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The confine of criminal law intervention in media

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ABSTRACT

As a public communication tool, mass media is the best instrument to achieve radical rights such as free opinion, free expression and free information/communication. Since radical laws are not limitable – except than necessary cases pointed out in international documents (Human Rights Declaration, Article 119; International Convent on Civil and Political Rights, Articles 19 & 20) – there should be justified grounds and principles to control and monitor mass media by penal tools as the most important limiting factor. To this end, it is only damage principle in extensive damages criminalization that leads into lowest criminal law interferences in media field. Other basics including public interest, legal patriarch and legal moralism pave the grounds for government to use such basics in order to interfere in basic rights and also media field.

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Introduction

Concerning the critical role of mass media as the fourth pillar of democracy that acts as the ears and eyes of nations that prevents despotism in governments in one hand, and, on the other hand, the role it can play in scattering internal and external security of different countries and destroying people's rights through rending and aspersion and entering into the private bounds would shape different opinions on right method of controlling and monitoring over media and to determine limitations for their activities. Although in the first years of media emergence, administrators considered it as a "potential enemy" and they did their best to limit media through posing pressures and censorship, they ultimately understood the important position of media in political, economic and social growth and development of countries via ideas provided by such thinkers as Raymond Williams, Denis McCoil and Fernan Trow on media controlling methods and freedoms (Motamednejad, 2002: 78). Therefore, although governments' approach on media was to pose pressure and censorship, in next ears opinions were raised on controlling governmental interventions by which nonintervention by governments in media scope was considered as a necessary. Today, it is believed that governmental intervention to support radical freedoms as well as paying attention to real status of medial is a necessary in order to achieve growth and development (ibid: 80).

Media scope is a radical field like free opinion, free expression and free information/communication. Although supporting public security/discipline, ethical health and respecting the rights of other people are right bounds for media to operate (Human Rights Declaration, articles 19 & 29; International Convent of Civil and Political Rights, article 19), it should be clarified that to what basis criminal law can intervene in this limit. Experience shows that using penal tools in cultural field especially mass media is considered inefficient due to the impossibility of implementation and, more importantly, disutility. Therefore, present paper tries to investigate the basics of criminal law interference in media field. So, by recognizing such basics, criminal law intervention in human radical rights can be done on this basis and as the final solution.

In this regard, the most important principles are damage principle, public interest principle, legal morality and legal paternalism that will be studied below.

The basics of criminal law intervention in media scope

Briefly, we know that all philosophical theories and schools have admired freedom limitation to assure their survival and individual freedom as well as for social life. Their differences are the freedom limitation power, its justification and how to shape it. Such difference is mainly rooted in different philosophical, verbal, sociological and political attitudes toward human, society and government and, particularly, the status of government and its dominating ideologies as well as the perception of governmental authorities and how to confront them. Each important theory has attempted to justify its intervention if individual rights and freedoms and to clarify its reasons and types of interventions.

Such circumstances and requirements that justify public power intervention does not only necessarily mean the of criminal and oppressive intervention but also justifies the deviation of behaviors or practices from individual freedom and its entrance into public power scope which involves a widespread scope of civil, official, disciplinary, social control and, ultimately, penal initiatives.

As we know, the natures of such initiatives are not identical. Some of them are harder while others are softer. To justify the hardest intervention namely criminal one, one should have special justifiable reasons and documents to show that it is admirable to recourse such interventions.

Another point is that despite of the importance and attractiveness of penal action, there is no ground to insure that government will not violate its authorities in using such penalties. Even, there is no concurrence among those officials who are accountable professionally like lawmakers, lawyers and criminal law philosophes to justify criminalization and its hallmarks and norms ethically. Perhaps, this is one the reasons of the emergence of an important phenomenon which is led into over – criminalization. Lack of a clear basic definition on criminal law intervention in media scope which is directly

related to human basic laws and liberties has caused maximum criminalization in this field.

Before starting the discussion, it is necessary to get familiar briefly with three major attitudes that impact on criminal law intervention remarkably. They include teleological attitude, deontological attitude and pluralistic attitude. According to deontology, a practice or norm is ethically good when it is right per se. overall, those people who believe consciousness as the guidance or benchmark of ethics are usually deontologists. In such view, it is emphasized on an offence already committed by a criminal so it is also called as past-orientation view. In contrary, teleology states that an act is good when its result is domination of goodness over badness. Teleology is often looking for enjoyment and profit and describes goodness as happiness and badness as suffering. In such view, the consequences and effects of a behavior are considered so it is a foresight view (Yazdian Jafary, 2005: 9).

Deontology blames the basis of criminal law intervention and considers a behavior as a crime if its condemning capability is to the degree that convinces punishment. It is task – oriented not only in crime but also in punishment and bases punishment on retribution.

Teleology considers damage principle as the basis of criminal law intervention and believes that a behavior is criminal when its evilness is too high that we have no choice to consider it as a crime. It considers a utility as the basis of punishment which is achieved by posing the punishment (ibid).

