Abstract

One of the issues involved in criminal procedure is evidence in the substantiation of claims or positive proof. Although there are similarities between criminal and civil positive proof, criminal positive proof has unique features, which distinguish it from the civil one. Therefore, it was tried here to study one of the preliminary issues related to positive proof, that is, “importance and place of proof”. Criminal actions are taken by public authorities (government) with full power against a defendant who has no support but a series of rules and doctrines such as doctrine of innocence. In criminal proceedings, what distinguishes the just from the unjust, and the right from the wrong is the proof adduced in favor or against the defendant by those who are involved in the procedural proceedings (including prosecutor, plaintiff, witnesses, defendant himself, etc.). This, excessive importance of proof in criminal proceedings is unquestionable and undeniable. However, it is not justified and acceptable to convict a defendant with the excuse of “proof”, as this is neither consistent with standards of justice, nor leads to the ends expected from criminal proceedings. Therefore, the present research tried to study and explain some of the generalities and principles in this area.

Keywords: evidence, proof, criminal matters, penal code

1. Introduction

In criminal matters, proof refers to anything that may result in uncovering of the truth. Therefore, in criminal cases, a series of evidence and circumstances constitute the material for deciding the case. In legal language, the term action means the right of recourse against someone demanded by a person from the court for the purpose of exercising some claimed right. Accordingly, the action comes to existence only after some difference arises as to existence or scope of some right. Therefore, there is no corollary between the right and the claim. As for importance of proving the right and providing the proof of the right, Dr. Katouziyan stated, “Existence of right doesn’t suffice for exercise thereof, and if right is not accompanied with its proof, it is not possible to exercise it by the government officials, and it may even be lost due to failure to provide proof thereof”. Therefore, even if there is a right, in order to exercise the right that has been violated or denied, and in order to use government authorities to exercise it, it must be proven through invoking its proof. In other words, proof is an instrument to exercise right, and no value may be attached to the right that is not exercisable. As for the crimes, because the objective of judicial system is to keep social security and prevent insolence of criminals, therefore, such noble goal can be realized only if it is proven that the crime has occurred. Proving of crime is only possible through providing the proof that the crime has occurred. Otherwise, human community will be faced with many uncovered and unproved crimes, the first adverse consequence of which will be insolence of criminals as a result of their criminal behavior remaining unproved, and the second adverse consequence of which is weakening of judicial system in dealing with criminals.

Therefore, all objectives sought by punishment can realize through proof of crime using a means called evidence, because exercise of punishment is only possible after commitment of crime is proven. Besides, policy of judicial system requires that the violator of the laws be subject to defined punishments, and not be harmless from prosecution and punishment. Realization of this end is also dependant on proof of occurrence of crime using evidence. However, defense of public interests must not result in ignoring the individual rights. Therefore, procedural and substantive laws, and especially those related positive proof, must be developed in a way that the said issues like indemnity from prosecution and reduction of crimes realize, and also, individual and collected rights also be considered. In fact, importance of procedure, and especially, positive proof, is fully
reflected by the following sentence: “exercise of judicial justice and just judicial security is subject to provision of evidence in substantiation of criminal claim”.

1-2. Theoretical Framework

1-2-1. Definition of Proof

(proof) is Arabic term, it is a transitive infinitive, in if’al from. It is the plural form of ثبت (record). It literally means fixing, establishing, proving existence of something, declaring something to be existent, and affirmation. Proving existence or occurrence of something for others can be considered as the opposite of existence in itself, as something may exist in itself, while its existence may not be proven for any reason whatsoever. It is opposite of negation (Jafari Langerudi, 2004, vol. 1, p. 390).

1-2-2. Positive proof code refers to a set of written or customary laws, which are applied by the judicial authorities in deciding the cases (including disputes and non-contentious matters) (Jafari Langerudi, 2004, vol. 14, p. 23).

1-2-3. Definition of Islamic Penal Code

The collection of criminal laws governing crimes and punishments prescribed by shariah, which have been imposed on specified crimes, with respect to hudud, qisas, blood money, ta’zirat (punishments having minimum and maximum determined by law and judge), and deterrent punishments, as well as security and punitive measures, as provided by law for all people.

