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The Presence of the Private Sector in Criminal Justice Enforcement and Its Comparative Study in the Criminal Laws of Iran and the USA

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Abstract

From 1980 onwards, the privatization under the influence of the neoliberal politics supremacy in the world entered the criminal justice arena as well. In that year, the government and the private sector entered into conventions that mandated the collaboration of the private sector in the process of punishment and to undertake the criminal justice services. The political groups which agreed with the privatization at national levels started to expand the privatization as they came to power and the criminal justice apparatus was no exception to the rule. A higher incarceration rate was an inevitable outcome of the increase in the severity of the punishment and the increasing number of violations that carried a prison sentence. In the field of penalty enforcement, the private companies can build jails very rapidly and cheaply. The presence of the private sector in the implementation of criminal justice from the viewpoint of Iran's law can be investigated from two perspectives. First, in terms of religious jurisprudence approach to the subject and second, from the viewpoint of the relevant rights.

Keywords: Private sector, Prison, Private police, Criminal justice, Religious jurisprudence.

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I. History

In the primitive societies with attributes that were devoid of concepts such as public interest, government and other public institutions, embedding the individual identity in the group, completely privatized concept of crime and punishment, and the enforcement of justice; the path of criminal justice may be pursued and investigated in two aspects, namely, justice among the tribes, and justice among the clans. In these historical periods, the usual punishments manifested as seeking revenge against the plaintiff's peer, revenging through retribution law (Qesas), the redemption of the violator by means of blood money, etc. The main issue in this period was the lack of public power and institutions such as the government, i.e. all punishments were enforced through NGOs and they implied a private burden (Saney, 2003: 94). All stages of the criminal justice were run by the private sector because in that period the public sector was not formed. At present, in some countries such as Myanmar, the tribes (the NGO sector) administer the criminal justice and even punishments such as execution are enforced by the private sector (Rasouli, 2005: 126).

II. The reasons for the participation of the private sector in the implementation of criminal justice

Generally, there are two categories of factors that explain why the countries approached the private sector to participate in the criminal justice enforcement: first, the political reasons and second, the legal reasons.

A. Political reasons

The privatization of the state is usually attributed to the conservative government of Margaret Thatcher. The Thatcher government, with Tory's plan, brought forward the privatization approach. Her goal was that the government should entrust its responsibilities. This led to a new business that had no guidelines in the developed countries or in the developing countries and introduced a new term which was called the "privatization" (Walker, 2007: 1).

Next, the Thatcher and Major governments in the UK and the Reagan and Bush (senior) governments in the USA are known as the pioneering governments in the privatization race. It was through these governments that for the first time parts of the criminal justice system were laid at the disposal of the private sector and then expanded accordingly (Mathews & Francis, 2002: 33)

B. Legal reasons

The legal reasons for employing the private sector by the countries in the criminal justice system are as follows: increasing number of prisoners, weakness of the public sector, higher efficiency of the private sector, saving costs, and paying attention to the rights of the crime's victim.

A higher incarceration rate was an inevitable outcome of the increase in the severity of the punishment and the increasing number of violations that carried a prison sentence. The number of prisoners in the United States has soared so much that the criminologists and some of the criminal justice officials talk about the "overcrowding crisis in prisons". That is, between the years 1925 to 1974, the average prison population in the United States was 107 to 108 inmates per a hundred thousand of the population. The total number of prisoners in 1968 was 187,914. But by the country's inclination toward the severity of punishment, the prison population has increased rapidly, so that at the end of the 1970's it reached 300 thousand and between the years 1980 to 1990 the figure was over 700 thousand (Kuson, 2003: 200). At 1994, the prison population in this country exceeded one million inmates (Najafi Abrandabadi, 2005: 31).

At the beginning of the third millennium, the mentioned population exceeded 2 million inmates. In recent years, it is said that there are about three million individuals jailed in the prisons of this country.

The inevitable result of the severity of punishment was the increasing number of the people convicted to jail and that required more prison space. The increasing number of prisoners is interconnected with a larger surface area of the prison buildings. For example, in the past 20 years, almost a thousand new prisons were built in the United States and just in 1995, 150 new prisons were built and another 150 prisons were expanded. In the UK, 150 new prisons were built and another 175 prisons were expanded during the year 1995 alone. The cost of building new prisons and the prisoners' maintenance costs have increased drastically. For example, the United States government spent 9 billion dollars on punishment in 1982, but it increased to 41 billion dollars by 1996 (Guimond, 1998: 42, 46). The countries have pleaded with the private sector to reduce these staggering costs. The private sector entered the prison business with the promise of better efficiency and lower cost.

