

The Criminal Intervention in Illegal Buy and Sell of Foreign Currency Looking at the Judicial Precedent

Mohammad Jafar Habibzadeh*
Mohammad Bahoo†

Mahmud Saber‡

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Buy and sell of foreign currency is one of the banking operations and the Central Bank is responsible for formulating and setting its regulations, as well as monitoring their implementation. The essential criminal laws supporting exchange policies are; the Monetary and Banking law of the country approved 09/07/1972, the punishment of the disarrangers of country's economic system approved 10/12/1990, the regulation law of the non-monetary market approved 11/1/2005, as well as the anti-smuggling of goods and currency, approved 24/12/2013. In this study, we investigate these rules and answer the question by the descriptive and analytical method that whether the criminal legislator's intervention in the protection of the government communication's policies in buy and sell of foreign currency is based on the principles including clarity and transparency, or not. We have concluded that the non-observance of some tenets of criminalization as well as the lack of attention to other laws which are approved in this area, causes ambiguity and the conflict between laws as well as controversy in the judiciary precedent. This matter eventually leads to the failure of adopting a single and coherent criminal policy which has been used to confront this illegal behavior.

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JEL Classification: G00, K00

1 Introduction

The law is the purposeful concept and object that is enacted for certain proposes; therefore, it has to be clear for the administrators and presenters to understand it well and use it to achieve the desired goal. (Ashworth, 74:2006) The importance of this subject is doubled in the criminal laws, which deals with the life, property, and freedom of the people. (Lopez Ray, 21:2001) Therefore, only norms can be considered as law which is explicitly defined,

* Faculty of Law, Tarbiat Modares University, Tehran; Habibzam@modares.ac.ir.

† Faculty of Law, Tarbiat Modares University, Tehran; M.saber@modares.ac.ir.

‡ Faculty of Law, Tarbiat Modares University, Tehran; Interrogator of the Prosecutor's Office for Money and Banking Crimes; bahoo.mohammad@yahoo.com (Corresponding Author)

so that the citizen could adjust his behavior based on it. (Marty, 66:2003) Because of this matter law must be available.

In the realm of the foreign currency system, due to the country's economic dependence on exchange resources from crude oil export and the exchange needs of importers and other applicants of exchange resources and also restrictions on foreign exchange resources; specific restrictions and prohibitions have been approved so far in the form of regulations. (Validi, 47: 2014) According to the results of the studies, foreign currency system is one of the most effective factors on the level of the gross domestic product, the level of import and export, price level, the value of the national currency, purchasing power and in general the economic growth and development. Thus the significant part of monetary and currency policies of governments are establishing control and stability in the management of the foreign currency level. Therefore in some cases, policymakers to support these policies and achieve their goals, have considered the solution of criminal laws and criminalization and criminal intervention.¹

Considering the historical context of foreign currency laws, this criminal intervention has been predicted by the legislature at the same time as the first law on foreign currency was approved. As the article 7 of that law states: "permit searching and observance in buy and sell of foreign currencies by the commission of the currency's rate" which was approved in 25/2/1930 has set up that "the offenders of the article provision number 2-4-5-1 of this law including steward, partners, and deputies, shall be obliged to pay the amount of the subject act or forbidden transaction."

The legislator has also been involved in criminal intervention and determination of punishment for offenders in scattered laws of buy and sell of foreign currency. The most important laws in this regard are A) paragraph A of the 42nd article of the monetary and banking law, which is approved in 1351 in the country. B) Paragraph 1 of the first article of the punishment of the disarrangers of country's economic system, which is approved in 1991. C) Note 4 of article 1 of the law of the unorganized monetary market of the country which is approved in 2005. D) Article 18 and 22 of the anti-smuggling law of goods and currency that is approved in 2014. The main point to be considered is that the subject of criminal intervention in all these laws is "illegal buy and sell of foreign currency." However, the legislator has

¹ The purpose of "criminal intervention" is firstly, criminalization and codifying criminal sanctions and secondly, applying criminal sanctions by judiciary, quasi-judiciary and other organizations.

encountered by this subject under various titles including illegal buy and sell of foreign currency, unlawful employment of foreign currency's purchase and sell, a disorder in currency law by illegal purchase and selling of foreign currency and currency smuggling. To evaluate the effectiveness of this kind of intervention, the relationship between these titles and rules must be determined.

In this article, we are trying to use descriptive and analytical method to examine the applicable laws in this field and their conflict with each other as well as the perception of the judicial authorities. For this purpose, we analyze documents including content and discourse analysis of the existing laws and regulations in this context, detailed review of the negotiations of the Islamic Council Parliament and also investigating prosecutors and court of justice votes such as public and revolution courts in separate sections.

2 Research Background

Many articles and books have been written about foreign currency and in general foreign currency discussion, in various perspectives, i.e., economic, banking, and business management perspectives, etc. However, by reviewing and searching in written references, it is seen that in the realm of criminal law, the subject of illegal buy and sell of foreign currency in terms of criminal policy has not been discussed directly so far. The thesis and articles do not pay any attention to this matter inside the country. However, some researches related to criminal policy in the field of economic and currency crises have specifically been written. For example on currency smuggling as an example of foreign currency crime and examination of its various issues, but without presenting any kinds of definition or analysis of the subject's dimensions, which has some indirect or direct references to this issue.

