

Principle of Criminal Legality in Saudi Legal System

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ABSTRACT

The principle of legality is the corner stone of criminal law as a whole. From this principle all principles governing criminal acts are stemmed, be they objective or procedural. The criminal legality is the one that supersedes other objective criminal principles and it is also called legality of incrimination. The backbone of this legality is the concept of prior warning or prior alarm, as a legislator has to warn individuals from committing certain acts so that they streamline their conducts in order to avoid punishment prescribed for the offence in concern .

This article attempts to confirm this legal base in Saudi Legal System. It refers to the Islamic Sharia rule and the articles of the Constitution.

Keywords: Principle of Criminal Legality, Saudi Legal System, Islamic Sharia rule, criminal law.

1. Introduction

One of the basic principles in modern legislation is the principle of " no punishment or crime without law"(**Nullum crimen, nulla poena sine praevia lege poenali**) as the legislator alone is the one who has the right to state punishable acts and determine punishments which will be imposed on perpetrators within the limit of law and in this limit the judge power will be specified. The judge can not impose a punishment for an act which is not punishable nor impose a punishment outside the limits of law no matter the case presented to him violates public manners or damages public interest (Alsaeed, 1952).

The International Conference of law makers convened in New Delhi in 1959 defined the principle of legality as: "the one that states basic principles, regulations and procedures to protect individual in the face of authority" {Ahmed, 2001}.

This principle has been stipulated in criminal legislations including Anglo-Saxon ones which refer to judicial tradition rather than to written law. The principle caters for preservation and maintenance of individuals' freedoms from ruler authority; therefore, it has been frequently stipulated in constitutions ¹ among the articles which provide for individuals' public freedoms.

This principle includes one of the guarantees to human rights in criminal code articles, it protects individuals right to personal freedom, because in case of absence of this principle person will be threatened in each work he wants to do as he will be scared this might be punishable by law and thus leads to limit individuals' activity and their right to work. It is well known that punishment in its all forms includes limitation of individuals' rights and freedoms due to violation of law and if there is punishment without law at the time of committing offence this means injustice and tyranny. Therefore, we find that the principle is based on the concepts of justice and freedom (Awad, 2002).

2. Sources of the principle of criminal legitimacy in the Saudi law

The Saudi legal system in general adopts the principle of criminal legality by means of two sources. Firstly: Islamic Sharia rule which represents the first source of regulations in the state, based on the clear statement that states its constitution is derived from the Qu'ran and Sunna (Prophet Mohammed sayings and deeds). The principle extends its legitimacy through implementation of Islamic Sharia rules including criminal system which is based on these rules. Since Islamic Sharia has become familiar with this principle since its first revelation as we mentioned earlier, the Kingdom of Saudi Arabia implements this system by means of implementation of Islamic rules. This is evident in the first article of the Basic System of ruling which states that "The Kingdom of Saudi Arabia is a fully

sovereign Arab Islamic State. Its religion shall be Islam and its constitution shall be the Book of God and the Sunnah (Traditions) of His Messenger, may God's blessings and peace be upon him (PBUH). Its language shall be Arabic and its capital shall be the city of Riyadh."

From the above quotation it has become clear that state religion is Islam and its constitution is Qu'ran and Sunna and all these general principles that govern the country regulations are derived from these two sources, including human rights and objective guarantees on top of which is the principle of criminal legality that aims at safeguard and conservation of human rights(Bassiouni , 1969).

In order to emphasize dominance of Islamic Sharia on all Saudi regulations including the ruling authority, the legislator affirmed in article seven of the Basic System of ruling that " Governance in the Kingdom of Saudi Arabia derives its authority from the Book of God Most High and the Sunnah of his Messenger, both of which govern this Law and all the laws of the State ". (This system) means the Basic System of ruling as it represents the supreme regulation in the legislative hierarchy but there is a higher regulation which dominates all other regulations which is the constitution of the country represented in Qu'ran and Sunna.

From the above two mentioned articles the Basic System of ruling affirms the constitutional dimension of criminal legality which extends its originality from the state constitution whose characteristics become vain through its power and prevalence over the Basic System of ruling and the rest of regulations which must all be subject to Islamic Sharia rules."(Vogel, 2000) .

Due to the correlation between criminal legality and human rights which represents one of the key guarantees for these rights, especially civil rights, the Basic System of ruling stated in article twenty-six that " The State shall protect human rights in accordance with the Islamic *Shari'ah* ". This statement is general and consists of all what concerns human rights including the principle of criminal legality and other human rights-related principles in line with Islamic Sharia, this is why it represents one of the sources of this principle in the Saudi system.

