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Disproportionate Punishments as Violation of Human Dignity

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Abstract

Disproportionate punishments are those punishments passed or enforced without considering the criteria of proportionality, namely the criteria of harm done, the absolute or relative seriousness of crimes, the kind of committed crime and offender characteristics, the degree and kind of victim's culpability. Considering the penological aims, such as retribution, deterrence and securing social defense, as a part of proportionality test, in the process of determining, distinguishing and enforcing proportionate punishments, is contrary to the rationale and philosophy of proportionality principle. In fact, this approach eviscerates this principle and leaves only an empty shell. The main cause of the prohibition of disproportionate punishments in the international, regional, national human rights' documents is the proscription of using human beings as a means to an end (instrumentalism), aiming at the heart of human dignity. In the Iranian legal system, there are no clear rules and regulations about the prohibition of these kinds of punishments and the determined punishments in many penal codes, such as the Islamic penal code (1991, 1996), the Penal Code of Armed Forces Crimes (2003), the Act against Narcotics (1997) and the Punishment aggravating Act of Bribery, Embezzlement and Fraud (1988) are not compatible with the standards of proportionality, especially with the absolute and relative seriousness of offences, offender characteristics and victim's culpability. This article tries to explore the principal criteria of proportionality between crime and punishment, the concept of disproportionate punishments and the philosophical foundations of the prohibition of such punishments and their contradiction with human dignity.

Keywords: Disproportionate Punishments; Criteria of Proportionality; Human Dignity; Iranian Criminal Law.

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Introduction

Although, from the historical point of view, the theory of proportionality has ancient roots and using the punishments such as "Retaliation", "Quasi-Retaliation" and "Intermediary Retaliation" in ancient Mesopotamian laws proves this fact (Westbrook *et al*., 2003: 97), officially recognizing and providing this principle in statutes and regulations has no long history. At most its historical record can be referred to the time of issuing of *Magna Carta* in 1215. In relation to the necessity of proportionality principle, Article 20 of this Charter provides that: "One free person should not be punished unless to the degree of the seriousness of committed offence and for a serious offence should be punished to the extent of seriousness" (Kashani, 2005: 212). Subsequently this principle has been prescribed in the England Declaration of Rights (1689), in the Constitution of the U. S. A (1791), in the France Declaration of Human Rights and Citizenship (1793) and in the other documents on Human Rights, either expressly or impliedly.

Nowadays, in the legal systems of many countries "the right not to be subjected to disproportionate punishments" is regarded as a fundamental principle of citizenship of criminal Law. This right, derived directly from inherent dignity of Human being, has been recognized in many international, regional and national human rights Instruments. On the international and regional level, Article 5 of the Universal Declaration of Human Rights (1948), Article 7 of the International Covenant on Civil and Political Rights (1966), Article 2 and 4 of the International Convention against Torture and other cruel, Inhuman or Degrading Treatments or Punishments (1984), Article 5 (2) of the American Convention on Human Rights (1969), Article 3 of the European Convention on Human Rights (1950), Article 5 of the African Charter on Human and peoples' Rights (1981) and Article 49 of the European Union Charter of Fundamental Rights (2000) have provided the proportionality principle and prohibited disproportionate punishments either explicitly or implicitly. Providing such regulations in the International human rights law means that the era of absolute and exclusive criminal sovereignty of the states has passed. Such provisions have been provided in the constitutions of many countries, too. Indeed, based on the

Bassiouni Report, until 1993 "the right to be free from torture and cruel or degrading punishments has been provided in at least eighty – one Constitutions (Bassiouni, 1999: 263). Other constitutions such as the Constitution of South Africa have recently joined this list, and some other constitutions that have not laid down such a right explicitly, have been interpreted so as to infer a similar right from other fundamental protections. For example, the right to human dignity in German and Nigerian Constitutions have been interpreted as including a prohibition on disproportionate punishments (Nnmani, 2005: 65-182). The Constitution of the Islamic Republic of Iran has no clear provisions on the prohibition of disproportionate punishments and it is very difficult to infer such a right (not to be subjected to inappropriate punishments) from other protective regulations, considering paradoxical provisions concerning human dignity.

In spite of the importance of the principle of the prohibition of disproportionate punishments in the International Human Rights law and in many national legal systems, the concept of disproportionate punishments has not already been defined in these instruments and no clear and exact criterion has been presented to make clear the notion of proportionality and to assess the proportionate punishments. Moreover, some of the presented standards such as the "General and Special Deterrence", "Rehabilitation of offender," and "Social Interest or Public Protection" are contrary to the rationale of the proportionality principle. Therefore, the main questions that spring to the mind first are that: what kinds of punishments are regarded as disproportionate punishments? What are the criteria of proportionality and how can we distinguish the proportionate punishments from disproportionate ones? Why are inappropriate and harsh punishments regarded as contrary to human dignity and human rights? What is the nature of the connection between disproportionate punishments and human dignity violation?