The first study which has examined the subject is a thesis titled "examination of the foreign currency crimes in Iranian law" by Mr. Rahman Azemy at the law college of Shahid Beheshti University. Observing its content make clear that the author's focus is on the examination of the newly approved law on that time "The Law on Combating Smuggling of Goods and Foreign Currency" which, along with the writing of that thesis, had been approved in 1996. The author had published the illegal buy and sell foreign currency as smuggling currency in that research. Also, another thesis titled "currency offenses in law" is written at Tehran University by Mohammad Reza Farahmand in 2008. As the title indicates, the author has merely discussed offenses in the realm of the currency system and has stated that illegal buy and

sell of foreign currency can be considered as one of the currency's crimes and other aspects have not been discussed.

In this field, another thesis titled "criminal intervention assessment of the disturbance of the country's economic system" is written in 2007 by Mrs. Mehrangiz Roustaei at the law college of the Tarbiat Modarres University. Examining this makes it clear that the author has explained the economic concepts and disrupting the economic system and has stated that there are some forms of disturbing in the economic system, which is disrupting by illegal buy and sell of the foreign currency.

Regarding the historical study of this subject in other countries, this issue has not been discussed directly in the laws of other countries. However, in some cases, it has been investigated as an example of the economic crime or the corruptions which are associated with offenses. Albert Tellechea described offences and currency crimes as an example of the economic crimes in capital markets in an article entitled "Economic crimes in the capital market" which is published in 2008 in *Financial Crimes Journal* of the law college of the Florida University and he has cited that "currency controlling and banning" law is the observer of these points. (Tellechea; 2008, 2014)

3 Banking- Monetary Law Approved on 9/7/1972

According to paragraph A of Article 42 of this law, buy and sell of foreign currency and any banking operation that resulted in foreign currency transfer or foreign currency obligation and the entry and exit of the country's common currency without observance to the regulations imposed by the Central Bank of Islamic Republic of Iran based on article 11 of this law is forbidden. And offenders will be punished in cash, equivalent to 50% of the offense amount. (Kosari; 2003:25) And also according to the note of the mentioned article, the prosecution in the above cases is subject to the Central Bank of the Islamic Republic of Iran's complaint.

Based on this article, buy and sell of foreign currency is prohibited and illegal unless by adhering the Central Bank's regulation which is under the paragraph C of the article 11 of country's monetary and banking law, the money and credit council approved them and the Central Bank will notify it. In this regard, some questions raised which will be discussed and answered below.

3.1 Illegal Concept and Its Accessories

One of the ambiguities about this article is the meaning of "illegal"? Does the prohibition just back against buying and selling itself, or in cases where buy

and sell is following the Central Bank regulation and the foreign currency was obtained illegally?

In order to answer this question, it is necessary to make a relation between the monetary and banking law of the country and materials which amending act of the combating smuggling of goods and currency that is approved in 29/7/2015 and also take a look at paragraph H of article 2 of aforementioned law as well as article 18 which was repeated. According to paragraph H of article 2 of the mentioned law; “failure to comply with established criteria of the government or not having the Central Bank’s necessary licenses to enter, exit, buy, sell or transfer of foreign currency” are considered as smuggling. On the other hand, according to article 18 of the mentioned law “conservation, supplying, or buy and sell of smuggled foreign currency is the subject of article “18” which is considered as offence by corporate units and currency departments and the committed one condemned to seizure of goods and foreign currency in addition to punishment”.

By this description it can be said that first: “illegal” in the article’s text, meant to failure to comply with governmental laws, including lack of necessary permissions of the Central Bank in foreign currency buy and sell, which, of course should refer to the circulars, regulations of the Central Bank and provisions of the Cabinet of Ministers. (Azemy Samimi; 1995:47) Secondly, any foreign currency which is earned by buy and sell of foreign currency without complying governmental laws is considered as smuggled currency, which has to be seized based on article 18 material amending the law of the combating smuggling of goods and currency approved on 29/7/2015. Therefore, paragraph (A) of Article 42 of the monetary and banking regulation of the country merely refers to the illegal buy and sell of foreign currency that means without complying the Central Bank and governmental regulations. In other words, “the prohibition term” refers to “buy and sell” not to the word “foreign currency.” So if an exchange currency acted in buy and sell of foreign currency without complying with governmental regulations, its behavior is based on paragraph (A) of the article 42 monetary and banking law, and the foreign currency of this buy and sell considered as illegal and any form of deal by that foreign currency including resell it and keeping and transferring or remitting it, is smuggling and more correctly it is a crime based on article 18 in 2015. However, if the acting person knows about the illegality of the foreign currency, start buy and sell it, his action can be considered in the condition of illegal buy and sell and is a kind of offense not a crime and can be charged in money laundering.

Thus making a distinction between these two titles, “illegally buy and sell foreign currency” and “buy and sell of illegal foreign currency” is necessary.