Since both views have their own deficits which make it difficult to base crime and punishment on them alone, most criminal laws and flows have admired an aggregation of both views which has yield to a pluralistic view. Today, deontology and blame principle are the basics of criminal law intervention as the pillars of justifying such intervention. In other words, to consider a behavior as crime, there should be an extent of ethical indecency in addition to damage and public interest so that criminal law intervenes as the ultimate solution. Therefore, along with damage principle and public interest, this principle is considered as the basis of most criminal law interventions.

Damage principle

The most important principle called as “liberty – limiting principle” and “coercion legitimizing principle” is loss norm in civil law and damage principle in criminal law. In many legal systems, it is accepted as a rational basis to limit individual liberty and the possibility of public power intervention and not necessarily as a penal action. In Islamic and Iranian laws, it is recognized as “damage prevention norm” which differs a bit from “damage principle” in traditional philosophy and laws in west. So far, private laws are discussed in Islamic laws and damage principle has not been considered as an independent principle to legitimize criminal law. Although there are paramount evidences on criminal law intervention is legal system to prevent damaging behaviors against other people, it is not discussed independently.

In fact, it is the oldest principle that justifies governments’ intervention and breaching citizens’ free wills. On this basis, the government is allowed to intervene in citizens’ behavior and breach their free wills on order to remove or prevent any damages.

The nature of damage principle

Here, the most important issue is to recognize what is damaged. What should be protected from any damage? Although the main and fundamental thinking beyond damage principle is yet remained and its contents are right in the format of a conditioned item (i.e. one can intervene in individuals’

behavior if such behavior poses damages against other people), social and political changes in 20th century on the expansion of welfare government and the emergence of different social insurances mitigated the attractiveness and efficiency of this principle. The reason is that it is hard to find a pure personal action without damage to other people element. For instance, someone is carelessness and is seriously injured or damaged. In such case, he poses a heavy burden on both his family and government and society in order to be cured and he also has caused expensiveness in insurance rates. Therefore, we cannot consider it as a personal behavior only because that it has damaged such person. It is true for many actions and behaviors that are purely seen as personal and have mutual relations to different aspects of human collective life. To this end, current social circumstances need to accept damages and social human is inevitable to admire some damages. Furthermore, more complexity in different human life aspects has caused that many principles confront each other so that one cannot decisively claim that which part of damages can be assigned to whom. On this basis, one can state that if consider the scope of damage principle as a circle, its perimeter and surrounding area is like a halo that no one can certainly tell that a given action is whether inserted damage principle bound or not. So, the practical utility of this principle is challenged to some extent.

However, damage or loss is a concept and a basis for civil and criminal guarantees in many global legal systems. In liberal school literature especially utilitarianism, this principle was introduced as the most important benchmark to limit liberty by Stewart Mill. He denied the permission of using criminal laws due to expedencies and believes that recourse to wrath and domination as well as criminal law is the only cases that legitimize damaging to other people (Mill, 1983: 8). Since limitation is where a personal loss or certain danger threatens a person or a society, he emphasized on utility principle. According to him and Bentham, governmental actions are considered as merit based on the rate they increase happiness and prosperity and they are incompetent if they decrease happiness and prosperity. The important point is that happiness or prosperity is not an effect rather it is a general term. Therefore, higher happiness and lower pain observable in utility theory is able to organize criminal laws on limiting individual liberties in secular societies through its amendments and along with damage principle (Mahmoodi, 2002: 187 – 189).

According to damage principle and it enriching basics, there is no intrinsic goodness and evil. All affairs are relative. Religion is considered an individual affair separated from the society. This is the intellectual basis of secularism that accepts only the individuality of the religion to keep liberty (Salehi, 2007).

Studying John Stewart Mill’s words on law philosophy and contemporary politics indicates the same insight: “the only thing guaranteed for human both individually and collectively against keeping any kind of liberty is to protect his nature. The only instance by which one can use power against the demands of any social community member is to prevent damaging other people and personal profit of such member – both materially and ethically – is not sufficient (Tabiat, cited by Hasan Rezaei, 2007: 177 – 185).

By accepting damage principle, it should be investigated that what damages can be posed by media. On the other hand, what damages can be posed to media? In Iran, law makers have generally considered those damages that can be posed by media. It is the same attitude that considers media as a potential enemy and is not looking for supporting the media. Protecting media

from damages can be posed to political, financial and monitoring independence of media is an important point that is neglected in Iranian media laws and, in fact, attentions are more paid to media bounds than media rights.

Therefore, if damage principle is accepted as a legitimizing basis for criminal law intervention in media scope, it should be seen whether media have posed a direct and tangible damage in a certain case or not. In most global legal systems, such cases as insulation, revealing personal myths, plagiarism and etc. are controlled by criminal law intervention as the damages can be posed by media to personal rights.

As mentioned before, since damage principle is the most used basis for criminal law intervention in majority of legal systems, we study it below in three liberalism, paternalism and Islam perspectives.

Damage principle in liberalism view

Scrutinizing in criminalization of any field without considering the legitimizing basics for criminal law intervention is a vain initiative. Criminalization in some behaviors in culture, economy and politics or especially in media scope has a profound and strong relation to liberty in one hand and public power on the other hand. Liberty bounds, the extent of public power intervention in individuals' liberties and the basics of legitimizing or justifying such intervention have all shaped numerous thinking schools.