Secondly: The official regulations stressed the importance of this principle, the most important of which is the Basic System of ruling that makes out from provision of security as one of the state duties which must be preserved and maintained for both citizens and expatriates on the same footing. Human rights must not be restricted or infringed by restricting acts or detaining any person on the ground of providing security except by a clear provision of law. This ensures citizen and expatriate their rights not to be infringe and this is stated in article 36 of the Basic System of Ruling which is quoted as saying: " The State shall provide security to all its citizens and residents. A person's actions may not be restricted, nor may he be detained or imprisoned, except under the provisions of the Law " .

From the above mentioned provision, the Kingdom keenness to security right and principle of criminal legality becomes evident. Security is the state responsibility and provides it to citizen and resident and no one may be detained or his freedom be restricted except in the limit of law, meaning law must be existent to approve such restriction. This provision affirms the principle of criminal legality where there is no crime and no punishment without law, and the expression (limit of law) meaning the law which must be resorted to upon necessity of restricting personal freedom (Shaham, 2002).

What indicates the Kingdom's care to personal freedoms as one of the human rights and linking the same to criminal legality, is the statement of this freedom in the Basic System of ruling which affirms prohibition of attacking homes and not to be entered except by getting permission from owner and not be inspected except in the case permitted by regulation. The System also observes telegraphic correspondences and telephone calls privacy, that should not be subject to violations, spied on or listened to except in the limit of law (Al-Otaibi, 2007).

This emphasizes human rights protection and implementation of criminal legality principle which stipulates no infringement of personal freedom except in the limit of law, i.e. by a legal text permitting and organizing this affair and determines the method of doing so. Such law states the cases where freedom will be restricted and the Basic System of ruling provided for the regulations protecting such freedom, but it did not address the details left to another regulation which is the criminal procedures law; and the reason for this is the lack of independent penal code in the Kingdom as it largely depends on Islamic criminal legislation.

Among the articles that take care of personal freedom is article thirty-seven of the Basic System of ruling which states that "Residences shall be inviolable, and they may not be entered or inspected without their owner's permission except in cases set forth in the Law ". Article forty states "Correspondence by telegraph and mail, telephone conversations, and other means of communication shall be protected. They may not be seized, delayed, viewed, or listened to except in cases set forth in the Law".

The above two articles focused on the cases which regulation states as exceptional, meaning infringement of these rights may not be allowed except in the limit of governing law.

In order to emphasize the principle of constitutional criminal legality from a regulatory point of view, an express statement regarding legality principle in addition to previous articles, is what stated in article thirty-eight of the Basic System of ruling "Punishment shall be carried out on a personal basis. There shall be no crime or punishment except on the basis of a *Shari'ah* or a statutory provision, and there shall be no punishment except for deeds subsequent to the effectiveness of a statutory provision ".

Through this article, the care for criminal legitimacy becomes evident in terms of emphasize on the principle "No crime and no punishment unless based on lawful provision or regulatory provision". Here, the difference appears between what is provided by the various laws and what is provided by the Saudi law; where laws stipulate that "No crime and no punishment unless based on a provision" in consideration that they depend on the unity of source represented by the penal law in relation to them, while the Saudi law depends on bipartite of the source in relation to the criminal legitimacy represented in the lawful provision from sources of Islamic law (*Shari'a*), and the regulatory provision issued from the regulatory authority which is under condition of not being in violation of the lawful provision. This comes in line with compliance of the Kingdom of Saudi Arabia to apply rules of Islamic law (*Shari'a*) which is meant by the lawful provision, i.e. the provisions mentioned in the Holy Koran, Sunna (Tradition of the Prophet Mohammad) or unanimity of the nation in consideration that it is governing all systems including the basic system of ruling. The judge's decision in the field of criminalization and punishment depends on consideration and looking into these provisions, so if he does not find relevance he goes to the regulatory provisions that are compliant with the rules of Islamic law as a basis of setting up the laws in Kingdom of Saudi Arabia, and this achieves the principle of criminal legitimacy with bipartite adopted by the kingdom (Salah,1983) .

3. Discussion

As a result, the principle of criminal legitimacy in Saudi laws depends on two sources: the first is the statutes and provisions of Islamic law, and the other is the regulatory provisions set up by the state in achieving of interest and eliminating of harms emanating from activating the lawful policy.

The regulator has assured these two sources through the forty eighth article of the basic system of ruling which stipulates that "The courts shall apply to cases cognized by them the provisions of Islamic *Shari'ah*, as indicated by the Qur'an and the *Sunnah*, and whatever laws promulgated by the ruler, not in conflict with the Qur'an and the *Sunnah* ".

The regulator through the above mentioned provision assures the sources of criminal legitimacy in the Kingdom of Saudi Arabia; and since the courts have jurisdiction in the general cases, and particularly the criminal ones, a mention has been made here to the importance of adherence to the principle of legitimacy during consideration of the cases by these courts.

