

A short view to the principle of Legality from the viewpoint of Afghanistan's legal system and Islamic Law

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Abstract: This paper discusses on the principle of legality under the Afghanistan law and Islamic law and international treaties. One of the fundamental principle of criminal law is the principle of legality of punishment. The principle of legality means that nobody can punished without the existence of a law in force at the time when the act was committed. The law must foresee an exact description of the act that is to be punished and punishment that can be applied. This principle insures that the State, its organs and its officials do not consider themselves to be above the law in the exercising of their functions.

The fundamental objective of this principle is that to protect an individual's liberty, dignity, life and property from any abuse or loss by state's authorities. Indeed, the individuals cannot be charged if the alleged deed was not considered a crime when committed nor will be punished for that act.

Key words: legality, criminal law, crime, punishment

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I. INTRODUCTION

Principle of legality is an important element of criminal law. In a narrow sense the Principles of legality means: No one shall be punished without provision of Islamic law and Criminal law. Fortunately, the aforementioned principle has been vastly accepted by national penal laws, international treaties and conventions and by the Islamic sharia.

In Islamic law, history of principle of legality is longer and its scope of Application is vaster than positive law. God almighty sent messengers (prophets) time to time to the human beings in order to alarm them of wrongful acts. While in positive laws this principle established in 18th century.

In ancient period the basic aim of punishment was retribution. But in recent era, they are implemented for specific purposes; such as retrieving and rehabilitation of criminals, ensuring true justice in the community and supporting community against criminals. Therefore, we will discuss the nature, concept and historical background of the principal of legality from viewpoint of positive law, international law as well as Islamic law.

II. MATERIAL AND METHOD

This research adopted the qualitative research method as relevant secondary data are collected from various textbooks, Laws, magazines, articles in international and other digital source.

1. Nature of the principle of legality of punishment

In order to understand the principle legality, it is essential to discuss this topic under two separate topics. Firstly, the concept of principle of legality to punishment and secondly, historical background of principle of legality of punishment in positive laws and Islamic laws. It is noteworthy that in order to avoid excessive description and further explanation to the topic, we regard national positive laws of Afghanistan as well as international conventions, beside the Islamic law. This topic shall be studied under two different titles. Firstly, concept of principle of legality of punishment secondly, historical background of principle of legality of punishment.

1.1. Concept of principle of legality of punishment

In positive laws, this principle is reflected together with another principle which is principle of legality of crimes and they are correlative. And it covers both criminal conduct and sanctions for it. The principle of legality of crime means that, an offence must be clearly defined by a law and this must be foreseeable for any

person. The principle of punishment means that no one can be punished for a deed or omission that did not constitute crime at the time it was committed.¹

In Islamic law, this principle conveys the same meaning and is very self-explanatory, precise, and has a long history than positive laws. This principle is a part of the general principle which says; there is neither crime nor penalty without Islamic law and the same sense has been accepted by statutory laws too.²

1.2. Historical background of principle of legality of punishment in positive laws

The principle of legality of punishment corresponded with the principle of legality of crime, which are correlated. The principle of legality of crime means that no act shall be considered a crime, but based on the provision of a law which has been promulgated prior to the commitment of crime. And a court cannot hear and make decision regarding a criminal case unless a law authorize a court to hear and make decision regarding the stated criminal case.³

In the past even in the laws of renaissance era, the principle of legality of punishment was not regarded. There is a French saying, "punishment is subjective and willfully".⁴

Therefore, judges and courts had absolute authority considering an act as a crime and assigning punishment for it. Even judges had the right to assign heavier penalty for someone and slight penalty for another for the same crime or even exempt them from penalty. There was a chaos in recognizing crimes and penalties.

Judges even had the right to disregard social equity in recognizing crimes and penalties. They could take into account the social status of the offender as well as the injured one and the reason was; if the offender would come from nobility (noble family), then he would be penalized with light penalty or not even penalized. If the offender would come from the commons, then he would be penalized with harsh penalty and he would never be exempted.