3.2 Determining Reference of the Conditions of Buy and Sell of Foreign Currency

The other question in this context is; who is the reference in addressing the conditions of buy and sell of foreign currency? And where these conditions are published?

In order to answer this question, it should be said that foreign currency market along with Rial and Gold market are subcategories of the money market (Hoseini, 2008:90), and under the article 11 of the monetary and banking law of the country; the Central Bank of the Islamic Republic of Iran plays as the regulator and supervisor. Under Article 16 of the said law, the Central Bank consists of five pillars: the General Assembly, the Money and Credit Council, the Executive Board, the Supervisory Board of the Banknote and the Supervisory Board. In this context, according to article 18 of the monetary and banking law of the country; the Money and Credit Council is responsible as one of the pillars of the Central Bank, in deciding on the general policy of the Central Bank of the Islamic Republic of Iran and monitoring country's monetary and banking actions. One of the duties of this council is “handling and approval of the mentioned regulations of this law” based on paragraph 3 of article 18 of the mentioned law. These bylaws include: “regulation observer of the currency exchange operations” which is approved in 1/11/2016 that is published under number 254141/95 by the Central Bank's website, the executive regulation “future currency transactions” which is approved in 15/6/2010, executive order “establishment, operation and supervision on currency department” that is passed on 19/8/2014 or the Central Bank's regulation including “import of goods and services, goods transport and insurance and foreign currency facilities”.

On the other hand, the government and the minister's cabinet are also implementing article 138 of the Constitution and start to regulate and approve regulations to regulate foreign currency market.

By these descriptions, in response to the mentioned question it should be said that; the foreign currency's buy and sell conditions should be searched in directives of the Central Bank and the Cabinet of Ministers and of course, is not published in Iranian Official Newspaper, but on the Central Bank's website or other widely published newspapers. It means that policymaker's reference and the way of publishing regulations are some of the fundamental and essential criticisms of the direction of the criminal intervention in the

foreign currency's crime including illegal buy and sell of foreign currency because it is respecting the legality of its criminalization (Safarpour, 2011: 124).

Disobeying conditions of buy and sell of the foreign currency make this operation a crime named "illegal buy and sell of foreign currency." Because based on the general rules of the criminal justice, this matter is among the necessary elements of the crime which is required to be clear and unambiguous by the legislator based on the legality of the criminalization. It is while the conditions of "illegal buy and sell of foreign currency" have not only been incorporated into laws and delegated into regulations and directives of the Central Bank, but also they have not been collected in a definite set. In searching for them, one should inevitably refer to the regulations and directives which are changing rapidly and in accordance to the country's foreign currency conditions, which is also one of the other criticisms of the way that the criminal intervention involved in crime "illegal buy and sell of foreign currency."

3.3 The Concept of Infringement

Another ambiguity about paragraph A of the article 42 is that what is the meaning of "infringement"? Does the legislator aim at determining administrative and disciplinary sanction for the illegal buy and sell of foreign currency? Or is it mentioned in the text of the law by the legislator's negligence?

In terms of the appearance of paragraph (A) of article 42 and considering the term "infringement" and "offenders" we should know that the legislator has aimed to the determination of legal sanction of the illegal buy and sell of foreign currency. So by resorting to an explanatory tool including the heading entitled "criminal and police regulations", and consideration of the other materials which are referred below of that chapter, article 44 and even note of the article 42 explicitly refers to the prosecution, and also paying attention to the significant history of the mentioned crime since 1924 till now. Which all are indicating the criminal nature of the mentioned behavior and the necessity of the criminal complaint, and also paying attention to the general spirit of the law and the legislating method which the legislator is trying to supervise all the foreign currency transactions. We must assume that the term "infringement" in this article merely means "non-observing law regulations" based on the legislator's negligence. Therefore, the illegal buy and sell of foreign currency are considered as a crime and the criminal prosecution is required. However, the Central Bank's complaint requires criminal

prosecution based on the mentioned article, and this matter is one of the fundamental objections to the legislator.

3.4 Approach of the Judicial Precedent

At the end of this section, it is noteworthy that whether the judicial authorities consider “illegal buy and sell of foreign currency” as crime or infringement?

By reviewing the decisions of judicial authorities, it is considered that judicial authorities have conflict on the mentioned crime, therefore on the one hand, some judicial authorities give an independent identity to the said crime, as the branch 1064 of the second criminal court of Tehran has decided:¹ “regarding Mr. (M. Sh) charges for illegal buy and sell and distribution of foreign currency for seven hundred thousand dollars, the court because of disregarding the rules of the Central Bank complies the absence of the official license of buy and sell of foreign currency with the crime of the illegal buy and sell of foreign currency and based on the paragraph (A) of the article 42 and 11 of the monetary and banking law of the country which is approved in 9/7/1972 sentenced the defendant to pay fifty million Rials to the Islamic Republic of Iran. The judgment will be subject to review within twenty days of the notification date by the reviewing court of the Tehran province.”

