

## Critical Review of Subordinate Punishment in Islamic law and its Challenges in the Iranian Penal Code

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### ABSTRACT

*The nature of the accessory punishment in Islam is specified based on the crime type. Thus, the accessory punishment is changed in its nature with the change in the type of the perpetrated crime so as to target a specific goal and avoid harming the other rights of the convict and additionally prevent the generalization of the accessory punishment to the convict's family and relatives via observing the principle of personalization of the punishments. In Islamic jurisprudence, the imposition of the accessory punishment on the crime title and its change in nature in respect to the crime type has led to the observance of the principle "crime-punishment proportion". However, as held by the authors of the present article, the principle of proportion has been occasionally neglected in Iran's current regulations and statutory provisions and Iran's rules solely determine the accessory punishment based on article 25 and according to the conviction amount as well as based on article 26 wherein 12 types of accessory punishments have been considered for all of the crimes without taking the crime type and criminal's personality into account. Thus, it seems that this case differs from the Islamic jurisprudence method.*

*Keywords: accessory punishment, Islam, Islamic punishment, Iran, criminal dignity restoration, amnesty, repentance*

### Introduction

Penalties are basically divided into three types of main, complementary and secondary penalties based on the relationship that they have with each other. Main penalty which has been dealt with by the legislator in the article 14 of Islamic Penal Code adopted in 2013 includes penalty, retaliation, blood money and discretionary punishment.

Then, main penalty represents the punishment that court's sentence allocates for the one who has committed a crime according to the law. It is noteworthy that given the point that secondary penalty can be enforced only as regards natural persons, the current essay is focused on secondary penalties which are enforceable regarding the natural persons at issue and by main penalties we refer to the main penalties of the natural persons not the penalties stipulated in the article 20 of Islamic Penal Code which are about the legal persons.

The legal experts have defined main penalty as follows:

"For every crime the legislator has determined one or a number of penalties which can be enforced merely based on the decisive sentence of the court. These penalties are main in the sense that their performance bond is the order of legislator and are not secondary to any other penalty".<sup>1</sup>

"Complementary penalties refer to those penalties which are complementing the main penalties plus the fact that they must be mentioned in the verdict and they are never sentenced alone".<sup>2</sup>

"Complementary penalty is a penalty that complements the main penalty in view of its effectiveness and goal. This penalty is enforced as regards those convicts whose main penalty is not sufficient and their honor and fame are required to be violated in the society. Thus, not only they are not of lesser importance rather from the point of view of penalty they might be even more significant than the main penalties".<sup>3</sup>

Although complementary penalties are discussed in this article we still need to mention that the idea suggested by Dr. Zeraat in this part as to the goal of complementary penalties to the effect that they are supposed to dishonor the convict is not in line with all the fifteen clauses of the article 23 of Islamic Penal Code. Then, his definition of complementary penalty despite its being useful is not comprehensive and exclusive. It seems that we can think of complementary penalty as a means of rehabilitation of offender (e.g. clauses L and M of article 23 of Islamic Penal Code) or even prevention from occurrence of crime (e.g. clause G of article 23 about keeping arms) or even one might consider it a means for forcing the offender to recompense the damages resulted from the crime (e.g. clause J of article 23 according to which the offender is forced to provide public services which vary from one case to another). Then, according to clause J of article 23 the court can order the offender to provide public services).

For example, the court can force the person who has committed a crime against environment to provide services that cover environmental interests.

But secondary penalties which are the main focus of the present essay are outlined by the legislator in the article 25 of Islamic Penal Code adopted in 2013.

Secondary penalty is defined as follows:

"It refers to a penalty that has been stipulated in the law and is enforced along with main penalties as such without requiring any stipulation by the court in the sentence".<sup>4</sup>

There is another definition which reads: "Secondary penalty consists of penalties which are enforced along with the main penalties without any mention in the court sentence according to law. In other words, secondary performance bond consists of penalties that there is no need for their indication in the criminal sentence as they are resulted from the criminal conviction itself".<sup>5</sup>

Then, it should be mentioned that secondary penalty is a penalty that deprives the convict from social rights after the enforcement of the sentence.

It also needs to be explained that "complementary penalty is different from secondary penalty, because the former is a type of judicial intensification that takes place by the court after finding the convict dangerous to the society while the latter is not indicated in the sentence. However, complementary penalty that can be enforced against the intentional and non-intentional convicts according to the article 23 of Islamic Penal Code must be mentioned in the court sentence".<sup>6</sup>

In this essay we have sought to provide a practical and critical discussion of secondary penalties as well as the methods of their enforcement in a comparative context in the light of the views of legal experts and judicial procedure as compared to the Islamic jurisprudence.

Article 25: Decisive criminal conviction in intentional crimes after the enforcement of the sentence or suspension of the sentence the convict is associated with deprivation from certain social rights as a secondary penalty.

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<sup>1</sup> Ardabili, Mohammad Ali, 2018, Public Penal Code, vol. 3, Third Edition, Mizan Press, p. 62.

<sup>2</sup> Ibid: 64.

<sup>3</sup> Zeraat, Abbas, Public Penal Law, vol. 2, Javdaneh Press, 2013, p. 116.

<sup>4</sup> Zeraat, Abbas, op. cit., p. 118.

<sup>5</sup> Hosseinzadeh Soroushjani, Saeed, Secondary Penalties in Criminal Law of Iran, Majd Press, 2015, p. 59.

<sup>6</sup> Zeraat, Abbas, Detailed Commentary of Islamic Penal Code, Jangal Press, 2014, p. 361.

A. Seven years in sentences related to the penalties of the execution and life in prison from the date of suspension of the main sentence.

B. Three years in sentence to mutilation as retaliation; if the wergild of the crime is more than the half of the whole blood money of the victim, the secondary penalty will be exile and fourth degree jail term.

C. Two years in sentence to lash; mutilation if the wergild of the crime is half or less than the total blood money of the victim and fifth degree jail term.