Also, if the injured would come from the noble family, then the offender would be penalized with harsh penalty but if the injured would come from the commons, then the offender would be penalized with soft penalty or not even penalized. This situation continued until the end of 18th century when some lawyers such as Jean Jacques Rousseau, Montesquieu, and Cesare Beccaria started criticizing and asked for a change to the situation. Out of these lawyers, an Italian lawyer, Cesare Beccaria who has a great reputation in the field of criminal law and he is a criminologist who published a treatise "Crimes and punishment" in 1764. In less than six months, his treatise was translated into 22 languages and it became of use in most universities of the world.⁵

In this treatise, he writes about harnessing the unlimited authority of judges and courts; "every individual must realize that when his behaviors are crimes and when they are not".⁶

1.2.1. Principle of legality in Afghanistan laws

The principle of legality is expressly adopted to the Constitution and the criminal code. Article 27 section (1) and (3) of the Afghan Constitution clearly contain the principle of legality, as it states "No deed shall be considered a crime but based on the law which has been promulgated prior to the commitment of the crime. and no one shall be punished without the decision of an authoritative court taken in accordance with provision of the law, promulgated prior to the commitment of the offence".⁷

The principle is also incorporated in penal code of 2017. Article 7 section (1) and (2) providing respectively that "No act shall be considered a crime but, based on the provision of a law which has been promulgated prior to the commitment of crime. and no punishment shall be applied unless affirmed by this law". Section (4) of the stated Article says "nobody shall be punished but with the decision of authoritative Court, in accordance with the provision of a law which has been promulgated prior to the commitment of the accusative deed".⁸

1.2.2. principle of legality in international conventions

The principle of legality is not only accepted and safeguarded in national level, but codified in international instrument too. For instance, the international declaration of human rights (1948) accepted this

¹ Goldozian, Iradj. (2009). General criminal law. (18th ed.). Tehran: National library pub.p.73

² Awda, Abdul Qadir. (2005). Al- tashri al Jenai- al- Islam muqarina bil Qanun al-Wadai, translated by Abdul Hadi Hedayat. (2nd ed.). Peshawar: Paigham pub.p.107

³ Danish, Hafizuallah. (2015). Penology. translated by Abdul Nasir Hamidee. Kabul: mustaqbal pub. P. 297

⁴ Muhaseneh, Murtaza. (2003). General criminal law era. Volume (1). (3rd ed.). Tehran: Ganje danish, Pub. p. 299

⁵ Danish Hafizuallah. (2015). Analysis of the international criminal court statute. (unpublished). P. 31

⁶ Becari, Cesare. (1998). crimes and punishments. translated by Mohammad Ali Ardbili. Tehran: Shahid Beheshti University Pub. P. 34

⁷ Unofficial translation of the Constitution of Islamic Republic of Afghanistan. Official Gazette No.818 (2004).

⁸ Penal Code of Islamic Republic of Afghanistan. Official Gazette No.1260 (2017).

principle. Article 11 section (2) of the declaration states that:⁹“no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed”.¹⁰

Later the United Nations approved the international convention on Civil and Political Rights (1966). In this convention the principle of legality is laid down in article 15 and states that “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when criminal offence was committed, if, subsequent to the commission of the offence, provision is made by law for imposition of the lighter penalty, the offender shall benefit thereby”.¹¹ In addition, the ICC statute also contains a specific provision on the principle of legality. Article 22 section (1) of the ICC statute states that “a person shall not be criminally responsible under this statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the court”.^{12,13}

1.2.3. Principle of legality in Islamic law

As mentioned previously, that in positive laws the principle of legality of punishment was not embodied until late 18th century, but in 1764 Cesare Beccaria wrote a dissertation under the title of “Crimes and Punishments”. While Islam established the aforementioned principle 11 centuries ago. As Allah almighty says in the holy Quran; “we never punish someone for any deed until we have sent a messenger”. Surah Israel, Verse (15).

Elsewhere, Allah almighty says “[we sent] messengers as givers of good news and warners so that mankind should not have a plea of unawareness against Allah after the messengers.”. Surah Nesa, Verse (165).¹⁴

In Islamic law, a similar jurisprudence maxim to the above verses declares that “permissibility is the origin state”. means that all things are permissible and no punishment shall be inflicted for act which no text has criminalized.¹⁵

The above verses are quite clear that Almighty Allah never punishes people unless he had warned them.

2.Characteristics of punishment in accordance with the principle of legality of punishment

Generally, punishment have some characteristics and the very important ones are; suffering characteristic, humiliating characteristic, specificity characteristic, invariable characteristic, and unreviewable characteristic.¹⁶

Out of these characteristics, specificity characteristic and invariable and unreviewable characteristics are mostly related to the principle of legality to penalties. They shall be discussed under different titles.