Some other judicial authorities considered illegal buy and sell of foreign currency as smuggling crime and depending on the criminal behavior that is organized or professional and based on the type and amount of the determined punishment that is imprisonment or permanent detachment or otherwise determine its jurisdiction for Revolutionary Court or Governmental Discretionary Punishments Organization. These references, depending on the general or partial buy and sell of foreign currency; know this as a general or partial disrupting victim, and if the victim’s intention is striking of the system and be coupled with knowing about striking of the system will be in accordance of the corruption on earth crime. Handling this action is based on the unity vote resolution of 704, which is approved in 16/10/2007 in public board of the supreme court and will be in the jurisdiction of the Islamic revolution court.

¹ Judgment No. 930-0054, Date 4/12/2015

4 The Disturbance's Punishment Law in Country's Economic System Approved on 10/12/1990¹

In some cases, the criminalization in the field of the economic activities have been affected by crises in society and in response to public expectations in the fight against these crises, and usually, the reason is the involvement of the legislator's emotions in approving laws or legislative demolition and not having scientific findings on criminology. (Roustaie, 2009: 5)

According to this approach, in the late 1360s in Iran, in parallel with the increase in currency and monetary operations outside of the banking network and foreign currency smuggling, the legislator rapidly ratifies the law "disrupters punishment in the economic system of the country" (Noorzad, 2010:62) which is criticized from different dimensions. In this regard, through various ambiguities referred to this article of the mentioned law, just we pay attention to two useful articles under two headings.²

4.1 Dependence or Independence of the Disruptive Crime in Foreign Currency System by Illegal Buy and Sell of Foreign Currency

The first issue is whether the crime of disrupting in currency system through major foreign currency smuggling is deferent from foreign currency smuggling or disrupting is seen as a result of foreign currency smuggling? And in both cases, the question is about the meaning of "being major" and "disruption" and what is the detection criterion?

In this regard, on the one hand, the crime, which is this law's subject is a criminal description, which is independent of other relevant laws. If we know the material elements of the crime which are consist of three parts: "physical behavior, conditions of the commission of the crime, and criminal result", it should be said that: behaviors such as major foreign currency smuggling (physical behavior) resulted in disruption in economic system of the country (criminal result), in the major or minor way (conditions of the commission of

¹ Discussing the law is considered since one of the disturbance ways in country currency system is major foreign currency smuggling and according to paragraph (I) of article 2 of the law on combating smuggling of goods and foreign currency, "buy and sell of foreign currency without considering the terms and/or without any license from the Central Bank is equal to smuggling."

² In this regard, it should be noted that at the same time as the crisis of 1391 which led to an increase in the exchange rate and the devaluation of the national currency, MPs in an open session on Tuesday, 17, 11/1391, urgently trailed under the title of «counteracting currency disturbance and the punishment of disrupters in the foreign exchange market» was approved and ratified, but it was not finalized in terms of some commentary.

the crime) are subject of this law. (Deputy of the judiciary, 2009: 45) Because of the transcendence of the “disruption,” this behavior follows this result and disruption in the currency system is a crime which is bound to result. So if the behaviors which are contained in the article’s text and other like, not to conclude in “disruption”, these are absolute crime and included in other criminal laws; unless they do not be crime at all and if they conclude in “disruption”, they are included in disruptor’s punishment law of the economic system. It should be noted that behavior and result are integrated into disruption. Otherwise, disruption is originally a behavior and disrupted is originally a result, and due to the unity of these two, it should be said that the mentioned crime, is bound to the criminal outcome.

In this regard, the “disruption in country’s currency system” crime is an independent and separate crime and foreign currency smuggling or illegal buy and sell of foreign currency, in the condition of the major smuggling, are its realization. When the court did not acquire “disruption in country’s economic system” and because of acquiring criminal title and its adaptation is on the court, the handling and taking the proper decision about the foreign currency smuggling should be taken place. However, based on my opinion, in the condition of appearance of the disruption result, the office’s prosecutor cannot inform the accused one about other criminal titles separately and this action is out of legal justification.

On the other hand, in consideration of the mentioned law, it is clear that there is no specific and measurable criterion in determining “majority” and “disruption,” which is in contrast with “the qualitative and transparent of the criminalization” principle. However, as mentioned before, based on paragraph 6 of article 1 “observer’s regulations of the currency exchange” which is approved in 2016 by the Central Bank, “the major deals are deals with an amount equivalent more than ten thousand dollars.” Although this numerical benchmark did not be mentioned in approved law of Parliament, it is mentioned in the Central Bank’s guidelines so that it can be used as a specific criterion. However, according to the author, indicating the particular amount, based on the current situation of the country that is facing a crisis, or it is at the peak of prosperity, cannot be a specific criterion, and it is a relative matter, and a more precise and flexible approach is needed.

But as the duty of judicial authority is to attain the subject and adaption of sentence on the subject, so it seems that in all of the mentioned cases, diagnosing its predominant and majority and making a disturbance in currency system is anyhow duty of the judicial authority.