1-3. Various Types of Positive Proof

1-3-1. Confession

(confession) literally means expressing clearly and explicitly. It refers to acknowledgement of another person’s right against one’s own interests (article 1259 of Iran’s Civil Code). In criminal matters, confession is acknowledgement by a person of an act or omission, which brings negative consequences to the confessor under the law (Madani, 2001, vol. 2, footnote 343).

1-3-3. Oath

(oath) is a Persian term for Arabic terms حلف or قسم. In legal terms, oath refers to call the God to witness that something has occurred in favor of one’s and against another’s interests. In Shiite fiqh, oath is valid only the person who takes the other swears to Allah or other names of the God that he/she is telling the truth (ibid, pp. 372-373).

1-3-4. Qasamah
Qasamah (compurgation) literally means distributor, and a person who takes oaths very frequently. In legal terms, qasamah is used in the context of premeditated murder, in which case it refers to oath-taking by 50 persons (in case of premeditated murder), and by 25 persons (in case of quasi intentional murder, and homicide by pure mistake) from among residents of the place where murdered was found, to the effect that they have not committed the murder in question, and have had no knowledge of the murderer (Goldouziyan, 2004, vol. 4, p. 97).

1-3-5. Written Document

(document) literally means everything that is reliable (Moein, ibid, 654). In legal terms, it refers to any written document that can be invoked in litigation in defense of oneself or against the other party (article 1284 of Iran’s Civil Code). It is commonly used in civil actions. In legal suits, proof of rights or defense against the claims made by the other party is possible through providing written documents. In criminal matters, the quality of a written document must be determines, that is, it must be determine whether it is in the nature of positive proof, and whether it is possible to proof a certain crime based on written document. Written document sometime constitute testimony, that is, a number of person provide their testimony in writing (Madani, PP. 351-352), in which case it is considered as testimony and has no other values, for example, in such cases it is not considered as evidence (article 1585 of Iran’s Civil Code). In some cases, written document itself constitute the crime, as, for example, where a document has been forged, or a false report is produced, or a counterfeited document has been used. At the same time, the same forged document or false report constitute the evidence of occurrence of counterfeit and use of forged document (Madani, pp. 351-352).

1-3-6. Circumstantial Evidence

is the plural form of اماره. It literally means sign. In legal terms, it refers to circumstances that are regarded as the proof of the matter under examination, either under law or in the opinion of a judge. Circumstantial evidence is divided into two categories: circumstantial evidence under law; and, circumstantial evidence adjudged to be so in the opinion of a judge. Circumstantial evidence under law has a limited nature. Such circumstantial evidence fall within the category of applied principles of fiqh, and are based on typical presumption or guess; while circumstantial evidence as adjudged to be so in the opinion of a judge has an unlimited nature, and are left to the opinion of the judge. The latter is stronger in terms of indicative power, and gives more assurance to the judge that he is making the right decision (Madani, pp. 370-372).

1-3-7. Judge’s Knowledge

(knowledge) literally means knowing. In legal terms, it refers to certitude, which has also been called ordinary knowledge (Jafari Langeroudi, ibid, p. 468). According to articles 105 and 120 of Islamic Penal Code, the judge can decide based on his knowledge in matters of the God’s and people’s right, and exercise the punishment prescribed by the God, in which case he is required to provide the evidence of his knowledge. Then, judge’s knowledge is a piece of evidence in substantiation of a crime, which is not specific to any specific crime, and even extends to ta’zirat (Zeraat, 2011, p. 61).

1-4. Place of Evidence

1-4-1. From Perspective of those who invoke the evidence

Accusatory System: Apart from it definition, conditions and characteristics, since the judge functions as observer in this type of trial, who must ensure the party that provides firmer and admissible evidence wins the case, therefore, in this type of trial, there is a close relation between the constitutive or adjudicative judgment on the one hand and quality of evidence adduced on the other hand.
In this type of system, the doctrine of prohibition of acquisition of evidence requires that the judge stand out of the people who provide evidence, and at the same time, the parties to the case are required to provide evidence to vindicate the right, or to accept that they have no right. Another point to note is that although the way in which evidence is adduced and the formalities of such procedure are important, it is not important whether the evidence is adduced in writing.