Clause 1: In cases other than the abovementioned once, the conviction details will be registered in the criminal record of the convict although they will not be reported in the certifications issued for the authorities unless upon the request of the judicial authorities or for revision.

Clause 2: In the forgivable crimes if the sentence enforcement is suspended due to the forgiveness of the claimant or private plaintiff the secondary effect of it will be neglected too.

Clause 3: In conditional remission or freedom, the secondary effect of conviction is cancelled after the passage of absolution. The felon is deprived from his social rights during his conditional freedom term as well as during the enforcement of the sentence.

### **Explanation of some points in article 25:**

From the phrase "criminal conviction in intentional crimes" one is suggested that firstly, the final sentence should have been issued. Then, as long as the convict is not declared to be a criminal in a sentence the secondary penalty shall not be enforced. The other point is that the offender has committed an intentional crime. In other words, no secondary penalty is enforced to the felon who has not committed an intentional crime. For example, in article 714 of discretionary penalties of unintentional murder, which takes place due to carelessness or reckless actions or failure of observation of governmental instructions or lack of skill and so on and so forth. Although we can sentence the offender to three years imprisonment plus payment of wergild there will be no secondary penalty because of the no intentional nature of the crime.

The phrase "after the enforcement of the sentence or passage of time" suggests that the conviction sentence should have been enforced in advance so that we can enforce the secondary penalty as regards the convict. Or if the sentence is not enforced after the passage of time the secondary penalty will be enforced. It needs to be mentioned that passage of time as indicated in the article 25 refers to the passage of time of the enforcement of the penalty which has been explained by the legislator in the article 107 of Islamic Penal Code because in the passage of time of prosecution no sentence has been issued and thus there will be no decisiveness. As we mentioned earlier, according to the opening phrases of the article 25, decisive sentences are associated with the secondary sentences.

### **Assessment of the clause A of article 25 and some points concerning it:**

Clause A: Seven years in sentences of execution and life imprisonment from the date of suspension of the enforcement of the main sentence. As the legislator's phrase suggests, if the decisive conviction of the offender is execution or life imprisonment a secondary sentence of 7 years is enforced to the convict. For example, if the offender is sentenced to life imprisonment and without even one day in jail the enforcement of the sentence is suspended the starting point of the secondary penalty is from the date of suspension of enforcement up to 7 years. However, there are doubts regarding the execution sentences to the effect that if the retaliation is part of the life taking sentences or this is merely restricted to the stoning and execution? "It was better if the legislator had clarified what he means by the term life taking. However, it seems that life taking besides stoning and execution also includes retaliation because the legislator was outlining the sentence and this should have been done via description of clear examples. Here life taking has more than one extension. However, since wherever there is no reservation we have to consider the judgement to be absolute and unconditional in the sense that if the legislator was referring to certain example he should have mentioned it. Needless to say, it is logical to assume that if the legislator intended to allude to certain extensions he should have done it in clear voice".<sup>7</sup>

<sup>7</sup> Legal Institute of Tandis-e Tadbir va Omid, article entitled Concept of Life Taking.

Thus, this definition suggests that the legislator by life taking in the article 25 refers to any penalty that leads to the death of the convict. Then, retaliation is also included here because it causes one's death.

Question: If in the latter part of the clause A of article 25 the phrase "enforcement of main sentence" is the Philip side of "secondary sentence"? An if the answer is yes what is a secondary sentence and where does it work and how?

Let's suppose that someone has committed an intentional murder and he is sentenced to death and retaliation by the court but the family of the victim decide to forgive the murderer and thus the retaliation sentence is cancelled. However, the offender is sentenced to 10 years imprisonment according to the article 612 of Taziraat.<sup>8</sup> In this case under which clause of article 25 the convict must endure the secondary penalty? Whether the judgment of the article 612 will be a secondary penalty?

If we choose the clause A, since the main penalty was life taking (death) and now the blood owner has forgiven and the death penalty is cancelled? Or based on the clause B according to which the penalty is three years imprisonment?

According to the article 225 of Islamic Penal Code, the married fornicator and the married fornicates who have been sentenced to death by stoning and this sentence is not possible to be enforced while the crime is established based on strong evidence the criminals will be sentenced to lash. Then, lashing is a secondary sentence which is enforced due to the impossibility of the enforcement of the main penalty.

In this case if the final phrase of the clause A of article 25 is taken to be in the sense of post enforcement we will understand that a hundred lashes is a secondary penalty. Then, the clause A will govern. In other words, the convict must be sentenced to seven years imprisonment due to the suspension of the stoning penalty. Now if we want to act according to the article 225 of Islamic Penal Code, i.e. we think that retaliation is the main penalty and the forgiveness suspends the enforcement of the penalty, the secondary sentence must be enforced after the suspension of the enforcement of the main penalty. Here it might be objected that if the secondary penalty of such a convict to be seven years imprisonment as mentioned in the article 25 while his main penalty according to the article 612 of Taziraat from the point of view of the public aspect of the crime the convict is sentenced to 10 years imprisonment and the secondary penalty comes to end while the offender is still in the jail. This is indeed a violation of the philosophy of the secondary penalty because it is supposed to cause restrictions for the convict after the main penalty.

