

## A Study on Bases and Consequences of Mandatory Principle of Criminal Prosecution

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### ABSTRACT

Governments are bound to preserve security and order in societies, and to protect the citizens against harms and incursions. One of the most important instruments of governments to achieve these goals is criminal law. The role of public persecutors on this path is remarkable. Public persecutor is the first agent of the government who stands against crimes and criminals. Legal systems have two methods in public persecutors way of action. Some of them bound the public persecutor in face of crime to pursue it, and some others have left the act of pursuing the crime arbitrary in the hands of the public persecutor. Legal systems which follow the first method hold that sufficiency of proofs is the only condition necessary for the public persecutor to perform the act of pursuing, but systems which have left the act of pursuing arbitrary to public persecutor along with sufficiency of proofs, also added the expediency condition. The first method is called "Mandatory Principle" and the second method carries the name of "Expediency Principle". Legal literature of Iran has concerned briefly to mandatory and expediency principles and their bases and consequences have not been investigated thoroughly. Some of the most important bases of mandatory principle are: legality principle, Separation of powers principle, classic school approach and some of the most important consequences on this principle are: guarantying equality before law, preventing informal retributive law and reflecting prohibitive structure of retributive regulation in persecution.

This article is to provide these bases and consequences and to focus on slow transiting to the Expediency principle.

**KEYWORDS:** criminal persecution, public persecutor, Mandatory principle, bases of Mandatory principle, consequences of Mandatory principle.

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### INTRODUCTION

Mandatory principle means that the act persecuting crime would be automatically started at the time that the official persecutor is informed, if sufficient proofs were available (Kerley, 2004, P2). "According to this principle, the official persecutor does not have the right to apply conditions and guarantees towards the culprit. According to mandatory principle, the mere duty of the official persecutor is to prepare the case to be sent to the court." ([www.europeansourcebook.org/chapter\\_2/2a](http://www.europeansourcebook.org/chapter_2/2a)) In this principle the legal assumption is that persecuting any crime is public expediency and protecting legal order is persecutor's responsibility. According to this principle the exact definition of crimes in the law is necessary and the law has subjectivity, is considered the aim and verbal interpretation is insisted in it. In this principle responsibility on the impacts of legal decisions is denied and interpretation without law is insisted (Hart, 1988, P23). Mandatory principle is also called imperative persecution principle (Vogler & Huber op.cit, p184 and Abbasi, p230, 2003) or legality of persecution principle.

Legality principle and indirectly the mandatory principle were introduced along with the emergence of renaissance. In this period social reformers and revolutionary philosophers like Bekaria, Bentham and Russo were fed up with tyranny of the kings and oppressions of the Church and revolted against the prevailing situation. These social reformers were against the centralization of legislative power, jurisdiction and execution in hands of the king and prejudices towards the people and shouted freedom. In order to achieve justice, they suggested separation of powers and due to the fact that anarchy and inequality had caused severe damages to the society, they insisted on preparing laws by legislature and necessity of its execution.

Mandatory principle is against Expediency principle. These two principles are governing the act of persecution. Expediency principle (Roger, 1975, p130) means recognition of the prudence which is both acceptable in common law and in Roman-German regime; this is while Mandatory principle is only nourished in Roman-German regime. As a result there is an undivided connection between retributive law and the principle governing the persecution (Bard, 1986-87, pp1-6). Historically Mandatory principle is prior to expediency principle and research about it needs some bases and preconditions. The method of legislation in Europe continent is one of the preconditions for Mandatory principle. Mandatory principle is also based on this fact that legal decisions are issuable beforehand by the legislator about all social problems. Precise trust in persecutor is another precondition of this principle; because

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this principle is based on the fact that the persecutor is in any case able to identify correct persecution among the law and does not need a matter outside of law. (ibid;p2) Mandatory principle along with its specific bases contains special impacts which, whether positive or negative, will be discussed in this article.

### **Section one: bases of Mandatory principle**

Mandatory principle is the result of specific bases in retributive law. Defining these bases would ease accepting or rejecting this principle. Of course, due to differences in history, culture, traditions, customs, rituals, morals and religions of different countries stating all these preconditions is rather difficult. In this part we will investigate some of the most important bases of legality principle.