Liberalism has highly impacted on criminal law and the best impacts have been on criminalization of behaviors and limiting individual liberty by public power.

Utility principle has three directions: 1. Relation of human to Allah, 2. Relation of human to himself/herself and 3. Relation of human to other people

In ethical principle, all three above relations are a function of religion while in utilitarianism relations between human and Allah is personal and free and it has no social appearance and any dispute between someone and Allah has no status in criminal law and it lacks any criminal effects.

If the relation between human and himself/herself is analyzed by freedom principle, then human is a free and authorized creature, provided that he would not damage others. Here, religion should remove its eternity over human and not doing religious assignments should have no punishments (Salehi, 2007). In other words, a person enjoys full liberty to the extent all issues are only related to him and no limitation against personal behaviors is accepted. A person enjoys full freedom when his/her behaviors are not related to other people and even if he/she poses a self – damage, other people or government cannot create any barrier against his/her behavior. In liberalism, liberty in individual scope has no limitation (Mir Ahmadi, 2002: 169 – 170).

In contrary to other fields like political liberty, social freedom has a plausible limitation. Differences in such fields are explained by John Stewart Mill as below:

In relations between people, it is necessary to respect general norms so that they know how they can expect each other. However, what relates to a person is his/her tendency to an action (ibid: 173). In the third theory, namely, human relations to other people, all individuals interact with humankind. Therefore, social life is the arena of man actions and reactions and a person is free to the extent he/she does not damage the liberty of other individuals (ibid: 174).

The definition of liberty in Human Rights Declaration, article 4, indicates such thinking: "liberty means the ability to perform any act that does not hurt other people" (ibid: 175). Therefore, one of the freedom limitations in liberalism

philosophy is not hurting others' interests. It is also emphasized in Stewart Mill's words (Tabiat, cited by Hassan Rezaei, 2007: 179). It is also emphasized in Wolfenden's report on public unchaste actions where private prostitution is considered legal while public prostitution is considered illegal. The Committee clarifies the task of criminal law as: "The law's function is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others... It is not, in our view, the function of the law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behavior. The scope of private ethics should be protected and we should say briefly and frankly that it is not in the scope of law task" (ibid: 178). Such attitude is rejected by other experts (i.e. Patrick Devlin) and it is stated that there is no theoretical limitation for law against unethical affairs and ethical issues cannot be divided into private a public domains. Overall, non-damage principle (damaging others as a necessary legal condition) is rejected and it is argued that, firstly, the duty of law is to execute ethics (establishing ethical order) so that the society enjoys a public order. Secondly, attack against law is attack against society since based on its definition; society is a set of political and ethical beliefs. Therefore, Devlin believes that collective concurrence on social and ethical affairs is a guarantee for the survival of the society and scattering such concurrence would lead into social and ethical disintegration.

According to such attitude (opponents of absolute freedom), unethical issues and corruption are endurable to the extent that the society does not feel danger and they should be removed when the social system feels jeopardy (Tabiat cited by Hassan Rezaei, 2007: 179 – 189).

Damage principle in paternalism view

In contrary to liberalism that defines administration in the scope of law, in paternalism view, the benefits and costs of people should be assigned to government. On this basis, the administration is imagined in an identity distracted by people and it becomes a value per se who serves absolute domination whether by a race/nation or a religious/special religious group (Husseini, 2004: 44). According to this theory, it is rejected that government follows law and the superiority of law is supported. Therefore, what respects by a paternalistic government is only utilitarianism for everything built by the government capability and power. Fascism view and shaping such thinking emphasized on government's absolute power. This motto "everything inside the government, nothing outside it and nothing in front of government" shows a paternalistic government (ibid, p. 45). Therefore, one can consider the distinguishing trait of such ideology in contradicting with legalized principle. Obviously, in such government, criminalization is more serious. Such ideology is always tended to intensify governmental controls over responding to criminal phenomena since expanding the scope of government's intervention would lead into often permanent survival.

In such model on criminalization which is particularly governmental, the main indicator is its being governmental which possesses protection and punishment and would finally lead into traditional domination by the government that lacks fixed and clear principles. Put it more precisely, "nothing prevents that governmental response is not only toward criminal but also a deviated person (ibid: 71).

On this basis, expressing thinking in media on social, ethical and religious issues may injure public ethics and chastity. The difference in liberalism on crime and social deviation and separating them has no meaning here and government is an

authority that is more rational than others so it decided to determine the type of crime and punishment and no bounds are considered for government so that it controls over all social behaviors and norms and such behaviors are pursued without any difference between crime and deviation in order to pose a thought and action. The result of such thinking is to neglect beliefs and rituals. Therefore, there will be widespread criminal responses to crimes due to diversified social customs.

Emerging and interfering crime and deviation with such meaning that any deviation is considered as crime would intervene in all abnormal behaviors to which Judiciary has no choice rather than cubing them (ibid: 73).

In paternalism system, administration enforces leaving an action or behavior if it believes that such action or behavior is damaging social system (Mahmoodi, 2002: 216).

Obviously, by such thinking, it would be possible to enter any private or public domain by government and the people are confined because that it is the discern of government and we will be confronted with broad criminology.

