

The Legal and Jurisprudential Boundaries Separating Legitimate Expression from Abuse in the Right to Permissible Criticism, Freedom of the Press, and Freedom of Assembly and Peaceful Demonstration, and Their Implications for the Establishment of Civil Liability and the Grounds for Exemption Therefrom

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Abstract

This research is a comparative, analytical and critical study of the criteria distinguishing between legitimate expression, which is protected by both laws and Sharia, and its abusive use in three areas: permissible criticism, freedom of the press and freedom of assembly and demonstrations. The research uses a three-dimensional comparative analysis based on Iraqi law with its legislative and judicial texts, Islamic law with its authentic sources and universal principles, and Iranian law with its constitutional, press and penal codes. The problem posed by this research stems from the ambiguous formulation of the limits of these freedoms in the three systems and the lack of specificity in the legislation defining the distinction between the two concepts, as well as the problems related to the grounds for exemption from civil liability . In this research the descriptive, analytical, and comparative methods were used in the survey and analysis of texts, and the critical method was used in assessing systems, shortcomings, and proposed solutions. This research has revealed several fundamental aspects, including: good faith and factual reliability are the most profound common criterion for distinguishing between permissible criticism in the three systems; Iraqi law suffers from a legislative vacuum in regulating the freedom of the press and freedom of demonstration; Islamic jurisprudence contains specific and detailed criteria for regulating speech, which are more detailed and profound than many of the positive laws of today; Iranian law has more detailed and sophisticated formulations in the definitions of exemptions from civil liability compared to Iraqi law.

Keywords: Abuse of Expression, Permissible Criticism, Press Freedom, Peaceful Demonstration, Civil Liability, Grounds for Exemption, Islamic Jurisprudence, Comparative Law.

Introduction

One of the fundamental rights of modern society is the freedom of expression in any form such as criticism, journalism, or demonstration. It is a right of every person, without regard to the state of the development of the society in which he or she lives (Universal Declaration of Human Rights, 1948, Art. 19). The norm was further reinforced at the international level by the International Covenant on Civil and Political Rights of 1966, which established the universal nature of the right to freedom of expression, but also allowed for its limitation in some circumstances in order to protect the rights of others, social order and national security (International Covenant, 1966, Art. 19). The problem as to the distinction between protected and unprotected speech, however, proves to be complex in all of the above mentioned legal frameworks, and the dynamism of the tools and the methods used, as well as their increase, adds to this complexity. The problem of legally identifying the legitimate from the illegitimate is especially complex in Islamic setting because there is a need for attention to the question of Sharia law and civil liability.

The Constitution of 2005 (in effect in Iraq) states that the State shall guarantee “freedom of expression of opinion by all means” (Iraqi Constitution, 2005, Art. 38), provided that this is not done to the detriment of public order or morality. However, the detailed legislative structure that would implement this guarantee,

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establish its boundaries and provide the criteria of abuse has not yet been developed and supplied, so there is a clear gap in the legislation that needs to be clarified through research and analysis and then filled with proposals. In this point, the jurist Fahmy notes that "freedom of opinion and expression in most of the Arab legislations has the issue of constitutional framing without legislation details, so it becomes a constitutional slogan and not a real guarantee" (Fahmy, 2009: 23).

This research has a number of complementary axes which are displayed. First, the obvious lack of comparative research that combines three aspects of the Iraqi law, Islamic jurisprudence and Iranian law in their application to the question of abuse of freedom of expression in these three contexts in one study. Secondly, the problems arising from the absence of laws in Iraq, which affects people's rights and allows for arbitrary interpretation by the executive authority, are practical. Third, the added value Islamic jurisprudence brings to the integrated approach of law which is bound by moral stability and flexible application is not fully utilized in the modern study of law. In Mubarak's (1989: 14) words, "the study of the abuse of rights in the great legal systems shows that there is a strong convergence between the position of Islamic jurisprudence and the position of the most modern contemporary positive law.

The Research Problem and Its Sub-Questions

This research problem is based on the following main question: What are the legal and jurisprudential limits that distinguish between legitimate expression and inappropriate abuse in regard to the right to permissible criticism, freedom of the press, and freedom of assembly and peaceful demonstration and what is the implication of going beyond these limits in establishing civil liability and what is the grounds for exemption from it in Iraqi law, Islamic jurisprudence and Iranian law respectively? The first question is: What are the conditions and controls of permitted criticism for the three systems and which factors make it different to abusive expression that would be liable? Second, how have the three systems reacted to freedom of the press and what are the boundaries of freedom of the press, according to the law and according to Sharia, to prevent it from becoming an attack on one's reputation or defamation? Third, what are the legal and Sharia requirements for freedom of assembly and peaceful demonstration in the three systems and what will make the demonstration become a cause for liability? Fourth, what is the basis for exemption from civil liability as a result of the abuse of expression and what are the conditions for which to exempt and how to limit it in the three systems?

The Research Hypothesis, Methodology, and Plan

The starting point of the basic hypothesis of the present research is that civil liability resulting from the abuse of the freedom of expression of opinion is organically linked to the abuse of the limits of the legitimate right and that the different forms of the excess in the right to permissible criticism take the form of freedom of the press and freedom of demonstration, for which a specific legal treatment exists, different from that provided by the general framework of the theory of the abuse of rights. The research used descriptive-analytical method by surveying and analysing the jurisprudential and legislative texts, comparative method in revealing aspects of similarity and difference between three legal and jurisprudential systems (Salman, 2010: 67), and critical method to evaluate these systems, to identify shortcomings, and to suggest appropriate solutions. The research has been structured around seven main parts: the first part deals with the introduction and methodological aspects; the second part with the applications of abuse in the right to permissible criticism in the three systems; the third part with freedom of press and its limits between legitimacy and abuse; the fourth part with freedom of assembly and peaceful demonstration and the conditions of its legitimacy; the fifth part with the grounds for exemption from civil liability arising from abuse; the sixth part with the comparative study and its points of agreement and difference; the seventh part with the conclusion and findings and recommendations, and the list of the sources and references.