It is notable that the legislator for resolving this vagueness and assisting the judge who is the handler of diagnosing the mentioned cases, in article 5 of procedure rules for how to investigate the crimes committed by disturbers in the country's economic system adopted in 14/11/2018¹ constituted: "the judge who is the handler of diagnosing its predominant, majority or abundance of the mentioned cases in the rule of disturbers in country's economic system adopted in 19/12/1990 and also the subject broadness of article 286 of the Islamic Penal Code adopted in 2013, must consider these cases according to the jurisdiction of crime place: A) The number of victims; B) broadness and extensiveness of economically and socially destructive effects or damages by that crime; C) the amount of money or benefits from the crime."

4.2 Approach of the Judicial Precedent

Not determining a measurable criterion for the contents "predominant and majority" and "disturbance" caused diversity of views for judicial authorities and difference in impression and applying personal tastes by the judges. It has caused that in one trial chamber, in the judge's opinion, the defendant behavior leads to disturbance in currency system and he/she is sentenced to the substantial custodial sentence because of being indicted on disruption in country's currency system. But in another trial chamber, he/she is just presented to governmental discretionary punishments and only is sentenced to pecuniary punishment because of failure to diagnose disturbance and just on charges of simple smuggling of foreign currency.

Notably, the judicial precedent has divided the disturbance in currency system into two kinds "major disturbance in currency system" and "minor disturbance in currency system" following the articles 1 and 2 of the mentioned law. But no measurable criterion has been suggested to determine the purpose of "majority and minority disturbance" and the judicial authorities act based on their own diagnosing and arbitrarily pass sentences. Some judicial authorities deem it necessary to consider a bachelor's thesis of the Central Bank for diagnosing whether disturbance in currency system has occurred in major or minor as the chamber 15 of Tehran's Islamic Revolution Court in file classifieds archive T/18942/91 accusation of Mr. (A.A.). The reason is that in terms of unanimity practice verdict 704 disturbance crime in country's economic system has two main conditions which one of them is that

¹ This rule has been approved for implementation the paragraph 11 of the procedure date 3/8/2019 for the chief justice of Iran and the supreme leader's agreement and article 286 of Islamic penal code approved in 1392 and for dealing with the currency crisis and quick handling the committed crimes by disturbers in the country's economic system

the actions of defendant persons are equal to disturbance in economic system, deem it necessary to consider a bachelor's thesis of the Central Bank in this case and has given back the file for solving the problem by issuing sentence.

About the view of judicial precedent related to disturbance crime in country's currency system and its dependence or independence from other commenced subjects, by considering some judicial verdicts, it seems that the predominant judicial precedent can recognize independence identification for the "disturbance in country's currency system" crime against the "foreign currency smuggling and illegal buy and sell of foreign currency" crime. As in terms of issued written judgment from the chamber 1064 of criminal court 2 of Tehran economic complex, the chamber judge has issued:¹ "about the accusation of Mr. (M.A.) on disturbance in currency system through illegal buy and sell and distribution of foreign currency as non-major practice (with the amount 550000 dollars), according to the kind and amount of the defendant actions which have been occurred on a small scale so that the effect of his committed acts on the currency system or economy is minor and based on this, his committed acts have no big importance which cause to disturb the country's currency system, so the subject is out of evidences for disturbing in country's currency system and matches the crime of illegal buy and sell of foreign currency ...".

As it is cleared, the judicial authorities have no specified criterion for determining the majority or minority of the disturbance, and in principle, they make their decision arbitrarily which is an objection entered the way of legislator's criminal intervention, and it must be reviewed to be resolved.

5 Non-Organized Monetary Market Regulation Law Adopted on 11/1/2005

In this law, the subject "buy and sell of foreign currency" has not been indicated directly and explicitly, but based on article (1) of this law:" occupation in a bank operation by real or legal persons under any title, and establishment and registration any association for performing bank operations without any license from the Central Bank is forbidden. Bank operations are applied to mediating between suppliers and applicants of funds and credits as receiving any funds, deposits, endowments and similar cases under any titles and giving loans, credit and other facilities, and issuing pay cards and credit cards."

¹ Judgment No. 930-094, Date 13/10/2014

Based on paragraph (C), article 11 of the country's monetary-bank law adopted in 1351, one of the Central Bank of the Islamic Republic of Iran's duties is to set up the regulations related to foreign currency transactions and commitment and ensuring foreign currency payments adopted by the Money and Credit Councils and also supervision on foreign currency transactions. It is also forbidden to buy and sell foreign currency and any bank operations without considering the regulations of the Central Bank of the Islamic Republic of Iran based on paragraph A, article 42 of the mentioned law. Since based on the cited articles, there is a mediating between foreign currency supplier and applicant in foreign currency transactions which is the intrinsic nature of bank operations, so the foreign currency transactions belong to bank operations is undoubted and allowed to be done in banks and adopted currency exchanges (such as bank currency exchanges or non-bank ones). And it is an offense to be made by other persons and will be counted as a crime in some cases, and the method for doing that and the conditions ruling on will be specified and adopted by the Central Bank and the Money and Credit Council.

By this explanation, buy and sell of foreign currency without taking a license from the Central Bank and without considering other regulations and criteria determined by the government is counted as an illegal occupation in bank operations and the perpetrator will be followed by the judicial authorities if the Central Bank prosecutes him/her.