Although in liberalism, liberty for human behavior is to attain higher value and human higher value is considered as its liberties, critics of paternalism believe that the government belongs to elites while most people are not elite and believe that majority of the society is irrational. They believe that the people should be enforced to individual interests (ibid, 218).

The important and radical critic one can express on such attitude is that if the government tries criminalization without respecting the role and contribution of people, it can cause conflicts among criminalization implications and people's perception on such behavior or action. It means that criminological behaviors are incorrect in people's view and they have no fear to breach them similar to problems in criminalization in media domain.

Damage principle in Islamic view

Damage principle as a concept of negating damages is more or less admired by different legal systems and thinkers/philosophers. In Islamic law, it is expressed as *undamaged principle* and Islamic jurisprudents have discussed about it. Although the focus of such discussions is in civil law, it is discussable to show that to what extent a damaging behavior causes a criminal responsibility under what conditions. As mentioned before, in Liberal literature, we are facing with minimum level of criminalization since it considers the highest pleasure for people and believes that using force is only toward preventing any the damages to other people. In contrary, paternalism view considers maximum criminalization through government intervention in all private affairs to respect social and personal interest.

Iranian criminal system stems from Islamic normative, value and ethical system. Therefore, in our society, criminal law is a function of a normal system and first factor to distinguish normal and abnormal behaviors is religious belief of the society that determines its value and ethical system as the normative infrastructure of any society (Husseini, 2004: 80). Behavioral control which may finally lead into criminalization differs from western view on damage principle because that different behavior is confined to good or evil ethics and they believe good or bad works. Therefore, normative basics are, in one hand, a function of value and ethical system and, on the other hand, social life and the necessity of regulating social networks, interest conflicts and the necessity of adopting executable regulations have all try to resolve such conflicts.

In Islamic view, in addition to ethical goodness and evilness and social requirements, human cross-material aspect also

necessitates human normativity. However, where breaching such norms are considered as crime and/or breaching which norms should be responded by legal execution guarantees depend on dominated ideology on plausible value system in each society which is variable. For instance, in a liberal – secular society based on singular vision in which cross-material values are not admirable and individual liberties are given more priority and importance, the scope of criminal law norms are confined. In such society, social norm is confined to minimum criminalization since it does not possess a value backup and it is in contradictory with “liberty” principle. Contradictorily in Islamic system which defines human based on two material and cross-material poles and considers his interest here and in next world, scope of criminalization is expanded (ibid: 80 – 85). Huge criminalization happened after Islamic revolution on cultural and ethical affairs particularly in media field is due to the results of such attitude and, in other words, an official perception of religion which has led into maximum intervention by the government in cultural and ethical issues.

Some people believe that executing Islamic social orders are legal and justified under special circumstances when an administration is not yet established and in such societies (religious administration) criminalization has two domains since in religious domain, stability and changeless principle is common while social laws and rules are dynamic and changeable (Ghyasi, 2006: 54). The purpose is that ethical principles are covered by the former so those laws that monitor on theories and ethics and pursue spiritual contingencies and demands are looking for the aims of the first group and to the same reason and based on human divine reality and the demands of human spirit, they seek for ethical and divine evolution. Therefore, the basis of such verdicts is depended corruptions and interests to human spiritual aspects. Such spiritual realities are always stable requirements and by their stability, depended interests are also stable and sustainable by human evolution (ibid: 55).

Furthermore, one cannot easily neglect the impact of laws and people's expectations. It means that people expect that authorities adopt favorable laws (Saneei, 2002: 89). Legal nature should not be incompatible with the spirits and culture of a society. The survival of laws and people respected to them are depended to that fact that they are compatible with public expectations, traditions, religious beliefs, cultural benchmarks and other social factors.

Criminalization scope based on damage principle

The most precise effort on recognizing and defining damage principle is criminal domain and elucidating damage principle is done by Feinberg (1984). He is a Mill proponent liberal who has provided the most comprehensive explanation and description on damage principle.

He believes that considering a behavior as crime is justifiable only when it is effective in preventing damages to other people or in decreasing its extremity and/or to prevent serious disfavored situations for other people. To this end, damage means to evaluate whether an action has been wrong or not mainly based on ethical judgment. For instance, a forgiven or justified behavior is not considered as an offence. Thus, if a victim expresses its satisfaction on happened risks or injuries, it is not considered as an offence and it is not legitimized to consider such behavior as a crime only based on mistake. Also, Feinberg states: “we are allowed to use criminal description in the circumstances where considering a behavior as crime is likely an effective way to create extreme disfavor for others and where there is no other tools like civil law with same

effectiveness.” By accepting the point that disfavor is lower than damage, considering an act as crime is justifiable only when the happened disfavor is extreme due to its amount and period. Likewise, it should have light punishment in maximum. Besides, below criteria are effective in decision making. It is possible to avoid it rationally? Has the victim accepted the risk of displeased situation? Are such factors mitigating by rational behavior of an individual that has caused his/her displeasure? The rationality of a behavior is determined by actor’s personal importance, its social value, accessibility to other places and times in which such behavior has created lower displeasure and the existence/nonexistence of a motivation to vex and to create displeasure. Such criteria are used on one of Feinberg’s examples (eating shit in public and against audiences that have no other choice inside a moving car). Such behavior creates serious displeasure and “independent rationality” norm cannot be applied for such case. So, it cannot be justified. Therefore, considering such behavior as a crime is legitimized if an effective and necessary instrument is determined to curb it. According to Feinberg, two criteria, damage and serious displeasure, are the only norms to justify the criminalization of a behavior. He refuses “legal taboo” namely preventing people from damaging to themselves and “legal moralism” namely preventing from behaviors that are unethical intrinsically as well as punishment theory based on fluid secondary damages (Clarkson, 1995: 231 – 232).

