An Introduction to Hermeneutics in Criminal law

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Abstract: Hermeneutics is a special branch of knowledge - a new phenomenon in modernity age- which has addressed “the process of understanding an effect” by scrutinizing methodology and looks for a way to “conceive phenomena” better. Hermeneutics is a knowledge which explores norms and principles of texts description and is in turn the rationality of dialogue which paves the ground to conceive the text correctly as well as norms to clarify ambiguous texts. The main paradigm of hermeneutics was a divine model which described holy texts. Simultaneous to dissemination and acceptance of Rome Laws in the middle age and the necessity of interpretations, legal hermeneutics was emerged as a way to describe laws. Since in criminal law field the persecutor looks for legal norms and meanings especially criminology and teachings for social defense, it describes them in order achieve to such comments. Such comments and descriptions are influenced by culture as well as time and place requirements as the focal point of hermeneutics as a way to describe and contemplate criminal law. In criminal law field, hermeneutics attempts to provide principles by which one can interpret laws so that it removes any tyranny due to laws inefficiency. To this end, we clarify the concept of hermeneutics and its origination in laws and to expound these principles and their impact on legal description in present paper.

Keywords: hermeneutics, critical – legal hermeneutics, text discourse, objectivity, prejudice.

Introduction

Criminal law claims that it creates and keeps the balance between individual rights and public security/safety. Undoubtedly, one should say that such balance cannot be created or kept without intervention of legal comments since, although, lawmakers claim comprehensives and clarification of laws, it is clear that the existence of ambiguity, deficiency and silence in laws and recourses to interpretations are inevitable.

Noteworthy, most lawyers believe that law interpretation is necessary only in the case of ambiguity and conflict; laws that have clearly provided legal rules free from any ambiguity and conflict do not need any mental attempt. Implementing such laws does not need to recourse to interpretative norms and rules. Interpretation of clear law is time wasting and even dangerous. It means to derive from law and cannot be negligible. Interpreting clear law is to replace rules by personal beliefs. According to a proverb: “clear terms need no explanation.” However, one should acknowledge that although such belief is seen as relevant principle and may be seen right in the first glance, one should know that clarification and comprehensiveness of law is an assumption which cannot be proved otherwise through interpretation (Amiri, Jalil, criminal laws interpretation, Laws and Political Science School Journal, vol. 41, pp. 9 – 12, 1998).

Additionally, what’s clear and comprehensive law in real world? Exploring judicial systems shows that the simplest and clearest legal descriptions are followed by inevitable questions. For instance, Islamic Criminal law has always a clear description on fraud, theft, chastity and similar crimes while judicial procedure has create numerous questions against such apparently clear and similar descriptions and has caused varied votes due to varied comments. It indicates that clarity and comprehensiveness of law is relative and differs person by person, item by item and time by time.

Thus, one of the issues which confirm the application of hermeneutics in law description is the fact that no word is fully and decisively clear. For more clarification, consider an example. In a case between an importing company (Frigaliment) and an international commerce company (B.N.S) in the court where the main demand was to clarify the real meaning of their mutual contract. According to the contract, B.N.S was committed to sell 750,000 iced chickens to its complainant (Frigaliment). Upon delivery the cargo in Switzerland, the company found that it takes long time to cook chickens and they were not fresh and baked as expected. Although the term “chicken” is precise and without any ambiguity, in this case the court should determining its real meaning. The complainant believe that the term has its own commercial application while defendant claimed that it not a global term. To determine the right meaning of “chicken”, a technical poultry expert was witnessed. He said that chicken be anything rather than goose, duck and turkey. Thus, the problem was that no party had identical conception on this concept. Therefore, to conduct the right procedure, court should find another implicit meaning for this term by using hermeneutics via comprehensive interpretation of the contract. In the case that it is not resolved by practical solutions one should analyze social, linguistic and cultural conditions governing this contract conclusion.
Therefore, one can claim that after confirming the subject, one is looking for its verdict in law and can common. If prosecutor recourses to such judicial techniques as experts' opinions, forensic law, judicial police and so non to find the reality, it is fully self - relied in issuing the verdict. Thus, in many cases at criminal law field, prosecutors looks for legal and criminalological rules and meanings as well as social defense teachings in order to use them in his/her determination. Therefore, to achieve it, the prosecutor construes them which are the focal point in hermeneutics as a way of interpretation and contemplation and laws. Hence, we plan to elucidate the concept of hermeneutics, its home and expansion scope, interpretations, conception methods, prejudgment and pre-contemplations and its impact on prosecutors’ decisions in terms of hermeneutics views.