In order to reply to these questions, in the first part of this article, we analyze the important standards of proportionality, emphasizing upon the historical evolution of proportionality theory, judicial precedents of different countries especially the precedent of the European Court of Human Rights and upon the criminal codes. Then, we will present a clear definition of disproportionate punishments.

In the second part of this article, we will explore the philosophical foundations of the prohibition of disproportionate punishments and make clear the connection between inappropriate punishments and human dignity violation. In pursuing this purpose, we will examine the Iranian criminal law from this point of view.

1. The Rationale of Prohibition of Disproportionate Punishments

Some questions are raised about the philosophical foundation of prohibition of disproportionate punishments. We first put forward these questions and then answer them. What is the main cause of prohibition of inappropriate punishments? Why are these kinds of punishments regarded as contrary to human rights? What is the nature of the connection between disproportionate punishments and violation of human dignity? To reply these questions, we first refer to the judgment of the South African Constitutional Court in S v. *Dodo*[1] involving some important points and then answer these questions, analyzing the judgment.

The South African Constitutional Court holds in this case as following: "The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue... Section 12(1)(a) [of the Constitution of the Republic of South Africa] guarantees amongst others the right "not to be deprived of freedom… without just cause". The "Cause" Justifying penal incarceration and thus the deprivation of the offender's freedom is the offence committed. "Offence" consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. In order to justify the deprivation of an offender's freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender. Thus the length of punishment must be proportionate to the offence. To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment is to ignore, if not to deny, that which lies

1. 2001 (3) SA 382 (CC) at 403.404.

at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and indefinite worth; They ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence, the offender is being used essentially as a means to another end and the offender's dignity is assailed. It is the same where the reformative effect of the punishment is predominant and the offender is sentenced to lengthy imprisonment principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relation to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end thereby denying the offender's humanity (DirkvanZyl *et al*., 2005: 546).

This judgment is important from several aspects: Firstly, it emphasizes the value of human dignity and of respect for individual's autonomy and freedom. This shows that the main cause of the prohibition of disproportionate punishments is their contradiction with "inherent dignity"[1] of man. Inherent dignity is that kind of dignity which all human beings enjoy it equally and inherently due to having moral autonomy and "free-will"[2], "ability to think reason and choose"[3] and due to having "divine face and

1. Another sort of dignity is "obtaining dignity" this dignity is acquired by voluntarily attempting at the direction of perfection and development and by developing the natural and potential talents deposited in the nature of human beings the most important criterion of this dignity on the basis of religious teachings is "virtue and faith"

2. By hesitating and exactly looking at the following tradition narrated from the Prophet Mohammad, we can infer well from it that the free-will and autonomy are one of the most important theoretical foundations of human dignity: The Prophet said: Nothing is in front of God more honorable than sons of Adam (human beings). It was said to prophet are not the angels more honorable than human beings? The prophet said: Yes, because the angles are compelled like the sun and the moon_(For seeing this tradition see to: Ashori, *et al*. 2004:84). It is worth mentioning that on the basis of the Kant_ theory, moral autonomy is also one of the most important foundations of human dignity. Putting forward the inherent dignity of man, Kant Says the main basis of this dignity must be found in the spiritual and ethical capacity of mankind for making universal - ethical laws (Beyleveled, 2001:59). Of course the theory of Kant has received some criticisms not examined here to observe the brevity of discussion.

3. One of the commentators, interpreting the Verse 70 of the Surah XVII (Israelites): "And surely we have honored the children of Adam," says this verse means that we honored the children of Adam due to having power of speech, reason and ability to distinguish right from wrong (Toreihi, 1974:152).

spirit"[1].

Respecting for this inherent dignity requires that all human beings be treated equally as an end in themselves, namely, all human beings; firstly, enjoy equally all rights derived from respecting inherent dignity including the right of freedom of expression and the right of choosing destiny. Secondly, "they could have the right to be immune from any action which ignores their being end and reduces them at the level of object and means". (Fathemi *et al*., 2004: 111)

Kant says in this regard in The Metaphysic of Morals that, "Every person has the right to be respected by the other fellow-persons and he (or she) herself, in turn, is under duty to respect the dignity of other persons. Humanity in it self, is dignity. Therefore no person should be used as a means to an end…But he should always be used as an end and his dignity and personality is derived exactly from this reality. The dignity by which the human being knows himself above all non-human creatures and even "objects", which could be used as a means (Kant, 1991: 209). According to Bedau[2] the inherent dignity of man, in Kant's view is the main basis for the equal human rights (Beyleveled *et al*., 2004: 53).