Inspired by Feinberg’s opinions and what is today called as damage – based criminalization, the models of criminalization can be also categorized in two main groups and to determine the scope of criminalization in each one. In the first model, a behavior is criminalized without any condition of direct damage and in the second one, posing damage is considered as a hallmark for criminalization discussed below.

Endangerment criminalization model

Criminalization based on the concept of endangerment is one of the values of criminalization based on damage principle so that crimes stemming from it are not targeting damage directly; rather, criminalization is due to breaching official laws and rules or breaching local scope in administrative permits and licenses.

Its distinguishing feature is that a certain noncriminal rule expresses initially a licit behavior and the criminal law has criminalized violating it. In this model by which crimes on goods traffic, environmental offences, traffic offences and some media field crimes (such as possessing a license or permission to publish a journal) are based, it is assumed that there are dangers in publishing a journal without any license. However, this is an assumption by Iranian lawmakers and in most countries, there is no assumption like this on such dangers and publishing a journal is based on free expression right. In fact, in this model, posing damage is not directly a benchmark for criminalization; rather, criminalization is based on administrative laws and breaching the decisions by official and civil law authorities is criminalized. Although such rules and regulations are to prevent a danger which is mostly likely to pose damage, damage itself is not a benchmark for criminalization. Put it differently, intervention by criminal law is based on accepting a civil or official discipline applied directly to support such discipline and indirectly to support mentioned values in civil and official laws and principles. In this model, realizing and proving damages that may be supported are ineffective in committing the crimes well as the conditions of crime and realization of criminal responsibility and it is not the event of crime commitment condition and criminal responsibility; rather, crime is realized

simply due to violating some administrative regulations and similar conditions (Mahmoodi, 2002: 201 – 204).

A simpler example is that in traffic offences, it is not necessary that passing red light creates any loss. Just committing such offence merits punishment. As mentioned, in such kind of offences, although criminalization is based on endangerment which may lead into damage and loss, realization of damage is not assumed since its contrary is not provable. Upon recognizing a violation, relevant courts would undertake determined punishments even though no damages or losses are happened. The most important example in this regard is to approve customs laws and regulation to import/export consignments in order to support national economy as well as economic planning and/or possessing permissions and licenses to publish a journal or to establish a website.

Serious damage criminalization model

Some laws forbidden an anti-social behavior and criminalize it due to damages to other people like murder, fraud, stealing and deliberated conflagration. In such cases, criminal execution guarantee is the damage per se. The aim of rules in this model is to support social and individual values against serious losses. Hence, criminal law criminalizes a forbidden action directly without any certain regulation on the right mode of such behavior. Although serious damage hallmarks are general and abstract that should be defined by rating the losses, one can briefly say that it means all damages that can be prevented by other methods and they leave so evil effects that there is no choice rather than criminalizing them. Their punishments differ in terms of intentional or unintentional actions (for more study, refer to *ibid*: 205 – 206).

It seems that in line with Feinberg, one can consider the application of damage principle in legitimizing criminal intervention in recent crimes mentioned in criminal law. He believes that such crimes are those ones that were called as “natural crimes” in 18th century and their punishments are due to losses happened by them directly. This group of crimes is against those crimes that are committed to protect discipline and their punishment is due to not obeying potential laws and the damages that may or not may be realized. They are called “reputational or artificial crimes”. However, they have different degrees in terms of their reputation (*ibid*: 207).

In this vein, if we call crimes based on serious damages model as “natural crimes” and the other group as “artificial crimes”, then one can simply criminalize natural crimes based on damage principle and other justifications should be looked for artificial crimes since including endangerment concept in damage principle is not compatible with its concept.

Additionally, one should note that damage principle raises when an action poses damages to other people while such condition is not always true and in many cases, all integrity of economy, security, environment and ethics is lost otherwise we extend the concept of damage and loss to include general damages under damage principle. In such case, we will be far from the real and classic concept of damage. Anyhow, using supplementary rules that fill current gaps is necessary and unavoidable despite of the deficiencies of damage principle in justifying artificial crimes. Public interest principle is utilized in many cases to remove such deficiencies.

Public interest principle

Public interest principle is raised as another basic of criminal law intervention. Along with damage principle, public interest principle is also considered as one the most important and challenging concepts in philosophy, ethics, politics and laws. It is a traditional principle respected by many thinkers and

authors since Ancient Greek as a hallmark of fair administration and law. It is claimed that on one hand, it is only the government that can take actions in line with people's interests. It means that governmental actions are only justified by such procurement and, on the other hand, public interest principle can be a basis for many governmental initiatives that are preliminarily seems as illegitimate actions that violate people's free wills. Here, we address to two fundamental questions on public interest principle: what is the concept of public interest? To what extent public interest can legitimize criminal law intervention of public and individual liberties?