Inquisition System: Unlike the accusatory system, the objective of which is to settle the dispute, the objective of inquisition system is to uncover the truth, and therefore, in this type of system, acquisition of evidence is permissible. As a result, in this system, aducing of evidence occurs on a large scale, and evidence is adduced by a larger number of people (Farahani, 1990).

1-4-2. From Perspective of Value of Evidence

In accusatory system, testimony, confession and oath have the highest values, in descending order respectively. However, in inquisition or investigation systems, because the dominant rule is the legal evidence adduced, confession has the highest values, followed by testimony.

1-5. Importance of Evidence

Evidence is the means to prove the truth. For this reason, positive proof is very important in criminal cases. Proof is the thread the links different stages of proceedings in criminal matters, from discovery of the crime to rendering of judgment. Although proof is not the ultimate objective of proceedings, it is always the most important factors by which the vindication of rights realizes. For this reason, after discovery of the crime, and learning about its occurrence, the trial revolves around collection of evidence in defense or against the defendant, and evaluation of such evidence. Before proceeding any further, explanations must be provided here about the place of evidence to ensure that the place of evidence in substantiation of a crime would not be confused with that of legal evidence in substantiation of a crime.

- Evidence in substantiation of a crime is not subject to a unified system. It is seen from division of punishments to hudud, qisas, blood money, ta’zirat, and deterrent punishments that evidence in substantiation of the said infringements are not the same, at least in terms of value of evidence and the quantum of evidence. Even if some punishments fall within a broader category, for example, category of hudud, under hudud, 4 confessions is required to constitute positive proof of adultery, while 2 confessions is required for theft, and 1 confession for enmity with the God (Katouziyan, 2005).

- The evidence in substantiation of a crime has not decisive effect, in the sense that invocation of such evidence doesn’t necessarily result in conviction of the criminal, and in the criminal undergoing the consequences of the effects of such evidence, even if such evidence prove the crime. For example, although 2-time confession of one attributing commission of adultery or sodomy to another is sufficient proof of such crime, such confession is not necessarily considered as the cause of conviction upon acknowledge of the person to whom the adultery or sodomy is attributed (Katouziyan, 2005).

- Commuting a punishment of results in commutation of positive proof. Vaqef believed that commutation of punishment resulted in commutation of positive proof. For example, in case of murder, if the plaintiff waives his/her right to punishment of the murderer, the crime of premeditated murder is commuted to quasi intentional murder or murder by pure mistake, in which case it is proven subject to paragraph b of article 237 of Islamic Penal Code, that is, by testimony of two men, or two women, or testimony of one man known to be just plus one oath. Such statement seems to be problematic, first because evidence in substantiation of a crime revolves around the crime (legal, physical and mental elements) rather than the punishment and its amount, and commutation of punishment have no effect on such evidence. The above example is irrelevant because plaintiff’s waiving of his right doesn’t result in commutation of the nature of murder from a premeditated one to a quasi intentional one. Article 612 of Islamic Penal Code, which provides that in absence of private claimant or subject to forgiveness by private claimant, the perpetrator of premeditated murder […] supports our view. However, articles 74 and 75 of Islamic Penal Code are provided as the counterexamples of the challenge raised by the author. According to these articles, with commutation of had from stoning to death to flogging, the quantum of evidence and testimony also changes, that is, is punishment involves flogging, testimony by two men known as being just, or that by four women shall be admissible, but for punishment of stoning to death,
testimony of four men known to be just, or three men known to be just plus two women shall be required, which defect is also resolvable. In fact, the reason for change in quantum of evidence is change in type and nature of the committed crime, because stoning to death is the punishment prescribed for the adulterer married woman, and flogging the one prescribed for adulterer woman who is not married (Katouziyan, 2005).

1-6. Evidence-in-itsel and Evidence-for-itsel

Evidence-in-itself is evidence as exists in itself, and evidence-for-itself is evidence as articulated by an argument. In other words, evidence-in-itself is the objective existence of the evidence-in-itself, while evidence-for-itself subjective existence of evidence in the knowledge. If a person really has a right, but he failed to prove it, he will not be considered to have such right. Proving is a step in proceeding, and the holder of a right must prove that he has such right. As far as truth in itself is concerned, since truth in itself is by nature not disputed, it is not required to provide evidence to prove the truth in itself. The proving becomes relevant only when it comes to truth for itself, because it is the truth as discovered by subject(s) (Katouziyan, 2005).