#### **Part one: social representation of the persecutor**

One of the bases of Mandatory principle is the theory of “social representation of the persecutor”. The right of retributive persecution and public suing which often leads to issuing a sentence or a punitive or socially benefit able action towards the criminal, belongs to the society which its order is compromised by the crime and the society have bestowed this right to the government. The government is bound to punish and reattribute the criminal to maintain justice in the society. As a result, persecutor’s office, representing the society, if a crime has taken place and enough proofs were available against the criminal, is bound to persecute the crime, and because it is now the owner of the right (Khazani, 1986, pp2-3) it cannot withhold this duty. Persecuting a crime is considered a right for the society and a duty for the persecutor’s office. In other words, the persecutor’s office is not the beneficiary to be able to withhold persecuting a crime ( Khaleghi,2009, p36) and does not have the right to decide whether it is appropriate or not to persecute a crime (Akhoondi,1993, p167) but it is bound to preserve the interest of the society. It is not the owner of public suing and cannot make its own decisions towards persecuting a public suing. This is while a private complainant can make any decision s/he wants using his private rights. This is a regulation which, following the legality of persecution legal systems, is accepted by most of foreign laws and is acted upon. (Khazani, 1986, pp2-3)

#### **Part two: law as an aim**

Aiming the law or subjectivity of law means that the law is considered the aim, regardless of its consequences, and it should be executed with no consideration of its impacts and its outside conditions. Subjectivity of the law does not accept that juridical cases to be resolved based on a regulation outside the law. Whether this outside regulation being justice, equanimity, expediency or any other condition. Based on subjectivity of the law it is the judge’s duty to represent the will of the law and resolve the disagreement. Resolving means that the judge neither consults the parties on things they can do or say, nor considers the consequences and problems which may be caused by the issued sentence. The judge can never take the position of a savior or a helper. s/he should remain completely unbiased and judge based on proofs of the case and statements of the parties. After resolving the case s/he presents the legal right (not the rightful or the juridical right) and should apply his/her entire attempt to execute the sentence s/he has issued. (Ansary, 2004, p115)

One of the most common mistakes about authority of the law is its mixture with authority of good law. As a result the problem with any theory about authority of law is the question that what is the authority of law? Why it is good and how much?

It is hard to answer this question; because it is mostly based on the theory which is foundation of rights and legitimacies of social control. For example, based on “Austin” theory, any order which has the support of de facto governor is considered a right or a law; as a result, when a group of people are actually governed by a governor, his government would be legitimate, with no regard to the exact form of the orders he issues. Based on this theory it would be hard to consider the instruments used by the governor to be illegitimate or not. But if the theory of natural rights and the claim that only regulations which have some certain moral privileges are considered as laws are accepted, in this case, a large portion of what was called the right or the law would not be laws or rights any more. If as it is believed by Austin all social control equipments which actually lead to a form of government are legitimate, then, the idea that judges should govern based on laws would be void of morality. On the contrary, if like supporters of natural rights we add some moralistic prudence to what which is considered to be the law, then the idea that governments and judges should rule according to law would change into an idea according to which governments and judges should rule using good law. This idea allows judges to maintain moralistic, justice and equanimity considerations in their decisions (ibid, p117). One of the most important impacts of aiming the law is mandatory of retributive persecution and not considering a matter rather than the law in process of persecution.

#### **Part three: legality principle**

Mandatory principle is a manifestation of legality principle. Legality principle was initiated by French human rights declaration and is included in 7th act of European human rights convention. The principle in question was considered a strong shield against tyranny of governments in eighteenth century. (Vogler & Huber, 2008, p184) Legality principle requires law to be clear, decisive and predictable. This principle asks juridical authorities to use

previously determined legal regulations in resolving the disputes and avoid personal tastes and expediencies, and in exerting the law not to apply any matter outside the law like expediency, justice or equanimity. Legality principle is tightly related to legal formalism and authority of the law regulation. It has branched from teachings of Feuerbach, Daisy and Montesquieu. This principle could be used in both private and retributive law. In realm of retributive law, this principle means that there would be no crime, penalty or righteous court; unless there is a legal requirement. The Mandatory principle which is legality principle in its retributive stage states that any criminalist action is pursuable based on previously determined law and based legal requirement about criminalist action persecuting it is obligatory.