1. Hermeneutics theoretical bases

Greek hermeneutics term was used since Plato’s age. Also, Aristotle used it for naming a part of its book “” on discussing the rationality of propositions and studied the structure of human words. As a branch of knowledge, hermeneutics was not emerged till renaissance and religious reformism age (16th century); therefore, it is a new emerging phenomenon in modernity age (Vaezi, Ahmed, an introduction to hermeneutics, Culture and Thought Research Center, 2004: 25).

In 17th century, hermeneutics was coined to point out discussion on the way of construing texts. At that time, it was recognized as classic hermeneutics and is a knowledge which explores text construe norms and principles and is in fact dialogue rationality which creates the way of perceiving the text correctly and removes ambiguity from vague texts. In 16th and 17th centuries, many people were influenced by reformist dispositions of religious modification movement and Protestantism in the Christianity established by Martin Looter as the result of opposition to the authority of church to construe Holy Book. Such separated people from church believed that conceiving the texts is possible and ordinary while they felt they need norms and principles to refer to Holy Book and to conceive it by which they could prevent likely misconceptions. In fact, classic hermeneutics was a response to this need (Husseinzaedeh, Mohammad, an introduction to cognition and religious cognition basics, Imam Khomeini Institute, 2006, pp. 109 – 110). Semantically, hermeneutics is seen more in methodology of contemplation as a way to construe Holy book. Hence, Donhaver (1654) called his work as “Holy hermeneutics”. He defined hermeneutics as necessary rules to construe Holy Book. Based on classic hermeneutics, one text has no more than one interpretation (Saeedy Rooshan, Mohammad Bagher, analyzing Holy Quran and the methodology to understand it, Hawza and University Institute p. 91).

Although the most important literal hermeneutics model after ancient Greek and Rome was divine model attempted to construe holy texts of church’s laws, in parallel there was another tradition of legal hermeneutics. Legal Hermeneutics model was contradictorily shaped around two sets of Rome’s laws: “The Twelve Tables” in 5th century B.C and “Corpus Iuris Civils” in 6th century A.C. Although they were fully different, both attempted to express divinity and abstract laws in manner which need no comment. The Twelve Tables addressed conflicted legal issues aimed at releasing them from Pope’s hands. Eastern Rome Empire, Justine, announced formally a set of Roma laws and attached his order: “no one – whether those ones who are currently executing the laws or those one who will be law executors in future – cannot image to compile their own interpretations on laws.” Later, it was emphasized that interpreting and distorting the law are the same. Therefore, a lawyer or someone who worked on legal hermeneutics should recognize the law and should follow it rather than construing it since law authority was more powerful that construe (Goodrich, Peter, legal hermeneutics, translated by Behrooz Jandaghi, Jurisprudence and Laws Journal, 2004: 213).

On this basis, hermeneutics is a discipline which studies legal interpretation process. The emergence of each kind of hermeneutics was simultaneous to the dissemination of Rome’s laws admission in the Middle Age. Hence, keeping, construing and transferring important texts of Rome’s laws paved the ground for building such certain type of hermeneutics referred to a rational course which close relations to the nature and pre-assumptions of construe (ibid: 211).

The norms of legal hermeneutics were invented by humanists. The key principle on such approach in Rome’s Laws is: “knowing the law does not mean to know its words; rather, it is to recognize power and influence.” Used terms in law are compared to “main reason”, “intention”, “cause”, “logic”, “aim” and real concept. Legal contexture does not simply refer to scales in expanding the laws; rather, it is related to principles, norms, local laws and traditions (Khosropanah, Abdulhussein, new speech, Cultural Research Center, 2000: 218).