1-6-2. Problem related to Distinguishing Evidence-in-itsel and Evidence-for-itsel

As for distinguishing between evidence-in-itself and evidence-for-itself, problem may arise on limited occasions with an affect on criminal cases. For example, article 22 of Iran’s Registration of Deeds and Properties provides that as soon as a property is recorded in the register of notary public, the government only recognizes the person in whose name the property is registered as the owner of the property. The question that rises with regard to this article is if record of a deed constitutes the evidence-in-itself or evidence-for-itself. Some consider it to constitute evidence-in-itself, as the sale in itself (offer+ acceptance+ official deed = evidence-in-itself); and some consider it to constitute evidence-for-itself, as the formalities of sale; offer+ acceptance = evidence-in-itself and (official deed) = evidence-for-itself.

This is especially important in relation to crime of transfer of another person’s property. Suppose a person sells a real property to another person by a non-notarial deed, and later, he sells the same property to a third person by a notarial or non-notarial deed, the question rises if the first purchase can raise the claim against the seller that the seller has sold another person’s property. According to the first opinion, because sale of real properties occur only when the deed is recorded in the register, then, because the seller has sold the property by a non-notarial deed, the sale has not realized completely, and therefore, the ownership of the property has not been transferred to the first purchaser. In this case, the seller has transferred his own property to the second purchaser, and therefore, the seller is not guilty of an offense. However, according to the second opinion, because sale in itself realizes upon realization of offer and acceptance, and record of the sale is just evidence-for-itself, merely constituting formalities of sale, the property has been sold to the first buyer, and the seller is guilty of an offense. In this case, judicial precedent has actually adopted the first opinion (at least with respect to criminal matters). Unfortunately, problem related to distinguishing between evidence-in-itself and evidence-for-itself exist in Islamic Penal Code as well. For example, in paragraphs 4 and 5 of article 200, and the notes of this article, legislator has by mistake used evidence-in-itself and evidence-for-itself in place of each other. However, the analysis of the said paragraphs is out of scope of this paper. Or, article 128 of Islamic Penal Code, which provides evidence in itself of homosexual act between two women is the same as that of the homosexual act between two men. Here, the legislator has employed the term evidence-in-itself instead of evidence-for-itself; here, it can be indulgently assumed that the legislator meant to use evidence-for-itself (Farahani, 2013).

1-6-3. Justification for Elements of an Offense

Every offense is composed of 3 elements: legal, physical and mental. For a defendant to be found guilty of an offense, and sustain conviction, all of these elements must be proven by the plaintiff or the prosecutor as the case may be. In the field of substantive criminal law, some jurists believe that legal element is follows the doctrine of NULLUM CRIMEN SINE LEGE (there is no crime except in accordance with law), and that legal element is the basis of the corporal and mental elements, rather than parallel with them, as mental and corporal elements are based on the law. In other words, they believe that legal element has a vertical relation with the
two other elements, rather than a horizontal one, and therefore, legal element is not required to be proven separately from the two other elements. Regardless of the truth of such opinion, in procedural law, that is, criminal procedure, all three elements must be proven by the prosecutor or plaintiff, as the case may be, by admissible proof and according to procedure prescribed by the law. Thus, in procedural law, even legal element is required be proven based on the evidence, which requirement is based on the doctrine of innocence (Mirmohammad Sadeqi, 2010).

1-6-3-1. Proof of Legal Element

It must be proven by evidence that the legal element of crime is present, or in other words, the act or omission has the qualities of a crime specified in the law. Based on the doctrine of NULLUM CRIMEN SINE LEGE, the courts and prosecutor’s offices must specify in verdict (paragraph d of note 213 and article 21 of criminal procedure), and bill of indictment (paragraphs 3 and 4 of chapter I of Establishment of Prosecutor’s Offices Act), respectively, the legal element of the crime, that is, they must explicitly specify the text of law or by-law that they have used as the basis of prosecuting and investigating the defendant. Also, the court or prosecutor’s office, as the case may be, must prove by evidence, as the case may be, that legal element is present, and it has not been barred by such means as amnesty or time. Nonetheless, in case of justifying circumstances, such as legitimate defense, in which the requirement of providing the legal element by the court or prosecutor’s office is removed, it is left to the defendant to provide the legal element. Such procedure rather brings to mind the topic of burden of proof, which is out of scope of this paper. Briefly, as for evidence, it should be said in this case that the authority in charge of prosecution must specify the article(s) of law that have been violated by act or omission of the defendant. And also, the judicial authority is responsible to prove the continuity of the legal element based on valid evidence. In other words, the authority is responsible to demonstrate that the law invoked is still applicable, and it is possible to prosecute based on such law (Sadrzadeh, 1990).