The nature of public interest principle

Public interest or discipline is a rule that justifies criminal law interventions and many authors have talked about its concept. Judiciary ex-minister, Mirza Alio Akbar Khan Davar, mentioned four different opinions on punishment emergence in his assertions on public criminal law lessons on of which is profit religious and belief. Accordingly, it is believed that there are actions that imbalance public discipline if they are highly repeated and the interest of the society is in their not occurrence. If a punishment is determined by the government, the reason is that it is the will of the society to prevent such actions and since its repetition would lead into corruption in the society, it is for the interest of the society to pose punishments in order to prevent such behaviors (Davar, 2005: 511 – 512).

However, social interest should not be interpreted as goodness since as experienced in outer universe, goodness and evilness are not following interest or mischief since sometimes the interest is in an evil action like to kill someone to achieve a medicine that can save 2 people. If we look only in interest and corruption perspective, the interest of such action is higher than its mischief. However, everyone would consider such murder as bad and shameful. Therefore, goodness and evilness are not always functions of interest and mischief; rather, in many cases, interest and mischief are agreed or disagreed (Saberian, 2007: 130).

Concerning the concept of public interest, many authors have assumed that the applied description of public interest can be simply achieved through by aggregating individual interests in a more or less mechanical method. Jeremy Bentham was an author who believed in qualitative determination of "social goodness". According to him, social interest is the same interests of its members who shape it.

One can say that this attitude is based on an unreal assumption by which a person cannot have any interest contradicted to social political interest. Although this theory was widely admired, the experience gathered in recent one hundred years rejects it. Perhaps, an individual's interest is in mitigating his/her tax load while some necessary social or governmental functions make it necessary to increase the tax. Although Bentham considered total individual interests rather than special implication of personal interests, determining a public goodness can be faced with serious problems without a qualitative evaluation on individual interests (Bodenheimer, 2002: 108 – 110). On the other hand, one cannot simply achieve public interest by aggregating personal tendencies and justifications because that some people may have shortsighted perception on their own interests and they can commit actions that damage public interest. Although public interest cannot be determined by counting personal interests, one cannot consider public interest identical to administrative policymaking. In other word, one cannot accept that public interest is the same thing mentioned in the verdicts of official authorities. If administrative are able to determine the best social interests successfully ad

without any deviation, then one may consider public interests equal to administrative decisions. Administrative officials may not only have an incorrect judgment on social requirements and demands, but also they may act based on fully irrelevant consideration to maximum promotion of public goodness. These realities are so explicit that no historical document or evidence is needed.

So far, we discussed in a privative framework to remove a part of difficulties that prevent representing an accepted concept on public interest. We tried to reveal three sophistries in representing a theory on public interest. The first one is to determine the concept of public interest with goodness and evil criterion. The second one is to determine the concept of public interest quantitatively and the third one is to determine the concept of public interest based on administrative verdicts. Concerning above points, it seems that the idea by Austrian lawyer, Alfred Verdross, is suitable on public interest concept. He claims that "public goodness" is neither looking for maximum individual tendency nor collective interest. Rather, it aims at establishing social conditions by which people can create a respectful life by serious and productive work (Mahmoudi, 2002: 278).

This approach is based on the assumption that it is unlikely to separate valued – normal or ideal element from any decision on public interest. For instance, Verdross's definition implies that self – indulgence and sloth are the traits that have no place in any public interest theory and are never recognized despite of the fact they can be seen in some people. His formulation indicates that devised policies to promote public interest should try to promote human greatness rather than expanding abjectness (Bodenheimer, 2002: 117 – 118).

This is the concept that Jane Dabin seek to understand it before Verdross. What is exactly goodness are total conditions upon which anyone can do and develop and its legitimate activities easily. Such attitude implies that human inferior traits that lead the society to and underdevelopment and have no place in any public interest theory (Radbruch & Dabin, 1951: 27).

Scope of criminalization based on public interest principle

Here, we address to a bound of liberty that its violation is possible by public interest. To explain the discussion, we divide liberty to two fundamental and non-fundamental categories.

One of the most unchallenging hallmarks to determine both kinds of liberties is to determine by fundamental law as mentioned in the Constitutional Law of any country. By referring to Constitutional Law of many countries, we observe a category of laws that are in fact personal ethical right against the government. It means that the Constitutional Law obliges these governments to respect personal rights and assure to retain them in ordinary laws. Therefore, a rule that limits liberty should be measured by benchmarks different from non-fundamental liberties limiting laws. There are disputes on such benchmarks and arguments by which governments can limit such rights. Since remarkable works are not yet done on these fundamental laws, it should be noted that this issue is in infant idea levels and it is not extendable in domestic rights literature. However, one can point out the benchmarks by US Supreme Court.

It uses Rational Basis to investigate those laws that have limited non-fundamental liberties while a more decisive benchmark namely Compelling State Interest is used on those laws that limit fundamental liberties. Here, we initially address to the bounds of criminal law intervention based on Rational Basis and then we analyze the scope of criminal laws intervention based on Compelling State Interest as an interpretation of public interest.