Thus, the aim of legal hermeneutics is to provide ethical principles on composing legal texts. These are principles which relate words to practices and their most philosophical manifestation, written laws to justice limitations (ibid: 206). On this basis, hermeneutics proponents and theoreticians have raised three theories explained in next chapters in detail.

2. Hermeneutics and laws

As mentioned before, although the main literal hermeneutics model after ancient Greece and Rome was divine model attempted to construe holy texts of church’s laws, in parallel there was another tradition of legal hermeneutics. Hence, legal hermeneutics is used in two interpretations today:

1. The general interpretation means the way of exploring the content of the text. This approach highly applied by Anglo-Saxon lawyers pay more attention to Diltai’s attitude.

2. Special interpretation is a conceptual theory which is the outcome of evolved hermeneutics by Gadamer.
As mentioned, legal hermeneutics in general interpretation roots in ancient Rome. In this tradition by which the laws were written, the commenter tasked to keep ancient and traditional legal texts and translate them to contemporary condition which is highly far from time and location of compiling. Conventional patterns of legal hermeneutics were shaped by two sets of Tome laws namely “The Twelve Tables” (the 5th century B.C.) and “Corpus Iuris Civilis” (the 6th century A.C.). We are facing with a revolution in interpretation in the 12th and 13th centuries by which the commentator uses literal explanations to understand the text. After ancient Rome age, legal hermeneutics faced with serious transformations including explainers’ school. By the emergence of this school in 14th century, Tome Laws were seriously transformed. Relevant lawyers looked for making Rome law and proper rules for the society similar to justify their legal facilities (Kamran Aghayi, descriptive schools in legal hermeneutics, Mizan Publications, 2009, p. 242).

During renaissance, descriptive theories were expanded more and went beyond literal interpretations. In this age, laws were a knowledge to which meaning was referred in order to understand it in tradition and description. In this age, lawyers added terms such as law spirit to legal encyclopedias. In fact, these terms point out the meaning explored or evolved in linguistic. In this age, hermeneutics was seen as a complementary way to understand the text. When it was approved that rules and traditions are not able to enter contemporary conditions without interpretation, hermeneutics accepted this task to conceive more than what is compiled and it used techniques of other sciences.

Afterwards, we observe Ramism school established by Petrous Ramos (ibid: 245). Ramos was an author who started anti-Aristotle thoughts before Decart. Ramos believed that Aristotle’s logic was fully useless and he was a catholic divinity critic and was finally used in massacre of Saint Bartholomew in Paris. He challenged the statement by Aristotle that “great proposition can be achieved through argument” and then asked whether Divinity needed Aristotle’s logic to point out human or not. Therefore, he believed that it is linguistics which is a mediator to transfer facts from the Divinity to human. In the meantime, Ramism School opposes rational integration seen in Holy Thomai Acquinas. According to this school, religious belief is shaped by empathy among human and religious event. Also, it is not sufficient to argue for expressing the facts; rather, proper forms of argument are similar important. Obviously, this point changes linguistics to research subject and the act which covers this is “discourse” since one can analyze terms an accent upon finding the subject in discourse.

Thus, Ramism raised two questions in laws: what is the relationship between laws and modern intellectual systems? What is the relationship between logic and discourse? Since Ramism movement was simultaneous to nationalism in Europe, its intellectual type helped that each country distinguishes its own legal system.

After Ramosim in legal hermeneutics, we face with John Martin Claudnios. As mentioned before, he believed that liberal arts are based on “interpretation art” and hermeneutics as another name for it. He believed that there are uncertainties in understanding written and verbal terms which make it difficult to conceive them fully. According to him, the art is to conceive written and verbal expressions fully. Caludnios’ hermeneutics is what he mentioned joint rationality of both lawmaker and construer. According to him, lawmaker sets rules based on rational structures and, on the same basis, the construer conceive them (Rikhthegaran, Mohammad Reza, logic and discussion on hermeneutics, Kongrehi Publications, 1999: 61 – 64).

