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CHALLENGES OF ECONOMIC EQUALITY PRINCIPLE IN IRANIAN LAW AND FRENCH

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ABSTRACT

In economic public law, it is permissible for the public authorities, whether the legislative or the executive, to adopt and enforce measures that they consider to be positive in order to improve the conditions in face of market and economic shortcomings. These are called regulatory actions, and although there are disagreements on to what extent and how they should be applied, they are in principle endorsed by all legal systems. Now, in particular, the legislator choosing a regulatory act faces the question whether such act is inconsistent with the legal principles such as the principle of equality. Every particular resolution of legislator naturally aims to create difference and discrimination. Thus, the question of this research is how the legal systems of Iran and France deal with the relation between regulatory actions and the principle of equality. It was seen from study of the legal resources, and in particular the practice of the Constitutional Councils of these two countries, that the Constitutional Council of France, except in 5 categories, including inter alia race, ethnicity and religion, where it does not accept discrimination in any way, adopts a precautious approach accepting in principle the legislator's opinion unless it encounters a gross error. The Constitutional Guardian Council of Iran, however, does not yet have a solid understanding of the principle of equality and, at times, does not accept the legitimate opinion of the legislator that the different conditions or the pursuit of public interest is involved.

Keywords: *Control, Constitutional Guard Council, Equality Principle, Regulatory Actions.*

INTRODUCTION

In the case of interventions or economic public regulatory actions, the principle of equality has been more disputed than principles such as the defense of private property or the principle of freedom of trade. The foundation of public economic law is in interventions that are usually associated with the creation of different conditions in order to realize certain intended results. Such solutions at least at the initial levels precisely mean breaking the principle of equality. But in contemporary times, there is no such simple perception of the principle of equality.
While, in the centuries before the early 20th century, only the political and civic aspects of the principle of equality were taken into account, today the social and economic equality, which is interpreted as equal access to jobs and opportunities, is the most fundamental aspect of the principle of equality. In fact, the mainstream of equality is moving towards social equality, and even the liberals declaring egalitarian individualism have considered egalitarian thoughts. The main controversy over this issue is whether, basically, the government must, in order to ensure equal economic and social conditions for individuals, adopt measures such as redistribution of

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income (property), reform of the tax system, provision of equal education system and social security, etc., and if the answer is yes, what the scope of the government actions is and how far it can go in justifying its unequal treatment (Sen, 2000). Based on the approach of this research, here, it was tried to extract the hard core of the said principle in relation to economic public actions and to determine how far the scope of the power of the legislator extends under objective conditions.

Title I: The Twentieth Century, the Growth of the Idea of Economic and Social Equality

By the mid-19th century, the doctrines of equality had been discussed largely based on their political and civil nature, and this aspect of equality had been gradually growing with the historical developments of the principle of equality, to the extent that consensus was reached in the late nineteenth and early twentieth centuries. Since the mid-19th century, another aspect of equality has been the focus of discussion, the social and economic equality, and generally this aspect of equality is the subject of economic public law.

This concept is also called the right to equal access to jobs and opportunities. In fact, the mainstream of equality is moving towards social equality, and even the liberals, declaring egalitarian individualism have taken into account egalitarian ideas. The main controversy over this issue is whether, basically, the government must, in order to ensure equal economic and social conditions for individuals, adopt measures such as redistribution of income (property), reform of the tax system, provision of equal education system and social security, etc., and if the answer is yes, what the scope of the government actions is and how far it can go in justifying its unequal treatment (Sen, 2000). Are these government actions justified where there are, for example, natural disadvantages, such as disabilities, or where there are rights - claims such as private property? Is it possible to advocate ideas of social equality even where there are fundamental differences, such as where the task entrusted to individuals is based on the merits, dedication and sacrifices of individuals?

Another issue is that although the idea of social equality is desirable; human beings are very different from each other in other ways. People have different backgrounds and circumstances. In addition to the differences in natural and social environments and external characteristics, humans differ in terms of personal characteristics such as age and gender, mental and physical abilities, and all of these are important for assessing inequality. For example, unequal revenues can cause a lot of inequality in human abilities (Imani Marani, 2006). Another important question in this regard is that if the idea of social equality is raised despite all the differences, at what level it should be revealed. There are two different ways of thinking in Western doctrines in this regard. The liberal doctrine and the doctrine of egalitarianism, the response and the ways in which these two systems of thought are posing cover most of the debate about the principle of equality in the present age.