If in a legal system the principle of legality is accepted, inevitably its consequences should be accepted too. Accepting legality principle in realm of retributive law would require accepting Mandatory Principle of Criminal Persecution. (Kerley, op.cit, p7) This means that, before any act of persecution, law should have accepted the criminalist nature of the action and the persecution authority should be persuaded that the elements of that crime have taken place outside. (Vogler & Huber op.cit, p184)

#### **Part four: Separation of Powers Principle**

Separation of powers principle means distributing the power between legislative, executive and juridical powers. In previous centuries ruling was in the hands of one person and the king possessed a vast authority on executive, legislative and juridical matters. With entrance of Europe into new generation several theories were presented to limit powers of kings and the necessity for inspecting their actions and separation of powers theory was one of the most remarkable of them. Subject of separation of powers, which is now accepted in constitutions of many countries in the world, was debated on since relic times. Contemporary meaning of separation of powers is resulted by thoughts of Montesquieu, French philosopher and intellectual in 18<sup>th</sup> century. Montesquieu believes that if legislative and executive powers are not separated, basic freedom of people will be tampered. A judge is not a legislator; s/he is a tongue and interpretation of the law. In other words, the judge should be limited to logical matters. This limitation is more manifestation in retributive matters. (Kooshky,2008, p181)the main aim of separation of powers principle is to control the power of the government. Montesquieu in his book *soul of laws* after stating the fact that centralization of all legislative, executive and juridical powers in one hand may lead to tyranny, insists that “in order to stop abusing the power, the governmental system must be formed in a way that power stops power.”

Separation of power principle was added to the Constitution of United States. After French revolution in 1789 and following American Constitution, the principle of separation of powers was accepted officially in French constitution and from that found its way to other countries. (Ashrafy, 2006,p148)

Mandatory principle of criminal persecution is adjustable to separation of powers principle, because penalty law is the result of legislative power which has imperative aspects to executive and juridical authorities and they are bound to follow its instructions and they are not able to change it in any circumstance. If an action is considered a crime by the law, the intent of legislator was undoubtedly punishing the criminal and if the public persecutor withholds pursuing the crime when enough proof is available, he have broken the law which is binding until the legislator have directly or indirectly voided it.( Khazany, 1982, p4) The separation of power principle does not allow the persecution authority to meddle in job of legislative power through withholding to execute a law which is binding; because, the right of avoiding a law, like executing a law, is owned by legislative power.

#### **Part five: classic school approach**

Classic school approach is considered a base for mandatory principle. “Peter” has described the classic school of criminal low as a conservative school which is governed by limitation and subjective spirit reflected in legality principle. This school is seeking to guarantee the criminal low through prohibition of arbitrary alternatives and prohibition of applying any punishment before the legal bases of it is provided by legitimate courts. Classical school contains the power of a national government and is the symbol of tendency toward law, and protects the citizens against oppressive and egocentric power of judges and custom laws.

Classic school was initiated in seventeenth century in England, and the thought of legality was first formed in intellectual philosophy of Western Europe and was expanded from there. Toward the end of nineteenth century “Gaisy” used the term “legality principle” in his descriptions of English constitution. Approach of this school is guaranteeing equality if face of law; this means that no one can stand above the law. From idealistic point of view the judges are bound to apply justice through law and not with view of equanimity or morality or private taste. (ibid; p24) Classic school believes that the aim of persecution is executing criminal law and regulations and more than anything else tries to control and limit the non-judicial matters. This school believes that only law can determine the conditions of people in the society. Based on this school, persecution is a natural matter and is initialed from criminal law. Legality and expediency principles are two entangled matters and any decision by the official authorities which is outside the framework of the law is considered an arbitrary action and voids the subjects of decisiveness and equality in the law and is considered illegitimate. In this school the choice of deciding about the persecution is illegal; because equality before law asks that the criminal and punitive laws be applied constantly, and

not to be chosen arbitrarily through tastes of public persecutors and based on totally unclear and non-revisable scales, with no execution guarantee and probably discordant which are formed outside the acceptable political structure of power. As a result, any time that a crime is unveiled, the duty of persecuting it is formed.

“Gaisy” writes in his explanations about constitution of England that legality principle results in dominance and absolute control of the law against the egocentric powers and denies any egocentric decision or any privilege and even vast expediencies on the part of the government. (Ibid, pp24-25)

“Supporters of classic school of criminal law believe that legality principle, not only governs that bases of law culture, but also dominated the method of execution. As a result it is expected that the law is fully applied and all the criminals are identified and are executed based on full appliance of legality principle and there be no situational decision.” (ibid; p29) Although classic or neo-classic thought is still can be sensed as a myth and gives the spirit to legislative, juridical and police sections, but with emergence of scientific discourse (the manifested school of the last quarter of nineteenth century) and sociology (the functional theory and recently the social response theories) it has been subject to many criticisms. (Najafi Abrand Abadi, 2002, p26) towards the end of nineteenth century focusing on legality principle have declined and the realm of authority and non-juridical identifications have increased clearly.