According to the discussed subject, we will investigate the concept of illegal occupation in buy and sell of foreign currency, the relationship between this crime and other crimes and the approach of judicial precedent.

5.1 The Concept of Illegal Occupation in Buy and Sell of Foreign Currency

Illegal buy and sell of foreign currency are possible in two ways: the first case is where buy and sell of foreign currency is done by illegal resources or in other words, buy and sell of foreign currency is done by the resources which have no license for it. The second case is the supervisory role on somewhere while being legal or formal resources for buy and sell of foreign currency, buy and sell of foreign currency by these resources will be done without considering the criteria and regulations determined by the Central Bank, and it causes these actions to be regarded as illegal ones.

In this field, according to the note 2, article 7 of the Law on Combating Smuggling of Goods and Foreign Currency adopted in 2013, "supplying and selling foreign currency" by the legal units specified by the government and

persons or guild units is forbidden and the offenders will be punished according to the law.”

According to the above regulations, buy and sell of foreign currency is only legal when at least a party, bank or currency exchange is legitimate. Otherwise, this action will be illegal and can be considered as a crime “illegal occupation in buy and sell of foreign currency.” But, according to the article aspect and the expression “occupation” at the head of the article which is the infinitive of “Bab-e-Efteaal,” another fulfillment condition must be considered for fulfilling the mentioned crime. The state of continuity and constancy of buying and selling of foreign currency illegally is a differentiation point and separation of the crime “illegal buy and sell of foreign currency” which is the subject of paragraph A of article 44 of the country’s monetary and bank law and article 1 of the law in the review.

5.2 Relationship between the “Illegal Occupation in Buy and Sell of Foreign Currency” Crime and the “Smuggling and Illegal Buy and Sell of Foreign Currency” Crime

In this case, as it was mentioned above, the differentiation point between the “illegal buy and sell of foreign currency” crime of the subject of paragraph A, article 42 of the country’s monetary and bank law and the “illegal occupation in buy and sell of foreign currency” crime, is in continuity and constancy of buy and sell of foreign currency illegally. More precisely, the intention of illegal purchase and sale of foreign currency covertly, makes it seem both crimes have independent nature from each other and are separately applicable and cannot be fitted in a unique act simultaneously.

About the relationship between the mentioned crime and foreign currency smuggling crime (the subject of the Law on Combating Smuggling of Goods and foreign Currency adopted in 2013 with the next reforms), it is believed that by adopting the Law on Combating Smuggling of Goods and foreign Currency in 2013, article 1 of non-monetary market regulation law and its note 4, at least about illegal occupation in currency process and especially buy and sell of foreign currency, there is an implied abrogation and is not functional; since according to paragraph I, article 2 of the Law on Combating Smuggling of Goods and foreign Currency with reforms in 2015, “non-considering the determined regulations through the government or without necessary licenses from the Central Bank for import, export, purchase, sale or currency bill are considered as smuggling”.

5.3 The Approach of Judicial Precedent

Here, it can be discussed “what do the judicial authorities interpret the mentioned article? Is the said crime an independent one from the crime of illegal buy and sell of foreign currency and foreign currency smuggling from the judicial authorities’ view or not?”

In this case, it is notable that some judicial authorities still know the mentioned article enforceable for occupation in illegal buy and sell of foreign currency. As the chamber 1063 of criminal court 2 of Tehran’s economic complex has cited in a letter that:¹ “about the accusation of Mr. (A.H) citizen of Afghanistan, indicating a minor disturbance in the country’s economic system through professional foreign currency smuggling in the amount of 1 million dollars and also illegal occupation in exchange process in terms of illegal buy and sell of foreign currency; the subject of indictment of District 36, Tehran’s public prosecutor office, according to all the documents and the file contents and based on this, firstly “the spiritual multiplicity of crimes” have been declared in the indictment. So, the secular behavior assigned to the defendant from the public prosecutor office’s authorities, inevitably is a unique act which firstly, endowed with two criminal titles (professional foreign currency smuggling and illegal occupation in exchange process) and then, these two titles have also been explained as the evidence of the third crime on the whole (minor disturbance in economic system). (Note 2 article 134 Criminal Act) Secondly, a separation between various offense investigations of the defendant in different judicial authorities exclusively is the supervision on a hypothesis which the defendant has committed different criminal actions. It is not the defendant’s unique act matches various illegal titles, and in the recent interpretation according to the established sentence in article 131 Criminal Act, a competent court can principally investigate it which has the authority to issue a maximum code verdict. Thirdly, since legal punishment for “professional foreign currency smuggling” crime is the maximum of legal punishment of “illegal occupation in exchange process” crime, according to paragraph (B) article 14 of the Law of the Sixth Plan of Economic Development, Social and Cultural Development of the Islamic Republic of Iran. Fourthly, since according to article 44 of The Law on Combating Smuggling of Goods and Foreign Currency, investigation the

¹ Judgment No. 960-179, Date 19/3/2018

crime “professional foreign currency smuggling” is in the jurisdiction of the Islamic Revolution Court.¹

So, ignoring this fact that professional foreign currency smuggling is not an evidence for disturbance in the country foreign currency system, but major foreign currency smuggling accounts as the evidence for a disturbance. So, the public prosecutor’s explanation about it is based on a mistake, this court does not know itself as a competent court for investigation, and under the article 341 Criminal Procedure Act the writ of non-jurisdiction to Tehran’s Islamic Revolution court is issued.”