Second: Applications of Abuse in the Right to Permissible Criticism in the Three Systems

The Concept of Permissible Criticism and Its Conditions in Iraqi Law

One of the most outstanding examples of freedom of expression of opinion and the most legally thorny of them, study of which is a scientific and practical need, which cannot be avoided, is the right to permissible criticism. Although Iraq's Constitution mentions the right to permissible criticism, it does not provide sufficient detail and clarity about the right, but, instead, it refers to the right through the general law (Iraqi Constitution, 2005, Art. 38). In order to fill this void, Iqbal has tried to produce the conditions of permissible criticism from judicial decisions and the general principles of torts liability in the Iraqi Civil Code which requires justification and explanation (Al-Sanhuri, 1998: 784).

A. The First Condition: Reliance upon an Established Fact or One Conceded by the Public

In Iraqi law criticism is permissible and legitimate only if it is based on a fact that has actually taken place, namely an objective fact that can be substantiated by the method of proof as prescribed by law. The criticism based on rumours, conjecture, or undocumented information cannot be protected by law, and the author of such criticism is civilly liable for the damages caused by it in accordance with the provisions of tortious liability. There is a part of the comparative legal doctrine which has affirmed that "criticism with a right factual basis is not an accusation without proof" (Fahmy, 2009: 45). An established fact here is one that has an objective basis, which can be verified, such as by official documents, published decisions, or events recorded in reliable documents. A fact conceded by the public is one known by the general opinion, and recognized as a truth without disagreement. In both scenarios, the fact should be one to which the public has a right to know, not one of personal secrets or one that is protected by the Constitution and the law (Iraqi Constitution, 2005, Art. 17).

The Iraqi legislator indirectly referred to this condition in the text of Article 433 in the Iraqi Penal Code No. 111 of 1969, as amended, which provides that if a person defames a public official or a person who is charged with a public service, he may present evidence for the truth of what he said to that person, if it is connected to the responsibilities of a public service. Though it is a matter of penal law, nonetheless it has a direct impact upon the civil liability, as the proof of the truth of the fact is a common ground for exemption from both criminal and civil liability alike, which is enshrined in doctrine and case law in the comparative legislations to which Iraqi law refers (Al-Jubouri, 2004: 312).

B. The Second Condition: The Existence of a Public Interest in the Subject of the Criticism

The fact being criticized must not only have been established and publicized, but it must also be of social relevance or connected to a valid public interest that warrants being treated openly by criticism. The exercise of the right of criticism does not permit a violation of the private life of individuals which is done under the name of criticism: it is not a right of the critic to interfere in the private life of others unless there is a close connection between the private aspect criticised and the public interest that the criticism is meant to serve. The importance of this condition is clearly reflected on the criticism of public figures, including politicians, officials and judges, as the breadth of permissible criticism is rather wider with respect to their exercise of their functions and public duties, and does not extend to their private life, which is constitutionally protected (Iraqi Constitution 2005, Art.17). Journalistic criticism of the performance of a public official is, in democratic societies, one of the necessary checks that has to be safeguarded from legal liability as long as it is based on correct facts and thus has a certain public interest (Al-Douri, 2005: 112).

The personal conduct of an official may overlap his public functional performance, so that the responsibility for the former is a component of the responsibility for the latter. For example, a cleric who uses narcotics is not a person whose personal conduct is open to criticism because it is an intrusion on his bare privacy, but because his use of narcotics is contrary to the role he plays in the society. On the other hand, even if a politician is criticized on his family relations unrelated to his working performance, it can be no longer said to be a legitimate criticism but a misuse of the freedom of expression, which leads to civil liability. In this respect, the doctrine of Iraq is based on the provisions of Evidence Law No. 107 of 1979, which says that the burden of proof shall rest on the claimant, and that the oath shall be imposed upon the one who denies: "The burden of proof shall be upon the one who makes the claim, and the oath shall be imposed upon the one who denies" (Evidence Law No. 107 of 1979, Art. 7).

C. The Third Condition: Good Faith on the Part of the Critic

The condition of good faith is among the most subtle of the conditions of permissible criticism and the most difficult to demonstrate in practice, because it is related to the subjective aspect of the critic in his mind that the expression does not always express. The condition is met when the critic aims at, and seeks to serve with, a public interest and/or the public good of knowledge and accountability, and not to merely damage the criticized or hurt the critic's reputation without a reason. This meaning has been expressed in a part of

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comparative legal doctrine, which says: "Criticism is permissible, insofar as it is meant for the purpose of revealing the truth and serving the public interest, but not to the extent that it is intended for denigration, invective, and defamation to satisfy envy and quench hatred" (Al-Saad, 1995: 201).

The signs of bad faith include several assumptions made by courts in cases concerning abuse of freedom of expression. These include where 'the criticism exceeds that which is warranted by the very nature of the fact criticized', 'when the critic resorts to inflammatory or defamatory language not related to the fact criticized but aimed at damaging the honor or reputation of the person criticized', 'when the critic reveals irrelevant private aspects of the life of the person criticized, which have no public interest or fail to shed light on the fact criticized', or 'when he continues to publish criticisms despite knowledge that the information is incorrect'. Part of the legal tradition goes further by introducing a professional standard for critics: 'The journalist or critic who has neglected his responsibility of verification and ascertainment before publication is presumed to have been negligent, and the burden of proof of good faith is on him' (Fahmy, 2009:78). Thus, the scope of criticism is further narrowed, and the responsibility of journalists and critics for everything they publish increases.