1-6-3-2. Proof of Corporal Element

In addition to proving the presence of legal element, the judicial authority must prove corporal element of crime, that is, he must demonstrate that conduct of the perpetrator including act and omission has attributes of a crime. Adducing of evidence is certainly more important in this case due to relevance of doctrine of innocence.

a) Proof of Act or Omission: The prosecutor must demonstrate by evidence the act or omission or imputation of crime match the attributes of a crime. However, finding a match between the act or omission on the one hand, and attributes provided by law for crimes on the other hand, is associated with legal element, rather than corporal element, unless otherwise is specified. It is not the proof of the match between circumstances of crime and the law, but the proof of the conditions and circumstances of crime that is a component of the corporal element.

b) Imputation of Act: In this stage, the claimant must prove it by evidence that the act or omission is imputable to certain person(s). In other words, the role of evidence here is to prove that the conduct imputed to a person was committed by that person. For example, in case many fine bills have been recorded on the grounds of excessive speed for an automobile, the questions rises if illegal driving may be attributed to the owner of the car just because he is the owner of the car, or sufficient evidence must be provided to show that such illegal driving is imputable to him. With regard to evidence and corporal element, Katouziyan held that, “In purely corporal crimes, the judicial authority is exempted from providing evidence in substantiation of the corporal element on the grounds of legal fictions”. The judicial authority is responsible for providing proof of mental element, rather than corporal element, that is, the judicial authority imputes the criminal act to the alleged offender (for example, drawer of worthless cheque), and then, provides evidence in substantiation of such imputation. Article 19 of Cheque Act provides that, “If a cheque has been drawn on behalf of the holder of an account, the signatory of the cheque shall be held liable, unless failure to payment is caused by the act of holder of account”. In this article of law, it is clearly provided that evidence in substantiation of imputation of criminal act must be provided. Therefore, in this case, unlike the previously mentioned case, the imputation must be substantiated by
sufficient evidence. Or at least, this opinion is introduced as an exception to the rule of the relation between mental element and the evidence (Goldouziyan, 1995).

1-6-3-3. Proof of Mental Element

a) For Intentional Crimes: If the crime involves general and personal mens rea (guilty mind, bad intention), such mens rea must be proven by judicial authority or complainant, as the case may be. However, because mental element is presumed in case of some crimes, in such cases, there is no need for proof. Such crimes include failure to pay maintenance expenses by the husband to his wife (in this case, presumption of guilty mind is an adaption from the French law), or pure corporal crimes such as drawing of bad cheque or passing red light (however, some believe that the element of intentionality must be proved in case of such crimes, and it is only the personal bad intention that is not required to be proved).

b) Unintentional Crimes: Since in this type of crime mental element comprises recklessness, negligence, non-observance of state discipline and technical standards (penal wrong), in such cases, mere perpetration of criminal act doesn’t prove the penal wrong. The Supreme Court stated about accident, “Mere proof of accident is not sufficient to prove recklessness”. However, some jurists have assumed such persons to be guilty of an offense based on Compulsory Insurance Coverage for Automobiles Act (Farahani, 2000).

1-7. Necessity of Transition from Traditional Evidence to Modern Evidence

Human advances in difference sciences in recent century have been significant and undeniable. Undoubtedly, in keeping pace with human advancements in different sciences, criminals have changed their criminal methods, and a fortiori, new crimes and infringements occur, one of which is cybercrime. Therefore, it is required in such case that the legislator revises the law and provides news solutions in the law as evidence in substantiation of a crime. However, E-Commerce Act has specified some of new evidence in substantiation of a crime such data message and e-signature.

