

Investigating the crimes and criminal liability of the Armed Forces' personnel from the perspective of jurisprudence and Iran's statutory provisions

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ABSTRACT

The existence of the special penal rules for the military personnel is inevitable. The criterion and the scale specified by the current statutory provisions for the identification and recognition of crime and distinguishing the military crime from the general crime is the concomitant existence of two features in a criminal action. One of the two features pertains to the legal personality of the perpetrator meaning that the crime doer should be a member of the armed forces and the second one is related to the statuses and conditions wherein and under which the crime occurs. Therefore, enactment of special criteria and regulations regarding the authorities and duties, violations and crimes of the military type and prediction of punitive strategies regarding their breach of their duties are amongst the sure and undoubted necessities in the military formations. Trial of the crimes related to the special military and disciplinary duties of the members of Islamic Republic of Iran's armed forces is within the jurisdiction of the military courts. By the crimes related to the special military and disciplinary duties, those transgressions are intended that are perpetrated by the members of the armed forces in the performance of their military and disciplinary duties and responsibilities as specified for them in the rules and regulations. These are the crimes or criminal behaviors the perpetration and exhibition of which by the civilians is impossible due to military personnel's responsibilities being different from those of the ordinary people. The nonmilitary individuals or the civilians might not be so much held criminally liable in case of perpetrating such crimes or exhibiting such behaviors like failure in fulfilling an order or leaving the position or deserting the service and so forth.

Keywords: armed forces, military crimes, special crimes, criminal liability, punishment

Introduction

In order to preserve their governments, independence and territorial integrity and supply their security, the human communities are incumbently obliged to prepare a military force. The independence and security of every country and government, including the internal or the external, as well, can be safeguarded in the light of the military power and vigor.

Fighting against the foreign invaders or the individuals who disrupt the social security via violating the regulations cannot be done except through military might. National security and public order are the grounds of the society's tranquility and all the human beings' social activities. In order to establish social security and guard the public order, the government prepares armed and committed military and disciplinary forces that are ornamented with a special order and discipline. That is because it is the well-organized armed forces that can defend the independence and national security against the invading states and establish the society's internal order. In the Islamic mindset, armed forces are considered as the manifestation of power and the cause of the system's esteem and magnificence and the sign of the Islamic society's pride and authority. In Islamic Republic of Iran, such a subject as the armed forces has also been focused from the ideological perspectives; defense and jihad based on faith is the substructure of Islamic Republic of Iran's armed forces

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and the preservation and protection of the limits and boundaries and territorial integrity guarantees the country's independence.

Armed forces are the first defenses of the national governance, independence, security, unity and territorial integrity against the enemies and foreigners. Thus, the armed forces' staff should be pious, committed, devoted, disciplined, brave and followers of the rules and regulations and do their best to perform their assigned duties even if by sacrificing their lives.

Each of the staff in the armed forces should well recognize his or her duties and learn the corresponding procedures and regulations very perfectly and with utmost zeal and carefully put them into effect. Any sort of indiscipline, looseness and negligence in the service is non-negligible and the commanders, heads and managers are to intelligently discern the causes of the shortcomings and prevent or compensate them rapidly through the use of their legal and managerial authorities. The behavior and method of the commanders, heads and managers should be the best example and pattern of spiritual and apparent discipline for the staff and they should also be models to their subordinate employees in terms of religiosity, virtuousness, skills, courage, forbearance, good conduct and Islamic ethics' observance. Commanders, heads and managers are primarily responsible for the precise implementation of the maintenance and repair methods in their corresponding units and they are obliged to make efforts in line with the protection and keeping ready and properly using the properties and equipment in their own units. Undoubtedly, shouldering any duty and submitting to any regulation is suspended on the existence of the internal and external motivations and, since mistake and slipping and deviation from the path are imaginable for everyone except the immaculate Imams (peace be upon them), exact fulfillment of the duties entails correct and fair regulations. Like other society members, armed forces need regulations and they are quite likely to violate the regulations and they might even intentionally or unintentionally ignore the regulations and perpetrate crimes; or, occurrences like murder, injury, other crimes and/or damage may take place to the others during their performance of their duties and use of the military equipment. So, the existence of the special penal rules for the military personnel seems to be inevitable. Therefore, the enactment of special criteria and regulations regarding the authorities and duties of the armed forces and their violations and crimes and prediction of punitive strategies concerning their breach of their duties are amongst the sure and undoubted necessities in the military formations. Considering the sensitivity of the military positions and jobs, it is necessary to investigate and explore the legal issues and criminal liabilities of the armed forces from the perspective of the rules and regulations governing them and the common norms of the military bases in a comprehensive research.

Thus, the following questions may be raised: what is the basis of criminal liability in the armed forces? How is the penal sanction for the prevention of the actions against the regulations? Islamic Republic of Iran's constitution, as well, has commissioned the armed forces to the guarding of the country's territorial integrity and protecting the Islamic Revolution and its accomplishments as

well as the public order. The mission and special responsibilities of the armed forces have made it obey a special disciplinary law essentially differing from the disciplinary and administrative laws of the other sections of the government's enforcement of governance. These military disciplinary laws follow special penal rules and regulations termed military penal lore which is a branch of the penal law with its subject being the study of the collection of rules and regulations related to military crimes. The criterion and scale specified in the current statutory provisions for the identification and recognition of military offenses and distinguishing the military crime from the general crime is the concomitant existence of two attributes in a criminal action; one is related to the legal personality of the perpetrator meaning that s/he has to be a member of the armed forces. In this regard, article one of LTIRIAF (passed in 1985) explicitly stipulates that "trial of the crimes related to the special military and disciplinary duties of Islamic Republic of Iran's armed forces ... is within the jurisdiction of the military courts". The second attribute is pertinent to the statuses and conditions wherein and under which the crime takes place. In this regard, as well, Act 172 of IRIC has stipulated that only "crimes related to the special military and disciplinary duties of the members of army, gendarmerie, constabulary and Islamic Revolution's Guard Corps (IRGC) are considered as military transgressions and they are tried in the military courts according to the relevant laws"; in the enforcement of the foresaid act, note (1) in article (1) of LTIRIAF has defined the crimes related to the special military and disciplinary duties as follows: "the kinds of transgressions are intended that are perpetrated by the members of armed forces in relation to their military and disciplinary duties and responsibilities as assigned by the rules and regulations".

