

Adoptive Study Of Criminal Prosecution Basics In Iranian And Turkish Law System

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Abstract

The principles governing criminal prosecution include structures and frameworks that explain what prosecution is and justify why it exist. Undoubtedly, understanding the social and philosophical foundations of any human establishment is essential. Accordingly, the logical and social structures governing criminal prosecution are of particular importance. The purpose of this study is to find out what and why criminal prosecution is based on which the whole prosecution process is based and is designed based on its strengths or weaknesses. This is because, on the one hand, in order to properly understand criminal prosecution and its accurate evaluation, it is necessary that the principles, goals and principles governing it have been carefully examined. On the other hand, in order to get acquainted with the prosecution process, different methods of prosecution have been comparatively studied in Iranian and Turkish law, prosecution by the court (the dominant method in Turkey) and prosecution by the prosecutor (the only solution in Iran).

Keywords: prosecution, criminal prosecution, basics of criminal prosecution, Iranian law, Turkish law.

Introduction

Prosecution in Moein culture is infinitive and means following something, following, follow up and searching for a person by the police. In our legal language, prosecution gains certain meanings with the addition of the legal-criminal term. The term also exists in Turkish language, but in colloquial language it merely means pursuing-stalking and pursuing something, but in the legal language of Turkey, criminal prosecution has a specific term. That is, there is no word created by combining prosecution with

legal or criminal terms, but the term kavuşturma means criminal prosecution and always follows the term soruşturma (Mahmoudi, golshan sharg, 2019, 47).

Literarily, the pursuit is from article of "backwards" in Persian language it means following up or prosecution, but in some Persian cultures other meanings have been mentioned for it include following up, following up, following or pursuing (Moein, 1992, 1102). the term of "pursuing" in Turkish legal culture has been translated as "prosecution, submission of claims,

complaints and proceedings". (Yılmaz, 1982, 212).

In Iranian legal culture, the concept of prosecution has been explained as "Resorting to a judicial action to obtain a warrant or to date or execute it, or to take criminal action in order to uncover a crime and a criminal. (Jafari Langroudi, 1987, 163). It is also necessary to note that neither Iranian criminal procedure laws, nor in Turkey's criminal law, nor in international human rights documents, prosecution of a crime is defined. This indicates the conceptual clarity and improvisation of the term "prosecution", although some believe in defining this concept that: "The stage of prosecution means preparing and arguing against a person who was involved in the crime as a defendant.

The problem that applies to the above definition is that it refers to the word of the person, because the person refers to individual person and legal person, and the legal person does not have criminal responsibility in the particular sense, and the realization of his criminal responsibility requires the assumption of fault. Also, the word "person" implies one person, while a lawsuit is sometimes filed against several individuals as defendants. Therefore, it can be said about defining of the prosecution of a crime that: "Preparation and lawsuits against an individual or individuals who were involved in the crime as defendants." (Masoudi Maqami, 2003, p101). Therefore, the term of criminal prosecution can be explained in different aspects.

From one perspective, the word "prosecution" is divided into strict prosecution and broad prosecution. Criminal prosecution in its strict sense means the decision to prosecute a crime (Zeraat, 2003, p 48) and in its broad sense has a wide range and includes appropriate actions to prepare the case for submission to the court and actions related to the defense of the indictment at the hearing stage and actions related to the execution phase.

A: Prosecutable crimes in The Iranian and Turkish law

In Iranian law system, crimes are divided into two categories: forgivable crime and unforgivable crime. forgivable crimes are crimes in which, the prosecutor does not prosecute the crime without the plaintiff's request and complaint because of the importance and priority of the plaintiff's private rights, and if the plaintiff begins to investigate, the case will be closed if the plaintiff resents his complaint. In contrast, unforgivable crimes are crimes that do not require a private plaintiff's complaint to initiate prosecution, and the prosecutor may prosecute it as soon as he is notified of the incident. In Turkish law, there is also such a division, but instead of being undesceteable, it is divided into public genel suçlar and private özel suçlar.