Article of E-commerce Act has considered electronic text (data message) to be tantamount to traditional text. By virtue of paragraph b (z) of article of E-commerce Act, electronic signature includes any ordered or reasonably connected together set of lines (data message), that is used to identify the signatory. Also, by virtue of the article of the Act, whenever the law requires a signature, e-signature is sufficient.


Since in the old code the evidence in substantiation of a crime in new Islamic penal code is not presented under a separate heading, limits, ways to prove, and evidence in substantiation of each crime are provided under the general heading of that crime. For example, in chapter on adultery, quality of confession and witnesses for adultery was also provided. However, since the new code provides the evidence in substantiation of a crime in a separate chapter, materials related to such evidence have been removed from other parts of the code (Katouziyan, 1994, vol. 2, p. 395).

Article 160 of the New Islamic Penal Code:

Evidence in substantiation of a crime includes confession, testimony, qasamah, and oath on the occasion prescribed by the law, or judge’s knowledge. In chapter fifth of Islamic Penal Code, evidence in substantiation of a crime has been specified, and then, each item is discussed in separate chapter.

Chapter two, comprising articles 164-173, cover confession, and chapter three, including articles 174-200, covers testimony, the fifth chapter, articles 201-210, discusses oath (excluding qasamah), and chapter five, articles 211-213, relates to judge’s knowledge. It is seen that qasamah has not been discussed in Iran’s civil code, and has been discussed in chapter four of Islamic Penal Code, comprising articles 312-364. However, oath is different from qasamah, as oath is used as proof in financial claims.
Although in case of injuries, qasamah constitute proof for charging the defendant with blood money and not retaliation in the same kind, article 208 also explicitly provides that hudud and ta’zirat may not be proven or disproved by oath. However, according to law, qisas, blood money, mulct, and the loss resulting from crimes may be proven by oath. However, qisas here refers to retaliation, which can be proven by qasamah according to the chapter four of the code, as qasamah doesn’t constitute proof in case of retaliation of injury in the same kind. On the other hand, the same conditions have been prescribed for oath takers in qasamah and oral testimony (Katouziyan, 1994, vol. 2, p. 395).

**Article 340 of the New Islamic Penal Code:**

The oath taker is not required to have witnessed the crime, and oath taker’s knowledge of the matter in question is sufficient. Also, it is not required that the judge know the source from which the oath taker has obtained knowledge about what he is taking an oath about, and claim of knowledge by the oath taker that he has knowledge of the matter in question is sufficient to make his oath valid as long as valid evidence contradicting such claim of his are not provided. Anyway, the judicial authority may investigate the person taking an oath, if such authority deems it expedient (Aqaei, 2013, p. 154).

**Article 341 of the New Islamic Penal Code:**

If there is a probability that the oath taker does so without required knowledge of the matter in question, or does so based on presumption, or collusively, the judicial authority shall be bound to investigate the matter. If the investigation doesn’t establish the above items, his oath will be considered to be valid.

**Article 343 of the New Islamic Penal Code:**

Before performing qasamah, the judge may explain to the person involved in qasamah the punishment for perjury provided by the law and the God (Aqaei, 2013, p. 156).

1-9. **Strengths and Weaknesses of New Islamic Penal Code**

Islamic penal code: One of the most important laws that symbolize criminal justice in every country is criminal code. In Iran, it is in form of Islamic Penal Code, which is the substantive and decisive law. According to the bill of New Islamic Penal Code, evidence in substantiation of criminal claim are confession, written document, oral testimony, circumstantial evidence, oath, qasamah, and testimony about testimony and judge’s knowledge, the latter of which has been discussed in qualitative and quantitative terms (Aqaei, 2013, p. 164). Islamic penal code, approved on 2013, has weaknesses in some articles; however, it has advantages over former codes, which include:

- Article 11 of Islamic Penal Code: the following regulations shall immediately be executed with regard to crimes committed before approval of the current code:
  a) Laws related to judicial organizations and jurisdiction;
  b) Laws related to evidence in the substantiation of claims until rendering of judgment;
  c) Laws related to mode of proceedings; and,
  d) Laws related to time bar.