In this regard the view of one of the legal experts is as follows: "based on the clause A of this article, the date of suspension of main penalty in the death sentences is the date of start of secondary penalty. Some experts believe that in those cases where the execution is stopped and the convict bears the imprisonment penalty the immediate beginning of secondary penalty from the date of suspension of execution while the convict is in prison is object able. However, one needs to note that when a convict sentenced to death penalty is forgiven by the victim's family he will be treated based on the clause B of article 25 of Islamic Penal Code. Accordingly, after the full enforcement of the discretionary imprisonment the term decided for the secondary penalty starts. For the forgiveness of the blood owners cancels the sentence and it does not halt the enforcement of the main penalty so that the convict to be sentenced to the clause A of this article. In fact, the main penalty of the murderer in the event of the cancellation of retaliation sentence is the degree 4 discretionary imprisonment. According to the clause 3 of article 25, the convict is derived from social rights both during and after the imprisonment".<sup>9</sup>

On the other hand, some experts contend that "after the cancellation of execution due to any cause the convict is derived from his social rights for seven years and if the convict is sentenced to imprisonment following the cancellation of death penalty the measure of his deprivation from the social rights will be the cancellation of death penalty not the discretionary penalty".<sup>10</sup>

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<sup>8</sup> Article 612 of Taziraat: anyone who commits intentional murder regardless of having a plaintiff or not and he is forgiven by the relatives and family of the victim no matter for which reason the court must sentence the convict to three to ten years imprisonment due to the action that threatens the security in society.

Note: In this case accomplicing the murder in intentional murder will be sentenced to one to five years imprisonment.

<sup>9</sup> Mohebi, Jalil, *Explanation of Islamic Penal Code*, Mizan Press, 2018, p. 213.

<sup>10</sup> Goldoozian, Iraj, *Islamic Penal Code*, Majd Press, Seventh Edition, 2017, p. 87.

As to the first theory one needs to state that if we consider the forgiveness of the victim's family to be equal to the cancellation of penalty (and not the suspension of enforcement of penalty) it could be asked that if after forgiveness of the blood owner the penalty stipulated in the article 612 of Taziraat was not enforced from the point of view of public aspect of crime or we did not have such a penalty due to the forgiveness of the plaintiff and the court does not consider the action of the convict as a threat to the public order and the convict is not sentenced to the penalty stipulated in the article 612 of Taziraat if we still consider cancelled the retaliation sentence which was issued before and was not enforced due to the forgiveness of the blood owner or we see this act of forgiveness a basis for suspension of the penalty?

If we believe that retaliation is the right of the owner of blood and he has neglected his own right and requested weregild instead, then given the previously mentioned facts, here we should say that the retaliation penalty has been canceled and the weregild is asked to be replaced. However, given the clause A of article 25, the legislator has said that after the suspension of the enforcement of the main sentence and in this way we are reminded that weregild can be effective as a secondary penalty only if the victim's family forgives the convict. The conditions of the clause A of article 25 are still enforceable (here it is all supposed that the conditions of the article 612 of Taziraat law do not exist).

Now we suppose that after the finalization of the retaliation sentence the victim's family thoroughly forgive the convict in the sense that they do not expect even any weregild and the conditions of the article 612 do not exist the sentence can be declared cancelled without being followed by the secondary effects only if the crime is forgivable (e.g. Qazf (accusing someone of having fornication or sodomy) which based on the clause 2 of article 25 is not followed by secondary effects. In this case we can say that the sentence has been wholly cancelled. Then, we will have neither the main penalty nor the secondary penalty and its effects). However, intentional murder is unforgivable. Then, even if the victim's family decides to forgive the convict the penalty is just suspended not cancelled because the conditions stipulated in the clause A of article 25 prevail.

Now given the previously mentioned points we know that the penalty is not cancelled. Let's suppose that blood owner has forgiven the convict after the finalization of the sentence and the court sues the convict from the perspective of the public aspect of the crime and the conditions of article 612. Now given the points mentioned before to the effect that the previous sentence is not cancelled and the convict has been sentenced to the penalty indicated in the article 612 (three to ten years imprisonment). In this case according to which one of the clauses of the article 25 the convict will undergo through the penalty?

If we seek to answer the question resorting to the principle of interpretation in the interest of the convict we have to state that it is in the interest of the convict that the clause A of article 25 as regards the deprivation of the convict from social rights for seven years from the date of the suspension of the death penalty to be enforced.

#### **Assessment of Clause B of Article 25 and Some Points concerning it:**

Clause B: three years in the mutilation sentence; retaliation if the weregild of the crime is more than half of the weregild of the victim; exile and degree four imprisonment.

Mutilation penalty: if the court sentences the convict to mutilation based on the law (e.g. sentence of war against the regime if the court chooses the penalties stipulated in the clause C of article 282 of Islamic Penal Code (i.e. mutilation of right arm and left leg) then after the enforcement of the sentence the convict is sentenced to three years imprisonment as secondary penalty according to the clause B of article 25.

Mutilation as retaliation if the weregild of the crime is more than the half of the weregild of the victim:

If the convict commits a crime against another person due to which he is sentenced to mutilation if the weregild of the crime is more than half of the total amount of the weregild of the victim, e.g. if the convict has caused both tympanic membranes of the victim's ears to be ruptured, according to the article 600 of Islamic Penal Code one whole weregild must be paid to the victim. Thus, since the crime is more than the half of the total weregild of the victim the convict must be sentenced to three years imprisonment based on the clause B of article 25.

It is noteworthy that no secondary penalty is forced to weregilds rather the weregild's amount just determines the term of secondary penalty. For if we consider weregild a penalty (not damage

recommendation) as it is mentioned in the article 14, the weregild is the main penalty of unintentional crimes. However, in the opening of article 25 the legislator has mentioned that secondary penalty can be enforced along with the main penalty of intentional crime.

Moreover, in those crimes where retaliation is not possible for any reason (e.g. fear of prevalence), secondary penalty is not enforced unless in the conditions stipulated in the article 614 of Taziraat law. In this case if the court sentences the murderer to a prison term more than two years up to five years the secondary penalty will be decided as follows.

Exile: if the court sentences the convict to exile according to the final sentence then the convict will be deprived from his social rights for three years.

Note: exile sentence must be the main penalty so that the convict to be deprived from his social rights. As a result, the exile sentence issued as complementary penalty (clauses A and B article 23 of Islamic Penal Code) is not included in this clause.

Degree 4 imprisonment: for the imprisonment more than 5 years secondary penalties are decided.