- *Liberal approach*

Liberal approach expresses the weakest ideas about social equality. In this regard, in order to get acquainted with the position of liberal approach, the ideas of one of the greatest thinkers of this line of thought, Hayek, is mentioned here. Hayek argues that it is not possible to compare the economic system with the institutions of the organization such as the army, business or school, but that the economic system forms in a spontaneous and automatic system, which is the very hidden hand driving the development of social institutions. Hayek considers the market system as the result of an unknowing and unpredictable process, and sees the continuation of the market

system as the result of meeting the needs of all or most people. He believes that the market process is neither fair nor unpardonable, since it has no intentional and foreseeable results; of course, he states that it should be accepted that the method of distributing privileges and deprivations in the market system is in many cases unfair, if it is considered as the result of conscious distribution. He considers social justice to be the Trojan horse of socialism in free societies (Qaninejad, 2009).

He believes that the concept of social justice violates the principles of the just law of freedom. He argues that the rule of law must equally treat individuals as anonymous beings and unaware of their inequality in having the facilities. Efforts to unify and eliminate these original differences and inequalities themselves lead to unequal and different behavior with individuals and create new inequalities. In his opinion, the government cannot have the necessary knowledge to correct and reform market processes. Government interference in the economy disturbs freedom and equality (Bashirieh, 2004). For Hayek, individual liberty and private property are inseparable. Private property is the main field of free choice of the individual. In a free society, different traditions and lifestyles compete freely, and private ownership is the main constituent of this competition, and therefore freedom and equality are essential for the cultural evolution of society. By contrast, the idea of distributive justice weakens the foundations of freedom, competition, and evolution. Of course, he does not oppose the government's involvement in protecting the poor, even if it guarantees minimum income for them, and believes that such action must be taken outside the framework of the economic system in order not to disrupt its functioning, otherwise the final result will defeat the purpose. In his view, disturbing economic order leads to inappropriate allocation of resources and reduction of wealth production facilities. Ultimately, he describes social equality as a "mirage", that is, it lacks real meaning, because for the establishment of material and welfare equality among the individuals and society, the government has to behave inequality towards individuals, because each person has different ability and talent and knowledge compared to others. Therefore, the government has to use special and case-specific guidelines instead of general and universal rules. It is clear that in this case, the law and any legal system, which is necessarily the basis of the rule of the state, will break the general and all-inclusive rules, and open the way to unlimited authority and tyranny of the government. On the other hand, unlimited authority leads to the abandonment of individual freedoms, and every step forward it takes in terms of the realization of distributive equality, it takes a step backward in terms of individual freedoms (Qaninejad, 2009; Imani Marani, 2006).

- *Egalitarian approach*

Modern egalitarianism have given two answers to question about the quality of equality. Equality in Welfare and Equality in Resources. Welfare equality requires that all should enjoy same level of satisfaction and may require the establishment of a purely paternalistic welfare state. At the same time, there must be a way for the government to pursue welfare not in a "collective" way but in a way that responds to the distinction of individuals. However, such formulation of the egalitarian perspective poses serious problems. The problem is that the principle of equality in welfare necessarily means subsidizing expensive tendencies and tastes. Keep in mind that it may be more difficult to make some people happy than others. Because they are harder to please, it is more costly to satisfy their taste. To provide satisfaction to these kinds of taste potentially means to allow the government to satisfy the non-reasonable desires of some to the detriment of

everyone else. However, on the other hand, there are some people in the community who are caught up in natural problems (such as sickness and incapacity, etc.) so hard that they are unhappy and that they need to consume much of the resources to reach the level of happiness and welfare of people who do not have these problems. Then, equality becomes something impossible or extraordinarily costly. At the same time, a milder interpretation of this thought may be more acceptable, that is, a state that guarantees a minimum level of prosperity for all. The government is no longer obliged to pay for piano lessons in this sense but it may be responsible for providing enough income to everyone, so that if person wishes to learn piano, that person can afford it. This argument leads us to equality of resources and resource egalitarianism. In this sense, equality of resources refers to material resources and perhaps internal resources.