Note: If a final judgment has been made with reference to paragraph b, then, the case shall be referred to court that has rendered the final judgment for review. This article explicitly refers to retrospection of the procedural rules. If laws related to evidence in the substantiation of a claim in criminal matters is changed under the new code, the cases involving such crime, for which the final verdict has been already rendered, but not enforced, shall be referred back to the same court, where a new judgment shall be rendered based on the new positive proof required by the new code, and the former judgment shall be dismissed. However, such procedure doesn’t constitute rehearing, first because prescription of rehearing is made by the Supreme Court, and second because rehearing is conducted in a branch similar to but other than the court in which the case was originally decided,
whereas in this procedure, trial is repeated in the same court. In fact, such rehearing has been assigned to the original court by the legislator, and no prescription from a higher authority is required (Aqaei, 2013, p. 170). Another advantage of the new code lies in article 11. Legislator has resolved the previous ambiguities. Article 11 provides the cases in which the new code retrospectively applies to the crimes committed before approval of the new code, as long as the punishment provided by the new code is not less severe, or the new code has not decriminalized the committed crime. However, article 11 provides that such cases shall be subject to retrospection anyway (Aqaei, 2013, p. 171).

1. First discussed item relates to judicial organizations and jurisdiction. The new code provides that laws related to judicial organizations and jurisdiction shall be subject to retrospection with regard to crimes committed before approval of the new code.
2. The second topic discussed relates to positive proof. However, positive proof should not be covered by this code, and legislator should cover the matter in criminal procedure.

The note under article 11 concerning paragraph b provides as follows: If final verdict has not been rendered, laws related to positive proof shall become subject to retrospection, and the court shall be bound to render judgment according to the new code.

For instance, the former code provided that the witness under oath must be male, and a male blood relative of the plaintiff or owner of the blood, while under the new code, if the blood owner is a female, then, she can be one of the witnesses under oath. Also, under the new code, the witness under oath is not required to be a blood relative, for example, brother-in-law can also be a witness under oath. Then, the law regarding positive proof is subject to retrospection, that is, all cases under investigation in justice administration, which has been initiated before approval of the new code, must be decided based on the new code, even if the final judgment has already been rendered about them. However, only if the changes in laws related to positive proof could result in substantial change in the judgment, the case shall be referred back to the court in which the final judgment has been rendered for the purpose of repetition of trial based on the new code (Aqaei, 2013, p. 174).

2. Discussion and Conclusion

Although Iranian legal system is apparently based on the second beliefs, as discussions related to proof have been adduced both in substantive laws of Iran’s Civil Code (article 1275 onwards) or Islamic punishment law, and in procedure (article 194 onwards), some jurists believe that the fact that a separate course titled evidence in the substantiation of claims is offered in universities independently from the Procedure Course indicates the dominance of the third method in Iran. Some scholars rightly believe that stipulation of the rules of proof under procedure law, civil code, or criminal substantive law doesn’t result in double standards of proof, and that rules of positive proof are rather an integral part of the procedural law, whether they are embodied by procedural laws or by procedural codes. Such belief has consequences which include as follows: first, in terms of retrospection; as procedural law is principally retrospective, therefore, rules related to positive proof can also be subject to retrospection, i.e., the judge can extend the applicability of latter law to the proof adduced when the former law was applicable. Therefore, the law governing the proof is the law applicable at the time when the action is brought rather than the time when the crime was committed. Second, in terms of the type of interpretation; that is, if the proof is adduced as part of the procedural law, it can be interpreted broadly, and deduction will not hinder the rights of the defendant, because the rules of proceedings are principally designed to facilitate defense of defendant’s rights.

In legal actions, and in crimes against property (such as theft), mere confession is accepted as positive proof, however, in criminal actions, the defendant may not confess against himself, and if he does so, such confession will not have any effect.

At least in crimes punishable by execution, knowledge of the judge has no positive value, to the extent that the judge that was a witness to the crime may not be a member of the body of judges (the body of the 23 investigating judges). Further, oath and compurgation do not constitute positive proof.

Based on Torah, ordeal is only permissible with regard to a type of sexual offenses. Yet, it cannot be considered as proof, and Jewish criminal courts didn’t decide based on it, because only firm testimony can be used as proof according to such courts.

However, since strict standard of proof results in failure to prove crimes, and consequently, makes criminals insolent, governmental courts as well as religious courts, when held as law enforcement institutions in charge of
keeping public order, were faced with less restrictions, and therefore, they could invoke a wide range of proof in order to prevent anarchy and to keep public order.

References