companion have referred to this rule and granted fatwa accordingly. In most criminal problems, when a doubt raises, jurists say

لاه من الشیبه الدارئه. Imam Khomeini is cited that if jurists concur in fatwa it is biggest reason for us even if there is no narrative or narrative is weak since the reason bigger and consensus is a reason for its credit (Moosavi Bojnurdi, 2010: 122).
Adaptability with rational principles
We know that admiration is the condition of actuality since it is proportionate of effect to cause as if not all elements do not exist in outside effect is not existed therefore if confirmed and all details determined the verdict is proved (Mohagheg Damad, 2010: 48; Moosavi Bojnurdi, 1998: 154).

Basis on discount and negligence
Islam is based on easy making in all fields. The Prophet asserts “تعثت علی الششیعَ السوحَ السهلَ” (Toosi, 2006: 141). It prevents any doubt on punishments and more tangible (Bahrami Ahmadi, 2011: 144). Islam is based on discount and negligence and judge consider confessor as the Allah right (Bayy, 2014: 194).

General
قال رسول الله(ص) :“إدرنوا الحذود عن المسلمين ما أطعتهم، فإن وجدتم للمسلم مخرجًا فخلًا، فإن الإمام لن يخطي في العفو خير من أن يخطي في العقوبة؛” as you can defeat hodu from Muslims and if you find a way out of punishment release them since it is better than punishing an innocent (Tarmazi, 1415: 438)
قال رسول الله(ص) :« ادعوا الحذود ما وجدتم له مدعًا If you found a way to defeat hodud, defeat it (Ebn MAjeh, 1401: 112).

Types of doubts
In a categorization, discussions on doubts are divided into jurisprudential and legal while jurisprudential is divided into Emamieh and general jurisprudence and different types are imaginable for each.

Jurisprudential
Doubt categorizations are fully different in terms of Emamieh and general jurisprudence and noteworthy that that provided categorizations in general fiqh does not exist in Emamieh.

Emamieh
There are two verdict and subject. Dora rule differs in verdict doubts and it seems that such rule is general and includes fault and ignorance Mohagheg Damad, 2010: 57; Moosavi Bojnurdi, 1998: 156).

Verdict
It means mistake in Divine side verdict and ignorance of credible verdict such as smoking which should be removed by lawmaker (Ansari, 2004: 232).

Subject
If means doubt in trivial Divine verdict or an issue out of a religious verdict like when a man knows that fornification with strange woman is haram but in night he finds a woman in his home and intercourses since he believes that she is his wife and doubt removal is conducted by investigation in external affairs (Ansari, 2004: 232). There is no difference among jurists on subjective doubts.

Public
Doubts are divided into four parts. Doubt in actor by which action is not haram like when someone has sexual intercourse with a strange woman while he does not know that she has not been his wife (Mohammad Ezam, 1426). Doubt in location by which the basis is location of action like intercourse with wife during her monthly periods (ibid). Doubt in contract by which a man is mahram to woman to whom contract is read and noteworthy it has caused differences between Shafei and Maleki jurists (ibid). Doubt in direction by which fatwa is
that correct action by bad deed like marriage of a girl without the permission of her parents (ibid). in common criminal law there are three radical elements: doubt in legal element, doubt in spiritual element and doubt in material element (Golduzian, 2007: 178). The first one means doubt in correctness of a deed. In common criminal law it is necessary to commit a crime by self since it is not the intention to transfer asset by material element in a person in criminal actions to prove it (Zeraat, 2013: 204). In criminal laws, human intention cannot be prosecuted or punished even too ugly. One important discussion is manat in doubt namely when someone say doubt is occurred, is it quasi the accused? What is benchmark in manad in doubt? As a result one should believe in the scope of Dora rule to know whether it involves other punishments like retaliation or blood money. Hodud means the punishment its extent is determined in the law which has no opponents and all jurists believe that divine punishments are based on discount and negligence and in Islam it is more emphasized on covering the guilty whether it is halal and understand upon the act that it has been haram. All jurists believe that دم اهشء هسلن does not differ from Dora rule and it requires wasting the right of people.

It seems that lawmaker in retaliation follows Dora rule in Islamic Punishment Law like article 482 or article 513. It is also true on article 479. Lawmaker has also considered blood money since the blood of no Muslim is wasted and even if the killer is not found, the blood money will be paid through right of people like article 487 or article 484 (Zeraat, 2013: 203). Lawmaker has clarified that ignored person is irresponsible and if not clarified for judges it can be used as an evidence to show that he has some the same thing and science education is not possible for him (Ameli, 1997: 286). There are also exclusions in Dora Rule like article 121 of Islamic Punishment Law which has excluded moharebeh, theft, corruption on the earth and ghazf. Considering contrary concept of other crimes like fornication and adultery since Islam has special sensitivity to sexual crimes one can say that the tendency of holy magistrate is to cover sexual crimes not to determine them.

**Conclusion**

Despite of the importance and application of Dora rule in Iranian Penal law, in Islamic Punishment Law (1996)it is not accepted comprehensively while it was mentioned briefly in general criminal law. In Islamic Punishment Law (2013), lawmaker considered this deficiency and accepted it explicitly in articles 120 and 121. Research findings indicate that it includes hodud, retaliation and taazirat and only blood money is out of it since it wastes the right of people. However, it is excluded in some crimes like moharebh, corruption on earth, theft and ghazf.
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