The private sector claims that it is more efficient than the government prisons because:

Whereas the public sector takes 2 to 5 years to build a prison, a private sector company can build it within 6 months to 1 year. Also, the public sector is capable of designing wings with higher efficiency.

It should also be mentioned that the private sector believes it can spend less than the public sector for the same level of services. So much so that based on the same level of services in the context of the preliminary investigation or enforcement of the prison sentence, its expenditure is up to 20% less than the public sector. The private sector with a correct cost management avoids unreasonable wasting of the resources.

Paying attention to the rights of the crime victim and the formation of restorative justice in the framework of individuals' interaction with the community plays a huge role in employing the private sector in criminal justice in the framework of restorative programs.

III. Methods of private sector presence in the criminal justice system

A. Anglo-American model

In this method, which has been known as full privatization, the criminal justice management whether at the preliminary investigation stage or the implementation of the court decisions is delegated to the private sector and all powers relating to criminal justice shall be submitted to the private sector on behalf of the government. Of course, in this case, the government's right to oversee the private sector will remain intact. Some countries such as the United States, England, Australia and New Zealand use this method to privatize their criminal justice. Basically, in these countries, a huge deregulation occurred in conjunction with privatization. This facilitated the generalization of privatization in the field of criminal justice in these countries (Guimond, 1998: 27).

B. The French model

The main characteristic of this model is that the criminal justice management remains in the hands of the government and the criminal justice support section is delegated to the private sector. For example, in the context of the penalty enforcement, construction of private prisons were considered in France since 1986. After the approval of the law of 23 June 1987, the government can entrust the plan, map, and building of prisons to public or private entities or a combination of them. However, the right to punish the criminals and enforcement of the penalties is a power monopolized by the government and the public power. The management and office administration duties are still at the disposal of the government. After approval of this law, a plan to create 15000 new sites in order to build 21 prisons in four

geographical areas were developed and it was anticipated that the chosen private agents should participate in the management of the new institutions. The law of 1987 mandated that only 40 percent of the jobs in the prisons such as secretary positions, kitchen, cleaning and other procurement tasks should be delegated to the private sector and security responsibilities including inmates' protection and maintenance were excluded. This is why they call these prisons *semi-private* (Bolek, 2006: 55).

IV. The presence of the private sector in the implementation of criminal justice from the viewpoint of Iran's law

A. Religious jurisprudence approach

In fact, Islam has considered two types of punishments for the criminals. First, the worldly punishment and second, the afterlife punishment. It is commonly believed that with the enforcement of the worldly punishment, the afterlife punishment would be forgiven by Allah. But if the worldly punishment is not enforced in any way, the afterlife punishment will be in effect unless there is the possibility of accepting the repentance. So, it can be concluded that if such a worldly punishment is associated with other conditions, it will cancel the afterlife punishment because of the Prophet of Islam, upon enforcing the punishment of stoning a woman said that the woman had repented in such a way that her repentance could release seventy people of the sin.

According to the above introduction that the importance of enforcing the penalty and also the role of the people in some of the penalties such as stoning can be deduced from it, the subject of participation of the private sector may be investigated from an Islamic perspective. Therefore, the role of religious jurisprudents in the *era of the absence* (in Shia) is also important in the enforcement of the punishment. Here, the private sector means the people (regardless of being jurisprudents or else) who are not a part of the state (whether Islamic or non-Islamic).

For a scientific study of the subject and identifying the role of the private sector in the implementation of Islamic criminal justice during the *era of the absence*, the issue can be studied through two premises: first, the period during which the Islamic government has not taken shape and the jurisprudence is not involved in the state affairs. The second is when the Islamic government is formed and the people's religious jurisprudents have risen to power.

(A) Criminal justice enforcement by the private sector in non-Islamic government:

When the Islamic State is not formed, the implementation of Islamic criminal justice is fully in the hands of the private sector. That is, the non-Islamic State in no way may handle the implementation of Islamic criminal justice while there are competent jurisprudents around. This seems completely obvious in the Shiite Imams' narratives. Imam Sadeq (pbuh), at a time when the Abbasid Caliph started to handle the enforcement of Islamic penalties, to answer a question about who must enforce the religious law penalties stated that: someone who God has entrusted to him the rule over the people and who is the legitimate ruler. That is, there is no way that the enforcement of the Islamic penalty could be entrusted to the non-initiated. Even though the state appears to be Islamic, but in fact it is a usurper (Khoi, 2008: 224). Now at this time who should implement the Islamic criminal justice?