In Iranian law system, the Criminal Procedure Code has placed the Criminal Prosecution Authority at the Prosecutor's Office, but there are some drawbacks in it including the prediction of direct investigation of 6th to 8th ta'zir crimes in the court of law. Also, the principle of the necessity of prosecution precisely refers to the compulsion of the judiciary to prosecute criminal proceedings. it means that it creates the necessity of prosecution equally for everyone. Likewise, all crimes must be prosecuted. Therefore, according to this principle, the prosecutor should prosecute the crime as soon as it is notified, gather evidence and avoid any expediency. However, in accordance with the principle of proportionality of the prosecution, the prosecutor has been allowed to assess the conditions of the accused, especially in order to correct him or compensate for the crime, and to repair his mental and physical conditions and to refrain from prosecution temporarily or permanently.

In the Turkish Law system, criminal prosecution begins after the conscientiousness of the prosecutor and confirmation of the criminal prosecution of the criminal courts competent to

investigate such as the main (normal) criminal courts, the aggravated criminal courts (the same as the Criminal Court 2 of Iran) the ordinary and aggravated courts of children- the criminal courts of intellectual and industrial property and taxes. The effects of criminal prosecution in Turkish law on individuals are that the wanted person takes the title of defendant and he (she) is prohibited from certain social and basic rights due to being subjected to such circumstances.

B: The Institution of Prosecution in The Iranian and Turkish law system

The criminal prosecution body is an institution that is responsible for prosecution on behalf of society. It is called as Prosecutor's Office in countries whose rights are based on the Roman-Germanic system, such as Iran. The Prosecutor's Office is a public institution specialized in prosecution (Gaston, Lavaswar, Bernar, former source, 714) in this law system, the Prosecutor's Office is an organization whose job is to protect public rights, supervise the implementation of laws, criminal prosecution of criminals, and conduct preliminary investigations of some crimes. Since in criminal prosecution society is owner of right, it has full authority and can bring the offender to justice or relinquish it. These powers are specific to the society, which can only be enforced by law, in accordance with certain criteria, and the Prosecutor's Office does not enjoy such powers; in other words, offender prosecution is the right of the society and the obligation of the Prosecutor's Office. The Prosecutor's Office cannot refuse or delay the implementation of this legal obligation.

In fact, it can be said that the Prosecutor's Office is not a full-fledged claimant, but it as a claimant. In addition to offender criminal prosecution, the Prosecutor's Office should also protect his interests, rights and freedoms. Any point and issue that could benefit the defendant should be taken into consideration by the Prosecutor's Office. According to Iranian code of criminal

procedure, the Prosecutor's Office is the only criminal prosecution body.

In the Ottoman law system, offender have been prosecuted by victim for centuries, and there have been no other entities to do this. Over time and after the formation of the Republic of Turkey, the police became increasingly involved in the pursuit, and when the police were organized in the early 19th century, it was expected that begin prosecution in addition to the discovery of crime and the arrest of suspects. Thus, police were the only criminal prosecution body in this system, and there was no another institution called as the Prosecutor's Office for a long time. In the mid of 1980s, however, the method of prosecution of this system was changed, and the independent prosecution body was created and expanded. Therefore, it can be seen that the prosecution body in Turkey now includes the police and the court. Taking to account the above description, the approach of why criminal prosecution and its concept and the institution of criminal prosecution will lead to the crime and its various aspects and the resulting claims. (arslantürk, 2018, 154).

C: The subject of Prosecution in Iranian and Turkish law system

Although prosecution operations are carried out against the accused or the perpetrator of criminal behavior, but the subject of prosecution should be considered as criminal phenomenon, because crime compels the prosecution institute to prosecute. Crime is a phenomenon that appears along with the formation and organization of human communities. Human communities create general rules and regulations, which are referred to as "law" in order to ensure shared fundamental values and in other words, to protect their order and survival.

Although customary or legislative rules and regulations are met with the enthusiasm and respect of the majority of citizens, a minority of

them always assume their interests by disobeying laws and regulations and violating them, because although the majority of members of society consider their personal and social interests to follow the orders of the legislature, but minority of them meet their interests by violation of regulation.