The egalitarian theorist is Ronald Dworkin, who says that the issue of "equitable distribution of resources in a way that is truly fair is an interesting and difficult issue." What Dworkin wants to defend is a manner of distribution of resources and facilities in which not all receive equal value but everyone is happy with their share so that a person's share is determined by the manner in which he satisfies his taste and procure his welfare, so the government take steps to organize the environment in a number of ways, including tax policy. It can also rely on markets to provide auction results and give people overall rather than exactly equal share of resources and facilities, to enable them to spend them to have their plans realized (Sen, 2000). Therefore, the source of positive discrimination forms in this theory; such discrimination requires an increasingly narrowing of the scope of the principle of equality. Therefore, examining the scope of the principle of equality is an important issue in determining how government should intervene.

- *Equality in Islamic thought*

According to Islamic thought, no matter from what tribe and people, individuals as sons of Adam have a common origin. This is based on evolutionary equality that rules out any ethnic, racial or social superiority of individuals over each other; from the perspective of the Prophet of Islam: "In the face of the truth, people are equal like shoulders (Hashemi, 2005). The viewpoint of Imam Khomeini (RA) regarding the equality is also interesting. He says about the principle of equality: "I say to all segments of the nation that there are no difference between rich and non-rich people, white and black and Sunnis and Shiites, Arabs, Ajams and Turks, etc. In the Qur'an, Allah has given the privilege to those who have justice and piety, which are not material at all; the priviledge is not due to ownership of properties and may be given to all people (Sahifeh Noor, 1993). In general remarks and speeches, the principle of equality before the law has been considered (Sahifeh Noor, 1993). He considered it necessary and obligatory for everyone to obey the law. In Islam, all even the great Prophet (PBUH) are equal before the law (Sahifeh Noor, 1993). Despite the positive view of the late leadership of the Revolution, does the Constitution also accommodate the above principle? The answer to this question is indicated in the following sections.

Title II: Legal review of the principle of equality

- *Identification of the principle of equality in constitutional law*
  - *Constitutional Law of France*

Is there a principle of equality in the provisions of French Constitutional Law? If yes, where does it appear? In the answer, the constituents of the principle of equality are set out in four considerable texts of the Constitution. The principle of equality appears in Article 1(2), Article

6(3) and Article 13(4) of the Declaration of Human Rights and Citizenship of August 26, 1789. Also, Paragraph 5 of the Preamble, Articles 3(6), 11(7), 12(8), 13(9), 16(10) and Article 18(11) of the Constitution of October 27, 1946 and also, in Paragraph 12 of the Preamble and Articles 1, Article 1(2), Article 13(14), Article 3(15) of the Constitution of October 4, 1958. While the above Articles are basically intended to provide for the organization and function of the public authorities, the Constitutional Council, however, does not refer to them in the same way and often cites Article 6 of the Declaration of Human Rights and Citizenship of 1789. Therefore, there is no correlation between the number of references and the importance of compliance with the principle of equality and the control exercised by the Council in applying this principle.

Equality versus Tax and Equality before the Court are of particular importance. From the French Constitutional Law, it can be inferred that a series of discrimination is prohibited in all the Constitutional Laws in the same way. These prohibitions stem from Article 1 of the 1958 Constitution, which stipulates that discrimination based on ethnicity, race, religion, gender, and beliefs is prohibited. Several times these five requirements of the equality principle have been mentioned in a restricted list. Certainly, the Constituent Assembly and the Constitution have not expanded the number of prohibited discrimination that the legislator has provided[1]. In this regard, it should be noted that when Article 6 of the Declaration of Human Rights and Citizenship distinguishes abilities and competencies for public administration, it is natural that this point of view is contrary to the said discrimination. Can we infer a general rule given the above description? In the initial step, Constitutional Council began the initial formulation of the principle of equality in 1979. Indeed, in the July 1979 decision, the Council both confirmed and emphasized the principle of equality and recognized the introduction of some restrictions on this principle by the legislator. The Decision provides: "The principle of equality does not prevent a law from taking a different decision in different situations that humans have". It furthers, “If the principle of equality before the law refers to similar situations, then different solutions can be adopted in different situations” (Cons.const, 12 Juillet 1979). In another Decision, it provides, “If the principle of equality precludes different rules in similar situations, it does not preclude different rules at different situations for achieving a certain goal” (Cons.const, 16 Janvier 1986). The second stage, which began in 1988, is characterized by consolidation of the Council’s procedure, because the Council began using repeated method of using the Article: "The principle of equality does not preclude the legislator from laying down a different rule in a different situation, nor does it preclude a legislator from violating the principle of equality for reasons of public interest.” (Cons.const,7 janvier 1988)