2.1. Specificity characteristic of punishment

In the past, there was no specificity characteristic to penalties. It means that judges could punish someone severely while another one lightly for the same crime. Judges and courts had the authority to apply punishment as they wished. As mentioned before that in western countries, this situation lasted for a long time. Eventually, in late 18th century, the principle of legality of punishment emerged. Based on this principle, nobody shall be punished but according to a law enacted prior to the commission of crime.

Therefore, we can say that because of the principle of legality of punishment, specificity characteristic of penalties is strongly regarded in current criminal law. Punishment should be proportionate to the severity of the crime, disproportionate and unspecified punishment shall not impose on criminals.¹⁷

⁹ Muhasenee, supra note 4, at 301.

¹⁰ Universal declaration of human rights. available at https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf

¹¹ ICCPR. Art. 15 (1). available at <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>

¹² Danish Hafizuallah. (2015). Analysis of the international criminal court statute. (unpublished). P. 26

¹³ ICC statute. available at <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

¹⁴ Holy Quran.

¹⁵ Zaydan, Abdul Karim. (2017). principles of jurisprudence, translated by Farid Ahmad Hilal, (4th ed.). Nangarhar: Muslim pub. P. 250

¹⁶ Danish, supra note 3, at 44.

¹⁷ Danish, supra note 3, at 48.

2.1. 1. Disadvantages of the specificity characteristic of punishment:

Specificity characteristic of punishment has many important advantages, but meanwhile it has some disadvantages too as we will discuss below.

2.1.1.1. From the prospective of corrective objective of punishment

Regretfully, specificity characteristic of punishment is inconsistent with the corrective point of punishment. For example; if we consider medical field, it's going to be hard for a doctor to predict exact period for the recovery of his patient. If it is so, then it's hard for a legislator to predict exact term for the correction of a criminal. For instance; if a criminal has been sentenced with five years' prison term by the judge and he hasn't retrieved within the indicated term, is it going to be reasonable to let him go back into the community in irretrievable condition? Isn't he going to commit further crimes? In contrary to the above example, if a person has been sentenced with 5-years prison term and he retrieved after three years' prison, is it fair to keep him in prison for the rest of the 2-years? Isn't it going to be useless?¹⁸

2.1.1.2. From the prospective of community protection

Though, the corrective objective of punishment brings about the community protect objective and that is why when a criminal has retrieved, then he doesn't commit further crimes. Therefore; the community is protected itself against this person, however some punishment does not have corrective objective, but they still come about supporting the community such as execution. By the way, when a criminal hasn't retrieved by inflicting the assigned penalty and he hasn't got taken care of retrieval from the prospective of corrective characteristic and sent back into the community in irretrievable condition, he will certainly commit more crimes and community won't be supported against him.¹⁹

2.2. Invariable and unreviewable characteristic of punishment

Another characteristic of punishment which is related to the principle of legality of crimes is; the invariable and unreviewable characteristic of punishment. It means that when a judge has convicted someone to punishment in accordance with the law, the penalty is applied upon the criminal without any variation and revision. When applying certain punishment, replacing it with a different one is not permitted based on the principle of legality to penalties.²⁰

2.2.1. Disadvantages of the invariable and unreviewable characteristic of punishment:

Though, invariable and unreviewable characteristic of punishment is very important and has many advantages, but it also has disadvantage.

The very important disadvantage of the invariable and unreviewable characteristic of penalties is that; it is inconsistent with the corrective objective of punishment. For instance; when certain medication doesn't work for a patient, the doctor has to prescribe different medication, but unfortunately, punishment does not have such characteristic. Therefore, any punishment provided by the judge in accordance with the law is applied upon criminal without any variation and it doesn't matter whether the punishment works in the rehabilitation of criminals or not.²¹

2.2.1.1. Solutions to the disadvantages of invariable and unreviewable characteristic of punishment:

The problem with the invariable and unreviewable characteristic of penalties about the retrieval of criminals has no solution because any approach is in contradiction with the principle of legality to penalties. Since the main objective of penalties is retrieval of criminals, there are some subordinate solution ways such as suspension and enforcement of punishment along with conditional release. Here we discuss suspension and promulgation of penalties and then parole.²²

2.2.1.1.1. Suspension and enforcement of punishment

Nowadays the objective of punishment is rehabilitation and correction of criminals, taking away criminal's liberty by imposing punishment doesn't suffice for his rehabilitation and correction. Usually, detriment of short-term prison comes up and this is because the criminal is affected by the improper

¹⁸ Id. Pp. 49-50

¹⁹ Id. P. 42

²⁰ Becari, Cesare. (1998). crimes and punishments. translated by Mohammad Ali Ardbili. Tehran: Shahid Beheshti University Pub. P. 680

²¹ Danish, supra note 3, at 87.