When this violation takes on an illegal and criminal aspect, i.e., converts from passive and defiant (social deviation) to active and tangible anti-Semitism (criminal offense), society shows a generally violent reaction to it in order to protect and protect its basic social, moral and inquisition values.

In all human communities, the criminal cycle has been achieved through three times with three stages which their ultimate goal is to ensure the continuity of social human life and its development (Lazerg,2003,9). However, antisocial behavior which is against to interests of society member interests must be realized, in order to move the criminal justice cycle; it is the behaviour which is called as "misdemeanor or crime".

The criminal phenomenon or crime is based on behavior that is against the social order in one hand, and it should be foreseen and punishable by law in the penal code on the other hand. Therefore, as long as the unusual and harmful behavior of the individual for society does not comply with the legal texts, the perpetrator cannot be prosecuted. (Golduzian, 2006, p. 65) In order to prosecute a person, criminal behavior must be shown, which is interpreted as a crime in criminal law.

Although criminal laws are always based on a definition of crime, but one of the major problems in the field of criminal law doctrine is the definition of crime. This phenomenon, according to the opinions of scientists and researchers of legal science, has a variety of principles and forms that if all of them are taken into account, it

will be observed that sometimes meanings are not only close, but are completely contradictory. in other words, what is considered as crime in someone opinion, may not only be considered a crime, but may even be considered as good act.in contrast, one act recognized as a good act, but in the other opinion, it is not only good, but also a crime. In addition, in defining the crime, the spatial and temporal aspect of the action should be considered and careful, because an action may be as crime in a specific place with a specific time, and on the contrary, the same behavior not be considered a crime at another time or place. (shambati, 1999, 215).

However, various definitions of crime have been made from different perspectives. Some have defined the crime as such: a crime is an act which is prohibited by law by means of determining punishment. (Jafari Langroudi, 1984, 195). In Turkish law, the legal texts to be referred are clearly clear that there is no comprehensive definition of crime and it is merely stated that the practical offense is against the law. (arslan, 2007, 73). Turkey's penal codes say that for practical purposes, a crime can be defined as a public fault that results in criminal proceedings that in turn will result in a punishment for treacherous. (gökdemir, 2018, 41) In Turkish law, any immoral behavior is not necessarily criminal, but behavior that is not immoral may be a crime based on social necessity.

As noted, there is no precise legal definition of crime in the Turkish thinkers' point of view, so that law scholars of that country and even dictionaries have not been able to provide a single definition of crime. According to above cases, it is well undersized that in some person opinion, definition of crime is due to the rules and in opinion of others, its definition is due to judicial procedure. in this regard, various comments have been made about the definition of crime.

What is implied from different statements about the definition of crime in Turkish law is that one

element is common in different definitions of crime, and that is public or legal foul. In addition, in the Turkish legal system, in order for a defendant to be found guilty, he must not only have committed a specific criminal act, but must also have a special mindset for his action; so defining a particular crime under the law or pursuant to judicial procedure requires the two above mentioned elements (criminal action and criminal mindset) to prove that crime. Law executors or the courts must prove both elements in order to remove any doubts from the minds of the judge or jury. otherwise there will be no escape other than acquittal of accused. As in the general perception and law of Turkey, everyone is considered innocent unless proved otherwise. (arslan, 2007, 75).

D: The Basics of Criminal Prosecution in Iranian and Turkish Law

By carefully reflecting on the existential middle of the prosecution, it is well possible to understand its position and philosophy. Criminal prosecution is related to the rights and freedoms of individuals on the one hand and with public order and security on the other hand. Acting on it endangers rights and freedoms, and abandoning it disrupts public order and security. This conflict between the two social values in the manifestation and emergence of criminal prosecution, can make it faced to difficulty and cause fundamental flaws for it, because the tendency towards either of these two values leads to ignore the other, which adds to the difficulty and flaws of criminal prosecution.

