



# The position of knowledge of the judge in a crime evidence of proof (with the approach to changes on Islamic Penal Code, adopted in 2013)

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## ABSTRACT

**Objective:** Knowledge of the judge as one of the evidence of proof helps to judge in penal and civil Affairs. Since the judicial system of the Islamic Republic of Iran has accepted "conscience convincing system" is accepted, science and convincing of a judge are support and criteria for validity of evidences to prove case. In statute law of Knowledge of the judge is accepted in Criminal affairs as well as support and validity for other reasons and as one of reasons doe criminal evidences. **Methodology:** The majority of Imamieh scholars consider Knowledge of the judge as absolute proof, but some of other scholars consider Knowledge of the judge against the Prophet. In Islamic penal code (1991) has been discussed sporadically about the Knowledge of the judge. **Results:** But In 2013 law, Knowledge of the judge assigned a separate topic to itself. In this law, after stating Knowledge of the judge along with the other evidence of proof, the Knowledge of the judge is defined And expressed that Knowledge of the judge is to ensure that the documents In something is presented with judge and science is announced as a better reasons on that no reason is able to conflict with science documentary of a judge. **Conclusion:** In this thesis, the position of Knowledge of the judge is evaluated among other evidence of proof of crime with regard to new developments in the Islamic Penal Code.

## 1. Introduction

Justness is one of the greatest epics in the world, which has always had a special place throughout human history in the whole world and the heavenly religions and rituals, So that the world is based on justice which is the result of right judge, and basically there is no better and lasting virtue justice. And it deserves to be said that the most timeless and most heroic battles, wars, fighting is on the side of justice and injustice, equality and inequality (Bennett, 1979). With the victory of the Islamic Revolution and the establishment of the first government jurisprudence based on Shiite Ahl al-Bayt, led by Imam Khomeini, there created changes for Islamic system. This Revolution had great effect in the world and it created all systems based on Islam.

Justness and the order governing it have always considered as a basis human social organization and establishment cornerstone of any government throughout the history of several thousand years. The crisis of Civilized human knowledge in various aspects including, moral, mental crisis..., has increased Mental and Psychiatric pressure and has led the people to crime (Englich et al., 2006). Therefore, if just we use the moral rules for treating and helping the criminal, there will be again many problems, so to prove the right and achieving it we just can use the Evidence of proof. Of the masterpieces of Islam, in the judgment and resolving claims, is to explain the evidence of proof of claim which is essentially from divine characteristic or it is proved. Confession, witness, swears, and Qasamah are the reasons which are considered as evidence of proof in Islam. Among those that are raised as the evidence of proof in knowledge of right, the "knowledge of the judge" has a long history. It is the Judge who expresses the correctness or wrongness of a claim or the reasons of the crime by valuating them based on his moral. One of the approaches of the knowledge of judge is justice and development and his other approach is oppression and destruction (Kaufmann, 2008). The judge in certain cases has no explicit and legal reasons, so he uses circumstantial evidence and acts based on his knowledge and based on this knowledge judges about the lives, property of the people. Knowledge of the judge in Islamic

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law is very precise and independent issue and needs a wide discussion because of different opinions. Modern and contemporary jurists, in their compositions and writings, claim about it and have different opinions on this subject. Some believe that judge can rely on his knowledge in all cases and the others don't accept this issue. Criminal and civil laws of Islamic Republic of Iran in implementation of Article 96 had found status and credibility in conformity with Islamic law (jurisprudence) (McKusick, 1938).

The Islamic Penal Code, adopted in 2013 is one of the codified laws, based on this principle. This law which is adopted in Ordibehesht 2013 in Islamic Consultative Assembly, had accepted Knowledge of the judge to comply with the opinion of the majority Shiite jurisprudents and knowledge of the judge in the evidence of proof in criminal matters is among the incriminating evidence, confession, witness, and oath and Qasamah And for sure it is the result of documentation defined in the matter brought before a judge (Bassiouni et al., 1982). The legislator in referred law makes innovations about evidence of proof in criminal cases. In Article 160, which is the sub group of the public affairs, evidence of proof is recognized and it states: "evidence of the proof of a crime consists of confession, witness, Qasamah and oath in the legal regulations and knowledge of the judge". The first innovation in the law is allocating a separate part of the first book of the law evidence of proof in criminal matters. And other innovations defined in Article 211 for knowledge judges is: "knowledge of the judge consists of ensuring documentation is made for him. In cases in which the documentation is knowledge of the judge, he must mention explicit documentary evidence of his knowledge." So if knowledge of the judge doesn't prove the issue throughout the evident documentation for whole judges, it won't have the validity. This definition from knowledge of the judge had no previous history and it wasn't cared in the law in 1991. Actually the legislator in respect of proof in Criminal Matters in 1991 law did not considered independent law (Turvey, 2011). But also the issues related to prove was raised in a scattered and incoherent way and Code of Criminal Procedure Act of 1378 was expressed. Now with the efforts of Legislator, this issue was solved in 2013. Here we have tried to evaluate the changes in this context by evaluating the place of knowledge of judge.