Respecting these facts, we can say that harsh, cruel and inappropriate punishments are contrary to human dignity due to instrumentalizing human being and using him as a means to an end. Individuals have right to be immune from these kinds of treatments and punishments. Secondly this judgment relates to the penological aims of punishment that lead to determination and

1. Adherents of the theory of dignity based on "Divine Revelation (or Divine Command theory)" justify human dignity not on the basis of a conventional, or nominal or a mere rational matter, but on the foundation of an ontological and original fact which has taken root in the nature of human being creation. They also justify it on the basis of divine commands. They say that human beings have inherent dignity not merely because of having free-will and ability to think and reason but more due to having "Divine Face" (God has created Adam in the image of himself". Indeed, human being because of having spiritual and moral nature has relation with existence and its creator; So the nature of mankind is the highest face for the identity of God" (Ibn-Arabi, undated:151-152). That is this relationship between God and human being which makes clear the ontological and philosophical foundations of human rights and human dignity. We can infer this important and valuable connection from this Verse of Holy Quran in which the God says: "I breathed into him of my spirit" (Jafari Tabriz, 1991:280). The proponents of this theory say that human has dignity because he (or she) is the Khalifah (successor) of God and this position is not a thing which can be denied and destroyed by the actions such as corruption and bloodshed; "In fact, what is subjected to blame is not the nature of human being but the actions and deeds committed by mankind and the nature of human is separated from his (or her) behaviors and actions (Ibn- Arabi, undated: 167)".

2 . Bedau, Hugo, A.

imposition of disproportionate punishments.

This decision shows that "public protection" claims behind deterrence or incapacitation or the paternalistic claims behind the rehabilitative rationale should not be used to increase the punishment beyond what is proportionate (DirkvanZyl et al., 2005: 547). In other words, this judgment proves that the "Utilitarian Theory," or the theory of "Government Expediency" and even the theory of "Offender rehabilitation and reformation" couldn't be used as a warrant to determine and impose the punishments inappropriate to the offence. Because, under the utilitarian theory and the theory of government expediency, the "justice" can be easily interpreted in favor of the government security. This theory can easily justify using governmental violence (Mojtahed Shabestari, 2006: 453). Human rights and ethics are sacrificed under the foot of utilitarianism and expediency measuring by this theory (Wood, 1997: 20-23). By relying on the public expediency, sometimes, killing, imprisoning and violating respect or dignity of others become authorized. This risk derived from high "subjectivity" of expediency discretion, shows itself best, where there is no compatibility and convergence between the interests of political authority and the real claims of people. It is for the same reason that in modern criminal justice systems the place of individual is always strengthened and his (or her) interests are protected vis-a-vis sovereignty. Thirdly, this decision shows that in addition to the seriousness of offence, the responsibility of offender should be considered in the process of determining and assessing the proportionate punishments.

The court has paid no attention to the guilt of the victim in his judgment and ignored the standards of fair trial. Because, as we said previously, the enforcement of justice requires, in all case where the victim has provocated the offender and caused the commission of crime or when who has provided a pre-criminal situation, the punishment of offender is reduced in a accordance with the degree of victim's guilt.

2. The Criteria of Proportionality

Over-viewing the history of the evolution of criminal law, we realize that the theory of proportionality between crime and punishment has evolved and developed under the effects of the doctrines of various

schools of criminal law and criminology; especially the classical and new-classical schools of criminal law and the schools of positivism, social defense and victimological criminology. In these evolutions and developments we see the criteria of "Harm done", "Social Interest" "Seriousness of Offence", "Kind of committed crime and Offender characteristics", "Culpability of Victim" and finally the standard of "Ordinal proportionality".

2.1. The Harm Done Criterion

This criterion, emphasizing the amount of harm inflicted (potentially or actually) on the victim or society, is the earliest standard of proportionality in the history of criminal law. One of the salient features of the early criminal law was the determination of punishment for offenders on the basis of harm done and results of action. In the ancient age, no attention was essentially paid to the mental element of crime and the blameworthiness of the offender. "Man was punished not because he was blameworthy but because he was an instrument of harm. Such thinking led some primitive laws to punish all instruments of harm, including animals, objects and human beings" (Clarkson, 2005: 9). This merely emphasis on the results of action and paying no attention to the blameworthiness of the offenders was the important reason for the breadth of criminal offences in this era. For example, in killing, the death of victim alone was critical in defining the offence and so there was only one broad homicide offence involving all sorts of killings (even accidental killings)(Ibid) .The logical result of this thinking was to enact and enforce the same punishments for a wide range of wrongdoings.