The Council also provides in several other cases that the difference in lawmaker behavior can be justified. In the third step, which is the last step and begins in 1996, the Council adds a descriptive and complementary phrase to the above, and it is a direct relationship between the various motivations of the treatment by the law and the purpose of the law. It has often formulated as: the principle of equality does not preclude the legislator from imposing different rules in different situations, nor does it preclude violating of the principle of equality due to the establishment and pursuit of public interests. In some cases, due to the direct relationship of the purpose of the law, which seeks to ensure its establishment, it shows different treatments

[1] The report on French regulation, in congress of constitutionals courts of francophones countries “the use of equality's Principle in constitutionals court's jurisprudence at Francophones countries”10-11, avril .1997, p225

(Cons.const, 25 janvier 1995). In short, the principle of equality in French law is accepted at the level of constitutional rights, and some of the discrimination is strictly prohibited, but some limitations and discrimination, known as positive discrimination, are permitted by the legislator.

- *Constitutional law in Iran*

While the Articles of the Constitution of Iran accept the principle of equality, they have also made this principle subject to Islamic requirements[2]. Therefore, wherever the Islamic rules make certain legal distinctions, including differences between women, men, Muslims and non-Muslims, the Islamic Republic will be committed and loyal to it (Hashemi, 2005). In the following, the complexities and conflicts of the application of the principle of equality and discrimination at the level of the constitutional economic law in Iran are discussed.

Title III: Principle of Equality and Public Economic Actions

- *Review of the opposing views on the intervention of the public powers to establish the principle of equality*

The present age embraces two different ideas about the realization of the principle of economic equality. A liberal intellectual system that essentially defies any government intervention for any reason, including public interest, the elimination of existing discrimination, etc., which rejects any violation of the principle of economic equality and considers any exemption to the principle of economic equality. According to this system of thought, no discrimination in the economic structure should be created, except for subsidies that has no economic nature and are merely social support given to some classes. Generally, there will be no public economic rights in the context of this idea. Therefore, it must be firmly stated that the rules and principles of the European Union, which are closest to the free and market-based economy, are also not in line with this perception, and according to the principles of the Union, which have already been partly discussed, the legislator may, within a certain framework, act to provide public interest in various ways, including violation of the principle of equality.

The second theory of equality has been the egalitarian idea that holds the government responsible for providing a minimum of welfare for all. To this end, according to Dworkin, the government should have the authority to distribute resources and facilities. Assuming such power and authority for the state, the public authorities, of course, will have the power to adopt policies and instruments for market interventions. Naturally, any government intervention to change the relationships in the market will be accompanied by a kind of discrimination against some group. Since this view is in perfect harmony with public economic rights, and even in the modern public economic law, called regulatory and competition-oriented public law, it is more consistent with the view of the egalitarianism than the liberals' view. Therefore, the study of the scope and limitations of the principle of equality in the field of public economic law is a matter of great concern and difficulty.

- *Implementation of the principle of equality in public economic actions*

The actions of public authority and private sector initiatives become very close directly and precisely in enforcing the principle of equality. This connection is indicated with two titles. On the one hand, the regulatory actions[3] of the public authority should not discriminate between economic agents, whether private or public. Any violation of the rule is contrary to the principle

[2] Article 30, I.R.I. Constitution.
[3] Regulatory action

of equality. Always, the said violations cause deviation from the principle of equality in competition. On the other hand, for the same reason direct intervention[4] of public authority in the administration of the economic and social sectors cannot be permitted unless the principle of equality is observed in the same way as mentioned above. However, a large number of public interventions violate the principle of equality, because they seek to achieve the goals of a state's economic or commercial policy. Also, the principle of equality for public benefit is sometimes violated. Thus, the violation of the principle of equality in the economic sphere appears to occur at two particular moments, where the nature of the discriminatory behavior justifies discriminatory behavior on the grounds of the public interest, and where, in terms of opinion and perspective, it is decided that a different situation exists that requires unequal treatments to be applied.