Islam does not wait for the formation of the Islamic government to enforce the penalty. But with the lack of formation of the Islamic government, the private sector completely handles the enforcement of the Islamic criminal justice, i.e. there is a duty to enforce the penalty as much as possible. Basically, the enforcement of the penalty is so important that to implement it, the duty of establishing a government arises.

The Shiite religious jurisprudence also believes so, and it holds that the enforcement of the penalty is a right of the qualified jurists. In this regard, Sahab Javaher stated: the Imami, in general, believe that the highly qualified people in terms of justice and jurisprudence, i.e. those capable of inferring the outcomes of the primary sources, are allowed to enforce Sharia penalties against individuals who commit crimes that require such penalties during the *era of the absence*.

(B) When the Islamic State has formed:

It means that in the *era of the absence*, the Shiite jurists are ruling over the Islamic State. Regardless of the opinions of the jurists about the permission of establishing a government in the *era of the absence*, naturally in this kind of governance, which is the same as the Jurist Supervision, though the government has a political and legal structure, but yet again the private sector has an effective role in the implementation of criminal justice. That is because basically the Islamic legal and criminal system is such that the victim and the damaged party of the crime and the people at large are somewhat involved in the judicial and judgment enforcement process. Generally, the purpose of the punishment, in addition to the divine and religious aspects of it, is maintaining the interests of the individual and the community. The Islamic State is responsible for criminal justice, but in this regard, the private sector (general public) also accompanies the government. For example, to enforce the talion punishment, the damaged party of the crime or the *owners of the blood* (as the private sector) play a very influential role. This influence is so vital that if the *owners of the blood*, arbitrarily and without the permission of religious governor take measures to enforce the talion punishment, they are merely condemned to *Tazir* (punishment having maximum and minimum limits determined by law and judge respectively) but the executed talion punishment is deemed correct.

In other cases, such as killing a *person whose blood can be spilled* (Mahdorodam) or a *combatant* (Mohareb), the private sector is vastly permitted to enforce the criminal justice and even in some cases, the husband is permitted to enforce the Divine Penalty. In some cases and by gaining some qualifications, a man can inflict the Divine Punishment on a man and woman that appear to be committing adultery.

From the overall Islamic regulations, one may infer that the stage of proving the crime is placed with the Islamic State but the execution of the punishment is placed with the individual members of the society. The Islamic ruler may give the permission of enforcing penalties to the individual members of the society. When the crime is proved, it does not matter whether the State or ordinary people enforce it.

B. Legal approach to the issue in Iran

In this section, the employment of private sector in the police force and prisons is studied from the perspective of Iran's law:

(A) Private police in Iran:

An institution similar to private police has been established under the title of the neighborhood guard in Iran. The neighborhood guard is one of the initiatives that in addition to the participation of the people in their security, increases the people's sense of responsibility towards maintaining the security. Local deterrence and formation of the guards in the neighborhoods had been taken into consideration for a long time and in our country security groups and companies have been formed with the cooperation of the police force that mainly consisted of police retirees and individuals or legal persons including government agencies and NGOs, enter into contracts with these companies to provide securing for their property and places (Mir Khalili, 2009: 325).

The authority scope of the private police or neighborhood guards are far more limited than the general police quarters in Iran. In accordance with the instructions issued by NAJA, the neighborhood guard tasks

include "taking care of residential and commercial places and parked cars in the area of activities in order to prevent theft, introduction of suspects to the local police office or Police 110, patrolling the area of the mission in order to keep track of theft, cooperation with local authorities and trustees during unexpected situations with vigilance in this regard, and scrutiny of the anonymous individuals and those who disturb the honor [female members] of the people."

(B) The presence of the private sector in prisons:

The privatization of the Vakilabad Prison in Mashad started in the year 1994 and in less than 3 years, the General Office of Khorasan Prisons delegated some sections to the private sector, such as management of the prison hospital, management of the judgment enforcement office of the prison, cooking the prisoners' meals, recording computer information and statistics, cultural services, prisoners' education, psychology and social work counseling services for prisoners, and non-armed watch services in the jail to the private sector. The private sector was successful in the four areas of administrative services, health and treatment, studies and researches, and physical protection.

Also, the delegation plan of Adelabad Prison in Shiraz had been studied for one year, which based on the contract between the government and the private sector, it was decided that 90 percent of prison management and administration should be entrusted to the private sector. All sections were delegated to the private sector except the computer, judgment enforcement, and the sections related to the prisoners' rights.