But towards the end of the twelfth century an important shift occurred in the criminal law of many countries, including the criminal law of Great Britain. Due to this evolution, man came to be regarded as a moral agent who could be held responsible for his actions. So the emphasis began to be placed on the mental element in addition to physical element in crime. Laying down "Retaliation" in the "Assyrian criminal laws" and Divine religions especially in the Judaism and Islam has been In fact, an attempt to refrain from vengeful reactions of persons and to establish proportionality between crime and punishment.

This criterion is defensible from the point of view to the nature of the committed crime and the amount of harm done. This test prevents the lawmaker and judge from making arbitrary decisions on determining and enforcing the punishments; but it is criticized and questionable because of paying no attention to the kind and degree of offender culpability, the offender motivation, characteristics, and the victim blameworthiness. The final result of this test is injustice and disproportionality.

2.2. Proportionality Based on Social Interest

Another standard proposed to determine and enforce proportionate punishments is that of social interest. According to the founders of Social Interest School and Utilitarianism, the only object of punishment is to deter the offender from recidivism (special deterrence) and other citizens from criminality (general deterrence).

According to Cesar Beccaria this aim is obtained when the plain produced by punishment is more than interest gained by committing crime (Pradel, 1994: 44). Jermi Bentham, one of the leading adherents of utilitarian theory says: "Nature has placed mankind under the governance of two sovereign masters, Pain and Pleasure. It is for them alone to point out what we ought to do as well as to determine what we shall do" (Primoritz, 1989: 16). Therefore, if the pain created by punishment is more than pleasure produced by committing crime, the deterrent power will govern and so the offence won't be committed (Pradel, 1997: 61).

As we see, according to this test the seriousness of crime is not measured on the basis of corruption bears, but by the dangers which it produces. Then the proportionate punishment is that one prevents crime best by creating more fear and threat. Notwithstanding, the essential question raised in relation to this criterion is whether the social interest can justify the punishment not proportionate to the seriousness of offence? In other words, what is the place and function of social interest in evaluating the proportionality of punishment? To answer this question, the Judge of the Canadian Supreme Court held in the Leading case of *R v.Smith*[1], that: "In assessing whether a sentence is grossly

1. R V Smith (1988)40 DLR (4th) 435 (1987) lSCR, 1045 (1987) 34 CCC (3d) 97.

disproportionate, the Court must first Consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would be appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender" (DirkvanZyl, 2004: 549). As we see the Judge in his Judgment, like the adherents of utilitarian theory, has regarded the general and special deterrence and social defense and interest as a part of proportionality test; While this test, namely considering the penological aims such as retribution, rehabilitation and deterrence in assessing the proportionality of punishment may eclipse the seriousness of offence and degree of offender culpability and actually castrate the proportionality principle and annihilate the citizens right not to be used as a means to an end by the states. This approach is contrary to the rationale of this principle and as White J held in *Harmelin v. Michigan (1998)*[1], eviscerates the existing test of proportionality and "leaves only an empty shell (Ibid, 555)". Thus any punishment imposed on one of those other grounds must be subjected to the overall proportionality constraint.

Having a bird's eye view of Iranian criminal laws and regulations especially the Anti Narcotic Drugs Act (1997) and the Aggravating Punishment of Bribery, Embezzlement and Fraud Act (1988), we notice that the legislator has acted these harsh and cruel punishments, essentially, on the basis of the social interest theory and not paid much attention to the nature of seriousness of offence and to the extent of harm done. In other words the lawmaker has used the offender as a means to an end. While using the offender as a means to an end (regardless of its legitimacy or illegitimacy) is contrary to the inherent dignity of man. Moreover, the history of criminal law evolution and experimental-statistical studies in criminology and victimology proves that the policy of crime prevention by aggravating punishments, especially corporal and liberty deprivating punishments has been condemned to failure.

Consequently the criminal law must not exceed the boundaries of just deserts and proportionality so that, as Clarkson says, if it fails in its objectives, at least it would not be a failure involving injustice (Clarkson,

1. Hannelin V. Michigan. 5, US 957 (1991).

2005: 187). Even if it could be scientifically proven that using such harsh and cruel punishments is effective in crime prevention, the criminal law would not be authorized to use them. Because, the end does not justify the means.