Historically, the criminal prosecution was initially the responsibility of the victim (Gaston & Georges Bullock, p. 714), because the crime denied the right to a misdemeanor at the outset, and this foreclosure protects the prosecution authority for rightful owner. During the period when this approach was manifested and known as private justice, the idea of prosecuting crimes by the representative of the society was not raised,

and the crime victim was pursued the crime itself and demanded the punishment of the perpetrator by collecting the reasons. With the decline of this view and the emergence of powerful governments as its primary sense, the General Court stepped into the realm of criminal thought, which during its lifetime, the prosecution authority acted as a defender of the state and the king. The prosecution institution or person or prosecutor in this role was considered as tax collector and representative of public power (Roger, p. joseph, 1975, 450).

with the advancement of communities and intellectual and cultural developments, this role of the prosecution authority suffered a serious transformation, and in parallel with their primary duty to defend the king's interests, they were given another task which was to defend the public interests of the society. but over time, these two views gradually continued to be empowered and their life together. However, one excelled over the other depending on time and place. From this time on, the perpetrator could also be prosecuted by the public prosecution authority in addition to the misdemeanor. This course is called the General Justice Course.

During this period, the public dispute was separated from the private dispute and the idea was appeared that the crime is antisocial behavior and it would cause a lawsuit against the perpetrator due to disturbance in public order. In other words, criminal prosecution was considered through paying attention to different aspects of the crime. the intellectual foundations of communities were also removed from the state of dictatorship and tyranny Gradually, therefore criminal prosecution as one of the fundamental principles of maintaining order in society was not immune from this transformation and this issue played an undeniable role in the evolution of the foundations of prosecution, so that the cases arising from the crime were also considered. Then, the nature and why of the prosecution were

discussed by evolution of the thoughts of politicians and rulers and the influence of the opinions of criminal law scholars and thinkers.

The government, as the protector of public order in the opinion of (Habez) is the damping God who has been empowered to accumulate the powers and freedoms of individuals enough to provide them with comfort and security and to give them the possibility of exploiting territorial fruits in the best possible way. This government, whose name and mention, along with its existential philosophy, are tied to their security, seeks to establish public order in society, and the general order is the oldest and most basic result of the state in its new meaning. In other words, wherever public order is seen in the history of civilization, the government comes to mind as the regulator and supplier of this order. Public order requires to the government and the government require public order. They both come together or fall apart.

The existence of the government is both stabilized and proven by the creation of public order, and public order is the only manifestation of the existence of the government. The government's need for public order and public order by creating a criminal organization inevitably implies that it is the basis of criminal law and, consequently, the criminal prosecution of the government. Therefore, the first chapters of Hammurabi tablets and other legal systems after them are assigned to counting crimes and determining the punishment of criminals, and should inevitably be investigated before determining the punishment of the prosecution stage. In principle, criminal proceedings have an early stage (Qasemi, 2008,2004). In fact, after the detection phase of the crime, the prosecution begins in order to maintain and meet this order and security.

When human found out with awareness that is not unable to continue living in the face of problems, it began a social life. In the form of the idea of

social contracting, this social life is placed in the form of a two-way contract. In addition to the terms of this agreement, a person who enters the realm of social life forgives some of his freedoms for the benefit of the regime and demands security and tranquility in return from the regime. (Rousseau, 2000, 17). This is the prelude to the formation of sovereign groups whose order and security are essential and the basic conditions for their existence.

The existence of sovereignty also gives the ruling authorities the right to exercise and implement sovereignty actions. The obvious manifestation of exercising this right is to interfere in the freedom of citizens and to prosecute and punish them for crimes committed by them. Prosecution and ultimately punishment in this process is a violent tool through which the government, as a manifestation and symbol of the regime, seeks to ensure security and repair the lost order, while simultaneously trying to prevent crimes from re-emerging by introducing broad objectives for it. (Mehrad 2007, 49-96).

In the meantime, justice is an integral part of the process of prosecuting and punishing the perpetrator, and therefore, in order to ensure justice and to achieve it more appropriately, there is a need for a central justice system that can favorably ensure justice in the acts of prosecution, conviction and execution of punishment and restore security ideally.