### ***1.1 The major research problem statement***

One of the very important issues in the judgment is evidence of the proof of a crime, because the fate of the accused and the interests of the people will be cleared by the alleged reasons and providing the resources is the goal of Islamic government which is considered by Islamic judge so as no crime can escape from the justice and not to trap anyone who is innocent. About the knowledge of judge, some Islamic scholars believe that knowledge of judge is absolutely true in God right and people right and the judge can make the sentence based on his knowledge (Shuy, 1993). It is accepted by many Islamic scholars. Some others believe that in no case the judge can rely on his knowledge. Some others separated the God right and people right and they say that, the judge can rely on his knowledge in God right and but not about people right. And some others think that the judge can rely on his knowledge in people right but not about the God's right. The Islamic penal code of (1991) with respect to the appearance of Articles 105, 120 Islamic penal code which is known as the religious judge, it can be said that, Legislator allows the judges who are so-called Religious judge to use their knowledge in all cases of crimes and the ordinary judges do not have the authority, but based on the articles 231 and 199, In connection with the robbery punishable with murder which was defined, the knowledge of judge was mentioned as one the evidence of proof of the same crime. It seems that except the religious judge other judges can rely on their knowledge in these crimes. The Islamic Penal Code, adopted in 2013 after a long discussion on the judicial committee Islamic Consultative Assembly and the frequent exchanges between the parliament and the Guardian Council in Ordibehesht 2013 was approved and in eleventh Ordibehesht it was approved by Guardian Council (Law Commission, 2011). The law, agreed with the knowledge of a judge to comply with the opinion of the majority Shiite jurisprudents the judge. And knowledge of the judge placed the evidence of proof in criminal matters, confession, testimony, oath and Qasamah. With the adoption of this law and expression Article 160 we want to know: Is knowledge of the judge considered as evidence of proof in criminal matters in general as such evidence of proof? What is the extent of it to all crimes and punishments and other reasons? In other words, from the perspective of the legislator is knowledge of the judge in itself valid? And can the judge issue a warrant with his knowledge?

Legislators discussed the definition of knowledge of the judge in Article 211 which didn't exist in previous law and it is considered as an innovation. From the knowledge of the judge definition in law, it seems that the legislator has solved this issue that knowledge of the judge is personal or attainment knowledge, Because he clearly considers the purpose of science to ensure that the explicit documents is defined to him in some issues (May and Wierda, 2002). In this thesis, after reviewing the overall concepts of "reason", "knowledge" and "justice" and the position of knowledge of the judge in Fiqh and law is discussed before 2013. And knowledge of the judge is evaluated in the Islamic Penal Code, adopted in 2013.

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## **2. Materials and methods**

### ***2.1 The importance and necessity of this research***

Among the issues which are taught in legal documents as the evidence of proof, the knowledge of the judge has a great position, because according to the recent changes in the Islamic Penal Code adopted in 2013, it is one of the principles to prove the crime. It means that, the judge can rely on his knowledge and it is prior to other evidence on proving the crime. Also the conflict of the knowledge of the judge with other reasons (Shari and legal reason), this is the judge that will be trusted and validate in the case of explicitly. But the knowledge of the judge is faced with many challenges. Some Islamic scholars believe that the judge cannot rely on his knowledge in all crimes, and some others there considered a separation between the God's right and the people's right. Therefore, according to this fact that, after 2013 no new research is conducted in this context, this research evaluates the recent changes about this issue.

The recognized purposes of this research:

1. Study the Quality and work and study of knowledge of the judge in Iranian criminal justice system with the approach to penal policy in 2013.
2. The study of position of knowledge of the judge among the evidence of proof from the perspective of Shia scholars and interaction of knowledge of the judge in the Iranian penal policy with the approach to the legal position.

### 2.2 Review of the literature and relevant records

Kaufmann in 2008 stated that, Imamiyyah jurists and lawyers have different ideas about this issue that whether knowledge of a judge can be evidence of a proof and can the judge rely on his knowledge in judgment about the crime and they have raised many different ideas. But considering their perspectives, in this research it is concluded that the judge cannot make any sentence about the God's right by relying on just his knowledge. Also Lippman in 1989 stated that: There is a part in the Islamic criminal law. It states that, if the judge faced with lack of criminal confession, can he rely on his knowledge in this case or not? Here we have tried to solve these issues. Lippman in 1989 stated that: according to different verses about judgment to right and justice, they considered this issue as a result for sending the prophets from God. Like the 38 verse of the Sad Sura: O, Davood, we appoint you as successors in the land so make sentences in the right way. And also other verses to refuse any sentence except God's sentence like the verse 58 of Nesa surah "Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and seeing". And also, there are many narratives which have emphasized on this issue.

### 3. Discussion and results

According to the article 160 of the Islamic Penal Code of 2013 about the evidence of proof, the Legislator has accepted the knowledge of the judge as one of the reasons. From the word "Crime" it can be understood that the judge can rely on his knowledge in all crimes including the God's and People's right, if he is sure about its correctness (Lippman, 1982). Therefore, according to the obtained results, it can be said that, the knowledge of the judge is the result of all reasons. By this evaluation it can be understood that the knowledge of the judge is as a principle to prove the crime, so the judge won't need any other reason because of his knowledge, because Legislator will certainly seek judgment on justice and right that are in accordance with reality. Therefore the knowledge of the judge can discover the reality by his own and it is an independent reason for proving the crime. From evaluating the knowledge of judge it can be understood that, the thing which is important in Criminal proceedings is discovering the reality. What we gained in evaluating the opinion of scholar and we will accept it as a reality is that, the judges have no integrated action in proving the crime. Therefore, some rely on knowledge and others rely on the evidences of proof of a crime (Imwinkelried, 1997). In Iranian criminal law, evidence for proving the crime is not limited to confession and witness and swear. Therefore, system does not siege rule of the reasons (Smith and Studebaker, 1996). Also the validity of mentioned reasons is relevant to the doctrine and as a result the knowledge of judge and the judge moral persuasion is very important and the confession and witness and swear will be accepted if it is matched with facts and circumstances and the evidence that suggests the validity of the claim.

### 4. Conclusion

Thus, confession and witness and swear is not enough and it is necessary to rely on knowledge of the judge which is obtained from evaluating the facts and circumstances and the evidence that suggests the validity of the claim and the judge cannot simply accept just the legal reasons and against his inner belief for legal reasons, and accept the conviction of innocent persons.

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