According to article (2) of the Islamic penal code of law (IPCL), any performing of an action or non-performing of an action for which punishment has been specified in the law is envisioned as a crime and military crime is no exception to this axiom and the military crime takes place wherever the legislator realizes the violation of the military headquarters' discipline or breach of the military responsibilities and obligations as a crime and sets punishment for it like desertion of service, leaving the outpost or taking measures against the social-military prestige and personality in such a way that it sets the ground for the people's pessimism towards the armed forces. It is evident that such crimes are amongst the special military crimes and their perpetration by the civilians is not considered as crime. Of course, it has to be stated that requiring an individual to answer for abusing the others, whether being done for supporting the individual rights or for defending the society, can be posited under the title of "criminal liability" or "penal liability". However, the legal nature and the definition of the criminal liability have not been explicitly mentioned in any of the penal regulations in the past or at present. Anyway, criminal liability is a sort of requiring an individual to present answers regarding the adverse effects of the criminal phenomenon or crime.

The goal of criminal liability is punishment of the criminal and it is performed for defending the society, guarding the order,

compensating the public losses and correcting and teaching the other individuals; the verification of the criminal liability necessitates the subtle investigation of the criminal's personality and the penal justice makes it necessary to take into account the personal characteristics and special psychological aspects of the criminal in an evaluation of his or her criminal behavior parallel to the determination of the type and amount of punishment so that the principle "case-specificity of the criminal liability" can be completely observed. Although military crime is readily distinguishable from the general crime in many of the cases like the military men's escape nor riot or disobedience, it is not so for all of the cases for there are doubts regarding the military nature of some general crimes of which some military men may be even accused. For example, if a member of the armed forces uses narcotics inside a military base or insults others or murders another person who has been taking a rest and not in military service, can it be considered as a military or general crime? The commanders are obliged to guarantee that their subordinate agents observe the Islamic and human regulations in the course of armed clashes and falling short of doing so is the cause of their criminal liability. More importantly, these forces should be necessarily familiar with their inherent duties based on Islamic scales so that they can defend the Islamic nation and country and, simultaneously, perform no mistreatment and, at the same time, know the actions to be formed or not performed by a committed military person. Thus, considering the fact that thorough familiarity with the general and special duties and performing of actions based on the religious commands result in success and reduce the violations and crimes amongst the armed forces' personnel in practice, it is necessary to carry out a comprehensive and complete research in this regard.

Study Method and Background:

Considering the sensitivity of the military positions and jobs, it is necessary to investigate and explore the legal issues of the armed forces' criminal liability from the perspective of the rules and regulations governing them as well as the common norms of the military bases in a comprehensive research. Using library-based method of data collection, the present article tries investigating the criminal liability of the armed forces' personnel from the perspective of the jurisprudence and Iran's penal lore with an emphasis on the statutory provisions and sentences of the country's courts and Supreme Court as well as the advisory notions and also the law scholars' opinions. As for the study background, although books have been written under a general title of the military penal law and the relevant cases have been investigated in the instructional pamphlets and the issue has been explored in the leaflets published by the judicial organization of the armed forces and the law on the punishment of the armed forces' crimes, they are only in line with the articles of the law on the punishment of the armed forces' crimes and their results are more interpretations of the aforementioned laws. Considering the fact that it is not easy to gain access to the sentences issued by the military courts and the related statistics

on criminal liability of the armed forces and there are restrictions in this regard, not many measures have been taken and the criminal liability of the armed forces has not been investigated from various perspectives and no research was found bearing this special title with the intended scales.

Theoretical Concepts and Basics:

Liability in Words:

In dictionaries and law books, many meanings have been offered for liability. Criminal liability is composed of two terms, namely liability and criminal. In dictionaries, liability has been defined as being asked and being wanted and it most predominantly means duty, responsibility and what a person has to shoulder^[1-3].

It is written in Al-Monjed Dictionary that the Arabic term "Mas'ouliat" [responsibility] has been derived of the root word "Sa'ala" meaning "the thing about which questions are asked" and it is stated that "responsibility means asking question and reproaching a person for what s/he has done"^[4]. Also, in modern comprehensive Arabic-Persian dictionary, responsibility has been defined as reproaching and responsible is he who can be asked^[5]. In Mofradat by Raqeb, it has been stated in a definition of responsibility that "the Arabic term "So'al [question] means requesting, demanding and asking" in such a way that it has been mentioned as an example that "Sa'alto An Halehi" [I asked him about his status and state] or "Yas'alunaka An Al-Anfa" [you are asked about the spoils] so a responsible person is s/he who is asked about a thing^[6].

Terminological Concept of Liability:

The term "liability" has not found its way as a technical word in the jurisprudential books and no comprehensive and complete definition has been offered in the jurisprudential books about responsibility or liability and each of the authors has presented his or her own specific definition thereof.

In defining this term, some have opined that "liability includes a commitment created for an individual for his or her causing of loss to another in a court and it is followed by civil, penal and/or criminal results^[7]. It has also been mentioned that the term "responsible or liable" means "reproached, reprimanded and questioned" in the civil, penal and administrative laws and that responsibility means being responsible and being liable to the performance of an action with it being a legal relationship stemming from performing an action or leaving it undone. This relationship is disbanded through the liable person's fulfillment of his or her duty and/or being subjected to punishment. Enmity is the common element of the civil and criminal liabilities^[8]. Some contemporary legal authors have defined criminal liability in the following words as intended in Islam: "the meaning of criminal liability in Islam is that a person should suffer the consequences of the set of forbidden actions s/he has willfully perpetrated with awareness of their contents and results"^[9].

According to the above-presented materials, it can be concluded that the criminal liability is associated with such words as commitment, duty and requirement hence it cannot alone retell

the real and primary concepts and various dimensions thereof. Thus, in order to perceive the real concept of liability, it has to be stated that there are three important conditions necessary for the actualization of liability:

- 1) Existence of commitment and duty established and enacted by a qualified authority, i.e. legal dos and don'ts
- 2) Existence of legitimate maxims or obligations set by the qualified authorities having the enactment right and affirmed by the liable person(s)
- 3) Awareness of the existence of the duty or the law or the statutory provisions and capability of performing or not performing certain action.