It is also noteworthy that the 5 years term is itself part of the degree 5 (in view of the article 19 of Islamic Penal Code).

### **Assessment of clause c of article 25 and indication of some points concerning it:**

Clause C: Two years in sentence to lashing, mutilation if the incurred weregild is less than half of the weregild of the victim and degree 5 imprisonments;

Lashing: lashing as a religiously enforced penalty is associated with secondary penalty and this suggests that Taziri lashing will not be followed by secondary penalty. Thus the convict will be deprived from social rights for two years as mentioned in article 26 of Islamic Penal Code. (This can be criticized which will be discussed in the part devoted to the effect of repentance on secondary penalty).

Mutilation if the weregild of the committed crime is half or less than the half of the weregild of the victim: The same points mentioned in the clause B are also the case with this but there is still one difference related to the amount of weregild of the body member of the victim. Then if the member weregild of the victim is half or less than half of the whole weregild the secondary penalty that must be undertaken by the victim is 2 years. Degree 5 Imprisonment: If in the court verdict the convict is sentenced to degree 5 imprisonments for two years after the end of this term he must be deprived from his social rights as secondary penalty. Note: the two years and one day up to five years jail term is degree 5 imprisonments.

A criticism of administrative procedure of the Judiciary as to the enforcement of the note 1 of Article 2511:

It seems that the administrative procedure as regards the enforcement of note one of this article is in conflict with the clear content of the text as well as the concept of this note; in other words, in current procedure if one of the non-judicial organizations request one's criminal record even if the convict has been exonerated from the allegations these are still reported as effective record. This is indeed in conflict with the latter part of the note (unless upon the request of judicial authorities). Moreover, given the last line of the consulting idea no. 1393/4/23-96/93/7 to the effect "it is not included unless upon the request of the judicial authority in which case even the ineffective conviction is also reported". Here it is evident that only upon the request of the judicial authority a full criminal record has to be provided.

This interpretation is more consistent with the interests of the convict and prevents from personal taste. For example, if the convict after finishing the prison term as mentioned in the article 25 of Islamic Penal Code along with the deprivation stipulated in the article 26 decides to apply for a job in a governmental organization his criminal record can be misused by some officials for putting pressure on the employee.

Critical Assessment of secondary penalties in Islamic Jurisprudence and its comparison with Positive Law: It needs to be mentioned that very long before contemporary legal schools to turn penalty and secondary effects of a crime, Islamic jurisprudence had dealt with the secondary effects of crimes in order to secure the interests of society and in some cases those of the individuals. For example, when someone

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<sup>11</sup> Note 1 of article 25: in other cases the details of crime will be registered in the criminal record of the convict although they will not be reported unless upon the request of the judicial authorities.

falsely accused some other person of having done fornication or sodomy this accuser was deprived from being a witness in order to secure the social interests and for this reason his testimony was not accepted in the court so that no harm is done to anyone due to his false testimony<sup>12</sup>. In this way people's rights in the society were secured. Thus, it was in the interest of the the convict to be encouraged to repent so that this side effect to be tackled. Even the convict could be called a believer due to repentance and his testimony could be heard. One of the most important features of the crime effects or secondary penalties of the crimes in Islamic jurisprudence is the compatibility between the committed crime and secondary penalties and its difference with the positive law lies in the fact that in Islamic jurisprudence crime effects or secondary penalty are decided in view of the type of crime and criminal title and then there is compatibility between crime and secondary penalty. However in Islamic Penal Code not only the secondary penalty is not based on the type of crime and even in some cases is irrelevant and in it secondary penalty is forced based on the amount and type of main penalty. It is noteworthy that there should be compatibility between the crime and the penalty and the determination and allocation of penalty must be done and legislated in view of the type of crime. Nevertheless, in positive law despite the Islamic title the secondary penalty is dealt in different way. In positive law the secondary penalty is enforced in proportionate to the penalty indicated in the verdict. Here one might ask if the measure of determination and enforcement of the secondary penalty is correct. The other question is that whether the secondary penalty of all crimes is the same and it is just lessened and added based on the amount of main penalty? Doesn't another question appear out of this question that what is the aim of the legislator of secondary penalty? Is he after neutralizing the dangerous state of the convict and in which price? Is it not suggesting that the legislator has just dogged his responsibility by legislation of such a secondary penalty while every specific crime must have a proper secondary penalty?

It seems that secondary penalty is compatible with justice in Islamic jurisprudence as compared to positive law. It is very likely that the convict does not feel oppressed and sees the result of his wrong action proportionate to his actions. The other benefit in Islamic jurisprudence is that the secondary penalty belongs to the type of crime and in other words to the nature of crime as we can see in accusing someone of fornication or sodomy. Thus, in positive law given the fact that in forgivable crimes in the event of forgiveness of the plaintiff not only the main penalty is halted rather the crime effects are also vanished. For example, in the crime of accusing someone of fornication or sodomy if the wrongly accused one forgives the accuser both the penalty and the crime effects are lifted. This is because the secondary penalty is a function of the main penalty not the crime itself but in Islamic jurisprudence, e.g. as to Qazf, even by the forgiveness of the accused one the main penalty (eighty lashes) is forgiven and according to the content of the verses 4 and 5 of Surah Al Nur<sup>13</sup> the testimony of the accuser is not accepted.

Then, this is because the secondary penalty of the wrong accusation of someone of fornication and sodomy (cancellation of testimony) has been related to the committed crime not the penalty of eighty lashes. Here another spoint can be inferred to the effect that in Islamic jurisprudence the reason for secondary penalty is also clear. For example, in this false accusation of fornication the convict is told: since you have committed wrongly accusing someone of fornication you will receive eighty lashes and on the other hand since you have proven your wrong action we will not accept your testimony.