### **Part six: legal liberalism school approach**

Legal liberalism and its subordinate schools like legal positivism, see the law as a barred, formic and machinery system that using logical regulations is applicable on contests. Legal liberalism leads to formalist approach to juridical processes and jeopardizes the personality of judges. This school limits the ability on the part of judges to adjust general regulations with special situations and makes them machines of applying laws. (Ansary, op. cit, pp113-114) Supporters of formalism and legal positivism believe that in any society the legal system is the outcome of subjective laws of that society and the duty of the judge is that to apply these laws as they are. The law is itself independent aim and ideal (Dyzenhaus, 1996, p129) which should be applied with no regard to its consequences. As a result, an injustice law should also be respected and executed; because, the cause of forming a legal system is to preserve order and domination of law; not to form a good order or a good government.

They believe that it's the duty of juridical authority to respect the law its presented regulations. It's their duty to find the spirit of laws and give meaning to strict legal regulations. They cannot withhold their duty with justifications like ambiguity or breaking the law or the bad consequences executing it may cause, or to decide merely on their own judgment. Based on this theory the legal authority is unbiased and has no consideration towards the people; as a result, his judgment is always the same; whether his friends are parties of dispute or his enemies; strong people be the parties or weak people; reach people be the parties or the poor. All the people that are equal to law should be treated equally no matter what its consequences may be.

Positivists believe that the judge performs a machinery duty and machines do not have any sentiments. As result, the law must be executed, how harsh or hard it may be. They believe that it's the duty of the judge to execute the formalistic justice using comparison and this is the only way of creating a good legal system. A system that gives all its members a sense of security and confidence and its resources of legal judgment is so rich and clear that it can be performed even by a machine.

This way, in eyes of positivists, the role of the judge in face of human actions and behaviors is to apply the law and he cannot change the law based on his own moralistic or justice interpretation about the law. The justice that he is seeking is static, not dynamic. The just behavior for him is a behavior which is in accordance to law and he as a judge cannot ask himself whether the law is in accordance to an aim outside itself like justice or equanimity or expediency. Because the separation of powers indicates that the right of legislation is only owned by legislative power and applying the law is the duty of juridical power. The formalist judge is aware of unjust consequences of the law he is applying, but the needs that have made human beings to form the laws prevent him to do anything besides applying law.

They believe that in a democratic society allowing judges to make decisions based on scales outside the law like justice, equanimity or expediency etc. would cause the fact that subjective rights be subject to personal conscientious of the judge and political philosophy or religious beliefs of him may change the legal sentence. (Ansary, op. cit, pp100-101)

Briefly, supporters of subjectivity of the law believe that basing a regulation outside the law like justice to resolve legal disputes are not acceptable for these two main reasons:

- 1- Appealing to an scale outside the law is dangerous;
- 2- Justice and law are two separate categories and mixing them should be avoided. (Ibid, pp101-103)

### **Section two: Consequences of Mandatory Criminal Persecution Principle**

By consequences of mandatory principle, we mean those consequences which are caused by this principle. These consequences can be seen as advantage or disadvantage, or simple positive or negative. Because of the fact that expediency principle is a result of deficiency in mandatory principle, so it is important to consider the consequences of mandatory principle from positive and negative point of view.

### **Part one: positive consequences**

Some of the consequences of executing mandatory principle are its positive impacts which are still effective in legal systems and because of them, executing this principle is still insisted. Some of them are as follows:

#### **Article one: guaranteeing equality before law**

The most important impact of mandatory principle is guaranteeing equality in face of law. This principle thoroughly preserve equality and parity before law; because any citizen who is culprit committing a crime, like all other culprits enjoys equal conditions, would be persecuted, probated and sentenced. ( Khazany, 1982, pp2-3) voiding this fact would result in dispersion and disarray in the field of persecution and would cause different solutions for similar cases. It worth mentioning that equality of citizens before law is tampered in two ways: either by authority's abuse of power in the process of persecution, or external influence of other people in the process of persecution. In order to prevent applying personal tastes and stop the authorities of persecution to probably abuse their power, Supporters of mandatory principle insist on mandatory persecution of crimes and consider this principle as the most effective guarantee for the citizens to maintain their equality before the law. (Tak, op.cit, p35) and also, they consider this principle to be preventer of any external application of influence in process of persecution; because, according to their belief, mandatory principle guarantee the independency of persecution authority. Supporters of this principle believe that with insist of the legislator on mandatory principle and not to bestow the act persecution up to the public persecutor the basis of applying influence on the part of executive authorities and even juridical authorities toward the authority of persecution would be removed. As a result, mandatory principle strengthens the independency of persecution authority and prevents tampering of his independency and results in equality among citizens. (Scaccianoce,2010,p1) mandatory principle prevents anyone to stand above the law. (Kerley, op. cit, p23) resultantly the best equipment to prevent the authorities to abuse their power and also to prevent application of influence on persecution authorities is the mandatory principle. (Tak,1986-7, p35) because based on this principle the persecution authority is bound to execute the law with no regard to conditions of the criminal and the situation of the crime. (Albonetti, <http://www.jstor.org/pss>)

#### **Article two: Reflection of Prohibitive Structure of Criminal Law in Persecution**

Criminal laws contain a prohibitive structure at the time of codification; this means that the criminal laws are reflecting norms and in order to manage and regularize social behavior countermands some regions and prohibits the citizens to go to those places. This is a prohibitive structure. In mandatory principle the persecution authority cannot consider the expediency and preserves the prohibitive structure of criminal laws and in all cases were the law have prohibited a behavior, he preserves this prohibition, but in expediency principle, the executive authority of law based on a prudence deletes the prohibitive structure, and does not prohibit in all cases behaviors that are prohibited by the law; in this way voids the prohibitive structure. (Kerley, op.cit, pp11-12)

In expediency-based structure in Netherland "prohibitive structure of official laws are not reflected in executive policies and active approaches. Although planting, buying and using marijuana are considered as crimes, it is freely and with no fear of persecution is planted, sold and used. There are stored in all over the country called coffee shops which are in direct contradiction to the law about narcotics, freely present marijuana and hemp to all their customers. Although this crime has a 4 year sentence in that country, but it is committed openly and in action density and accession of these coffee shops have resulted in attracting the narcotic tourism to Netherland."

#### **Article three: preventing instrumental approach towards the law**

There are two approaches towards the law: aiming the law or subjectivity of the low and instrumental approach towards the law. According to the first approach the law is, with no regard to its consequences, the aim and should be applied with no consideration toward its impacts and outside conditions. According to the second approach, the low is bound to a regulation outside itself for resolving the juridical cases. That outside regulation can be justice, equanimity, expediency etc.. in this approach executor of low does not limit himself to theoretical bases and mental considerations of the legislator; and uses the law as an instrument to achieve goals outside the law. Resultantly, in this approach existence of an aim or a goal outside the law is pivotal. (Ansary, 2004, pp106-107)

The mandatory principle follows the aiming of law approach and considers the law as the goal and does not use it to achieve an outside aim. According to this principle the law is applied exactly the way it was codified and does not change in execution according to expediency and it is not applied with an instrumentalist approach with regard to actual and practical considerations. Usage of the law in mandatory principle possesses stability in action and unity in execution. Resultantly mandatory principle avoids an instrumentalist approach towards the law; and does not consider the law as a device to achieve previously determined desires. (Kerley, op.cit, p31) Based on mandatory principle, the law itself is an aim and is not an instrument to gain a goal outside itself. But in expediency principle, the approach towards the law is an instrumentalist approach and the law is considered an instrument to achieve goals outside it.

According to this principle the law loses its engineering and architectural nature over human behavior and gets the form of a preaching or a guidance and engineering and managing human behaviors is left to executors of the law.

#### **Article four: Guaranteeing general deterrence function of criminal law**

As there have two types of general deterrence and special deterrence provided in function of the sentences, criminal law possesses these two types of function too. (Albonetti, p4) And like general deterrence function is bound to have the character of certainty in punishment, general deterrence function of persecution should possess the certainty character too. If the punishment is applied to one criminal and not applied to another criminal and does not have the character of firmness, it loses its intimidation phase and the citizens while committing a crime would hope to escape punishment and become more eager in committing crimes. In persecution processes if the character of certainty is lost and the power is given to the authorities of persecution and citizens find a hope that while committing a crime they may not be persecuted, the general deterrence function of persecution will be weakened.

Mandatory principle through certain persecution of crimes in all the matters and focusing on equality before law, prepares the general deterrence atmosphere. Based on this principle, it is the duty of public persecutor to pursue the case regardless of culprits condition and the atmosphere of the crime. On a quit contradictory position is the expediency principle which with its situational approach towards persecution process leaves it without determination and firmness and takes the deterrence character from it.