Of course, it can be stated for more information that these meanings cannot alone recount the various concepts of liability. In order to perceive the real concept of liability from various aspects, other factors and conditions should be considered in addition to the commitments and obligations enacted and established by the qualified authorities.

- 1) Existence of duty for performing or not performing an action which can per se come about as a result of the legal provisions and/or social relations
- 2) Being aware of the existence of such a duty for a person unaware of his or her duties cannot be held liable in absolute terms; the unawareness of the duty's existence might be the result of defections in the intellectual and affective faculties or social upbringing and/or the responsible and commissioned person might be found not having been practically informed of the existence of the duty and the content.
- 3) Having ability to perform the duty; assuming that the foresaid two conditions have been actualized, a person who is incapable of performing his or her duty cannot be absolutely held liable; ineptness and inability of an agent in his or her performance of his or her duty might have personal and/or social causes^[10]. In general, requiring an individual to answer for his or her abuses of the others is carried out in line with the support of the individual rights and/or individual freedoms or for defending the society hence it can be proposed under the title of penal (criminal) liability the recognition of which is of a great importance from the perspective of the Islamic penal code of law^[11].

Based on the last terminological definition that was mentioned above (definition of criminal liability in Islam), "if a person is found lacking will such as a reluctant person or a person who has perpetrated a prohibited action when in coma, s/he would not be held criminally liable and the person who has had will and perpetrated a forbidden action but s/he has not been aware of the nature of that action, such as a minor or a silly person, as well, cannot be held criminally liable.

Importance of Responsibility from the Perspective of the ĀYĀT and Narrations:

Islamic law is a system wherein duty is of a high importance. Imam Sajjad (PBUH) orders that *"اعلم ان الله تعالى"*

عزوجل عليك حقوقا محيط بك في كل حركه تحركتها و سكنه سكنتها احوال حلتها او منزله نزلتها او جارحه قلبتها او آله تصرف فيها فاكبر حقوق الله تبارك و تعالى عليك ما اوجب عليك لنفسه من حقه الذى هو اصل "الحقوق"^[12] meaning "know that the esteemed and glorious God has rights over you and they are around you in whatever the movement you make and in every comfort you gain and in every state coming about in you and in every place you arrive at or in every body organ you move or in every instrument you use and the greatest of the God's rights are those He has obliged you to their fulfillment in respect to Him and they are the very rights sourcing all the other rights"^[13].

In the Holy Quran, as well, the acceptance of responsibility has been resembled to a hefty burden indicating its importance as well as the necessity of dutifulness for every human being. The Eminent God orders several time that *"لا تزر وازرة"* (SŪRAH AL-AN'ĀM, ĀYA 164; SŪRAH AL-ISRĀ'A, ĀYA 15; SŪRAH FĀTER, ĀYA 18 and SŪRAH ZOMAR, ĀYA 75) meaning "no sinner can shoulder the burden of another person's load of sin". In this ĀYA, the term "Vezra" means hefty and it has also been sometimes used to refer to responsibility".^[14] In the foresaid ĀYA, the God guides us to the purport that any person's heavy load can be shouldered by another person and everybody is responsible for presenting answers about his or her deeds on the Judgment Day and the dimensions of such accountability are so vast that the human beings' body organs are even to provide answers for what they have done. The mighty God commands it in the holy Quran that *"لا تقف ما ليس لك به علم إن السمع والبصر والفؤاد كل أولئك كان عنه مسئولا"* (AL-ISRĀ'A, ĀYA 36) meaning "and, do not follow the thing you have no knowledge about because the ears and the eyes and the heart are all responsible" and it is also ordered again that

"إِنَّمَا الْمُؤْمِنُونَ الَّذِينَ إِذَا ذُكِرَ اللَّهُ وَجِلَتْ قُلُوبُهُمْ وَإِذَا تُلِيَتْ عَلَيْهِمْ آيَاتُهُ زَادَتْهُمْ إِيمَانًا وَعَلَىٰ رَبِّهِمْ يَتَوَكَّلُونَ" (ANFĀL, ĀYA 2) meaning "the believers are only those whose hearts start shivering in fear upon hearing the name of the God and their faith is increased when his ĀYĀT are being read to them and they rely in their God"; Also,

"الَّذِينَ إِذَا ذُكِرَ اللَّهُ وَجِلَتْ قُلُوبُهُمْ وَالصَّابِرِينَ عَلَىٰ مَا أَصَابَهُمْ وَالْمُقِيمِي الصَّلَاةِ وَمِمَّا رَزَقْنَاهُمْ يُنْفِقُونَ" (SŪRAH Haj, ĀYA, 35) which means "they are those whose hearts become full of the fear [of the God] and they exercise tolerance in disasters and those who say prayers and endow from what we have endowed to them".

From the perspective of the immaculate Imams (peace be upon them), as well, responsibility is so important that Amir Al-Mo'menin His Highness Ali (PBUH) finds himself so responsible before the God that his highness even guarantees what he says by the darling existence of himself and orders that *"ذمتى بما"*

"اقول رهنيه و انا به زعيم"^[15] meaning "what is say depends on the truthfulness of my words and I am bound

to it and I guarantee it" and we should know based on an order by Amir Al-Mo'menin His Highness Ali (PBUH) that «ان عملك ليس لك بطعمه و لكنه في عنقك امانه و انت مسترعى لمن فوقك ليس لك ان^[16] تفتات في رعيه و لا تخاطر الا بوثيقه...» meaning "verily, your assignment to the commanding position is not a means of earning water and bread for you rather it is a position trusted in your neck and you should obey your commander and Imam; you do not have the right to exercise despotism towards the peasants and you cannot perform an important task without first receiving an order for it".