Then, both the reason of deprivation of the wrong accuser from testimony is evident (i.e. violation of justice and wearing the cloth of corruption) and there is also compatibility between the crime and the secondary penalty. Therefore, it seems that in positive law it is better the secondary penalty to be due to crime (type of crime) not due to the penalty of crime. For example, we suppose that the person A is summoned to a court at Tehran for fraud and is sentenced to one year imprisonment and is also fined. The person B in another court at Tehran is sentenced to three years jail and fined because of fraud. In view of

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<sup>12</sup> Testimony: report of a right in the interest of a person against a third party.

<sup>13</sup> And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations),- flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors;- Unless they repent thereafter and mend (their conduct); for Allah is Oft-Forgiving, Most Merciful (Al Nur, 4-5).

the degree of imprisonment of the persons A and B we find out that no secondary penalty is enforced to the person A but for the person B according to the clause C of article 25 of Islamic Penal Code a secondary penalty of two years jail is enforced. In the example of fraud if a secondary penalty was enforced it would have better hit the target of secondary penalty including social defense. We see that the person A can sign up as the candidate of Presidency and there is no legal ban as regards him unless his competency is not verified but the person B according to the clause A and note 2 of article 26 of Islamic Penal Code can never nominate even for the village council. Whether these people are both fraudulent? Can the society trust the fraudulent? What is the difference between the conman A and the conman B that we can trust the former but not the latter? Whether the lesser amount of fraud can lessen its ugliness or the higher amount can add to it?

I wish the effective cases of increase or decrease of the fraud sentence including the lesser or higher amount and fraud conditions affected the main penalty's conditions not its secondary penalty so that the social defense could have been realized as one of the goals of secondary penalty.

By the way it needs to be reminded that fraud is one of the many crimes and it was used as a basis for better understanding of the intention of the author.

### **Secondary Effects of Sentence to Apostasy:**

Apostasy denotes an act of giving up one's religious creed (here Islam) and turning to paganism.<sup>14</sup> "Given the history of religious apostate, apostasy has been divided into two types: primordial apostate and national apostate – primordial apostate is one who is born of Muslim parents and accepted Islam after his puberty and then has converted to atheism. This person has turned his back to the primordial nature and this is why he is called primordial apostate. National apostate is someone whose first religion was a religion but Islam and only later he has converted to Islam and then he has become an atheist again and in other words, he has returned to his previous nation".<sup>15</sup>

The conditions of enforcement of the main penalty of the apostate differ in view of the type of apostasy but in the secondary penalty they are almost the same.

### **A- Marriage Cancellation:**

Among the secondary penalties of apostasy one can refer to the divorce of the apostate with his wife. The marriage cancellation and waiting period differ based on the gender of the apostate and penetration state; if the penetrated woman becomes primordially or nationally apostate and also the man becomes a national apostate the marriage is cancelled. However, the wife must keep waiting period and if during this period the husband repents and converts back to Islam these become a couple again; because in these three assumptions no complete separation has taken place and the marriage is not totally cut; in other words, the marriage is suspended. Nevertheless, if the wife is not penetrated from the moment of apostasy the separation becomes official and even after the presumed repentance they will not joint again.<sup>16</sup>

In primordial apostasy if the man is an apostate the divorce is once forever and even after the repentance there is no way back and the wife is required to keep waiting period for death.<sup>17</sup>

### **B- Confiscation of Properties**

"The Shia scholars unanimously believe that the properties of the apostate must be confiscated and transferred to the inheritors while Sunni scholars are divided as regards the one to whom the properties are supposed to be transferred. In Shia jurisprudence, confiscation of properties is done in different ways depending on the type of apostasy and the gender. To put it otherwise, if the apostate is a woman

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<sup>14</sup> Al Mufradat fi Gharib Al Quran, p. 192.

<sup>15</sup> Vahedizadeh, Javad, Place of Secondary Penalty in Criminal System of Islam, Journal of Transcendence of Law, no. 5.

<sup>16</sup> Helli, Mohmmad Ibn Yusif (Allameh Helli), Ershad Al Azhan Ela Ahkam Al Iman, Qom, Islamic Press, vol. 2, first edition, 1980, p. 189.

<sup>17</sup> Vahedizadeh, cit. op., p. 5.

regardless of being primordial or national and also in national apostasy of the man the properties of the person are not confiscated and confiscation is restricted to those conditions that the apostate is a man and the type of apostasy is primordial".<sup>18</sup>

#### Secondary Effects of Sexual Crimes:<sup>19</sup>

A- Marrying the married woman or a woman who is passing the waiting period for another marriage:

If a man marries a woman who is married to another man or is in the waiting period knowing the facts about them he will be banned from marriage with these women for lifelong.

B- Marriage during Hajj:

If a man marries a woman during Hajj knowing its prohibition even if he has not slept with her the woman will be prohibited for him forever and accordingly in article 1035 of Civil Code it is stipulated: "It is unlawful to marry a woman during Hajj and this will cause its eternal prohibition".

C- Adultery with Married Woman:

If a man commits adultery with a married woman he will be banned forever from marrying the woman. By the way the woman who is passing her returning period is taken to be a married woman.

Sodomy:

If two persons commit sodomy the mother and sister of the sodomized will be prohibited to the sodomer forever. It does not matter if the persons involved are underaged or adults. Accordingly, the article 1056 of Civil Code suggests: "One who perpetrates a shameful act on a boy cannot marry his mother, sister, or daughter."

#### Difference of Conditions of Enforcement of Secondary Penalty in the Law of Crimes of Armed Forces as Compared to the Islamic Penal Code:

In Islamic Penal Code the convicts face the secondary penalty after the enforcement of the sentence or after the end of suspension term but in the crimes of armed forces after the finalization of the sentence the effects of conviction are forced to the convict.

Article 12 of Law of Crimes of Armed Forces can be regarded as the secondary effect of the conviction of the armed persons. Although the legislator in the opening of the article has not referred to it with the specific title of secondary penalty, since the conditions of this article are pursuant to the decisive conviction in intentional crimes and do not need to be mentioned in the sentence and also given the fact that the legislator has mentioned the term "secondary" in the first note of this article it can be referred to as the secondary penalty.