Most of these provisions are not only incompatible with the nature and seriousness of offence but also with the amount of harm done and the offender culpability and motivation. For example what proportionality has the imprisonment provided for the crimes such as Fraud, Embezzlement (in the articles 1 and 2 of the Punishment Aggravating Act of Bribery, Embezzlement and Fraud) and Execution and Whipping for Importing or Exporting of Narcotics (in the Act of Narcotics) with the nature of offences? What kind of compatibility is there between the double fine punishment provided for embezzlement, in addition to the imprisonment and restoration of embezzled funds and the amount of harm done? Is providing execution in the article 4 of Narcotics Act, for one who imports narcotics (6 kilo) with the intention to consume and not to distribute it, proportionate to the motivation of offender?

The legislator has criminalized the consumption of narcotic drugs and addiction to the psychedelic drugs essentially with the intention to secure public order and tranquility and to prevent the addict from inflicting harm to the freedom of others. But the issue which has been neglected in making clear the criminogenic of consuming narcotic drugs is to what extent the crimes committed by drug addicts is due to the penal policy and their criminalization by the legislator (Zeynali, 2005: 16).

2.3. The Seriousness of Offence Standard

On the ground of this standard, the "kind and amount of harm inflicted to the victim or society" and the "offender culpability", namely the kind and degree of the offender intention, motivation and generally the various states of mind and means are the main elements of proportionality. By considering this test the lawmaker and judge must bear in mind the following issues in the process of determining, distinguishing and evaluating the appropriate punishment: Firstly, is there any rational proportionality between the nature of the evil derived from offence and the nature of punishment? Secondly, is the

measure of punishment compatible with the amount of harm done? Thirdly, is the punishment proportionate to the motivation and various blameworthy states of offender?

Naturally paying attention to the kind and amount of harm done establishes rational proportionality between offence and punishment and considering the various states of mental element brings the determined punishment near to the just deserts. Moreover taking into account the motivation of perpetrator of an offence can help us understand the Criminal personality of the offender. The understanding of criminal character and its central elements (Egotism, Liability, Aggression, and Affective Indifference) is a good criterion for evaluating the measure of criminality and the dangerous state of offender. In order to act in accordance with the proportionality principle, the punishment must be determined considering the measure of criminality (Zarei, 1994: 245).

A brief study of Iranian penal codes and provisions leads us to the reality that: Although the Iranian legislator has classified offences into the intentional, quasi intentional and unintentional crimes, the provided punishments in many cases are not scientifically and practically proportionate to the measure of harm done and to the culpability and motivation of offender. For example the punishment of "Muharaba" (execution or cutting hand and foot opposite or crossing or banishment) provided for the offences such as the "Malice" towards the life of the Leader or the chief of the Legislative, Judiciary or the Executive or for counseling and procuring the offence of "Planning to overthrow the Islamic Government" in the articles 515 and 187 of the Islamic Penal Code (of Iran) and for the crimes of "Forbearing oneself from doing the commission at the time of war" or "Sleeping intentionally at the time of guard" or "Self - hitting" or "Escaping from military service at the time of war" in the articles 42, 44, 51 and 65 of the Penal Code of Armed Forces Crimes (2003) or providing capital punishment for the perpetrators of Narcotic drugs offences in many cases, including for Importing Narcotic Drugs in Article 4 or Carrying Narcotic Drugs in the article 5 of the Narcotic Drugs Act (1988) is not appropriate to the kind and amount of harm done. Indeed, determining and enforcing these kinds of punishments

means to use the offender as a means to an end. Unfortunately, this policy has been repeated in Amended Anti Narcotic Drugs Act 2010 including Note 2 of article 8[1], in comparison with article 7[2].Because, considering The seriousness of offence standard (kind and amount of harm inflicted to the victim or society and the offender culpability), there aren't any difference between these two crimes. While legislator has not regarded this standard in the Article 8. In other cases the provided punishments are not compatible with the kind and degree of offender culpability. Take for example the article 206 of the Islamic Penal Code (1991); in this article the legislator has made no difference between the homicide committed with the guilty intention an fixed specific intention and the homicide committed with the non – fixed (contingent) specific intention and has provided the same punishment (retaliation) for these two kinds of killings. The legislator has provided retaliation in the section B of this article, for one who does intentionally a fatal action and causes the death of the victim, even though it could be proved that the offender wouldn't have a guilty intention.

Providing retaliation for the homicides committed under the duress or coercion is another example which shows that the Iranian Legislator has not distinguished between the different sorts of killings and provided the same punishment for a wide range of similar crimes. Certainly considering retaliation for the homicides committed under duress is contrary to the standards of religion and reason but we don't enter its rationale because it is not directly related to our subject.