D. The Fourth Condition: Moderation in Style and Expression

According to the legal doctrine of Iraq, the expression and the style used in criticism must be appropriate to the content of the critique and to the nature of the fact under criticism and must not go beyond the limits of what is necessary for the purpose of expressing a view and communicating it to the public. A criticism of a fact which relies on insults, degradation, and sufficient and abundant mockery in an inflammatory fashion is going too far, and is an abuse resulting in liability, even if the fact criticized is established and the intention itself is good. This is because, according to the Iraqi Civil Code (1951), Article 50, the person criticized has an inherent right to dignity, standing and reputation which must not be violated for any reason, nor may anyone be deprived of it, and the protection of this right is guaranteed by Article 50 of the Iraqi Civil Code (1951).

The Conditions and Controls of Permissible Criticism in Islamic Jurisprudence

Islamic jurisprudence built a comprehensive framework for the discipline of criticizing the right and clarified the conditions under which it is permissible, which is based in essence on the injunctions of good and evil, and the prohibition of harming others, an Islamic jurisprudential maxim deeply embedded in the sources of Islamic jurisprudence, "no harm shall be inflicted or reciprocated" (la darar wa la dirar). This system is based on the noble Qur'anic texts, including the words of the Almighty: "Invite to the way of your Lord with wisdom and good instruction, and argue with them in a way that is best" (Al-Nahl: 125), which established an integrated methodology for the use of the right of criticism and expression in a way that is beneficent, true to the text and guided by wisdom.

The scholars who were experts in Islamic jurisprudence developed three levels of permissible criticism in Islam. The first level was a change by the hand, which was intended for those who had the authority to change the particular person or an object. The second level was a change by the tongue, which was a form of permissible criticism. The third stage was disapproval by the heart, which was the lowest level of criticism. Ibn Qayyim al-Jawziyya pointed out that "the degrees of disapproval are graduated, each having its own controls and conditions, and that departing from these conditions transforms permissible criticism into prohibited harm entailing liability (daman)" (Ibn Qayyim al-Jawziyya, 1997: 219).

The most salient Sharia basis for the permissibility of criticism in the Islamic jurisprudence is enjoining good and forbidding evil. The jurists broke this duty down into steps: first verify the fact to be blamed, second, watch the proper form of criticism, third, prescribe the legal consequences of the disapproval. Al-Ghazali cautioned that "the duty of sincere counsel and honest criticism is coupled with essential conditions: the first is verification of the fact; the second, the intention of reform rather than defamation; and the third, the choice of the appropriate style that achieves the purpose without inflicting unjustified harm upon the person criticised" (Al-Ghazali, 1993: 112). These three conditions are at the core of the conditions of permissible criticism that have been established in contemporary legal doctrine.

In the applied legacy of Islamic jurisprudence, the Commander of the Faithful, Ali ibn Abi Talib (peace be upon him) represents a high standard to which one should aspire in responding to criticism and listening to the harshest criticisms of opponents and enemies within the limits of acceptability. If the criticism was aimed in an acceptable direction, but, however, expressed in an inappropriate way, he (peace be upon him)

responded to it with arguments and evidence without resorting to any measures against the critics. Thus, the Commander of the Faithful responded to criticism with arguments, proving his own correctness and the incorrectness of the criticize, and this confirms the authenticity of criticism in Islam. Criticism is an integral element of the Islamic jurisprudence system, and for using abuses in criticism, Islam has a list of forbidden actions, for which liability is imposed by Islamic law (Ibn Qayyim al-Jawziyya, 1997: 237). Criticism in Islam must be based only on truth and compliance with Islamic principles. Firstly, it should be noted that in Islam, criticism is not forbidden, but it is necessary to criticize only those who are guilty. The most common and widespread forms of abuse in criticism considered in the source are *ghiba*, namely, speaking about a person in his absence, something that would not have been pleasant for him, even if it is true, *buhtan* – calumny, that is, attributing to a person statements and actions that he did not do, and *namima* – talebearing, i.e., scattering rumors. Finally, degradation and mocking of others also fall under criticism, for which *ta'zir* punishments are imposed.

Permissible Criticism and Its Limits in Iranian Law

Iranian law is characterised by the interplay between different sources of law, with permissible levels of criticism being determined both at the constitutional and legislative levels, thus uniting the Islamic and positive law traditions. On the one hand, the Iranian Constitution of 1979 features Article 24 which grants freedom of the press and publications in terms of criticism; however, it also stipulates that such freedom is conditional upon not “violating the foundations of Islam or public rights” (Iranian Constitution, 1979, Principle 24). The other side of the coin, however, is the principle of Iran's law, that no one can use the exercise of his right to harm others or to violate the public interest (Iranian Constitution 1979, Principle 40).

The Iranian judiciary, at the level of judicial implementation, has adopted, in determining permissible criticism, four criteria that are complementary to each other, and constitute an integrated evaluative framework as follows: The objective criterion has to do with the subject matter of the expression, with the degree of the expression's transgression of religious symbols or its dissemination of obviously false statements. The purpose criterion is the reason for the criticism, whether it is to attack or to further some agenda. According to the criterion of effect, the actual effects of the criticism are evaluated based on social disturbance, economic loss, and psychological and moral harm. The criterion of professional fault is related to the degree of the journalist's conformity to the duty of verification and ascertainment before publishing (Nosrati, 1394 SH: 34). Katouzian has emphasized that “the four criteria point to a more precise and complete judicial norms for detecting abuse of criticism in comparison with the unitary criterion used in many other legislations” (Katouzian, 1386 SH: 267).