²² Id.p.51

environment and professional criminals where he ultimately turns to be getting more corrupt than getting retrieved. That's why at the present, suspension of punishment is accepted.²³

Suspension of punishment means that after the final decision of court, convict is given a fixed period of time as he doesn't commit another crime within the given period then the assigned punishment is not applied upon him but only if the assigned punishment is not severer than the extent defined by the law and also, he should have a supreme character and personality.

If he commits another crime within the given period, not only the punishment is applied upon him but also he will be tried for the second crime. There are two kinds of suspension to penalties; simple suspension and tentative suspension.

2.2.1.1.1. Simple Suspension

Simple suspension means that penalizing the criminal is suspended for a fixed period of time while no security measures are taken for his rehabilitation and correction.

2.2.1.1.1.2. Tentative Suspension:

In contrary to simple suspension, in tentative suspension, penalizing criminal is suspended for a fixed period of time but along with security measures being taken to avoid him committing another crime and as well for his rehabilitation and correction.

articles 235 and 236 of the Afghan penal code (2017) mentions these two kinds of suspension of penalties, while the Afghan penal code (1976) only mentions simple suspension.²⁴

2.2.1.1.2. Conditional release

Condition release is a mechanism whereby convict who has shown evidence of some positive changes and reaction while in prison maybe conditionally released prior to their official release date. The convict releases on parole for specific period of time. If the person commits crime before the expiration of the specified period, he is sent back to prison to complete the prison term along with punishment of the new crime that he committed during conditional release. In case, he doesn't commit another crime within the specified period of conditional release, he will be on absolute release.

One of the reasons of the conditional release is; as the main objective of penalties is correction and rehabilitation of the convict so if these two things have been observed prior to the completion of his prison term, applying the remaining punishment is in contradiction to the logic and intellect. The second reason is that conditional release brings about efficient incentive in correcting convicts. Conditional release incites other convicts to adopt good behavior while during the prison term and this is the reason why application of this method is proposed for the lifetime imprisonment.²⁵

It is noteworthy that convict cannot benefit from parole without any conditions. There are two kinds of conditions for granting parole.

Firstly, Criminal must have served a part of the prison term. The extent of time varies to countries' penal-codes. For instance; according to the criminal procedure code of France, convicts maybe benefit from conditional liberation who severed half of their sentence prison, but for convicts in a state of legal recidivism two- third of the prison term has been considered while for the criminals convicted of lifetime imprisonment, fifteen years has been considered. According to article 335 of the Afghan criminal procedure code (2015) conditional release can be granted to convicts who have served three- fourth of their sentence. Secondly, Convict's behavior must have been observed satisfactory by authorized officials.²⁶

III. CONCLUSION

One of the most fundamental rights of the individual is the liberty. Therefore, any governmental institution and official vested with the power to deprive people of their liberty must exercise that power in according to fundamental principle of legality of punishment. Principle of legality means that nobody can be punished without the existence of a law in force prior to the time when the act was committed. this principle protects an individual's liberty, dignity, life and property from any abuse or loss by state's authorities. Nowadays the principle of legality is accepted by national laws, international convention and Islamic law. In Islamic law, history of principle of legality is longer than positive law. There several verses in the holy Quran regarding the principle of legality of punishment. This internationally accepted principle is explicitly has adopted in the Constitution and penal Code of Afghanistan.

I. Recommendations

²³ Muhasenee, supra note 4, at 475-476.

²⁴ Danish, supra note 3, at 179.

²⁵ Awda, supra note 2, at.813.

²⁶ Danish, supra note 3, at 183-184.

1. As the principle of legality of punishment is a very important principle, it shouldn't suffice with what has been set forth in the context of law, but it must be fully regarded in the field of trial and applying penalties.
2. Professional and experienced people must be employed for courts, so they can make decision for the rehabilitation and correction of convicts in accordance with the principle of legality of crimes and punishment.
3. Competent and experienced people must be hired at prisons and other centers where punishment is applied, so they can apply punishment right after conviction.

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