According to the contract concluded with the private sector, some mechanism for evaluation of the provided services was considered to benchmark the performance of the private sector in the prison. This protection of prisoners was arranged so that the private sector watched the inner prison sections and the external shell was protected by the disciplinary unit of the organization of prisons. It was decided that in case of successful privatization of Adelabad Prison in Shiraz, the management of all the country's prisons would eventually be assigned to the private sector. But this scheme failed. Adelabad prison in Shiraz was privatized almost completely, i.e. the prison management was entrusted to the private sector (Shams, 2002: 22).

V. Private sector presence in the criminal justice system in the United States law

The private sector in the United States has gained a foothold in the police force, the courts (restorative justice) and the judgment enforcement areas.

A. Presence of the private sector in the police force

During the 1980's the American people required more services. On the average, in the years 1976 to 1981 the people's expectations from the police increased by 20%. In addition to the normal demands, expectations such as inspecting the home environment, workplace, escorting businessmen's goods, extra patrols, etc. were added to the demands of the people, notwithstanding that in the years 1974 to 1985 the number of public police force was reduced by 10%. Therefore, increased level of the people's demands on one hand, and the reduced number of public force, paved the way for the entry of the private policing.

The private police was formally established to take care of public places and the states were entitled to the right to hire private individuals as caregivers. In the past years, the Pennsylvania Governor had been authorized by law to hire the private sector to maintain security. The private sector was employed in coal mines and factories, for railway protection, and as store supervisors. At present, the number of this type of police force amounts to 800,000 strong (Stewart, 1985: 758).

B. Presence of the private sector in the courts of law

The presence of the private sector in the USA courts can be studied from the perspective of restorative justice. The restorative justice programs range from the first stage of the criminal justice to the enforcement of the penalties. Restorative justice programs are as follows:

1- Mediation: This program has been established since 1970 in the United States. These programs are a kind of judicial deregulation wherein the court is not involved. These programs may advance up to the enforcement of the judgment.

2- Family meetings: These meetings were initially formed in New Zealand and then in the United States. The criminal, the crime victim and their families and a government official attended the meeting. All stages of the criminal justice were also enforced by the private sector. The location where this method took place could be a church, school and any other place except the courts.

3- Circles: Various circles, such as the judgment issuance circles or circles to arrive at compromises, the circles of the people, the criminal, and the crime victim are formed and some of them are entitled to comment and talk.

4- Restorative establishments in the local community: These entities basically handle the juvenile crime. In the United States, they processed over 4000 cases from 1995 to 1999 in the Vermont State.

C. Private sector presence in prisons

In the beginning, the private sector started its activity in the juvenile section in Massachusetts. The private sector was more involved in juvenile correction and training than in other categories. In 1974, based on the state cooperation law, a general census was carried out in the United States, which showed that 37,749 teenagers that consisted over 41% of all juvenile criminals were kept in 1,300 private institutes. According to the available statistics, during 1975 to 1989 the private sector institutions have grown 70%, which means they had increased from 1,277 to 2,167. While during the same period, the public juvenile correction and training facilities had grown only 26% and increased from 874 to 1,107 institutions (McDonald, 1992: 367).

Since 1980, the tendency toward privatization began in adult prisons and it faced harsh resistance at that time. Thereafter, the prison privatization was seriously included in the conservative government agenda. Some institutions, such as American Bar Association (ABA) and the American Civil Liberties Union (ACLU) opposed it, but finally the country advanced toward the privatization of prisons (Flanagan, 1991: 600).

The first full transfer of prison to the private sector occurred in Tennessee State in the Hamilton County. This contract was concluded in 1984 and set the stage for other contracts. But in the beginning, some believed that complete privatization had not been achieved and the government had still been involved in the prison control. However, the United States from the very start exploited the opportunity of full economical privatization and by the virtue of economic models, entrusted the prison management and security to the private sector and reserved its own rights thereto. Except 10 states, the other 40 states entered into contracts with the private sector. The rogue 10 states were Connecticut, Massachusetts, New Hampshire, New York, Rhode Island, Vermont, Illinois, Iowa, Nebraska, and West Virginia. Texas and California pioneered among the states that allowed the private sector to enter the field of prison administration (Lippke, 1997: 1).

Conclusion

The governments looking forward to the private sector involvement in the criminal justice system have attempted to share some of the heavy burden of justice administration with this sector. However, during the past few years that the governments have come up with the idea of employing the private sector in the criminal justice enforcement, the Islamic criminal law had already delegated a huge part of the criminal justice implementation to the private sector from the outset. Some of the major reasons for the countries were restorative trends that can be clearly pinpointed in the Islamic criminal law. Sometimes the countries have not been prudent in entrusting parts of criminal justice to the private sector and that has resulted in crumpling blows to the body of the criminal justice system.

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