Rational public interests

Perhaps, one can look for the simplest interpretation of public interest in rational interest theory. As will be mentioned below, this theory is too simple to justify criminalization as one of the most complicated lawmaking processes. In rational interest – based criminalization, what happens in practice is to mention the losses and benefits of a forbidden action in legitimizing the adoption of criminal laws. It means that imagined rational reasons for an interest are sufficient reasons for criminalization. As a result, it is sufficient that government has a rational aim to adopt criminal laws and those who violate such laws will be simply punished since the government has a rational reason for criminalization. So it is no exaggerating to say that almost any behavior can be criminalized.

One example can clarify the scope of government power in adopting criminal laws and latent potential injustice in such power. Assume that lawmaker confronts the fact that fatness related unhealthy in the society has become a worrying problem. Initially, the government adopts laws to require food stuff manufacturers to mention their damages on their packages. Now, we assume that abovementioned law has trivial impact on the problem of food products. In such case, the lawmaker decides to forbidden the consumption of certain damaging foods by criminal execution guarantee. For instance, consuming sausages is criminalized. If we investigate this law by rational interest, we will face no problem to confirm it because that eating sausages is not covered by fundamental liberties and the government has undoubtedly interest in protecting public health. What interesting in above approach is no distinguishes between criminal and noncriminal laws because that criminal law is radically different from other laws. In such kind of punishments, the issue is not that whether eating certain food products is under fundamental liberties or not. Rather, it is the nature of punishment which violates fundamental rights. In this concept, right is a scope of behavior to protect individual freedom and independent out of social interests and decisions. Therefore, rational interest is not sufficient for criminals even though other laws are adequate (Emami Arandi, 2007: 1 – 11).

Compelling state interest

The failure of rational interest even in criminalization of non-fundamental rights has led us into the question that why we do not consider compelling state interest necessary in adopting any criminal law. If compelling state interests as an interpretation of public interest are not considered as crime then the government should prove that achieving public interest is too hard – if not impossible – without criminal execution guarantee. This is the ultimate solution. However, its importance is in how to interpret it rather than its theoretical acceptance (ibid: 12).

However, it seems that although compelling state interest can be considered as a basis for criminal law intervention in non-fundamental rights, it cannot be basis for criminal laws intervention in fundamental rights because that its latent corruption destroys all theoretical justifications provided so far. Thus, one should accept that in practice, governments are more interested in limiting personal rights by a utilitarian analysis when public interest necessitates albeit the person does not agree with any limitation on his/her ethical and fundamental rights. On the other hand, by different arguments, governments do not accept any violation of such limitations by citizens because that all citizens are obliged to respect the law.

On this basis, the government has an open hand in maximum criminalization and as Durkin stated: "public interest cannot be a good reason to limit the rights even when the concerned interest requires more respect to law." It cannot be a

basis to legitimize governmental interventions in fundamental laws. Durkin considers as justified to limit these rights only by "rivalry rights" called as "rights disturbance" in Iranian and Islamic jurisprudent because that citizens have personal rights to support government and, similarly, personal rights needed to be freed from government interventions. So it may be necessary for governments to select between two options. For instance, insulation limits the personal right on what he/she thinks because that he/she is obliged to give conceiving reasons for his/her claims. This law is even justifiable among those people who consider it as aggression to personal rights because that such law protects the destruction of one's reputation due to a careless expression (Durkin, 2002: 233).

Disturbance among rights happens always in each legal system and it is the government that selects them based on importance principle. Noteworthy, we accept such principle in a scope of rights that belongs to people not disturbance of individual right with public rights or interests. Concerning individual fundamental rights, the government is obliged to support them and if it can limit them by justifying public interest, we will accept that such rights cannot be supported especially when the interest of the government and political regime are considered, they will support public interest. In such case, it is not useful to list a group of rights belonged to people and to re-forbid them even by adopting laws (Shojaee Nasrabadi, 2010: 52). If we accept such limitation in using interest principle, then we will observe the lowest usage of public interest principle among other principles that are a basis for criminalization. It will help this minimum criminalization.

As the final point against the claim that "the reality is to have free expression but the interest is that we shouldn't have free expression", is that we should distinguish between theory and practice. In theory, the discussion is on honesty and authenticity. In practice, however, the most important problems confronting us stem from options and practical power to select them. In other words, one can say that honesty in a claim like "all should enjoy equal liberty", is theoretically defensible but it does not mean that all the people have liberty in practice and it is in our potency to prepare freedom for all. Basically, there is a distance between theoretical patterns (ideality) and the real power in make that pattern practice and it is the same distance that prepares the strength of "criticism" because that criticism always requires an ideality. Obviously, such distance should not lead us to mix theory and practice and to call such mixture as "interest". It means that the current distance should be mentioned clearly and a decision should be taken in terms of possibilities and to be loyal to provided defensible theory and have the will to move toward that theory and pattern. Sophistry starts from where we replace theory with practical limitation and call it interest.