2.4. The Nature of Offence and Offender Characteristics

"The nature of offence" and "offender characteristics" is one another important test to assess the proportionality or

1. In the all above mentioned cases , if the accused person is the governmental employee or the employee of governmental firms and government relating organizations, in addition to the aforementioned penalties in this article he would be sentenced to permanent dismissal from governmental duties as well.
2. In the case that the perpetrator of the offense mentioned in articles 4 and 5 is the governmental employee or the employee of governmental firms and government relating organizations and institutes and he doesn't become liable of dismissal from governmental duties as per the state employment laws, he would be condemned to 6months of dismissal for the first time and one year of dismissal for the second time and permanent dismissal from the governmental duties for the third time in addition to the aforementioned penalties.

disproportionality of punishment. Considering this standard, the courts must, in the first place, take into account the kind of crime from the point of legal and criminological view (considering the subject matter of offence and the nature, situation and the form of committed crime)[1] and then examine the bio-psycho-social features of the offender, including the age, sex, state of health, psychosis and nervous abnormalities, and then sociological features of the offender, including poverty, economic wealth and work situation, in order to enforce an appropriate social reaction. It is obvious that this observation would necessitate evaluating of the criminal personality of the criminal and the central elements of it, namely "Unintimidatability" and "Prejudiciality"[2]. Unintimidatability and prejudicality require a pattern of completely egotistical, fearless, persistent or repetitively aggressive or violent behavior. Of course, the important point is that we must notice the risk of using the offender as a means to an end in determining punishment to dangerous criminals.

The Article 3 of The European Court of Human Rights has held, in deciding whether a sentence violates prohibition "inhuman or degrading punishment", that the penalty must attain a minimum level of severity, and that this should be evaluated in relation to the sex, age and state of heath of the offender (Emmerson *et al*., 2007: 484)[3]. In *Weeks* v. *United Kingdom (1988)*[4] a boy of 17 had been condemned to life imprisonment for armed robbery, having threatened the owner of a pet shop with an unloaded starting pistol and stolen 35 pence. The Strasbourg Court considered the punishment to be preventive and justified it on that basis, but it commented that if the sentence had been indented as punitive rather than preventive, one could have serious doubts as to its compatibility with Article 3 of the Convention (DirkvanZyl *et al*., 2005: 548).

The decision of court can be criticized for paying attention to the penological

1. On the basis of criminological data, crimes considering the nature and the form of them are classified into three groups: Violent, Deceitful and Reckless crimes.
2. "Unintimidatability" is the result of two elements, namely egotism and liability and "Prejudiciality" is produced by the combination of two elements aggression and affective indifference.
3. Republic of Ireland v. United Kingdom (1979)2 EHRR 25, Para 62.
4. Weeks V United Kingdom (1988)10 Ehrr 293.

purposes of punishment. As we saw previously, considering the penological aims of punishment as a part of proportionality test is contrary to the rationale of that principle. Such a punishment would be disproportionate even if it is enforced with the preventive purpose. Because using the offender as a means to an end is contradictory to human dignity.

Considering what was said, it seems necessary to enact legal provisions about the organization of *"Personality Case"*[1] alongside the penal case in the process of condemnation and enforcement of sentence. Looking briefly at the provided punishments in the Islamic Penal Code (including articles 668, 669, 684, 687, 714, 715, 716 and 717) we notice that the legislator, in relation to this test has replied violence with violence. This policy is contrary to the primary just-wishing feeling of mankind. Indeed, "A society resorting to controlled, explicit violence against its offenders reduces itself to their level (Clarkson, 2005: 185)".

Moreover, the lawmaker has not paid sufficient attention to the offender characteristics and to the central elements of criminal personality. The proof of this matter is that the legislator has determined imprisonment and blood money for all sorts of "recklessness" and "negligence" (especially on the Articles 714-717 of the Islamic Penal Code) could be derived from various factors such as egotism, absence of ethical feeling, week power of association and excessive fatigue (Zarei, 1994: 248). The essential question raised in this area is what effect could the imprisonment punishment have on a person who has committed crime recklessly or negligently due to losing the personality equilibrium or due to forgetfulness, weakness of association and excessive fatigue?

2.5. The Victim Culpability Test

On the basis of this standard we can classify the victims into various groups including "provocator victims" and "infractor victims" These groups of victims are, in fact, ones who provocate directly or indirectly the offender to commit a crime by their provocative behaviors or ones who are victimized because of violating the other person's rights, in the position of self-defense. These victims in fact are

1. The case which is being held alongside the penal case to knowledge the bio-psycho- social features of the offender is called "personality case".

guilty alone or more than offender (Filizzola *et al*., 2001: 53). The classification of victims on the basis of their guilt or responsibility and considering their guilt and role in the creation of offence is one of the essential elements of a fair trial.