#### **Article five: preventing informal and in shade criminal law**

Mandatory principle of criminal persecution prevents formation of in-shade criminal law. But expediency principle allows the entrance of a subject called politics to criminal law and formation of an official character in it. This fact results in emergence of an informal and in-shade criminal law. More than that, legal situation of people would not be determined solely on subjective law, but each individual to determine his legal situation along with framework of criminal law, should consider the executive politics of his legal situation. For example "in Netherland the guidelines presented for persecuting crimes are constantly expanding. These guidelines have an administrative nature which is a kind of informal criminal law. For example the collection of criminal laws about narcotics consider certain behaviors to be of criminal nature; but the persecution process guidelines which are issued publically state that these behaviors would not be persecuted, and in this way they won't be considered crimes any longer. Based on these facts the subjective laws become a kind of preaching or moralistic laws which are the result of executive politics when they are constantly changing from not to be done to fully done.

On this basis criminal laws are finally formed by the guidelines about persecution process. This means that law is more exactly determined in action not in books." (Kerley, op.cit, p19) But, based on mandatory principle, the disputes are merely resolved by legal regulations which were previously determined and along with formal criminal law, informal criminal law and along with public criminal law, in-shade criminal law is not formed.

### **Part two: Negative Consequences**

The negative consequences of mandatory principle have made many legal systems to attempt in reforming and repairing this principle and move toward a new principle called situational persecuting. Some of these negative consequences are as follows:

#### **Article one: lake of possibility to use teachings of humanistic and social sciences in persecution**

According to mandatory principle, expediency is not considered in process of persecution, actual conditions and social matters are not regarded. Knowing the personality of the criminal, his mental, psychological, social and cultural conditions and the roots and social causes of committing the crime are not needed. Because of the fact that thorough understanding of these fields needs mastery on sociology, psychology and other humanistic and social sciences, resultantly using these sciences is not also needed. In other words mandatory principle does not seek individualism in persecution and punishment, but to persecute the criminal with no regard to matters outside the law. That is why in this principle applying humanistic and social sciences in persecution.

On the other side, situation principle adds expediency to the conditions of persecution. It's obvious that in determining the expediency of persecution more than legal data, non legal data is used. Resultantly it is not only appropriate but also essential for the authorities to along with legal teachings, learn the teachings of other related sciences or use specialists of these sciences because authorities of persecution are at the gate of justice system and if their basic decisions are correct, the justice system would achieve functionality and stays immune of a pile of criminal cases. Basic decisions at the gate of justice system are the foundation of justice building. Based on this principle persecution would gain logic, mentality and expediency and the role of public persecutor is elevated in process of criminal justice. (Van Dijk, 1986,p1)

#### **Article two: denying the responsibility of persecution authority in consequences of decisions**

Because of the fact that law is an equipment for achieving goals outside itself, the executor of law, whether it is persecutor or the judge, should be considerate of the consequences of the decisions which are being made and he

cannot stand apathetic about the consequences. Resultantly the executor of the law is not a mere executor of law, but he should be cautious of the method he is choosing to apply the law and feels responsible about the consequences of his decisions and the persecution authorities are bound to be cautious of the consequences of their actions based on the framework that the law has determined for them. (Sheidaei, 1989, p153)but, in mandatory principle “persecution authority does not do anything more than automatically applying the laws and denies any responsibility about the consequences of the decision he had made. The persecution authority does not need to consider the consequences of his actions in the framework determined for him by the law.” (Kerley,op.cit,pp11-12)

in this principle juridical and persecution systems are merely a machine of matching the sentence and the punishment applied to it; and the main concern of the criminal justice machine is to persecute and discover the behaviors determined in criminalist framework to the highest degree. (Kerley,op.cit, pp11-12) the persecution authority considers himself as a mere slave of executing the law. As a result, his decisions are copied from predetermined documents and are not considerate of actual realities of society and this matter results in the fact that juridical system moves away from justice and equanimity and hides in the arms of the law. (ibid. p47)