6 The Law on Combating Smuggling of Goods and Foreign Currency adopted in 24/12/2013

According to paragraph (A) article 1 of the above law, foreign currency smuggling includes: “Any act or omission which causes to violate due process related to import and export of the foreign currency is considered as smuggling based on this law and/or other laws for that a punishment has been considered, if it is discovered in entrance and exit bases or any points in the country even in its supply places in domestic market.”

The foreign currency has also been defined according to paragraph (C), the same article and it includes: “currency of foreign countries such as banknote, coins, currency transfers and other written or electronic documents which are applicable in money transfers.”

According to the presented definition about the currency concept as above, it is evident that foreign currency could not be limited to foreign countries’ currency, but the currency concept is much broader than that.

Based on this description, here we merely investigate the relationship between the crime “foreign currency smuggling,” and the other mentioned crimes in this article and the view of judicial precedent will be discussed about pre-said law’s abrogation and/or their legal weight.

¹ According to paragraph (B), Article 14 of The Law of the Sixth Five-Year Plan for the economic, social and culture development of the Islamic Republic of Iran which has been replaced with article 1 and note 4 of article 1 of the regulation law of the non-monetary market: “doing any bank processes, leasing and exchanging by legal or real persons without gaining license from the Central Bank is forbidden and the perpetrator will be condemned to one or more discretionary punishments degree 6th of article 19 Criminal Act except imprisonment and whip (lash) based on the cases.”

6.1 The Relationship between the “Foreign Currency Smuggling” Crime and the “Illegal Buy and Sell of Foreign Currency” Crime

One of the vagueness which has also been pointed previously is that by enforceability of the law on Combating Smuggling of Goods and foreign Currency adopted in 2013, whether independent legal action with the “illegal buy and sell of foreign currency” crime under paragraph (A), article 42 of the country’s bank and monetary law adopted in 18/04/1351 and prosecuting it separately from the “foreign currency smuggling” crime has legal justification or not?

According to the definition of “foreign currency smuggling” in paragraph (A), article (1) and paragraph (I), article (2) of the law on combating smuggling of goods and foreign currency modified on 29/7/2015, which absolutely considers any purchasing, selling and illegal money transferring as the currency smuggling, we must be convinced that paragraph (A), article (42) of the country’s bank and monetary law has been implicitly abrogated and know any illegal buy and sell of foreign currency included in the “foreign currency smuggling” crime. It must also be pointed to the article (7) of the law on combating smuggling of goods and foreign currency and especially its notes (2) and (3) for confirming this opinion. The article (7) of the law indicates: “the Central Bank is obligated to do the following actions to prevent and control the illegal foreign currency exchange markets:

A- Specifying and informing the amount of foreign currency can be kept and exchanged inside the country, with the passenger, with passing driver and the same cases.

B- ...

Note 2- Supplying or selling of foreign currency out of the customary units specified by the government by persons or guild units is forbidden, and the offenders will be treated under the law.

Note 3- The government specifies the terms and conditions of foreign currency usage”.

In this relation and also article 18 and 18 repeatedly of the law characterized for foreign currency smuggling and storing it determines to protect by sanctions and paragraph (D) of article 18 states: “pecuniary punishment for buy and sell of a foreign currency or transferring it is twice more than its price in Rial.” Article 18 is frequently expressing this law: “carrying and storing, supplying or selling the smuggling foreign currency, subject of article 18 of this law by the guild units or currency exchanges is

offending and the offender will be punished peculiarly based on the frequency of the action repeated as well as restraining his/ her currency.”¹

It can be concluded that while illegal buy and sell of foreign currency is considered as smuggling, it is an offending; (Farahmand, 111: 2009) which governmental discretionary punishments have jurisdiction to investigate it unless it has been committed professionally or in an organized manner and/or imprisonment for life or suspension has been predicted for that. Then its jurisdiction is on behalf of public prosecutor and Islamic Revolution court. Other files about the smuggling of goods and foreign currency are offending, and the governmental discretionary punishments have jurisdiction to investigate them. If a file has many offenders and one of them must be investigated in judicial authorities, the others are also investigated over there.

6.2 Approach of Judicial Precedent

By investigating the decisions of criminal legal authorities including public prosecutors and courts, it is clear that although the judicial authorities had a dual approach to the behavior of “illegal buy and sell of foreign currency” from the past, i.e. before adopting the law on combating smuggling of goods and foreign currency in 2013, some consider it subject to paragraph (A) article 42 of the monetary and banking law and some others know it subject to the title “foreign currency smuggling”, (inferred from the article 6 of the law on how to apply Governmental Discretionary Punishments about smuggling of goods and foreign currency adopted on 2/5/1995. So, after adoption of the law on combating smuggling of goods and foreign currency in 2013,² it seems that the most judicial authorities are believed in implied abrogation of paragraph (A) article 42 of the country bank and monetary law unless the act “illegal buy and sell of foreign currency” leads to “disturbance in country’s foreign currency system”, then the most judicial authorities believe an independence identity for “disturbance in country’s foreign currency system through illegal buy and sell of foreign currency merchandising”.