Thus, criminal prosecution as a way, or perhaps as the only way to achieve this security, is mandatory which arises from the social contract entrusted to the regime by citizens. Because the right is a degradable and removable matter and if prosecution is a right for the state, it can renounce or dissipate it if it wishes. However, if we consider prosecution as a kind of duty, it is not possible to refrain from doing so, but all the powers of the state should be used to carry out this task. Trying to provide a safe situation is an obligation for the government, because it is

responsible for doing it, and in this regard, the prosecution is an attempt to achieve a conviction or innocence in a just manner. According to this simple introduction, criminal prosecution can be considered as a social obligation for the regime to be carried out along with other requirements.

E: Principles related to the basics of criminal prosecution in Iranian and Turkish law

After occurrence and detection of crime, the prosecution authority must make its decision regarding the prosecution of a public dispute. Since criminal prosecution has a two-way function; on the one hand, it restricts the rights and freedoms of citizens, and on the other hand is related to public order and security, action for it endangers rights and freedoms, and leaving it disrupts public order and security. Therefore, criminal prosecution targets the achievement to interests of society and individuals (harmed and accused) simultaneously. In this regard, criminal prosecution plays an essential role in the criminal justice process. Now, prosecution has gained an important place in controlling crimes and managing criminal reactions due to the increasing number of crimes. (Jehle, Martin, 2005, 2-3).

The position of prosecution in criminal justice systems and its role in determining punishment is now one of the main issues involved in criminal issues and criminal law experts. Therefore, criminal prosecution and its role in achieving the goals of punishment have been seriously discussed and exchanged by criminal thinkers. is discussed international societies in recent decades and in international communities (Van Dijk, jan, 1988, 1).

Criminal prosecution has always been specially studied and investigated by criminal law experts due to confrontation of criminal prosecution with the rights and freedoms of individuals in society on the one hand and its immediacy relationship with maintaining public order and security on the

other hand, so that in order to improve its efficiency, several principles have been predicted. The pity principle, the principle of independence, the principle of respect for human dignity, the principle of protection of a misdemeanor, the principle of equality of arms, the principle of exclusiveness, the principle of speed, the principle of legality and the principle of the position of prosecution are some of these principles that seek to shape a just prosecution process (Richard, Barbara, 2008, p185).

These principles guide the prosecution and assist it to achieve its goals. among these principles, the two principles of "the necessity or legality of prosecution" and the principle of "having a situation or the requirement for prosecution" have most importance. The principle of legality emphasizes on the binding structure and coercion of the prosecution drummer via prosecution all crimes. However, in contrast, the principle of having a situation tends to state that criminal prosecution does not require a binding and necessary structure in order to achieve its goals. the most important thing about the actions or enforcement of public litigation is the decision to prosecute a public dispute. one of the above two methods is performed for it. governments choose a strategy or both from two existing mechanisms Based on criminal policy and considering the situation and the state of delinquency. Obviously, each of the two mechanisms for criminal prosecution of crimes has advantages and disadvantages. It seems that today, the tendency of countries is absolute rejection of one of the two mentioned mechanisms and the attitude of most criminal procedure laws are the combination and combination of the two mentioned methods.

F: Legal basis for criminal prosecution in Iranian and Turkish law

Another principle of prosecution is the legal basis of this principle. Contingency or expediency in criminal law was introduced after the transition of criminal law from classical school. With the

transition of criminal law from an abstract and subjective approach and its link with social sciences, new aspects of human and society facing criminal law were introduced as if criminal law believed in the ability of humanities to manage humanities and society and based its actions on these teachings.

With the emergence of the proof school, the beginning of the transition phase of classical school and the tendency to the ability of the humanities instead of relying on philosophy and abstract approach in resolving human relations began. According to the School of Proven Criminology, humanities can explain and predict the psyche of the offender and the end of treatment or prevention of crime simultaneously.

In the discussion of legal principles of the principle of contingency, we can mention the instrumental or utilitarian approach in criminal law. The concept of instrumentalism is used as synonymous with the term utilitarianism, because instrumentalism in criminal law means that criminal law is used as a tool and a means for a predetermined purpose (Hart, 1986, 80).