Punishment and Reward in Words:

Literally, punishment and reward mean "rewarding a person for the performance of good deeds and punishing a person for the performance of bad deeds"; it means that they include general meanings literally. In law terminology, "punishment includes the pain imposed on a criminal for his or her perpetration of transgressions" and punishments have properties the aspects of which are deemed logical and expedient for the individuals. Punishment guides a person to correction and, in case of not being correctable, s/he will be put aside from the society and it is in this way that the society is cleaned of badness and disorder. Punishments also feature terror and dread for every individual member of the community and dissuade others from perpetrating an action similar to the criminal action"^[17].

Crime's Concept in Islam:

Islam's approach to crime can be investigated from two perspectives each of which deserving a special type of punishment:

- 1) Sins and crimes that cannot be justified in the courts of canon (or they are difficult or improbable to prove) and cannot be subjected to corporeal punishments for this set of sins are in such a way in their nature that there is often no evidence and proof that can prove them such as lying and gossip^[18].
- 2) Crimes that can be justified in the courts of canon and proofs and evidence can be presented for their justification and assistance can be sought in the witnesses and attendants of the crime scene. Corporeal punishments like Hadd, retaliation, blood money and Ta'azir have been specified for these set of corporeal crimes^[17, 19].

So, it can be stated from the Islamic terminological perspective that crime includes "an affirmative or privative issue or action forbidden by the Islamic legislator who has also specified an amount of corporeal punishment for it. Thus, the performance or non-performance of actions for which no punishment has been set is not envisioned as crime".

It has to be also pointed out that the jurists use crime and transgression interchangeably in many of the cases and most of them use the term "crime" for actions targeting the human body or organs such as murder, injury, battery and so forth and "in jurisprudential terms, transgression is the name of the action

which is canonically prohibited whether being imposed on the human body and soul or properties or so on". For instance, in the book "Kanz Al-Erfān", Fazel Meqdad calls the book of retaliation [Qisas] the book of crime and Qotb Ravandi orders in this regard that «الحد في اصل اللغه المنع و حدايعاصي و سمى به لانه شىء يمنعه عن المعاوده، الحدود في الشريعة معروفه موضوعه للعصاه لايجوز ان يتجاوز عنها و قد امرالله بها في اشياء مخصوصه... و قال على (ع): إن الله حد حدوداً فلا تعتدوها و فرض فرايض فلا تنقصوها و سكت عن اشياء و لم يسكت عنها نسيانا لها فلا تتكلفوها رحمه من الله تعالى فاقبلوها.»^[20] meaning "literally, Hadd means prevention and a transgressor is subjected to Hadd punishment and Hadd is called so for it prevents the transgressor from recidivism and Hadd is well-known in Islamic canon and Hadd punishments have been enacted for the transgressors (criminals) and they should not be exceeded and Hadd punishments have been stipulated by the Eminent God for certain cases and Imam Ali (PBUH) orders: the eminent God has set certain Hadd punishments (Hodūd) in the canon so do not exceed them and the creatures have been required to fulfill certain obligations so do not fulfill them imperfectly and some issues have been left unexplained and up to the creatures for the sake of exercising mercifulness towards the servants so accept them".

It can be understood from Qotb Ravandi's words that "stipulation of Hadd punishments for doing or not doing certain actions has been by the eminent God and the persons failing short of fulfilling them are to be viewed as transgressors deserving the specified punishments and the creatures should not exceed those Hadd punishments; it means that no Hadd punishment should be specified for those actions that God has not stipulated any punishment and they should be considered permissible according to the narration from his highness Imam Ali (PBUH); therefore, crime is a forbidden action and/or desertion of an obligatory action for which a sort of punishment has been specified by the canonical ruler. Ibn Zohreh writes the following words in Ghunyah about Ta'azir:

«و اعلم أن التعزير يجب بفعل القبيح، أو الإخلال بالواجب الذي لم يرد الشرع بتوظيف حد عليه، أو ورد بذلك فيه و لم تكامل شروط إقامته، فيعزر على مقدمات الزنا و اللواط من النوم في إزار واحد و الضم و التقبيل إلى غير ذلك، على حسب ما يراه ولي الأمر، من عشرة أسواط إلى تسعة و تسعين^[21] سوطا.» meaning "Ta'azir punishment becomes compulsory in cases of the performance of a heinous action and wrongdoing or disruption of one of the obligations for which canonical ruler has specified or no specified Hadd Punishment; however, the conditions of Hadd punishment enforcement might be found not met such as when a person sets the ground for performing adultery or sodomy but s/he has not succeeded in performing adultery or sodomy such as when two persons lie down in one bed or embrace one another and kiss each other and so forth in which case Ta'azir punishment is well-justified based on what the

holder of the command finds expedient and it may vary from ten to ninety nine whips of lace". Mohaqqeq Helli orders that

«كل ما له عقوبة مقدرة يسمى حدا و ما ليس كذلك يسمى تعزيرا؛ و أسباب الأول ستة الزنى و ما يتبعه و القذف و شرب الخمر و السرقة و قطع الطريق؛ و الثاني أربعة البغي و الردة و إتيان البهيمة و ارتكاب ما سوى ذلك من المحارم...»

meaning "punishments specified in the canon for certain actions are called Hadd otherwise they are called Ta'azir with means of Hadd being of six kinds: adultery and its branches, accusation of adultery and drinking alcoholic drinks and robbery and waylaying and the instruments of Ta'azir are fourfold: rebellion, atheism, copulation with animals and performance of any forbidden action of this type".

«الحدّ يقال لغة الحاجز بين الشيئين و يقال أيضا للمنع و يقال لمنتهى الشيء و شرعا هو إيقاع عقوبة قدرها الشارع للمكلف على ارتكاب معصية و يمكن أخذه من المعنى الأول لكونه حاجزا بين أكثر العقلاء و بين ارتكاب المعصية و من الثاني لأن فيه معنى المنع و عن الثالث لأنه عقوبة لها قدر و غاية لا يجوز التجاوز عنه»

[22].