Third: Freedom of the Press and the Boundaries Separating Legitimate Practice from Abuse

Freedom of the Press in Iraqi Law: The Legislative Framework and Applied Problems

Freedom of the press is one of the most common manifestations of the right to self-expression, which is one of the most controversial topics regarding law and society since the right of citizens to privacy, reputation, and dignity intersects with the right of public opinion to freedom of expression. The 2005 constitution of Iraq, currently in force, enshrines citizens in the right to freedom of the press, printing, advertising, media, and publishing according to Article 38 (Iraqi Constitution, 2005, Art. 38). However, the absence of a law that would formulate this freedom and establish the responsibilities and obligations of citizens in its violation has had a devastating impact on the functioning of the whole legislative system in Iraq. Al-Douri argued that “freedom of the press in Iraqi legislation suffers from a clear deficiency in detailed legislative framing, and the absence of a press law containing clear criteria produces a hazy legal environment that neither protects the responsible journalist nor holds the transgressing journalist to account” (Al-Douri, 2005: 112).

This drafting inconsistency is manifested by the very fact of the conflict between the Constitution, specifically its text on freedom of the press, and the law on criminal prosecution for defamation, insult or affront, which can be used to limit and restrict this freedom (Iraqi Penal Code, 1969, Arts 433-434). Iraqi courts do not have clear criteria for distinguishing between acceptable and unacceptable forms of criticism in terms of law; and this, in turn, leads both to variability in court rulings and to confusion among journalists in their professional activities.

A. The Limits of Press Freedom in Criticising Public Figures

The journalist in Iraqi law has a more extensive opportunity to criticize public figures and officials than to criticize and expose ordinary citizens. This is because of the concept of accountability, which requires that

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actions of those in positions of authority must be open to the scrutiny of the public as a way of ensuring good governance and fighting corruption. In comparative jurisprudence, the criterion used to judge the applicability of the exception is that a public figure 'implicitly accepts, by virtue of his acceptance of the post, that his functional activity may be criticized and subject to media accountability without however this entitling the press to invade his private life, unless it has a direct bearing on his public behavior' (Fahmy, 2009: 89).

The Iraqi legislator in the Penal Code of 1969, addressed this issue indirectly by giving permission to provide evidence of the truth of what has been attributed to public official or someone charged with a public service and it is linked to his position, the offence is eliminated (Iraqi Penal Code, 1969, Art. 433/2). However, there have been significant difficulties in its application to practice because this only applies to the criminal aspect of defamation, and not to all forms of permissible journalistic criticism, which need to be clearly defined and comprehensively outlined in the law.

B. The Harm Arising from Journalistic Abuse and Its Types

Iraqi law has several forms of harm resulting from the abuse of press freedom, which can be divided into two major categories: material harm and moral harm. Material harm is manifested in the damage suffered by the person directly from the use of the material, including the loss of employment, loss of business goodwill, and the destruction of his or her professional opportunities because of damages or due to news of a falsehood, such as defamation of character or false information. Article 202 of the Iraqi Civil Code stated that there should be compensation for every act that causes damage to the body or property of the injured party, and Article 204 of the Iraqi Civil Code confirmed compensation for every transgression that causes any other harm to another.

On the other hand, moral harm is the most prevalent form of claims relating to journalistic abuse, and the most difficult to evaluate and demonstrate. The Iraqi Civil Code, 1951, Art. 205 recognised moral harm as a basis for the claim for compensation, where psychological pain was used as a measure of the quantum of moral harm. Moral injury in the realm of freedom of the press involves reputational, honour, standing, psychological or insulting damage to the target, distortion of their social and professional image as well as violation of private life. Al-Aboudi has pointed out that proof of the moral damage caused by journalistic defamation is to be assessed by the court based on a series of presumptions, and the circumstances surrounding the allegation, proof in this regard is to be presented in all forms of proof accepted by law (Al-Aboudi, 2010: 198).

Freedom of the Press and Its Limits in Islamic Jurisprudence

Although classical Islamic jurisprudence does not know the concept of the press as it exists today, the basic principles underlying it are fully developed. Contemporary Islamic scholars agree that the press in general fits into the category of "information" (i'lam) and is subject to certain well-defined Sharia principles that relate specifically to ensuring reliable information for the benefit of society. These principles are the source of many of the most important guidelines on freedom of the press and the responsibilities of the press in society. God Almighty said in His Book: "And if there comes to you, O Messenger, an announcement with news, verify it, that you may not be like those who have denied before, and be most sorry" (49:6). By the Book of God Almighty, it is incumbent upon all Muslims to ensure reliable information and verification before publishing any news.

It may be inferred from this noble verse, and from verses of similar import, that the media professional, or news transmitter, is obliged, according to Sharia, to ascertain the truth of the news before publishing or transmitting it, and that failure to do so renders him accountable to Sharia and liable to pay daman (indemnity) for the damage suffered by the subject of the news. In addition, the Qur'an's prohibition of backbiting, talebearing, and calumny is, by itself, an integral part of Sharia restrictions on freedom of the press, forbidding the journalist or media professional from publishing or transmitting any information likely to injure the reputation and dignity of individuals without due justification. God Almighty has enjoined upon the Muslim the obligation to air his views; He has not made it a mere option or a privilege. He says: "... And let there be [arising] from you a nation inviting to [all that is] good, enjoining what is right and forbidding what is wrong, and those will be the successful." (Surat Al Imran, verse 104). The Messenger of God said: "... Let no man's awe of the people prevent him from speaking the truth when he knows it" (Al-Murtada, Ithaf al-Sada al-Muttaqin bi Sharh Ihya', n.d.: p. 9). Furthermore, the pure Imams (peace be upon them) imitated the practice of our Beloved Prophet (peace be upon him), Who said: "By Him in Whose hand is my soul, if anyone