- ***Discrimination due to a different economic situation:***

The principle of equality must be respected in all legislation, but in any case, different situations require the legislator to make the difference in adopting its own laws. In most cases, the subjective[5] nature of the difference of the situation obscures the principle of equality, and the difficulty in assessing the difference in status is because the elements are mostly personal rather than objective. The same is true when decisions are taken by the constitutional council and the state council, in different cases, they make different decisions. In the decision of the Constitutional Council on enjoyment of the residents of a tariff discount on the use of an air bridge, the Council did not accept a tariff reduction for the use of an air bridge for residents near the Re Overhead Bridge, because the Council believed that these people were like other taxpayers, they had no difference in the situation with other residents of neighboring regions and others (Cons.const, 12 juillet 1979). A year later, in 1979, the State Council, in a totally contradictory decision, justified the discounts on the tolls of the bridge (CE,10 dec,1982). The State Council has assessed in this regard that the common feature of taxpayers is superior to their geographic location. Therefore, its different interpretations and the reference to the different situation of consumers with regard to services (geographic and financial) make a different and very wide range of criteria, and it is the judge who examines the situation case-by-case. In another case, the Constitutional Council in its decision of 16 January 1982 on the occasion of deliberation on the nationalization law, which excluded foreign banks from the implementation of nationalization, making a clear discrimination, justified the difference between the status of foreign and domestic banks in the nationalization process by stating that the implementation of the principle of equality in this case may have caused possible problems in law enforcement in relation to foreign banks that conflicts with the goals of the public interest sought by the legislator in the national.

For this purpose, the Constitutional Council seeks to establish an appropriate coordination between the principle of equality and the principle of proportionality. The way in which the principle of proportionality applies to the establishment and implementation of the principle of equality is a matter to be addressed, but it should be noted here that the method of the French Constitutional Council is largely inspired by the practice of the state council. As for the legitimacy of discrimination based on the existence of differences, the administrative judge

[4] L'intervention directe
[5] Malleability

actually requires the administration to provide the justifiers with their decisions. This method is in conflict with the principle of private law, which puts the burden of proof on the plaintiff, because in a lawsuit against an administrative organ that has committed discrimination, the administrative organ is required has to provide justification (Ibid, p77). However, the judge also may not subdue administrative and legislative authorities. In a precautionary approach, the Constitutional Council ensures that the legislator does not commit a gross error in identifying the differences that the legislator establishes. For example, in the very opinion that in the case of nationalization accepted the exception of foreign banks, but did not accept the exclusion of the cooperative credit institutions and large non-interest bearing loan institutes did not recognize the justification for the principle of equality, because the criterion of establishing based on the nature of bank capital or the nature of banking practices are not suitable justification for the discrimination sought by the legislator (Ibid, p. 67).

In the practice of the Guardian Council of Iran's Constitution, almost any kind of positive discrimination is accepted except for the discriminations provided for under the general policies of the laws of the program that have come from the supreme leader. There are many cases in which the legislator has, for some reason, established a different situation or is seeking to achieve certain goals and has therefore adopted different provisions in that regard but the Guardian Council has not accepted it. For example, in Article 27(28) and Article 28(1) of the Islamic Penal Code (the section on Ta'zir & Inhibitive Punishment), the legislator provides for the punishment for the forgery of signature or the stamp of the Supreme Leader's or those of the heads of the Three Powers with imprisonment and punishment more severe, compared to ordinary documents. The Guardian Council considered it to be contrary to the principle of equality of all citizens (The Guardian Council's Opinion, 1995). In another case, the legislator sought to oversee and control more firmly the government spending on the travel abroad of government employees that were made with government credentials. It provided in the Note to this Article of the Law that the travel and missions of the heads of the Three Powers and their deputies and the ministers and commanders of the ground, naval and air forces of the army and the army and the police shall not be subject to the provisions of the Article. The Guardian Council declared the exception to be contrary to the principle of equality and unfair discrimination (The Guardian Council's Opinion, 1994). However, the Council does not take account of the outcome of its decision, because the legislator has provided in this law that trips outside of the staff of any power shall be controlled by the head of that power. It is natural that the head of the power himself cannot supervise his actions and travels, so even on the assumption of the fact that the abovementioned Note was not mentioned, the authorities specified were excluded from the scope of the provisions of this law. Despite this, the Guardian Council considers the exception to be contrary to the principle of equality.