Afterwards, Gadamer’s thoughts were observed in 20th century by compiling the book “fact and practice” and allocating it to legal hermeneutics by which remarkable development were observed in this area. In addition to accepting two linguistic and historical pillars emphasized by Shlaver Makher, he also added adaptation principle. It means that construer treats the text in his own world and adapts the text to his/her own world. Therefore, such mixture of text and construer is called adaptation principle. Therefore, Gadamer is text – oriented and believes that construer attempts to adapt his thoughts with lawmaker’s demand or Divinity words and has no right to change them. In fact, Gadamer calls it legal argument of laws by which the judge conceives legal texts. According to him, judge’s argument is not historic; rather, this historian has contemporary situation and asks the same questions accounted by judge. Also, Gadamer believes that need to legal hermeneutics emanated from law deficiency since one cannot limit to law text and the judge make crystallizes it in each special cases and this is adaptation principle. However, he cannot issue unpredicted comments therefore, his comment should be benchmarked by totality and the same measurement is emanated from judge’s decision and creates judicial trust. Therefore, comment is fully obliged to text and lawyer should release the text. Law is originated from value and normative system and finding the main meaning of law is to explore historic and value infrastructures motivated lawmaker to set laws and rules. Judge is not obliged to learn the intention of compliers and authors of laws; rather, he is tasked to learn changes in conditions and to create a new value function for law. He conceives law from and for current case. Therefore, he determines the meaning of law by interpreting its functionality and makes it objective (Kamran Aghayi, ibid: 251).

2.1. Legal – critical hermeneutics
Devising dynamic laws is a necessity in any legal system. However, it is always confronting such problems as gaps between norms and laws with their own outcomes like illegality and diversity in the ways of operationalizing the law. As mentioned above, hermeneutics teachings in laws discredited fundamentally the assumptions which believe laws are a set of interrelated and integrated sets of fixed laws. Some connoisseurs such as Frederick Carron van Savini in Germany provided their theories by critical and breakthrough reactions based on historic approaches in hermeneutics. He believed what could be named as legal critical hermeneutics that are based on different fields such as sociology, linguistics and
psychotherapy and he denied a legal set with objective and unit meanings in descriptive level (Porsaeed, Ramin, critical methodology and legal hermeneutics, Islamic Laws and Jurisprudence Research Journal, vo. 7, 2011, pp. 79 – 80). Issued verdicts on criminal cases for rape can be seen as an explicit document on applying legal critical hermeneutics theory in European criminal law. Well-known and challenging case (R.V.R) on marital rape in UK Court is one of such cases. Although the court protected the man from charge of marital rape, House of Lords cancelled marital rape impunity. In this verdict, House of Lords construed the laws by social conditions in order to protect human dignity as the main aim of European Human Rights Convention. Upon broad social discussion, such changes were posed in criminal law regime (Ashworth, A, Principles of criminal law. Oxford University Press, 2006, pp. 70-71). In USA, the first prosecution for marital rape was issued against James Chritin in 1979. Before that, marital rape was illegal in five states. Since then, several states have approved laws or experiments to confirm marital rape impunity. (Ashworth, A, Principles of) criminal law, Oxford University Press, 2006, pp. 70-71). All these decisions indicate the utilization of legal critical hermeneutics in judicial justice system.

2.2. Hermeneutics approach to criminal law interpretation

As mentioned above, “construe” and “contemplation” are used against hermeneutics. Hence, legal hermeneutics is either subject to the interpretation of laws and norms by law maker or on interpretation of decision by courts and/or citizens’ private contracts (Jafaritabar, Hassan, legal interpretative philosophy, Enteshar Company, 2009: 12). It explains implicitly that interpretation is a personal process between commenter and text of law. Criminal law and laws science doctrine always communicate implicitly that they have highly attempted for proper interpretation of criminal situations. Although criminal courts have not accepted explicitly hermeneutics in their judgments, its principles are practically seen in their judgments. Hermeneutics does not ignore norms on construe; rather, it mitigates comments by which one can construe laws to prevent tyranny due to law deficiency. In fact, using hermeneutics is to realize the inventive aims of law construe rather than its traditional interpretation (Ornowska, ibid, 251 – 252).