It is noteworthy that secondary penalty of armed forces is a function of the secondary penalty of the Islamic Penal Code it seems that these are in opposition to each other in one point: we know that according to the article 12 of Law of Crimes of Armed Forces the secondary penalty of conviction is getting fired from the service. In the first note of article 12 the legislator has allowed the court to suspend the secondary penalty as to the permanent members of armed forces but in the Islamic Penal Code (articles 25 and 26) the legislator has not given such permission to the court and thus the court does not have any role in the enforcement or suspension of the secondary penalty.

The conflict occurs where the first note of article 26 of Islamic Penal Code reads: the employees of the governmental organizations if are deprived of their social rights whether as the main penalty or as complementary or secondary penalty they will be fired from the service depending on the work conditions.

Since the armed forces are part of the government then the first note of article 26 is mandatory and the court does not have any right to refuse to enforce the sentence or suspend it while the first note of the article 12 of Law of Crimes of Armed Forces in which the legislator has allowed the court to suspend the sentence if the conditions mentioned in the note to the article 1220 exist.

<sup>18</sup> Ibid.

<sup>19</sup> Hosseinzadeh, Saeed, Secondary Penalties in Criminal Law of Iran, Majd Press, 2016, p. 97,.

<sup>20</sup> Note One to Article 12: The court is allowed to suspend the secondary effect of the sentence according to the regulations related to the suspension in Islamic Penal Code adopted in 1996 if there are specific conditions of service or upon the request of the commander.

It needs to be mentioned that if the previous law is specific and the later law is general the former is not cancelled by the latter unless the cancellation is mentioned in this general law.

If it is objected that in the note to the article 25 it is mentioned that the convict has been suspended from the service not fired during the period indicated in the law (i.e. the period mentioned in the clauses A, B and C of article 25), or put otherwise, given the fact that the legislator has spoken of the amount (i.e. a special time period), then the legislator means that in this period the convict is suspended from the service and not fired. It is answered that the legislator could have used the word "suspension" but he has used instead the word "dismissal" then the legislator not only intended to fire the employee rather he has also wanted to deprive him from the right of returning to his position. Anyway although the previously mentioned points regarding the cancellation of the preceding specific law by the succeeding general law there might be some further doubts.

The other difference can be explained as follows:

According to article 255 of Islamic Penal Code adopted in 2013<sup>21</sup>, the accuser must be prosecuted and punished upon the request of the accused one.

The difference between the Islamic Penal Code and the Law of Crimes of Armed Forces lies in the fact that according to the article 12 of the latter law the secondary penalty (suspension) is enforced as soon as the convict is found guilty and there is no waiting for the enforcement of the main penalty.

In the false accusation of fornication due to its belonging to the person at issue he can forgive and we know that by the forgiveness of the accused the effects of crime also disappear but in the Law of Crimes of Armed Forces there is no such thing; because if someone is suspended he will no longer be considered a staff and he will need reapproval and taking part in the procedure.

This seems to be in conflict with criminal justice as the accuser is immediately suspended due to the secondary penalty without taking the nature of this right which belongs to the person who has been falsely accused.

The other difference between the two laws:

"In the Islamic Penal Code a secondary penalty has been predicted for the mutilation which is mentioned in the clause B of article 25 of that law as well as the stipulation of "mutilation retaliation" by the legislator. But in no part of the article 12 of the law of crimes of armed forces there is no mention of retaliation. In the clause "D" of the article 12 of Law of Crimes of Armed Forces the mutilation sentence is said to include the sentence to the penalties mentioned in the clause "B" of the same article. In other words, mutilation sentence is just restricted to theft and belligerence both of which are among the penalties decided by the religious authority. Then, it seems that the composition of this part has not been done with the required precision. Otherwise we should think that the intention and goal of the legislator have been retaliation which requires to be clearly stipulated and we are not allowed to infer such thing because it is against the convict.

It seems that this phrase should have been rephrased as follows: "sentence to retaliation of death or mutilation".<sup>22</sup>

Critical Assessment of the Effect of Amnesty on Secondary Penalty:

In Iran's legal system amnesty is divided to public and private amnesties and each one of them has its own specific effects.

"Private amnesty refers to a decision that is taken upon the request of the Judiciary and acceptance of the highest executive authority of the country, i.e. Supreme Leader, and based on it, the whole or part of the penalty of the convicts is forgiven or changes to lower penalty".<sup>23</sup>

Private amnesty includes all Taziri penalties. The penalties of retaliation and weregild due to their being considered the people's rights are excluded wholly from the public amnesty. The religious penalties except wrong accusation of fornication or sodomy (which is a personal right), provided it is in line with

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<sup>21</sup> Article 255 of Islamic Penal Code: penalty of the false accusation of fornication and Sodomy is a right of person and in this sense its prosecution and enforcement depends on the view of the one who has been falsely accused.

<sup>22</sup> Quoted with modifications: Hosseinzadeh, *ibid*: 107.

<sup>23</sup> Ardabili, *ibid*: 263.

the article 11424 of Islamic Penal Code, if the convict repents, even after the establishment of the crime the court has the right to ask for amnesty by the Supreme Leader.

Private amnesty according to the article 11 of the Constitution of Islamic Republic of Iran and the article 9625 of Islamic Penal Code just converts the delinquents who are known as competent based on the verdict of the court.

The legislator has spoken of "convicts" but this condition must be associated with other reservation and it is the "decisiveness" of the sentence. Therefore, private amnesty is possible only after the issuance of the decisive sentence.

Private amnesty does not eradicate the effects of crime. The legislator has referred to this in the note 326 of the article 25 of Islamic Penal Code. Accordingly, it needs to be mentioned that based on the consulting idea no. 92-186/1-749 of the legal office of the Judiciary the amnesty as used in the aforementioned note refers to private amnesty.