In other words, instrumentalism or utilitarianism in criminal law means that criminal law is a function of benefit, rather than benefiting is function of criminal law. The adoption of a utilitarian approach in criminal law brings it closer to administrative law and diminishes the boundaries between them and makes the rules governing them similar. Therefore, instrumentalism in criminal law requires acceptance of administrative nature. (Ibid,32).

G: The Criminological Basis of Criminal Prosecution in Iranian and Turkish Law

One of the other basics of principle of necessity of prosecution is the theoretical basis of criminology. Each of Criminology theories and schools have influenced criminal law and the criminal justice system in a way. Some of

criminology Schools which are have turned to the principle of necessity, and schools of criminology that are offender-centered or victim-centered have paid attention to the principle of contingency. Under the influence of criminology perspectives, three generations of criminal justice have been raised in criminal law: punitive criminal justice, rehabilitative or corrective criminal justice and restorative criminal justice.

In the period of punitive criminal justice, criminal justice is crime-based. Punitive justice considers the crime as morally reprehended act that the perpetrator must face a bad treatment in the name of punishment. Beccaria has been in favor of this view in criminal justice (Najafi Abrandabadi, 2004, 1). This view does not bear the principle of contingency in position of prosecution and is more in line with the principle of the necessity of prosecution.

During the prevalence of rehabilitative criminal justice thinking, criminal law distanced itself from the ethical concept of justice and turned to clinical-medical attitudes. During this period, the offender was noted because it was believed that the crime was merely a crime that shows us the dangerous state of the offender, and the reaction of the community is determined by the character of the perpetrator, his motive, and the circumstances of the perpetrator. (Katouzian, previous source, 2).

During the governing of restorative justice, along with the perpetrator, the magnificent against is also taken into consideration. In this period, scientific and clinical attitudes to crime continue and along with the offender, the other axis of the crime, i.e. magnificent against is also considered. This justice, which is a rehabilitative justice, leads to restorative justice. In this period, the principle of contingency and principle of legality of prosecution are taken into consideration simultaneously. in the principle of the legality of prosecution. This course can also be called the

third period and the restorative justice course. (Katouzian, former source, 3).

conclusion

In Iranian criminal law system, a public dispute or criminal prosecution for the accused is pursued by the Prosecutor's Office on behalf of the public. Criminal prosecution against some individuals is subject to certain conditions. In some cases, there may be obstacles, and in some cases, public litigating may not be aborted or continued.

In the event of a gathering of the necessary conditions and the lack of barriers to prosecution, preliminary investigations are the most important stage of prosecution is public litigate, which takes place in the Prosecutor's Office and within a short distance from the occurrence of a crime and is subject to certain criteria. Therefore, when studying a public dispute, it is necessary to investigate the conditions and obstacles of prosecution, as well as the cases of the remove of a public dispute, and then determine the principles and regulations governing preliminary investigations.

Today, the public prosecution authority in Iran is the Prosecutor's Office, but in the Turkish law system, the main authority for prosecuting of public dispute is criminal courts which initiates a public prosecution by the prosecutor's office. (Article 175 of the Turkish Penal Code). it means that if the prosecutor's office fails to reach conscientious contentment in relation to doubts, it issues no need for prosecution and returns the case.

Prosecuting crimes in Iran is the most important task of the Prosecutor's Office, and in Turkey, with the Prosecutor's Office, after the formation and completion of the case, preliminary investigations will provide the grounds for trial and sentencing by the court. This duty is referred to as the principle of legality or necessity of prosecution.

According to the above explanations, it is obvious that the difference between Iran and Turkey's legal systems alone can cause differences in the subject of criminal prosecution. Also, differences in views, especially differences in The Turkish Penal Doctrine regarding prosecution and its effects and foundations, have caused numerous gaps and unknowns, because by studying the legal researches of Turkish researchers, we are faced with a new division regarding the fundamentals and effects of criminal prosecution. The country's researchers have discussed individual and systemic (organizational) impacts on criminal prosecution and have discussed their human rights and citizenship principles and rules.

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