- *Referral to public interest*

There is no clear procedure by which the public interest can justify different treatment in a similar situation. However, sometimes public interests impose restrictions on the principle of equality. The public interest causes a public or private economic agent to have a behavioral difference and has a certain privilege. In a decision on June 21, 1951, the State Council allowed the French refinery to have concessions due to the famine period and the role played by storage in the provision of public interest, which the similar institutions were deprived of. But the idea that public interests are not necessarily incompatible with private interests does not seem to be

correct, because it is now well seen in the combined economic sectors. This procedure is an exception to the principle. In another example, the issue of referring to public interest becomes clearer. The Paris Airport Administration decided to coordinate between the tolls on the airline service and the amount of tonnage in the new Airport, that is, as the tonnage decreases, the toll percentage also decreases. The State Council decided on the issue: "This coordination causes differences between companies, while such a restriction is contrary to the principle of equality, it is justified on the grounds of the public interest (CE, 13 oct, 1999).

Today, public interest justifies the government's intervening actions, which are called "positive discrimination." The Constitutional Council has also allowed tax exemptions as a means of encouraging the development of specific activities. The creation of different taxes on different regions to meet the goals of seeking public interest has been the subject of legislative action. For example, in the field of money, public markets and competition conditions, there are many differences in the public utility tariff system, which are mainly for the sake of public interest. Of course, it should be noted that although the EU regulations violate the equal conditions for economic agents for the sake of public interest, the scope of powers of the public authorities in this area have been subject to limitations. In this regard, it should be added that the said discrimination, due to the lack of clarity and objectivity of its basis (public interest), can broadly extend the scope of the violation of the principle of equality. This makes it really difficult for regulatory authorities, particularly the Constitutional Council, because in the public interest, the legislator seeks, through the application of discrimination, to create and stimulate motives for a political and economic purpose, and in fact the Council's action is not due to difference in the situation and doesn't seek to identify the facts but the legislator is seeking to change the facts (Linotte et Romi, 2006).

CONCLUSION:

That all human beings are created in the same way and have equal rights is the assumption that almost all modern legal systems have accepted. But on the other hand, the content of this principle never implies that the legislator considers the different situations the same and establishes the same rules. Although all human beings have equal rights and duties, no common sense accepts that the rights and duties of non-adults and minors are the same as the legal duties of wise and mature individuals. Therefore, the core of the principle of equality is that, in equal conditions, the legislator should not impose differing and discriminatory provisions. This approach has a special impact on government and legislative interventions in the market and in the economic field because inequalities and heterogeneous nature are always seen in the market and in the community, which naturally arise in the vast majority of cases. The question now is how much government can take different actions and set different plans to eliminate existing discrimination.

The procedure of the French Constitutional Council is well aware of this approach and, with caution, applies minimum and precautionary supervision over the choices that the legislator adopts where it claims that there is a difference in the situation and makes different provisions for them, to ensure that the legislator doesn't make gross mistake in identification of the issue. As a result, French legislator has frequently considered different rules and the Constitutional Council has also justified them. Another basis provided by the French Constitutional Council for

the legislator to adopt different rules for legislators is to pursue specific goals for the benefit of the public interests. For example, it applies different tariffs for the old and the new Paris airports. As for the Guardian Council of the Iranian Constitution, although the legislator has in principle accepted the discriminatory actions subject to their not being undue, in the manner in which the legislator can make different measures and resolutions to achieve certain goals but the Guardian Council ignores such legislative power and in most cases, it has rejected the legitimate legislative approvals. Therefore, it can be said that the Iranian government and legislator are confronted with a lot of restrictions on the use of interventional and regulatory instruments.

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