reviles me, then my successor should act leniently towards the reviler and not retaliate. God Almighty has bestowed upon me tongue, heart, and power; but the reviler does not seek God's pleasure, rather he seeks to wound me." When Ali ibn Abi Talib (peace be upon him), the Commander of the Faithful, was subjected to criticisms and reproaches, he granted those critics and reproachers freedom of speech; he did not punish or retaliate against them, although they did not seek the pleasure of God Almighty (Najati, *The Theory of Political Crime in Comparative Positive Laws and in Islamic Sharia*, 1983: p. 365).

Freedom of the Press in Iranian Law and Its Legislative and Judicial Controls

Freedom of the press was controlled by Iranian law, which included a multi-layered system of laws based on the constitution, Press Law, Civil Liability Law and the Islamic Penal Code. Article 6 of the Iranian Press Law (as amended in 1379 SH/2000 CE) guarantees the liberty of publications and the Press to express their demands while listing 17 clauses that contain the restrictions on the liberty of publications and the Press. (Iranian Press Law, 1379 SH, Art. 6). Amongst these are: breaking the foundations of Islam, spreading rumours and statements that contradict the facts, altering the words of others, and causing harm to public and private rights.

Regarding citizens' liability in case of any kind of abuse in the profession of journalism, it is written in Article 1 of the Iranian Civil Liability Law of 1339 SH/1960 CE that all of those who intentionally or negligently cause injure to the life, body, property, freedom, reputation or commercial goodwill of another shall be held legally responsible (Iranian Civil Liability Law, 1339 SH, Art. 1). In contrast, according to article 8 of the Iranian Civil Liability Law of 1339 SH/1960 CE, "whoever publishes an item or a statement that affects the standing, esteem and position of another person and infringes on such position, is liable to compensate for damage to the injured person" (Iranian Civil Liability Law, 1339 SH, Art. 8). Also, in accordance with article 10 of the Iranian Civil Liability Law of 1339 SH/1960 CE, the judge "may require the obligated party to make a public apology or publish the judgment in the press and take other remedial measures such as removing the damaging item". The author of the Iranian treatise on Civil Procedure Bahrami Ahmadi states that such measures are not only economic in nature but are also an innovative development in Iranian law and are also more than the measures in some comparative laws" (Bahrami Ahmadi, 1395 SH: 88). In the perspective of Civil Liability Law, the procedural aspect is related to the article 3 stating that "the court is at liberty to determine the form of payment of the compensation for damages according to the circumstances of the case and the conduct of the parties,... and it takes into consideration the impact of the damage and compensation therefor on the parties... and determines whether compensation for damages is to be paid in a lump sum or annually and decides on the form of payment and the right of the person ordered to pay to defer payment or provide security" (Mohseni, Saeed, and Seyyed Mohammad Mahdi Qabuli Dorafshan, 1395: p. 46).

Fourth: Freedom of Assembly and Peaceful Demonstration between Legitimacy and Abuse

The Legal Framework of Freedom of Demonstration in Iraqi Law and Its Problems

The Iraqi Constitution of 2005, currently in force, guaranteed freedom of assembly and peaceful demonstration within the general framework of the freedoms of expression provided for in Article 38, on the condition that demonstration not violate public order and morality (Iraqi Constitution, 2005, Art. 38). Article 220 of the Iraqi Penal Code No. 111 of 1969 had defined unlawful assembly (tajamhur) as "a gathering of no fewer than five individuals in a public place of such a nature as to disturb public security, coupled with their refusal of the order issued to them to disperse" (Iraqi Penal Code, 1969, Art. 220). Coalition Provisional Authority Order No. 19 of 2003, however, suspended the operation of this Article and those following it, on the ground that they "unreasonably restrict the right of individuals to freedom of expression and their right to political assembly," which produced a legislative vacuum that has not been filled to this day by a special law on assemblies and demonstrations.

A. The Conditions of Legitimate Peaceful Demonstration in Iraqi Law

The Iraqi law has formulated criteria, based on the principles of the constitution and other laws, according to which a rally can be regarded as an exercise of the right of freedom of expression. The first criterion is a complete lack of any elements of violence, threats, and coercion; otherwise, a rally turns from an event of the guaranteed right to assembly into an offense. The second criterion is the rally's aim; it should pursue a legitimate and constitutional goal or question, not violate the rights of others or threaten societal safety and order. The third criterion is the location of the rally; it should be organized on a road or in another public

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place accessible to all citizens. Finally, the rally should not violate the principles of public order and morality explicitly mentioned in the Constitution (Al-Aboudi, 2010: 223).

In practical experience, Iraq has seen many cases of the use of force against peaceful protests by the executive authority, such as what occurred during Tishreen (October) 2019 when there was a near complete ban on internet service to prevent the spread of news about the protest, or when the executive authority used force against peaceful demonstrators, all of which were violations of citizens' constitutional rights to peaceful protest. It is not always citizens against authorities who are abusing; authorities against citizens who are abusing.

Freedom of Demonstration in Islamic Jurisprudence and Its Foundation

Although classical Islamic jurisprudence did not know the concept of "peaceful demonstration" in its modern terminology, it recognised a set of collective practices which are in their essence a legitimate expression of collective opinion consistent with the spirit of the right of peaceful demonstration. The Qur'anic principle of consultation (shura), established by the words of the Almighty: "and whose affair is [determined by] consultation among themselves" (Al-Shura: 38), founds the collective expression of opinion and the making of the popular voice heard before the authority. Likewise, the principle of enjoining good and forbidding evil legitimises, in some of its collective forms, a form of organised collective expression in the face of wrongful practices.