Legal paternalism

Paternalism principle or legal protectionism is to "limit individual's liberty for self – interest. It means that the law limits personal liberties to protect him/her against mental and physical damages and responses by punishments to violating such sanctions." According to this principle, the government attempts to protect citizens' real rights and by forbidding some behaviors, it would not allow them damage themselves or by creating some assignments and responsibilities, it obliges them to make personal profit and puts punishments for leaving such assignments.

According to this insight, it is incompatible to assign human life plan to people due to limited capability and capacity of human and due to the mistakes by human in relation to its

conceptions and his limited intellectual capacities in reality – based conception and his disability to recognize correct from incorrect, human cannot be an axis for decision making on life pattern, they are people who cannot make sufficient procurements and predictions and usually this theory is enforced that they are not the best judges for their own lives (Mahmoudi, 1991: 140 – 141). Such idea is called paternalism.

In such attitude, social members should be supported or, in other words, they need government's paternalistic intervention in order not to be damaged by their own incorrect decisions and choices. By forbidding some behaviors and intervening in citizens' liberty, criminal lawmaker tries to inspire that although criminalized behavior does not damage other people's freedom or does not alienate social order and security, its commission would damage physically and mentally and to support and to prevent self-damages, the lawmaker has forbidden it and its violation, the government would punish violators. Such approach in criminal law intervention is divided into two "maximum" and "minimum" groups.

Hard paternalism

In this approach, criminal lawmaker accepts that supporting health and matured people against damaging results of their actions is necessary. To the same reason, in this attitude, criminal law poses its own values and instructions that are in the interest of people (Schonscheck, 1994: 179).

Criminal law intervention in media such as forbidding using satellite equipment and indirect interventions like websites/weblogs filtering and not to issue permission to publish those books that are in contrary to Islamic rules according to relevant monitoring boards can be analyzed in this line.

It seems that obeying such principle is the reason of many criminal law interventions in media. Limiting the capability of recognizing, understanding and selecting criminal law followers in terms of hard paternalism would put them in a situation by which they will find no space for their free maneuver. Therefore, those people who observe that their liberty is breached would try to revive it and such tool based on personal pattern and selection may be a kind of passing legal bounds by criminal lawmaker.

Soft paternalism

If hard paternalism looks for supporting adults against damages to mature or immature people, a relative soft paternalism allow people to be protected against unintentional decisions (Ibid: 179).

In fact, this kind of legal paternalism criminal lawmaker intervenes in selecting the people who have lower recognition power and may damage themselves physically and spiritually by selecting some behaviors.

Obviously, expanding criminal scope expansion by legal paternalism is plausible compared to some behaviors in culture and media field to support vulnerable people like children and teenagers through indirect intervention such as monitoring on publishing books for children and teenagers and so on. However, adopting paternalistic policy for adults through direct criminal law intervention and criminalization of some behaviors would lead into the expansion of criminal laws scope.

Conclusion

In information and communication age, media is the most important pillar for public sector and communication tool to achieve the best route of fundamental liberties like free opinion and expression as well as information and communication freedom.

Some fundamental rights and liberties cannot be limited or postponed in any condition while other rights like free expression and liberties of press and mass media are limitable in

some circumstances. In contrary to the first years of emergence of media that were recognized as the potential enemy for governments, media is now recognized as the fourth pillar of democracy and as a main instrument to achieve democratic society and the role of media is more respected in achieving the growth and development of societies. Therefore, although there are legitimizing basics for criminal law intervention in media field, a bound is also recognized in international documents for governments' interventions in this field. Based on damage principle, the government can use criminal tools in media field only in the scope of others' rights and dignity because that damage to personal rights and dignity creates a direct, tangible and explicit hurts. However, there are clear reasons that media can pose damages to the society in addition to harms and losses to personal rights and dignity. Therefore, as a complementary basis, public interest principle recognizes a bound to support public security and discipline and to protect public health and good ethics for criminal law intervention.

Although there are paramount reasons on using such basis to utilize punishment instrument by governmental officials, it can eliminate all fundamental liberties in media field if we have no strong principle to use such basis. In this line, there is no such principle in Iranian criminal law but it seems that compelling state interest principle is plausible to some extent in US Supreme Court.

Utilizing paternalism in media is unacceptable in all its forms because that any criminal official control over media would extremely weaken public sector.

Legal moralism is another point which is plausible to some extent in countries like Iran where religious sources inspire values and norms and are reflected in their criminal laws. In those countries that are based on liberalism thinking, damage principle is considered as the only basis to justify using criminal laws and any damage to ethics does not pose a direct and tangible hurt to personal rights and dignity. So, the scope of criminal laws is too limited and ethics are supported only to the extent that there is a serious risk against society's public ethics health as well as disfavored feeling for people (like Feinberg's example on eating shit in public). Such conditions are considered in the scope of criminal laws.

However, limiting the scope of criminal laws in religious countries like Iran is not acceptable because that there are numerous ethical values and norms that social consciousness supports them. The important point is that although using such principle can be right, the necessity of supporting values/norms and including them in the scope of criminal laws should be clearly respected otherwise one can insert any value with ethical basics into the scope of criminal laws. We are observing numerous cases of such excessive ethical supports in criminal law intervention in media field. The examples are "squander propaganda", "insulation against authorizes, entities and organs" and so on.

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