As mentioned, criminal courts deny using hermeneutics in their judgments while implementation of hermeneutics principles and methods are severally seen in their decisions. Therefore, we elucidate legal hermeneutics by expounding such principles as text discourse, objectivity of the rules and prejudice.

2.2.1. Text discourse

Gadamer believes that the fourth component is to comprehend collision of commenter and text horizons. Comprehension achieves through mixing the horizons of commenter and text. By a special semantic horizon, commenter refers to a text and since the text has its own semantic horizon, comprehension would be the offspring of their intertwining. Such collisions cause that construer achieves a meaning on text which may be not meant by author. It means that construer can achieve facts from text by raising questions, expectations and prejudgments (Nasri Abdullah, the elements of comprehension in Gadamer’s view, Religion and Wisdom Philosophy, 2004, vol. 4, p. 58).

Hence, in hermeneutics, it is assumed that each piece can find meaning only when it relates to total text and interpretation should be adjusted circularly to create a unique cycle of adaptation and modification. On the other hand, hermeneutics theories express implicitly that any uncritical application of comment may yield into a deadline in interpretation process (ibid, 268). It means that any comment on text in a society, tradition and intellectual flow emanated from its requirements irrespective of what author meant. However, in legal description, it is undeniable to necessity of lawmakers’ intention in approving such law. Exploring such intention, however, needs multidisciplinary researches on text and studying the impact by historic, political and social conditions. Thus, when construing criminal laws, it is always necessary to respect the text of law and lawmakers’ will and one should consider it as the starting point of legal dissection. (Ricoeur, P, The conflict of interpretations: Essays in hermeneutics. Evanston: Northwestern University Press, 1974, p 3.).

Thus this hermeneutics principle believes that one should respect text and the purpose of author in interpreting criminal laws and one should not ignore time requirements such as tradition, history, life conditions and the whole society in which the text is created and construed since hermeneutics expounds interpretation as a complicated and multidimensional relationship. On the other hand, fully text-oriented approach to interpretation limited to semantic analysis can only remove a part of legal problems with trivial traits. Therefore, it is necessary to release criminal laws from excessive constructivism and text – orientation in addition to keep fundamental methodological norms.

2.2.2. Objectivity of the rules

Another hermeneutics principle is to crystallize the laws. Hermeneutics assumptions are shaped by distinguishing objective and non-objective interpretation emanated from German hermeneutics now used in Italy (Ornowska, ibid, 263). Objectivity of the rules means to dissect laws in a particular manner rather than relying upon the text approved by lawmaker. However, this theory may be criticized that it is contradictory to crime and punishment legality. The response is that the aim of laws crystallization is that commenter can create a just equilibrium between laws and expediencies and consider that literal interpretation is preferred and one commenter should also consider the meaning, language and history of laws. In this line, Bundes Gerichtshof’s approach to object interpretation was highly efficient. In his recent judgments, he confirmed that German Constitutional Law does not accept surface positivism approach to laws interpretation and creative comment is not forbidden by law. Therefore, law interpretation is not limited to the meaning of terms; rather, one should...
also consider the logic and function of comment moment. It means that crystalizing texts plays a remarkable role in
criminal law (ibid, 264). In this line and since 1997, a new system on cash fines and punishments were considered in Polish
criminal law. There was no benchmark to consider minimum and maximum cash fines in Poland; thus, the amounts of
fines were adapted to monthly income of offenders by court determination in order to judge them fairly. Likewise, some
courts in Poland determine the amount of punishment by crime intensity and daily income of offenders (ibid).

2.2.3. Prejudgment
Gadamer believes that someone does not go to text mindless. Rather, he/she will be faced with a set of expectations and
prejudgments on text. Therefore, the beginning of any comprehension is accompanied by prejudgments. Not only
prejudgments do not act as a beaker against comprehension, but also they are a necessary condition. The roots of such
prejudgments should look for in tradition, questions and expectations of people. Gadamer criticizes intellectualism thinkers
who planned to remove prejudgments. According to him, prejudgments not only have a negative value but also one can
comprehend without them. He divided prejudgments into two wrong and false groups. He believes that false prejudgments
are the factors of miscomprehension. In the view of Gadamer, certain questions are raised for any commenter by which
he/she can construe the text. Without questions and expectations of commenter on text, he/she cannot achieve any
interpretation (Nasri, ibid: 59).