Literally, Hadd has been used with three meanings: 1) separation, partition and division between two things; 2) prevention and prohibition; and, 3) size and end and termination of everything and in "Shar'e Anwar", Hadd means a punishment the amount of which has been specified by the sacred canonical ruler and it might have been even considered in the canon with the first meaning because Hadd separates and divides between the perpetration of sin and crime as viewed by the intellectuals and obligees and it might have been considered with the second meaning because Hadd has prohibition latent therein and it might have been considered with the third meaning for it is a punishment the size and end and extreme amount of which is clear and vivid and it is not permissible to violate and exceed its limit [23].

In Al-Kāfi Fi Al-Fiqh, Halabi writes that "the intellectual abominations can be divided into two parts: 1) performance of heinous actions like oppression, falsity, adultery, usury and drinking of alcoholic drinks and 2) disruption in the obligations like honesty, fairness, Zakāt, Salah and performance of heinous actions and disruption of the obligations are also of two kinds: 1) disruptions that deserve Hadd punishment; 2) disruptions that deserve Ta'azir punishment. The examples of the first kind are blasphemy, murder, instigation of war, adultery, sodomy, lesbianism, pimping, theft, drinking wine and drinking beer. The examples of the second kind are disruptions other than the abovementioned cases [24]. It has been ordered in a definition of Ta'azir that "Ta'azir has been stipulated by the canonical ruler for deterring the wrongdoers and also preventing the other obligees from the perpetration of the heinous actions and the canonical ruler has been given the authority to subject to Ta'azir

punishment any heinous action and any disruptions of the obligations for which no Hadd punishment has been set" [24].

According to the above-presented materials, it can be stated that it becomes clear from the definition of crime that the performance or non-performance of any action is not considered as a crime unless a punishment has been set for it and jurists use the term "Oqūbāt" (punishments) with its singular form being "Oqūbat"; so, the performance or non-performance of an action is not considered as a crime if no punishment is found having been specified for it. In the definition of crime, canon is in full match with the statutory provisions because the regulations of the latter define the crime in the following words: "crime is an action prohibited by the law and/or it is an avoidance of an action the performance of which has been ruled therein and, from the perspective of both the statutory provisions and the canonical regulations, the performance or the non-performance of an action is considered as a crime only in case that punishment has been specified for it otherwise it is permissible with its performance or non-performance being not forbidden.

Conceptualization of Military Crime and Military Criminal:

Military crime and military criminal are two primary axes of the discussions in the books of military punishment law. Considering the fact that the laws of the general punishment and the laws of the military punishment share a common realm and the military regulations follow the lead of the general punishment law in the majority of the cases, the substantive regulations, i.e. the crimes and the punishments, and the formative regulations, i.e. the trial procedure and the military court's qualification and jurisdiction, should be sought in the military punishment law sources as well as in the penal law resources in some of the cases.

In the general punishment law, crime is usually divided in respect to its legal, material and psychological (intellectual) elements meaning that in order for a human action to be enumerated amongst the crimes, three conditions should be met:

Firstly, the action should have been realized as a crime by the legislator and a punishment should have been stipulated for it (legal element).

Secondly, the performance or non-performance of a given action should have reached a manifestation point hence emerged even if in minimal forms (material element).

Thirdly, the performance or non-performance should have been carried out with the perpetrator's knowledge and will (intellectual or psychological element) [25].

The crimes that are usually performed by a military person are of two types:

- 1) Purely military crimes
- 2) Crimes that might be perpetrated by the military individuals or civilians (general crimes) meaning that one of the classifications is the dividing of the crimes into general and military in respect to the legal element.

For more information, it should be stated that there has to be a performance or non-performance of an action with respect to the legal element and it has to have been realized as crime by the law; so, as long as the law has not specified an action as a crime and as far as there is not specified a punishment for it therein, the doer who has performed it or left it undone cannot be legally pursued and prosecuted. The second element which is the material component of the crime incorporates the doer's giving of a material aspect to his or her plan and intention meaning that s/he takes the action from an intellectual stage to an implementation stage. In terms of the material element, crimes are divided into performance or non-performance of certain actions; as for the intellectual element, the crimes can be divided into intentional and unintentional ones with the latter being dividable into quasi-intentional and purely mistaken crimes. It is evident that the accumulation and formation of these three elements is the prerequisite to the actualization of crimes and no crime can be said to have taken place in case of the foresaid three components non-accumulation in one place. Of course, it is worth reminding that these elements are not unique to the special crimes and their accumulation is necessary for all the crimes. Furthermore, this issue is carefully considered in the general punishment law and "the justificatory causes of crime or the crime's legitimizing factors like imperative legal order, law's rule, legitimate defense, emergency and helplessness, victim's satisfaction and the liability-negating factors like minority, insanity, coercion, reluctance and mistake are investigated; sometimes, it happens in a crime's perpetration that the doer is found not having committed the crime alone and independently rather s/he has perpetrated it in complicity with some others; in this regard, it has to be seen how much each of them shares the criminal action's perpetration and it has to be figured out how they have facilitated the crime's perpetration when they are found failed in the crime's real actualization which is prosecuted and punished under the title of complicity in crime"^[19].

In act (172) of IRIC, it is stated that "in order to try the crimes related to the special military or disciplinary duties of the members of army, gendarmerie, constabulary and Islamic Revolution's Guard Corps, military courts are formed as stipulated in the law. But, their general crimes or the transgressions they perpetrate in the position of the justice department's law enforcers are tried in the general courts". It can be discerned through scrutinizing this act that the foresaid maxim divides the military crimes into three parts:

- 1) Crimes related to the special military and disciplinary duties
- 2) General crimes
- 3) Crimes perpetrated by the members of the armed forces as the law enforcing officials

The materials presented about the elemental constituents of the crime as well as the general penal law also hold true for the military individuals. However, recognition of the crimes related to special duties is exclusively monopolized by the military courts and it has outcomes even influencing the countries'

interrelationships. Based on article (1) of LPAFC, "the military courts try the crimes related to the special military and disciplinary duties of the military personnel" and, additionally, corresponding to this law, "the military and disciplinary crimes of the military staff members working in other organizations are also tried in the other organizations and dismissal from service cannot prevent trial of the service time's crimes (approved in 2003, notes 1 and 2 in article 1). According to LTIRIAF, "trial of the crimes related to the special military and disciplinary duties of the members of Islamic Republic of Iran's armed forces (army, Islamic Revolution's guard corps, gendarmerie, constabulary, judicial police, Islamic Revolution committees and any other legal armed force) is within the jurisdiction of the special military courts as ruled in this law's articles" (article 1, passed on 12th of May, 1985).