In some cases the Iranian lawmaker has, with or without awareness, enacted some regulations under the effect of etiological victimology. For example we can refer to articles 22(3), 25(b), 61 and 62 of the Islamic Penal Code. Although providing these regulations shows that the Iranian legislator has taken some positive steps towards the administration of penal justice, these provisions are not without of defect and deficiency. Because the enforcement of justice requires that, in all cases where the victim has provocated the offender and caused the commission of crime or when who has provided a pre-criminal situation, the punishment of offender be reduced in accordance with the degree of victim's guilt. Therefore the meaning of optional mitigation or suspension of punishment in these situations is not anything but ignoring the victimological findings of scientific victimology and keeping aloof from the essential standards of fair trial. So, the legislator in these cases and similar ones, must provide the victim provocation as a compulsory mitigating of or excusing for the punishment of offender, as in the English legal system, the legislator has classified "Manslaughter" on the basis of the degree of victim's guilt, into two groups: "voluntary manslaughter" and "involuntary manslaughter" and so he has provided the punishment of involuntary homicide for intentionally killing (murder) committed under the effect of the victim provocation or for the murder caused by excessive defense in the position of self-defense.

2.6. Proportionality Based on the Relative Seriousness of Offences

This criterion, called in mathematical language "Ordinal Proportionality" by Andre Von Hirch (DirkvanZyl *et al*., 2005: 559), refers to the relative seriousness of offences and involves comparative assessments of gravity (Ashworth, 2010: 104-115). Considering this test the courts studding comparatively the criminal codes and rules of the national legal systems, must examine whether the offence is punished proportionately with like ones?

Otherwise, what is the gross difference between special offence and other like ones? Of course it may be said that observing the criminal codes of other countries could be contrary to the principle of sovereignty and political autonomy of countries. Additionally, the relativity of crimes and diversity of cultures make us free from referring to the other criminal codes. But, we can say that, in the first place, by successfully entering the individual into the domain of international law and establishing the international human rights law, the era of the absolute and exclusive criminal sovereignty of countries has passed. Today, interaction of criminal Law with international institutions and principles, comparative Law findings, standards of international system, criminological findings and new technologies, such as Information and Communication Technologies (ICT), has been resulted in the formation of specific criminal discipline as the ICT criminal Law. In this regard, all countries don't act the same way. Because, some of this countries don't have sufficient studies or previous preparation for international interaction. Sometimes, countries believe that resorting to classic principles and concepts of criminal Law and traditional interpretations of sovereignty can fight against crime and resolve issues arising from it. These countries follow self-sufficient principles and don't participate in area of international Law, international norms generation, joining and performance them. While, these countries can contrast for short term. But due to social, economical and diplomatic problems and appropriate response to various forms of crime and etc, are inevitable to be present in various international areas (Fletcher, 1998: 15- 26). In the second place, notwithstanding the diversity of cultures and normative systems, as Gassin says, two elements, "violence" and "deceit", which constitute the nature of many offences, are common, constant and unchangeable in all of the legal systems (Gassin, 2000: 80).

Studying the punishments of Narcotic Offences and comparing it with the punishments determined for other crimes in Iranian criminal law shows that the legislature has provided very harsh and cruel punishments for the narcotic offences and has paid no respect for the seriousness of offence and the measure of harm done.

Perhaps this harshness could be justified

so that the commission of this kind of offences subjects the reason of human being to danger and converts the perpetrator to an idle and useless individual and paves the way for committing other crimes or that the obscenity of the commission of these offences in the common culture of Iranian society is more than other offences (Ibid, 44).

But it may be said in reply that: firstly in Iranian society the public repulsion in relation to the offences against chastity, respectability and property is more than narcotic crimes. Secondly, the fact that the commission of these offences converts the offender to an idle and useless person is not enough to enforce such harsh punishments. Indeed, inflicting such punishments upon the perpetrator, when the committed crime is not important and serious means that the offender is used as a means to an end. Considering this criterion we notice disproportionality among the very narcotic crimes. For example in comparing articles 3 with the article 5 of the Act against Narcotic Drugs (1997), concerning the holding, carrying or concealing the flowered or fruit-bearing trimmings of hemp, we realize that the punishment for this crime when committed with the intention to produce the narcotics is less than otherwise while the commission of this crime with the intention to produce narcotics is more serious than otherwise. Moreover, comparing the Iranian criminal policy with the criminal policies of some European countries including Poland, Hungary and German Vis-a-Vis narcotic drugs shows that the Iranian criminal policy is more excessively harsh[1].