The question of resisting the unjust ruler, in general, had a detailed answer from Islamic jurisprudence, with regard to non-violent resistance, criticism and justifying the policy of the ruler were allowed, but armed resistance was not, unless in exceptional cases, and under strict conditions. Ibn Qayyim al-Jawziyya said: "Public condemnation of the tyrant is allowed, and even necessary, as long as it is conducted in accordance with Sharia, with a process, and using valid arguments that are not subject to any doubt" (Ibn Qayyim al-Jawziyya, 1997: 356).

Freedom of Assembly and Demonstration in Iranian Law

Constitution of the Islamic Republic of Iran, which comprises the basic law in the country, stipulated the rights to freedom of assembly and demonstration under a condition that "gathering and rallies shall be unarmed and shall not damage the foundation of Islam" (Iranian Constitution, 1979, Principle 27). On the other hand, the law on the manner of activity of political parties and groups of Iran also regulated the freedoms of gathering and assembly and demonstrations in the country. According to the law, "licensed political parties may gather, and demonstrate provided that they notify the competent authority and specify the subject, time, place and names of speakers" (Iranian Parties Law, 1395 SH, Art. 13).

It is important to note that the Iranian law has a fundamental distinction between demonstration that involves legitimate rights of collective expression within the constitutional and legal framework, and assembly that becomes incitement to destabilisation or infringement on national security. Based on Iranian law, Movahed has confirmed that the dividing line between the legitimate and the prohibited in freedom of demonstration is decided by three criteria: the demonstration's method, its announced and actual purpose, and the social resultant after the demonstration on the public order (Movahed, 1401 SH: 143).

Fifth: Grounds for Exemption from Civil Liability Arising from Abuse of Expression

Grounds for Exemption from Liability in Iraqi Law

The Iraqi law stipulates a number of grounds for exemption from civil liability for abusing freedom of expression. Together, they comprise a system of guarantees that exclude curtailment of the right to freedom of expression on the grounds of civil liability. The law determines four general grounds for exemption from civil liability for abusing freedom of expression, including legitimate defense, the exercise of a right, consent, and coercion (Al-Sanhuri, 1998: 847).

A. Legitimate Defence as a Ground for Exemption from Liability

Legitimate defence is one of the bases of exemption from liability for damages prescribed by the Iraqi law that allows a person to use abusive expressions for the purpose of protecting himself or another person against an aggression. Three factors must coincide in order to exempt a person who used abusive expressions in legitimate defence from civil liability for damages. Firstly, an aggression repelled by force should be real or perceived as immediate. Secondly, the defence measure should be limited to what is necessary to repel the aggression. Thirdly, it should not be possible to resort to other measures less harmful to the aggressor in order to achieve the same result. According to the Iraqi jurisprudence, legitimate defence as a basis of exemption from civil liability for damages presupposes that the protected side should defend himself against false accusations, refute lies, and reveal the truth to stop the aggression (Al-Hakim, 2006: 178).

B. The Exercise of a Right as a Ground for Exemption from Liability

The exercise of a right is one of the most widespread bases for the exemption from civil liability in the sphere of expression, as it covers several cases in which the expression is legitimate despite its possible harmfulness towards others. Most significant of them in the Iraqi law are the following: the right to criticize on permissible grounds as described above; the right to give testimony to the competent judicial authorities even if it contains damaging statements about the person; the right to report to the authorities about the persons accused of committing a crime; the right of defense in court and the right to use all the remedies available in law. Al-Hakim warned that "the exercise of a right stops at the limits of its legitimate purpose; whenever its holder exceeds it and his exercise becomes a means of harming others rather than achieving the purpose for which it was established, it transforms into an abuse entailing liability" (Al-Hakim, 2006: 195).

C. Consent as a Ground for Exemption from Liability

The consent of the injured party was one of the grounds for exemption from civil liability for harmful communication. It presupposes the consent of the injured party to the statement or action of the communicator, which is derived either from specific circumstances or from the actual consent of the communicator. In particular, among the most common ways of expressing such consent are: accepting by a public official of criticism and control of his public activity in the form of his own assumption of public office or as a result of the decision of a journalist to cover him. Subsequently, another way of expressing consent may be the fact of the journalist's consent to provide personal information in connection with the preparation of biographical radio programs or television (Al-Jubouri, 2004:334). The consent of the injured party does not release the communicator from responsibility, but the responsibility is borne within the limits of the explicitly expressed consent, while any other statements of the communicator will still be considered as his liability to the victim.

D. Coercion as a Ground for Exemption from Liability

Coercion constitutes a ground for exemption from civil liability in the field of expression where a person is compelled under its pressure to issue an expression that inflicts harm upon another. The Iraqi Civil Code defined coercion in Article 112 as "compelling an individual, without right, to perform an act without his consent" (Iraqi Civil Code, 1951, Art. 112). The Iraqi Civil Code requires in Article 113, for coercion to be legally recognised, "that the coercer be capable of carrying out his threat and that the coerced person fear that it will befall him should he not perform the act he is coerced to do" (Iraqi Civil Code, 1951, Art. 113); coercion likewise varies with the differing circumstances of persons, their age, their social positions, and the degree of their susceptibility and suffering (Iraqi Civil Code, 1951, Art. 114).