### **Article three: resulting in tyranny**

Mandatory principle gives an increasing power to the government. According to mandatory principle persecution is done based on demands of the government and its acceptance is also the government and it gives credit to the persecution. In this principle the demand of the society in performing a persecution does not have a significance and social acceptance is not an element of credit in the process of persecution and legislation is the only condition of guaranteeing the credit. Based on this principle criminal law is a device for facing social abnormalities and the persecution authority is considered an institution to face irregularities. Based on mandatory principle, the persecution authority does not have any responsibility in consequences of his decisions and in this way prepares the ground for tyranny and a way of encountering behaviors which are against formal norms of the government. (Kerley,op.cit,pp32-33)

On this topic Hart states: “mandatory principle prepares the ground for applying criminal justice system automatically and harshly and making quick and inappropriate decisions which are to face outside manifestation of the norms which are changing constantly. Applying power in this principle does not consider social accreditation and acceptance. The essence of decisions in this principle is credited from the power and it does not rely on the society in accreditation of applying power. It does not consider acceptance as an element of accreditation and society does not see being legitimate as a condition for accreditation. Resultantly the government in performing its persecutions relies solely on the law and does not consider the social consequences of its behavior.” (Hart, op.cit, p75)

In France, mandatory principle in renaissance resulted in tyranny, but in some of other countries which accepted this principle the social characters prevented oppression. Netherland, for example, although accepted the mandatory principle in renaissance, because of strong patriarch characteristics and activism, stayed away from oppression. Activism in Netherland prevented stopped the French tyranny to reemerge in their society and the patriarch character of it prepared the ground for a growing confidence in juridical minds.

Juridical authorities in Netherland because of their cultural characters believed that acceptance of the society is the only way of accreditation of applying power and legitimacy of a subject has just this condition of accreditation. (Hart, op.cit, p75)

The irresponsible approach towards the consequences of decisions is denying social acceptance in legal reactions which can lead to tyranny.

### **Article four: imposing costly trials**

Legal justice system is so costly. Regarding the increasing number of crimes and lack of appropriate expansion of judicial power in accordance to increasing number of cases it is imperative to the persecution authority manages the cases at the gate of justice system and be able to choose among the cases which one to enter the justice system and which one can be resolved without-system methods. According to mandatory principle persecutor is bound to pursue all the cases. In legal systems which accept the mandatory principle stating the exact criminal behavior and the degree should be performed by the legislative authorities and determining exactly which crime needs penalty. In systems which accept mandatory principle the legislative authorities is the architect of the crimes is bound to protect the judicial power against the pile of unimportant cases. In countries which accepted the mandatory principle the number of crimes is increasing. This principle which bounds the judicial power to persecute all cases adds to the problems of this power. Resultantly the resources available for dialing with these cases would not suffice and executing justice would be tampered. This would make the judicial power to spend lots of resources to resolve all these cases, to use lots of judges, spend so much time and to expand this already huge system. Based on this principle, the persecution authority is bound to pursue all the cases till the level of issuing a sentence. Today one of the ways of reducing costs of justice system is forming substitutions and refraining to persecute all the cases.

Substitutions of persecution pursue the cases in institutions other than criminal justice institutions and in a way outside the system.

Huge humanistic and economic costs of justice system waists big amounts of country's resources and if this wasting is controlled, and the resources are used in appropriate fields, this fact would result in development of the country. Mandatory principle does not have any mechanisms to reduce its costs and encouraged the judges to persecute cases which may have no social benefit instead of damage. (Emami & sadeghi, 1998, p7)

#### **Article five: increasing statistic of criminal cases**

Increasing number of crimes in past decades have left no choice but choosing among the cases to persecute. The statistic of crimes has increased in past years in countries of the world. (Tak, 1986-7,pp73-76)mandatory principle at the gate of the court enters any case into justice system. One of the disadvantages of this principle is the aggregation of cases in legal centers. Because the public persecutor is bound to pursue all the cases whether they are big or small, this fact causes a huge number of cases in judicial centers which prevents the system to work smoothly and fast. According to this principle if performing or not performing an action is considered a crime and the general conditions of the responsibility is presented, the public persecutor is bound to pursue the case and persecute the case for performing investigations and trial.(Kooshky, 2010, p332) as a result exact applying the mandatory principle not only has no advantage, but also have caused traffic in courts. (Emami & sadeghi, 1998, p4)

"In this situation criminal justice system would not be able to perform the least of executing the law which is imperative for any legal system. When there is a huge distance between crimes and the legal reactions for them, the deterrence and uniformity execution of law aims would be out of hand and it may be that the citizens do not like respect the law. In order to prevent such a situation, both legal and practical actions are necessary. Mandatory principle is good for dialing with critical situations. One of the advantages of expediency principle is that it stops persecuting small crimes which may lead to less criminal traffic. (Tak, op.cit, pp79-80)