Thus, construers start interpretation process by their preliminary knowledge and beliefs. Hence, it has a straightforward
impact on final conclusion. Prejudgment means initial imagination on a non-special concept as the general opinion of a
judge. As Nelken notes: in initial steps (investigating judicial decision making procedure and laws construe), it is too
fruitful to study the culture of division courts as well as social groups and professional cooperation and interests (Nelken,

In some cases, an act may be seen as crime in a given culture. Therefore, culture, judge’s previous experiences, beliefs,
ethical principles or personal sensitivity are, inter alia, the most important components play a vital role in his judicial
description and determination based on prejudice. For instance, in article 202 of Polish Criminal law, possession, retain,
dissemination, importation and proliferation sexual stimulation material or rendering them in public is considered as a
crime. Therefore, when there is no concurrence on sexual stimulating contents, any evaluation is valid only by judge’s
decision. Besides, it is clear that the border between sexual stimulant contents is different for any person and such border
are determined by different factors (Ornowska, ibid, 270). Therefore, the judge clarifies the proposition by relying upon his
beliefs. We witness this in our domestic criminal law. An objective instance is Hijab-less, sexual affair, insult, family
violence, crimes against children and so on. In these crimes, disagreement on decisions can be seen more than other crimes
since judge’s perceptions depend on their culture, belief, ethics and personal sensitivity.

Conclusion
We found that some scientists believe that legal hermeneutics is emanated from law deficiency since one cannot limit to
law and judge must crystalize laws in a given case. However, he cannot issue unforeseen comments. Therefore, he should
use a benchmark to create judicial trust. Therefore, his comment is fully depended to text. It is the same principle dialogue
with text in commenting criminal law hermeneutics. It is said in this method that comprehension is the result of mixing the
horizons of commenter and text so that one should consider law text with law whole on the one hand and on the other
hand, comprehending the text by commenter is impacted by social and psychological factors grown in his/her life; it means
a multidimensional attitude on description which can play the effective role in adapting the laws and daily problems since
fully text-oriented approach to interpretation limited to semantic analysis can only remove a part of legal problems with
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addition to keep fundamental methodological norms.

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create a just equilibrium between laws and expediencies. Undoubtedly, it can play a vital role in removing lawmaking gaps
and adapting the laws to society and its demands.

Ultimately, prejudgment is an undeniable principle of criminal hermeneutics. Prejudgment means to imagine a non-special
concept on the results concerning interpretation process which is just general opinions of a judge. In this line, Damato
clarifies that prosecutor perceives the justice before making a decision by his own legal knowledge like other people. He
asserts: “for instance, you know that if you enter another person’s orange garden and use the fruits, you will be arrested
and will likely imprisoned. You assurance is not due to the fact that you have read the text of law and are aware of laws;
rather, it is due to the fact that you know that you have no right on fruits and using them can deprive the owner unfairly
form his endeavors. Therefore, we do not look at laws; rather, we can predict what law would say even though we do not
know the details since the society where we live considers it as “justice”. On this basis, the judge’s decision against theft is
not only impacted by law, but also by his perception on justice like us” (Anthony Damato, on laws and justice link”,

Therefore, culture, judge’s past experiences, beliefs, ethics and personal sensitivity are, inter alia, the most important
components that play a vital role in interpreting judicial decisions. In some cases, one can see that they have led into
judicial autocracy and judges have made criminalization that negates the principles of just proceedings. Thus it seems that the best solution to remove this challenge is special attention to attract professional and educated judges and their more familiarity with hermeneutics and judicial comments by emphasis on teachings from other human sciences on the one hand and respecting and multiplicity and cultural norms and expediency approaches in judicial construe on the other hand.

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