Grounds for Exemption from Liability in Islamic Jurisprudence

Islamic jurisprudence recognized certain grounds for exempting an individual or a speaker from Sharia liability for expression issued from a person's speech, which may on the surface contain abusive language and lead to damages. The first reason for exemption is necessity and coercion, based on the principle that "necessities render the prohibited permissible," which makes a person who issued harmful expression under coercion exempt since the coercion is removed from him in Sharia terms. The second reason is legitimate *ijtihad* (independent reasoning). Islamic jurisprudence recognizes that a *mujtahid* (a Muslim scholar qualified to perform *ijtihad*) who expresses an opinion that contradicts an established Islamic law is not subject to Sharia liability for his opinion if it was not explicitly formulated by God and His Prophet (peace be upon him and his family), and the *mujtahid* can be rewarded for his correct opinion just the same as for an incorrect one, as stated by the Prophet. The third reason is the individual's obligatory sincere counsel (*nasiha*) to God,

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His Messenger, the leaders of the Muslims, and their people, which is a fundamental religious obligation, since the Noble Prophet said, "Religion is sincere counsel," which also constitutes an exemption from liability if the sincere opinion expressed does not comply with Sharia controls and restrictions, as noted by Al-Ghazali (1993: 198).

Perhaps this is also the most significant difference between Islamic jurisprudence in principle and the other systems in this respect that, in addition to the criterion of the observance of a particular external formalization of exemption, it takes into account also the internal subjective side of exemption – the will, the aim, the intent. And if by the will, the aim, or the intent to bring about evil, which hides or is justified by *ijtihad*, opinion, or necessity, a person commits a sin according to Sharia, then such a sin is at least partially atoned for by an exemption from liability.

Grounds for Exemption from Liability in Iranian Law

The most obvious difference between the two jurisdictions is that Iranian law is more developed when it comes to the grounds for exemption, as opposed to Iraqi law. This can be attributed to the fact that in Iran, exemptions are divided into three distinct and separate grounds with different conditions and scope.

First: The Legal Duty of the Media as a Ground for Exemption

This ground is one of the most typical in the Iranian legal system concerning media liability. According to this ground, the media personality or a company is not responsible for civil liability if harmful expressions are published or distributed through media resources when following a particular legal duty, which the organization is forced to comply with. One example of such a situation might be Principle 69 of the Iranian Constitution, which emphasizes the public availability of the Islamic Consultative Assembly and the media's responsibility to provide the exact reports of their sessions (Iranian Constitution, 1979, Principle 69). In this case, if any person's honor and credibility are damaged due to statements made during the plenary meetings, the victim's family or the person himself may not sue the press because it is a mandatory duty required by the Constitution, and mandatory duties cannot entail civil liability for their consequences.

Second: The Order of the Judicial or Higher Administrative Authority as a Ground for Exemption

The person or media is exempt from civil liability when, during the publication of information, its harmful dissemination results from a judicial or administrative decision passed by the official authority having general competence. Article 96 of the Iranian Law on the Management of the Services of the State Executive Apparatus regulated this issue by stipulating that the employee should comply with the written orders of his superiors while providing him with a right to inform them in writing about the illegality of the given order (Iranian Executive Apparatus Law, 1386 SH, Art. 96). In such a situation, if the superior repeats his order in writing despite being informed about its illegality, the executor is considered to be completely discharged from responsibility as his superior is regarded as the true order issuer, and thus, the one who should be held accountable for damages.

Third: Coercion and Compulsion as a Ground for Exemption

Coercion is a ground for exemption from liability in Iranian law in more detailed formulation than in the Iraqi law. According to the Iranian law, for coercion to be used as a ground for exemption from liability, there are two conditions. The first is that the threat must be strong enough so that a person cannot withstand it nor get help from elsewhere. The second is that the person who was coerced must have acted strictly in accordance with the orders given to him by the person who coerced him. As soon as he has gone beyond these orders, even to some degree, he must bear the guilt for the deed.

Sixth: The Comparative Study – Points of Agreement and Difference among the Three Systems

The Fundamental Points of Agreement among the Three Systems

A careful comparative analysis of the three systems under consideration leads to the identification of several common fundamental denominators on which it would be possible to agree when attempting to formulate a unified or, at least, coordinated law in this field. Movahed, when comparing Islamic law with modern positive

laws, also notes common fundamental principles that embody the universal human idea of the need for a balance between two polar concepts. He writes that “the convergence between what Islamic jurisprudence has to say and what modern positive laws have to say in the matter of disciplining the freedom of expression is testimony to the universality of human values, all of which seek to strike a balance between freedom and responsibility” (Movahed, 1401 SH: 187).

First: the three systems give the recognition to principle of the balance between the right of freedom of expression and the rights of others, and the principle that the freedom of expression does not extend to the point of causing harm to others. This principle is known in the Islamic jurisprudence as the maxim “no harm shall be inflicted or reciprocated” which is articulated in the Iranian Constitution (Iranian Constitution, 1979, Principle 40) and the Article 7 of the Iraqi Civil Code on the abuse of rights (Iraqi Civil Code, 1951, Art. 7).

Second, the three systems coincide on the fact that good faith and reliance upon an established fact are two of the most important requirements for legitimate and protected criticism. In another word, the first level of the differentiating conditions for permissible criticism, which is common to the three systems, is that good faith and reliance upon an established fact precede any of the other requirements. Al-Sanhuri stated that “good faith constitutes the moral cornerstone of every integrated legal system, and disregarding it in the evaluation of acts disturbs the essential balance between freedom and responsibility” (Al-Sanhuri, 1998: 810).