#### **Article six: lake of cooperation with authorities outside the persecution organization**

According to the mandatory principal, the role of public persecutor is to support law and its performance separate from achieving any goal outside the law. Considering the aforesaid principal public persecutor doesn't have to cooperate with any system outside the pursuit system. According to this principal the justice has nothing to do with considerations outside the law. Content and the message of law are all that matters. But in a system that persecution is taken for granted, criminal law is bound to serious cooperation with resources out of persecution system. Therefore, criminal justice system has a social point in common with other systems. Thus, social aims and policies are formed in a mutual concordance between the authorities of criminal justice and other authorities; and criminal justice organization and other institutions would seek the same aims and their concerns and attempts of all these organizations becomes mutual and would pursue their goals in a close and effective cooperation.

Expediency approach have passed several levels: in the first level, expediency approach used to be an exception subordinate to mandatory persecution principle. Then, after passing the evolution stages expediency approach became a principle of its own and mandatory principle became an exception for expediency principle. In this level criminal law was considered equipment or a device for achieving social interest. In this level the guidelines, manuals and policies of persecution are suggested by the authority and agents of persecution, designed after revision of the public persecutor, and then are sent for execution. In this level policies of persecution are provided and designed in an in-organization process and criminal law is a device for achieving these policies.

Then expediency approach has passed this level and has reached the evolved Holland expediency style which is reflected well in statement of "Professor T. Hart". In this level the public persecutors are debating and discussing the maters with other social and civil institutions accordingly to each case, and produce and design the persecution policies. In this level criminal law becomes a device of pursuing social policies and criminal justice organization is no longer acting alone; it works side by side with other sections as an instrument used for achieving social goals. In this level persecution authorities, instead of supporting the low, pursue the persecution of social policies and consults with a large portion of other organization. In a way that discussion between authorities of persecution, police representatives and municipality is quit a common phenomenon. (Kerley,2004,p20)

## **RESULTS**

Criminal legislators in the field of persecution, follow two systems: Mandatory persecution and Expediency persecution. Mandatory persecution system at the time of its emergence in eighteenth century was used as a dam before tyranny of the governors. In that time legislative power and executive power was in the hands of the ruler. This situation had driven the society into discrimination and people were feeling unequal. Little by little centralization of power became subject to criticism and separation of powers was suggested as a solution. In his model legislative and executive powers were segregated, and in order to preserve the sense of equality on the part of citizens before law, mandatory principle was formed. This principle was seeking equality of citizens before law and



worked as a dam against unjust attempts of executors of the law. As it was stated in this article, mandatory principle contains various positive and negative points. The most important advantage of it is guaranteeing equality before law which is its main consequence and is an undisputable privilege. When this principle was formed, due to its valuable privilege, the negative points of it were overseen and its execution was insisted. As the societies gained distance with eighteenth century, the social and political structure of them changed and the subject of power was more inclined towards separation. Powerful institutions attempted to control each other and prevented tyranny and anarchy to take place. Dispensed power in various governmental and civil institutions in this new political structure prepared the ground for balancing the power and prevented culmination of power in one point and prevented tyranny. In his new situation, mandatory principle lost its functionality and in order to prevent tyranny of its executors, it was no longer needed. This new function formed an alternative method and the substituting principle, although it left the act of persecution arbitrarily to the hands of public persecutor, with forecasting the scales, guidelines and executive structures it stayed immune of these problems. Resultantly regarding the fact that after two centuries since this principle was emerged and after all the deep social, political, cultural vicissitudes of societies in this long period and considering all the positive consequences of this principle compared to other methods, it seems that we can leave the mandatory principle and substitute it with its rival principle in this new social and political atmosphere. Of course, as it was stated in this article, mandatory principle is based on special basics, approaches, and social criteria, as a result any society that have gained more distance with bases of this principle, would gain more distance from the principle itself. On this basis, societies in which the social upheavals are slow and their social and political structure had not seen deep revolutions, are not able to pass the mandatory principle completely. Therefore it is suggested about the legal system of these countries along with changes in social and political situations, with preserving the mandatory principle add exceptions to it with the same scale and with the same scale leave the power of the persecution act to institutions of persecution, so that persecution authorities with considering the aims of the legislator, execute actual situations and practical expediencies based on scales and guidelines of expediency principle and in this way functionalize the persecution and preserve the justice system from disadvantages of mandatory principle.

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