By crimes related to the special military and disciplinary duties, those transgressions are intended that are perpetrated by the members of armed forces when fulfilling their military and disciplinary responsibilities specified by the rules and regulations for them (Ibid, note (1) of article (1). The perpetrator's being a military person and the military nature of the criminal action is totally associated with the jurisdiction of the military court. According to the new Islamic penal code of law, "crime includes any behavior such as the performance or the non-performance of an action for which punishment has been specified in the law (article 2, passed on 21st of April, 2013)". In Iran's criminal and military regulations, no precise definition has been offered for military crime but, based on articles of IRIC and LPAFC, the concept of the military crime can be obtained: "Perception of the military crime's concept is necessary for determining the jurisdiction of the military courts and two elements should be taken into consideration in the comprehension of the military crime: firstly, the personality of the perpetrator which is the basis of the personal jurisdiction of the military courts and, secondly, the nature of the crime that forms the inherent jurisdiction of the military courts"^[26]. Act (172) of IRIC has prescribed the establishment of the military courts for trying the crimes related to the special military and disciplinary duties; in an answer to the interpretation request by the Supreme Judicial Council (former) regarding the Act (172) of IRIC, Guardians Council has answered in a letter of written on 24th of September, 1984, under the number 1790 that "the respected Judicial Supreme Council: considering the letter numbered 1/12839/M, written on 20th of September, 1984, the issue was discussed in a session held by the Guardians Council, it has to be announced in reply that 'the general concept of crimes related to the special military and disciplinary duties is well clear and does not need interpretation; the violations are intended that have been perpetrated by the military or disciplinary agents in relation to their special duties the limits of which are specified by the ordinary laws'"^[25-27]. In this interpretation, no specific criterion has been presented by the Guardians Council and military crimes have not been clearly specified and only the violations perpetrated by the military or disciplinary agents in relation to their special duties have been realized as military crimes".

However, later on and during enactment of the LTIRIAF bill, Guardians Council declared that article (1) of the proposed bill contradicts act (172) of IRIC and expressed its inferences of the foresaid act in the following words: "based on act (172) of the constitution, the mere violation of the special military and disciplinary duties like leaving the post and escaping the war front and desertion of the watch is considered as a crime and the military courts have the jurisdiction for trying them. However, giving the military courts the jurisdiction for trying crimes like murder during the fulfillment of these duties that are enumerated amongst the general crimes is contradictory to the constitution"^[25-27]. In fact, from the perspective of the Guardians Council, special military crimes are those absolutely not perpetrated by the non-military individuals like sleeping when being on watch and escaping the service and so on but the other crimes like embezzlement and bribery and forging of the documents and so forth which are amongst the general crimes cannot be considered as military crime even if perpetrated by military personnel hence they are excluded from the inclusion circle of this definition; this is also believed in by some jurists^[28] who have expressed their agreement to the Guardian Council's interpretation of Act (172) of IRIC. Thus, it is using this interpretation that Islamic Consultative Assembly has stated in a note to article one of LTIRIAF (12th of May, 1985) during its enactment that "by crimes related to the special military and disciplinary duties, the transgressions are intended that can be perpetrated by the members of armed forces in relation to their special military and disciplinary duties and responsibilities as specified in the rules and regulations for them" (note (1) of article (1)).

It is worth mentioning that this definition is also similar to what has been mentioned in the interpretation of Act (172). Some of the jurists have defined the military crime as stated in the following words: "military men's default in preserving discipline and violation of their army responsibilities to which they have been assigned in relation to their jobs". According to them, military men's duties are specified based on the quality of the armed forces organization's needs; therefore, "if a military person picks up and takes possession of the objects and equipment entrusted in him or her for his or her own personal interest, s/he has perpetrated military crime. In addition if a military person discloses the documents or the classified information to individuals who are not qualified to get informed of them, s/he can be accused of military crime hence indicted"^[25].

And, the single article of the law on the restoration of the qualifications of the judicial authorities of the justice department (passed on 28th of April, 1979 by the Islamic Revolution Council) stipulates that "since the date of this law's approval, the military courts can exclusively try the crimes related to the special military duties and trial of the other crimes which have been brought within the jurisdiction of the aforesaid courts is assigned to the judicial authorities of the justice department" and its underlying note (1) stipulates that "the crimes perpetrated by the officers and non-commissioned officers as well as by the constabulary and gendarmierie staff and employees of the country

during the fulfillment of their duties and in service can be tried by the judicial authorities of the justice department" and, in the legal bill on the appending of a note to the single article of the law on the restoration of the qualifications of justice department's judicial authorities (passed on 21st of December, 1979 by Islamic Revolution Council) under the title of the note (3), it has been stipulated in explaining the military crimes that "by crimes related to the special military duties, those transgressions are intended that have been perpetrated by the officers and non-commissioned officers and the employees and staff members of the ministry of defense and army during their providing of service in their corresponding military organization or unit"; by the force of this law, the military crimes are not limited solely to the military crimes rather it can be stated according to this law that "military crimes are those that have been occurred by the cause of service or during service". This definition is general and it includes embezzlement and/or bribery or document forging and so forth which are related to military crimes; so, only the set of crimes perpetrated by the military men but not related to their military responsibility and duty during their service is considered general. This law is more consistent with LPAFC's perspective (passed on 9th of August, 1992 and on 30th of December, 2003).