Third: the three systems accept that there is less protection for public figures than for ordinary individuals in respect of permissible criticism of them. The three systems provide this differential treatment on the grounds that, by accepting public responsibilities, public figures have ‘willingly subjected themselves to a wider acceptance of liability for criticisms made about them’ and that ‘in the interests of openness and the right to know’, public figures should be held to this standard (Al-Douri, 2005: 156).

The Fundamental Points of Difference among the Three Systems

While there are several aspects in which the ideas presented in the readings could be considered similar, there are also major differences of paramount importance that must also be stressed.

A brief comparison is provided below:

First: The three systems are profoundly different with regard to the frame of reference (by which they restrict freedom of expression). Islamic jurisprudence relies on a religious-moral frame of reference according to which the free expression of one’s own opinion is a religious obligation for the Muslim. Consequently, the Muslim has to obey this Islamic obligation, and, unlike the other systems, the control is internalized, not just external. Iraqi law relies on a positive frame of reference, one that is oriented toward the individual and his rights, and which limits freedom of expression for the protection of the general and others’ rights. Iranian law enshrines both dimensions in a hybrid legislative structure that seeks to harmonize the two (Nosrati, 1394 SH: 56).

Second: Iranian law is distinguished by its recognition of a ground for exemption connected with the legal duty of the media, which has no counterpart in Iraqi law, whereas Islamic jurisprudence is distinguished by its recognition of a ground for exemption connected with legitimate *ijtihad* and another connected with obligatory sincere counsel, both of which have no counterpart in the other two laws. These variations in the grounds for exemption reflect different legal philosophies in setting the priorities of protection between freedom of expression and the rights of others (Bahrami Ahmadi, 1395 SH: 124).

Third: The law of Iraq lacks a substantial legislative cover for the freedom of the press or freedom of demonstration as compared to Iran’s law that possesses a comprehensive structure for such freedoms despite their restrictive nature to a certain extent, which, in turn, is considered to be an oppression tool of the State against the masses. Mubarak notes that “freedom is not a sign of the absence of legislation, but rather the reverse since the lack of detailed formulation provides a basis for the authorities to apply it in a way that suppresses dissent at one moment and then to use it to liberate the transgressor” (Mubarak, 1989: 78).

Fourth: Islamic jurisprudence is distinct from the other two laws in that it incorporates both the inner and outer aspects of discipline in a manner that is unrivalled by the other three laws. As a result, Islamic jurisprudence is more effective in enforcing social discipline and achieving voluntary compliance, which is

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the ultimate form of social control. Because of this, Islamic jurisprudence continues to serve as a cornerstone in the legislative frameworks of states that have a sizeable Muslim population.

Seventh: Conclusion, Findings, and Recommendations

Findings

Having completed extensive research and analysis, the study has revealed a number of significant results that could potentially be applied in practice. Therefore, the conclusions that could be drawn from the study are the following:

First Finding: The study revealed that Islam's jurisprudence was the first to appear and, in addition to being the deepest, to develop the concept of the dividing line between the permissible use of expression and its abuse using established jurisprudential maxims that simultaneously address the ethical and legal aspects, which modern positive law does not yet fully cover. The maxim about no harm being inflicted or reciprocated along with related maxims developed from it can be used as an original basis for modern legislation regulating matters of expression.

Second Finding: The study demonstrated that there is a clear and substantial legislative vacuum in Iraq regarding the regulation of the press and, in particular, freedom of peaceful assembly. In other words, the researchers showed that the Iraqi law does not have detailed enough rules to ensure and protect these freedoms from being abused by the government.

Third Finding: The research has revealed that the situation of dependence on an established fact, together with the situation of public interest and the situation of good faith, is the most essential criteria determining the frame of allowable criticism in the three theories, and, correspondingly, the violation of any of these situations is one of the most crucial abuses of the right of expression and the most substantial conditions for full liability.

Fourth Finding: The study concluded that there is an immediate scientific and practical need to revise and develop the legislative framework that regulates freedom of expression in the three systems in order to keep up with the rapid development of the media and means of expression and new forms of abuse that the legislations do not address in an appropriate and comprehensive manner.

Recommendations

First Recommendation: The research recommends that the Iraqi legislator adopts a special law on the press and media, which clearly stipulates freedoms and restrictions on the press, permissible and non-permissible criticism, exemptions from responsibility, and procedures for reviewing complaints and cases, in order to regulate the current gap in legislation and ensure the protection of rights provided for by the Constitution.

Second Recommendation: The research suggests that the Iraqi legislature pass a specific law on freedom of assembly and demonstrations that specify the conditions for exercising it, controls, procedures, the judiciary's supervision mechanisms, and safeguards against the executive branch's abuse of this freedom.

Third Recommendation: The research suggests using the Islamic jurisprudential system to formulate objective and precise criteria for determining good faith in the field of expression, including the maxim "no harm shall be inflicted or reciprocated," the maxim of averting corruptions, and the principles of verification of news, so as to contribute to modern legal thought with fresh sources of profound meaning and well-foundedness.

Fourth Recommendation: The research suggests that the mechanisms of compensation for moral damage resulting from the abuse of communication should be developed in the regulation of Iraqi law. In turn, measures to compensate moral damage should include non-monetary moral compensation such as a public apology, publication of a correction, and deletion of information on the Internet, as was done in the regulation under Article 10 of the Iranian Civil liability law.

Fifth Recommendation: The research suggests that the Iraqi and Iranian legislatures should strive to promote a balanced approach in exercising media and digital freedom of expression while respecting the right to reputation, honor, and privacy without veering toward either of the two extremes - overly restrictive measures that totally devalue legitimate freedom of expression and dilute the rights enshrined in constitutions or go

on the other extreme of providing absolute license that ends up using freedom of expression as a weapon against individuals and society at large.

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