But public amnesty is one of the other means of cancellation of penalty that is decided based on the law.

"Public amnesty contrary to private amnesty is of generic aspect; this is to say that it is the subject of the criminal behavior of a group of delinquents without taking their character into account. The public amnesty can be issued by the parliament".<sup>27</sup>

It needs to be mentioned that Iranian legislator has explained the nature of public amnesty in the articles 9728 and 98 of Islamic Penal Code. From the article 98 it is inferred that in public amnesty contrary to the private amnesty the secondary effects of the crime are suspended. It is noteworthy that public amnesty simultaneously includes the convicts and the offenders.

Then, up to here we understood that public amnesty except weregild and payment of damages cancels other main, complementary and secondary penalties.

Legal Experts Division as regards the Effects of Private Amnesty:

One of the legal experts in his work has written in this regard: "Private amnesty covers all penalties including main and complementary which are issued by the public, revolutionary and special courts".<sup>29</sup>

He believes that private amnesty covers both main and complementary penalties.

Another legal expert contends that "private amnesty chiefly includes main penalty; however it may include complementary and secondary penalties in the event of the stipulation in the order".<sup>30</sup>

We see that in his view, private amnesty as such does not include complementary penalties and there is a need for stipulation in the order of amnesty.

The other legal expert has a completely different idea in this regard and states: "If in the order of private amnesty it is noted that secondary penalty does not include the amnesty the convict is subject to the opening of the note 3 of article 25 of Islamic Penal Code. Whenever the amnesty order is absolute and no

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<sup>24</sup> Article 114: In crimes resulted in religious penalty except wrong accusation of fornication and sodomy and waging war against Allah whenever the convict repents before the establishment of the crime and the judge is sure that this is a true repentance the penalty decided by the religious authority will be cancelled. If the aforementioned crimes are established via confession the court has the right to ask for amnesty from the leader due to the repentance of the convict.

<sup>25</sup> Amnesty of the offenders is possible upon the request of the head of the judiciary and the acceptance of the Supreme Leader

<sup>26</sup> Note 3 of article 25: in conditional amnesty and freedom the secondary effect of the conviction is neutralized after the passage of the intended time from the time of amnesty or freedom. The convict during the time of conditional freedom and in the time of enforcement of the sentence are deprived from the social rights.

<sup>27</sup> Ardabili, *ibid*: 271.

<sup>28</sup> Article 97 of Islamic Penal Code: Public amnesty which is given in the Taziri crimes based on law suspends the prosecution and trial. If the sentence of conviction is issued the enforcement of the penalty is cancelled and the effects of conviction are suspended.

<sup>29</sup> Ardabili, *ibid*: 264

<sup>30</sup> Quoted from Commentary of Islamic Penal Code, Jalil Mohebi.

allusion has been made to the secondary penalty. According to the opening of the article 98 the secondary penalty also disappears".<sup>31</sup>

Then we see that in the opinion of this legal expert, private amnesty as such cancels the effects of conviction including the secondary effects unless it is noted in the order of amnesty that "secondary penalty is not subject to amnesty".

Anyway although we may endorse one of these ideas or reject them what happens in the judicial procedure of Iran is more compatible with the first theory and private amnesty includes the main and complementary penalties and does not have any effect on the secondary penalty unless it is stipulated in the order of the amnesty.

Since "in public amnesty which is enforced in Taziri crimes there is no jurisprudential basis and has been proposed through the principle of *Al Tazir be Yade Al Hakem* [punishment by the hands of the ruler] contrary to the private amnesty which has an independent chapter in jurisprudential texts and the legislator has conferred the right of amnesty in the religiously punished crimes upon the ruler".<sup>32</sup>

The author believes that we can synthesize these theories. For example, in the religious sentence of lashing (subject of clause C of article 25 of Islamic Penal Code) with the enforcement of the secondary penalty (enforcement of deprivations mentioned in the article 26 of Islamic Penal Code) we lead the penalty beyond the limit that has been drawn by the legislator and with these deprivations we apply the penalty to the relatives and family of the convict. If the legislator poses the same penalty that is considered to be appropriate according to the conditions the maximum secondary penalty can be enforced in this regard. This can be neglected as regards some crimes if the convict repents.

Then one can feasibly argue that private amnesty in the crimes subject to religious penalty eradicates the effects of crime but in the Taziri crimes there is a need of stipulation in the order of amnesty. In this regard the more detailed explanation will be provided in the part devoted to the criticism of the secondary penalty in Iranian law.

Criticism of Secondary Penalty in Islamic Penal Code:

As to the crimes subject to religious penalties if these penalties are enforced in Islamic Jurisprudence if the convict repents the secondary effects will disappear unless it is stipulated otherwise, e.g. the effects of some sexual crimes that last forever.

But as to the crimes subject to religious penalties in the Islamic Penal Code of Iran after the finalization of the sentence if the sentence is not enforced because of any reason given the fact that we have accepted the inclusion of the passage of time as regards Taziri crimes what will happen to the secondary penalty?

For example, let's suppose that the convict is a person who if gets even one lash he would die due to his illness. In this case what will happen to the secondary penalty which has been conditioned on the one hand by enforcement and otherwise it is conditional upon the passage of time?

Now if we suppose that the sentence is not enforced and the convict repents and the leader accepted his repentance according to the note 3 and clause C of article 25 of Islamic Penal Code after two years the convict retains his honor.

It is asked that shouldn't we suffice to religious penalty as decided by the religious authority? But the legislator in the article 25 of Islamic Penal Code has determined the penalties of the crime. In Islamic law the rehabilitation of honor takes place after the acceptance of repentance.

The significant question is that doesn't repentance as depicted in Islam nullify the penalty?

Then why secondary penalty is enforced unto the convict after the repentance?