In the law on the trial of the general crimes by the officers and others (passed in June, 1960) which had been revoked by the abovementioned law, military crimes had been defined as crimes perpetrated by the cause of providing service and during providing military service so it only included the crimes that had been perpetrated during providing service but having no causal relationship with the military service; and, in the army's law of trial and punishment (passed on 26th of December, 1939, which became enforceable since 4th of April, 1940 as approved by the national consultative assembly, article 1), it had been stated that "crimes attributed to the military men are tried according to this law in the special military courts". With its vastness, this legal article encompasses all the crimes of the military men, even their general crimes, whether during service or at the time of fulfilling duties, and stipulates their trial by the military courts. And, article (88) of the abovementioned law asserts that "private lawsuits are investigated in the justice department's courts and the private lawsuit is left suspended until a decisive sentence is issued for the general aspect thereof". Many of the articles of the aforementioned law included the ordinary and non-military persons and the trial of their crimes which were related to military men was within the jurisdiction of the military courts and it was actually a threat to the individuals' rights and freedoms. Thus, it was necessary to reduce the jurisdiction of the military courts and domain of their duties to some extent. Eventually, the law on the trial of the general crimes by the officers and others was enacted in 1960 and, finally, after the victory of the Islamic Revolution in 1978, restoration of the qualifications of the general justice department's authorities and limitation of the jurisdiction of the military courts were amongst the priorities of revitalizing the judicial justice. Note (3) that was appended to the legal bill on the restoration of the qualifications

of the justice department's judicial authorities was approved on 21st of December, 1979 and the Islamic Revolution Council defined the military crime in the following words: "by the crimes related to the special military duties, those crimes are intended that have been perpetrated by the officers and non-commissioned officers and individuals (privates included by the law on general military service) and employees of the ministry of defense and army by the cause of service in their corresponding military unit or organization". It was so until the separation of the military crimes in the Act (172) of IRIC which only placed the crimes related to the special military and disciplinary duties within the jurisdiction of the military judicial authorities and excluded the general military crimes, whether being perpetrated during service or when not in service, in absolute terms from amongst the military crimes. After the enactment of LTIRIAF in 1985, the legal administration of the judicature enumerated the general crimes related to the military duties and even the crimes perpetrated in military environment amongst the examples of note (1) to article (1) of LTIRIAF and asserted that "according to note (1) to article (1) of LTIRIAF (passed in 1985), by the crimes related to the special military and disciplinary offenses, those transgressions are intended that are perpetrated by the members of armed forces in relation to their military and disciplinary duties and responsibilities and by the cause of service-providing in their corresponding military organization or unit as placed on their shoulder in the rules and regulations" (notion number 7/76, issued on 23rd of April, 1986) ^[27, 29]. The advisory notion issued by the legal administration of the justice department have assigned the trying judicial authority to the adjustment of the cases and examples meaning that the military judicial authorities are responsible for the recognition of the special military crimes. It has been stated in the foresaid notion that "the note (1) to the article (1) of LTIRIAF has defined and described the military crimes and considered the duties and responsibilities' being of military nature as one constituent element of the military crime". Considering the law's definition, figuring out the match of a case with the law has been assigned to the trying judicial authority. It can be additionally explained that the trial of the crimes like robbery of the properties and money sums belonging to the military and disciplinary forces, robbery of the equipment and properties belonging to a military man by another military man in the military environment, embezzlement of the properties and money sums belonging to the military and disciplinary forces, receiving bribe in relation to duty and performance or non-performance of a task for the briber such as providing a certificate of military service exemption or completion, two military men's intentional beating of one another in the military environment, shooting that ends in murder during training and/or when being on watch and, in other cases, negligence in cleaning the weapon or when being on patrol or by ignoring the safety cautions when inspecting a place is within the jurisdiction of the military courts if they are found having been perpetrated in relation to the military duties and responsibilities; crimes like treason, instigating to treason and espionage are tried by the military court if they are found perpetrated in relation to the special

military and disciplinary duties and responsibilities otherwise, according to the first paragraph of the single article in the law on the limits and jurisdictions of the Islamic Revolution Courts, they can be tried by the Islamic revolution Courts (advisory notion no.7/4318 issued by the legal administration of the justice department on 28th of September, 1987 and Elham, *Ibid*, pp.34-35).

LPAFC which was temporarily enacted in 1992 by the Islamic Consultative Assembly's judicial commission and later on permanently approved on 30th of December, 2003, following some reformations has 12 chapters of it dedicated to the military men's crimes but many of the aforesaid crimes of this law are amongst the crimes that are considered general and a civilian can also perpetrate them like robbery, sabotage, forging and duplicity, embezzlement and extortion and so on ... Can these crimes be considered as special crimes with their trial being within the jurisdiction of the military courts or is it so that they should be within the jurisdiction of the non-military courts for they are amongst the general crimes? In case of a positive answer, is it not contradictory to Guardians Council's interpretation of Act (172)? If it is in conflict therewith, how could have Guardians Council confirmed it and failed to declare its contradiction of Act (172)?

The answer is that the Act (172) pertains to the jurisdiction of the military courts and it is not pertinent to the military men's crimes and punishments and it has not been also explicitly stated in the articles of LPAFC that the trial of all these crimes is within the jurisdiction of special military courts hence it is not contradictory to the Act (172) and it can be stated that all the cases mentioned in this law are not amongst the special crimes hence they can be not within the jurisdiction of the military courts unless all of the cases mentioned in this law are found implicitly or explicitly assigned to the military courts in the judicial procedures.

It can be anyhow stated that these discussions need more and precise discussions and investigations. It can be understood from some of the articles of this law that trial of the crimes that are not special but related to the military duties is within the jurisdiction of the military-judicial courts as it is also stipulated in note (1) to article (24) of LPAFC (passed in 2003) that "if persons take part in espionage in complicity with military men, they will be tried along with the primary military culprits in the military courts and they are sentenced to the same punishments specified for the military men"; note (2) to the aforesaid article stipulates that "complicity in espionage or hiding and providing shelter to the spy are criminal actions and the perpetrators as well as the primary military culprits will be tried in the military courts ...". Although, espionage has not been apparently considered as a special military crime, trial of this crime is within the jurisdiction of the military courts.

Data Analysis:

Considering the penal regulations from the past and the present, it becomes clear that the legislator has not defined the criminal liability and its legal nature. Sometimes, the term "liability" has

been solely used in the legal articles and sometimes the words "penal liability" and/or "limits of the penal liability" have been expressed and each of the legal authors has also offered a definition thereof but no comprehensive definition has been presented so far for the reason that each of them has approached the issue from a special perspective.