Considering what was already said about the criteria of proportionality, we can define disproportionate punishments as: "punishments enacted or enforced without considering the amount of harm done or risked, absolute or relative seriousness of offence, the kind of committed offence and offender characteristics and the degree of victim's guilt". Therefore, to describe a punishment as disproportionate is to assert that it lies outside the boundaries of proportionality. Punishment will be proportionate when a "pressing social need" Justifies its necessity for the achievement of a legitimate aim and when

1. For more expression, see Jerom. Freh (2000). *The Criminal Policy of Some European Countries vis-a-vis Narcotics Drugs*, Trans. by Rohaddinkord Alivand, Tehran.

it fairly balances the rights of individual and those of the whole community (Spencer, 2004: 17).

Conclusion

Considering what was said about the criteria of determination and evaluation of proportionate punishments, and taking into account the rationales of the prohibition of disproportionate punishments and paying attention to the Iranian criminal provisions and laws, we come to believe that: Firstly, the notion of proportionality is a relative one which has been evolved and developed under the effect of different criminological and penological schools at the length of the criminal law history; Secondly, proportionality is a relation between of fence and punishment determined on the basis of the kind and amount of harm done, absolute and relative seriousness of offences, type of committed crime and offender characteristics and victim's guilt. On the ground of this fact, punishment will be proportionate when a pressing social need justifies its necessity for achievement of a legitimate aim and when it fairly balances the rights of the individual and those of the whole community; Thirdly, regarding the penological aims of punishment such as general and special deterrence, rehabilitation of offender or public interest as a part of proportionality criteria is contrary to the rationale and philosophy of this principle; Fourthly, the main cause of prohibition of inappropriate punishments lies in respecting human dignity and autonomy, from one side and in prohibition of using human being as a means to an end from the other side; Fifty, the Iranian legislator in various cases, especially in the Act against Narcotic Drugs and in the Penal Code of Armed Forces Crimes, has criminalized and penalized without regarding the criteria of proportionality and mostly on the basis of penological aims, including deterrence and social interest, and so has gone beyond the boundaries of just deserts. Therefore, in order to rehabilitate criminal Law and respect human dignity, it is necessary to review and amend the present laws and to provide a new and mandatory series of regulations especially about the establishment of personality case and reduction of offender criminal responsibility regarding the victim's guilt. We must scientifically know that every society can bear punishment to a certain extent; If it exceeds the boundary of

"criminal saturation" it would be intolerable. To preserve its legitimacy, moral authority and it's social acceptability, criminal law must be compatible with the primary just-wishing feeling of human being which contradicts any form of violence (especially governmental violence) and deceit. It must perform its main function in the framework of criteria determined by human dignity.

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مجازات های نامتناسب به منزله نقض کرامت انسانی

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مجازات های نامتناسب به مجازات هایی گفته می شود که بدون در نظر گرفتن معیارهای تناسب که عبارتند از: معیار صدمه و آسیب وارد شده، میزان خطرناکی مطلق و نسبی جرایم، نوع جرم ارتکابی، خصوصیات مرتکب و میزان و نوع تقصیر بزه دیده، به تصویب و اجرا می رسد. با درنظر گرفتن اهداف کیفرشناسی، از قبیل سزادهی، بازدارندگی و تأمین دفاع اجتماعی، به منزله بخشی از معیار تناسب در فرایند تعیین، تشخیص و اعمال مجازات های متناسب، در تضاد با منطق و فلسفه اصل تناسب است. در واقع، این رویکرد. علت اصلی ممنوعیت مجازات های نامتناسب در اسناد بین المللی، منطقه ای و ملی حقوق بشری، ممنوعیت استفاده از انسان به منزله ابزاری در نظام کیفری ایران، مقررات روشنی برای ممنوعیت چنین مجازات هایی وجود ندارد و مجازات‌های تعیین شده در بسیاری از قوانین کیفری، از قبیل قانون مجازات اسلامی (۱۹۹٦- ۱۹۹۱)، قانون جرایم نیروهای مسلح (۲۰۰۳)، قانون مبارزه با مواد مخدر (۱۹۹۷) و مجازات مرتکبین ارتشا، اختلاس و کلاهبرداری (۱۹۸۸)، مطابق با معیارهای تناسب نیست. به ویژه با میزان خطرناکی مطلق و نسبی جرایم، خصوصیات مجرم و میزان تقصیر بزه دیده. این مقاله به بررسی معیارهای اصلی متناسب میان جرم و مجازات، مفهوم مجازات های نامتناسب، مبانی فلسفی ممنوعیت چنین مجازات هایی و تضاد آن با کرامت انسانی می پردازد.

واژگان کلیدی: مجازات های نامتناسب، معیار تناسب، کرامت انسانی، قانون کیفری ایران.

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