The philosophy of repentance in Islam lies in the fact that by it the sin or crime turns to something that is supposed to have never been there. One needs to take it into account that before repentance we were allowed to enforce the penalty because the the divine legislator had ordered (Right of Allah) but after the repentance and its establishment and acceptance we can no longer enforce any penalty because of its being a right of Allah except the wrong accusation of fornication and sodomy and declaration of war against

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<sup>31</sup> Mohebi, Jalil, *ibid*: 215.

<sup>32</sup> Mohebi, Jalil, *ibid*: 491.

Allah in which case all penalties have been considered to be conditional upon the order of leader (article 114) and this amnesty can be a verification of repentance of the convict.

For in Islamic philosophy as we explained earlier, private amnesty is of jurisprudential priority and the repentance is conditional upon acceptance and amnesty of the ruler.

However, the ruler is not allowed to accept it half way through in the sense that for example in the penalty of wine drinking he cannot say that I have accepted your repentance but I do not accept your testimony at courts, i.e. not to forgive the secondary penalty.

But as to the crime of declaration of war against Allah after its establishment it seems that the ruler is allowed not to enforce the penalty but due to disturbance of public order the convict is punished based on the fifth book of Islamic Penal Code.

Now the question is that if we accept repentance in religiously punished crimes we have indeed declared them as if it has not taken place. Then, how can we enforce secondary penalty for something that has not taken place? (Of course here it is supposed that the action of the convict does not have any other criminal title). And this is a violation of the intention of the philosophy of repentance. Is this not taken to be an extension of the verse 85 of Surah Al Baqarah?

Having said these, isn't better we accept that private amnesty as regards the crimes of religious penalty to eradicate all effects and secondary penalty along with the eradication of the main penalty?

Of course, this idea of the author might be objected from the point of view of the school of social defense to the effect that how can one trust the criminal who has revealed his own bad faith? Isn't social defense one of the goals of the secondary penalty?

In response to this objection we should say that on the one hand we can consider the convict to be an oppressor (regardless of committing a crime like drinking wine that oppresses himself or the declaration of war against Allah that hurts others) and according to the verse 124 of Surah Al Baqarah "oppressors have no share of Divine Promise" the oppressors will not represent the God on earth as suggested by Imam Ali to the details of which we cannot turn in this paper. Anyway given this verse and the interpretation that is provided by Imam Ali of it one can conclude that secondary penalty is restricted to the crimes related to the authority enforcement that includes three opening clauses of article 26.

Another Criticism:

It seems that in the discussion of secondary penalties of crimes of religious penalties Iranian legislator has neglected the personal nature of it.

For example, in the debate of lashing (subject of clause C of article 25 of Islamic Penal Code) with enforcement of the secondary penalty (deprivations of the subject of article 26) the legislator goes beyond the penalty decided by the religious authority and has applied it to the relatives and family of the convict while the divine and justice promoting legislator has underlined the necessity of enforcement of the same penalty and the maximum secondary penalty that can be enforced is what has been already determined in the religion (of course this is not the case with the secondary penalties of the sexual crimes).

Like the penalty of wrong accusation of fornication and sodomy the secondary penalty of which is not accepted in Islam due to the violation of the justice by the accuser and this is also for forcing the accuser to repent.

Now the conflict occurs between Islamic law and positive law where two persons accuse each other of fornication. According to the clause C of article 261 of Islamic Penal Code the penalty is cancelled and based on the note of the same article the convicts are sentenced to 31 to 74 lashes.

Then, the conflict lies in the fact that despite the cancellation of the penalty in Islamic law the secondary penalty due to the violation of justice prevails until when the convicts repent but in the positive law of Iran secondary penalty has been made conditional upon the enforcement of penalty.

Moreover, it seems that in the enforcement of secondary penalty in religious crimes the principle of proportionateness is not observed. For example, if someone bursts into rage and wrongly accuses someone of fornication how can one suspend him from his work based on the article 26 of Islamic Penal Code? Is this penalty proportionate to the committed crime? Whether this leads to the pessimism of the person who has committed the crime and his family who undergo through numerous hardships?

Whether the enforcement of the secondary penalties indicated in the article 26 of Islamic Penal Code is an additional generalization? Even in the complementary penalties? Is this in line with the criminal justice of Islam? For example, in complementary penalties which tradition suggests that the fornicator to be sent to exile after the enforcement of the penalty?

While based on the clauses A and B of article 23 of Islamic Penal Code one can issue such a sentence.

Whether we are allowed to add secondary penalty besides the religious penalties? In other words, can we punish someone in two ways? In this case it seems that we are not allowed to punish someone twice for single action. Of course, if by single crime like wrong accusation of fornication and sodomy two victims are damaged the convict can be punished with two penalties one for the wrong accusation and the other for the insult that has affected some other one.

It needs to be mentioned that if we choose this idea that the penalties are the divine rights (except wrong accusation of fornication) and in view of the article 1533 of Islamic Penal Code in which Hadd has been defined but the legislator has intervened in hudud and added the penalties because in the article 23 the jurisdiction has been given to the judge and the 15 clauses are not religiously informed.

Although such an objection might not be leveled against the secondary penalties which are added to the main penalties because Tazir is a right and at the same time an obligation of the ruler.

But in hudud the ruling powers do not intervene in the amount or type of the penalty and only the Islamic government is required to enforce the hudud unless this crime would disturb the social order because of the lack of required evidence for establishing its hadd (for example the article 49834 of Taziraat suggests that if someone's declaration of war against Allah is not established he will be punished according to article 498) which should be dealt with in an independent way while if this action has another criminal title but hadd then if the Taziri penalty was associated with secondary penalty it must be enforced. (For example in the article 498 if the court sentences the convict to two years and one day imprisonment there will be secondary penalty too otherwise not).

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<sup>33</sup> Article 15 of Islamic Penal Code: Hadd is a penalty the cause, type, amount and quality of its enforcement have been determined by the Islamic Shariah.

<sup>34</sup> Anyone who founds a group under any title whose goal is disturbing the social order and security he will be sentenced to two to ten years imprisonment.