One of the contemporary jurists states that "criminal liability is the responsibility formed based on the perpetrator's knowledge of the action's criminality in addition to his or her prior malicious intention or criminal purpose so there should be a causal relationship between the perpetrated action and the result obtained from the crime so that the perpetrated criminal action can be attributed to the perpetrator"^[11].

It has also been stated that "criminal liability includes an individual's 'capability' or 'capacity' for suffering the penal consequences of the criminal behavior"^[9]. Some of the other jurists, as well, have defined criminal liability in the following words: "it is the responsibility of a person who has perpetrated a crime that has been explicitly mentioned in the law and it is based on this responsibility that the criminal is subjected to one of the punishments also explicitly mentioned in the law with the society being the victim of the crime"^[30, 31].

It can also be stated that "criminal liability is a sort of requiring an individual to provide answers regarding the abuses to the others whether for supporting the individual rights and individual freedoms or for defending the society which is introduced under the title of penal liability; the recognition of criminal or penal liabilities is of a great importance from the perspective of the Islamic penal lore"^[19].

It has also been stated that "in cases of falling short of performing the administrative duties and obligations and disobeying the rules and regulations governing the country and when they happen to be turned into crimes, the perpetrator can be punitively pursued and sentenced to the punishment specified in the law. Some of the authors, as well, have expressed the criminal liability as intended in Islam in the following words: "criminal liability in Islam includes a person's toleration of the consequences of the set of forbidden actions s/he has perpetrated by his or her own will and knowledge of the contents and results thereof"^[32].

The above definition expresses that criminal liability is laid on the foundation of three premises in Islam: 1) perpetration of a forbidden action; 2) having will in the perpetration of action and 3) being aware of the content and results of the perpetrated action.

So, the coexistence of these three pillars results in the actualization of criminal liability. As for the crimes, they can be divided into two types that can also be considered criminally liable in case of the coexistence of the abovementioned three premises.

1) Purely military crimes: they are transgressions or criminal behaviors that cannot be perpetrated by the non-military persons; they can be carried out following the assignment to certain duties so they are not usually performable by the ordinary people or their performance by the ordinary persons, i.e. civilians, does not end in holding them

criminally liable such as disobeying an order or leaving the post or deserting the service. In other words, these crimes are completely military. However, if we look for a precise definition of the military and non-military crime, they should be defined in a way fully conforming to and accepted by the country's military regulations.

2) General crimes: these are transgressions perpetrated by the military and non-military individuals like bribery, misuse of the governmental properties, sales and purchases of weapons and others that can be discussed and investigated in the general and specific penal laws; crimes of the first set are fall in the realm of military penal laws with military prosecuting offices having the jurisdiction for trying them. Of course, the personality of the perpetrator of the second set of crimes might cause them to be considered as the military crime meaning that they are separated from the second set and appended to the first set in which case the military court would try them.

Conclusion:

Like other society members, the armed forces, as well, need regulations and they are likely to violate the regulations and they may intentionally or mistakenly ignore the regulations and perpetrate crimes. Islamic law is a system wherein duty and obligation are of a great importance. In the holy Quran, as well, acceptance of responsibility has been equaled to the shouldering of a hefty burden indicating the importance and necessity of dutifulness for every human being. Responsibility and dutifulness are also considered so important by the immaculate Imams (peace be upon them) that Amir Al-Mo'menin Imam Ali (PBUH) finds himself so responsible before the God that his highness guarantees what he says by his darling existence.

In the dictionaries, responsibility has been defined as "being asked" and "being demanded" and it has been predominantly conceptualized as obligation, duty and what a person shoulders. Criminal liability is associated with words like commitment, obligation and requirement. And, punishment, as well, includes the hardship a person should tolerate for the perpetration of a crime. Punishments have properties with aspects deemed logical and expedient by the society and the individual members thereof. Criminal liability is a sort of requiring a person to provide responses for the abuses of the others whether in line with the support of the individual rights and/or individual freedoms or for defending the society and it can be also proposed under such a title as "penal liability"; armed forces, as well, are no exception to this rule and military courts are established as ordered in the law for trying the crimes related to the special military or disciplinary duties of these forces; however, their general crimes or the transgressions they make as the justice department's law enforcers can be tried in the general courts. By the crimes related to the special military and disciplinary duties, the transgressions are intended that have been perpetrated by the members of the armed forces in relation to their military and disciplinary duties and responsibilities to

which they have been assigned as ordained in the law. The military position of the perpetrator and the military nature of the crime are fully associated with the jurisdiction of the military courts. Crime is any behavior, including the performance and non-performance of an action, for which punishment has been specified in the law. Perception of the concept of military crime is necessary for determining the jurisdiction of the military courts and two elements should be taken into account in perceiving the military crime: firstly, the personality of the perpetrator which forms the basis of the personal jurisdiction of the military courts and the nature of the crime which forms the inherent jurisdiction of the military courts; secondly, the regulations related to armed forces which are utilized as the sources of the military penal law. Finally, recognition of the responsibility of a person and holding him or her liable are to be done based on certain preconditions that are actualized only after a person's knowledge, acceptance and taking measures in practice. A person can be held liable only when s/he can be considered as an obligee and when s/he is found having perpetrated the action with will and voluntarily not reluctantly or coercively or by threatening and so forth ... liability can be credible only when the individual is found having the power of perception and distinction. Thus, unaware and negligent persons cannot be forced to a task or assigned to responsibilities. A person can be reprimanded in respect to a shortfall of the responsibility assigned to him or her when s/he has previously recognized his or her responsibility and the prerequisite to this matter is debriefing and conception. So, it is necessary for the members of the armed forces to become completely familiar with all the angles of their duties and responsibilities from jurisprudential and legal perspectives so that they can protect the security of the Islamic society and country most correctly. Thus, it is suggested that these issues should be taught to the staff members of the armed forces as their lessons and instructional topics and, in doing so, the officials should not solely suffice to informing sessions.

Abbreviations:

- 1) Islamic Republic of Iran's Constitution=IRIC
- 2) The law on the punishment of the armed forces' crimes=LPAFC
- 3) The law on the trial of Islamic Republic of Iran's armed forces=LTIRIAF
- 4) Islamic Penal Code of Law=IPCL

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