As the interrogation branch 5 of Tehran district 36 public prosecutor about the file classified archive 960021 has made such a decision: “about accusation of Mr. (H.A) indicating disturbance in currency system majorly through illegal buy and sell of foreign currency, according to the early report of the Ministry of Intelligence, the documents discovered from the defendant’s office, the

¹ The legislator has not pointed to the word “currency purchasing” by guild units or currency exchanges and it seems that this issue is because of the legislator’s negligence.

² This law has become abrogated expressly due to article 77 of the law on combating smuggling of goods and foreign currency.

response of the Central Bank about no necessary legal license for his foreign currency acts, the amount of his bank account turnover and the volume of foreign currency transactions: 8,560,000,000,000 Rials within 2013 to 2017 which caused high fluctuation in market and according to clear confessions by the defendants, writ of summons for the defendants has been issued in documentary to paragraph A, article 1 and 2 of the law of punishing disrupters in the country's economic system and considering the article 265 of the law of Criminal Procedure Act.”

7 Results and Suggestions

By adopting the country's bank and monetary law in 1972, the Central Bank and at its top, the Money and Credit Council, have been introduced as the supervisor organizations and policymakers in foreign currency exchanges. Since 1351 till now, the Central Bank has paid to policymaking in the field of foreign currency issues such as buy and sell of foreign currency. In direction of criminal supporting from these policies and contrasting with any harassment to determinative policies from the Central Bank in the field of foreign currency, the lawmaker in distributed laws such as paragraph A, article 42 of the country's bank and monetary law adopted in 1972, paragraph 1, article 1 of the law on punishing disrupters in the country's economic system adopted in 1990, note 4 of article 1 of unorganized monetary market regulation law adopted in 2004 and also in articles 18 and 22 of the law on combating smuggling of goods and foreign currency adopted in 2013 has considered criminalization and determining criminal sanctions. So, due to precipitancy in making laws resulted from the disorganization of the foreign currency market and also because of nonconformity the primary principals of criminalization and also inattention to other laws adopted in this field, it causes to make vagueness and contradiction between the adopted laws and even diversity in the votes of legal authorities.

In this field, judicial precedent has been divided because of nonconformity the principle of “perspicuity and transparency” in making laws, then some judicial authorities consider “illegal buy and sell of foreign currency” as an independent crime and determine punishment in terms of paragraph A, article 42 of the country's monetary and banking law. The second group of judicial authorities consider “illegal buy and sell of foreign currency” as smuggling and refer it to the Islamic Revolutionary Court. The third group of judicial authorities sees this act as the crime “illegal occupation in bank operation” and the fourth group of judicial authorities consider all of these items for this behavior and referring to the spiritual multiplicity rule, will sentence capital

punishment on this act. It is while some of suppositions of investigating the accused titles are incompetency of different judicial authorities such as criminal court 2, criminal court 1, Islamic Revolution court and/or governmental discretionary punishments then which conformity of the spiritual multiplicity rule will encounter some problems due to identify the type of authority. It is also notable that some of judicial precedents know the act "illegal buy and sell of foreign currency" as the "disturbance in the country's currency system" crime because of disturbing in the currency system. And based on the amount of defendant's currency exchanges majorly or massive and if it is massive, to hit the Islamic Republic of Iran's government, or knowing the effectiveness of actions in striking the regime, they are treated differently by this unusual behavior. In this regard, although through passing the "Law on Combating Smuggling of Goods and Foreign Currency" of 2013, positive steps were taken to adopt a coherent criminal policy in dealing with the crime of "illegal sell and buy of foreign currency" and the legislator tried to establish a single approach to any violation of the formalities of foreign currency trading, there are still some shortcomings in this area, including the lack of explicit reference to the abrogation of laws.

In any case, given that Iran has not had any comprehensive legislation on foreign currency and combating its various offenses, including illegal buy and sell of foreign currency, in different periods of the Iranian legislature. Therefore, it is suggested that all possible examples of criminal behavior that could endanger the security of the country are identified and governed explicitly by criminal law. But since it is not possible to account for all the examples, some examples are created in terms of time and place; therefore, it is better to censure some other based on a specific criterion.

The primary consideration of this type of criminalization is that, as in the Disturbance's Punishment Law in Country's Economic System, the legislator's criteria should not be ambiguous but comprehensible. Since the concept of "disturbance" is a general and vague concept that can be interpreted and attributed to many instances in which the expression of the cases in an allegorical sense, in this broad sense, can lead to the violation of the rights of the people and bring the principle of the legality of crime and punishment to justice. However, in contrast to the vague concept of disturbance, concepts such as an increase in foreign currency or the devaluation of the national currency a decrease in the reserve of the country, etc. are certain concepts that behavior leads to this result, for the audience of the law is identifiable.

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