Jurisdiction of the courts by applying the lawful and regulatory provisions on the cases presented to them is a principled jurisdiction according to the basic system of ruling in which article forty ninth provided that "taking into consideration provisions of article fifty third of this system, courts have jurisdiction in considering all disputes and crimes".

The basic system of ruling guaranteed these courts the power and independence and non interference in this power or impacts it by whatever entity according to article forty sixth of the basic

system of ruling which stipulated that "The Judiciary shall be an independent authority. There shall be no power over judges in their judicial function other than the power of the Islamic Shari'ah".

In this article, there is expressly assurance of the criminal legitimacy principle through independence of the judicial authority in a form that makes it practice its missions in full freedom, away from impacts that may lead to violation of human rights and transgress over them, moreover, it makes it the first authority in the state when the basic system of ruling stipulated in its forty fourth article that "authorities in the state consist of the judicial, executive, and regulatory authorities ...".

This independence of the judicial authority equally grants to all citizens and residents the right to resort to it free of charge. This would be reflected on the feeling of the citizens and residents with their status and importance and maintaining their rights. This was stipulated in the forty seventh article which provided that "The right of litigation shall be guaranteed equally for both citizens and residents in the Kingdom. The Law shall set forth the procedures required thereof".

To add crucial importance to the principle of criminal legitimacy in the kingdom, the king personally supervises on application of the Islamic law (Shari'a) and the general systems and policy of the state. This supervision clearly guarantees all principles related to the human rights including the principle of criminal legitimacy. This was confirmed by the fifty fifth article of the basic system of ruling which stipulated that "The King shall run the affairs of the nation in accordance with the dictates of Islam. He shall supervise the implementation of Islamic Shari'ah and the general policies of the State, and the protection and defense of the country".

Since the criminal legitimacy in the kingdom is based on two main sources which are Islamic law (Shari'a) and the regulatory provisions that are not in contradiction with it, and for the reason that rules of Islamic law (Shari'a) are constant, and for adherence of the authority to these rules; the field of diligence is the second source represented by the regulatory provisions that the Saudi regulator determined the entity possessing the authority of issuing them, which is the regulatory authority and which the basic system of ruling considered it as the third authority in the state and which is assigned the task of formulating systems and regulations that are under condition of non violating rules of Islamic law (Shari'a) with its authorized sources (Ibrahiem,2001) .

This authority is responsible as well for setting up systems and regulations issued by royal decrees after considering and reviewing them by competent authorities. Jurisdiction of the regulatory authority of setting up systems and regulations assured the principle of criminal legitimacy through limiting sources of criminalization and punishment in the hands of this authority. This was mentioned in article sixty seventh of the basic system of ruling which stipulated that "The regulatory authority shall have the jurisdiction of formulating laws and rules conducive to the realization of the well-being or warding off harm to State affairs in accordance with the principles of the Islamic Shari'ah. It shall exercise its jurisdiction in accordance with this Law, and Laws of the Council of Ministers and the Shura Council".

In addition to provisions of the basic system of ruling, the system of regions issued by the royal decree number (A/92) dated 27/8/1412H () assured principle of legitimacy and its role in maintaining human rights through section (C) of article seven which stipulated that within duties of each region's governor "to guarantee individuals' rights and freedoms and not taking any measure that could violate such rights and freedoms unless within the limits adopted lawfully and regularly".

The care of Saudi system has not been limited only to the criminal legitimacy but it went beyond that to giving attention to procedural legitimacy, where the first article of the penal procedural system stipulated that ""in the cases presented to them, courts should apply statutes of Islamic law (Shari'a) according to guidance of Koran and Sunna (Tradition of the Prophet Mohammad) and the systems issued by the ruler that do not contradict with the Holy Koran and the Sunna and adhere in procedures of considering them to the provisions of the system".

The second article of the same system stipulated that "it is not lawful to arrest any person, frisk, detain or imprison them unless in the cases stipulated by law. Further, detention and imprison should only be in the places allocated to both and for the period determined by the competent authority..."

The Saudi penal procedural system indicated that of the conditions of imposing any penal sanction to any person is that the committed deed should be prohibited and punishable lawfully and regularly (Brett, 1994).

This means the importance of availability of the provision that determines the crime and punishment, whether this provision is lawful or regulatory and that was provided in the third article of the penal procedures system which stipulated that "it is not lawful to impose penal sanction to any person unless for a prohibited and punishable matter lawfully or regularly and after they are proved to be guilty based on a final ruling after a prosecution that is carried out according to lawful rules and regulation". This confirms the principle of procedural legitimacy, which completes the principle of criminal legitimacy.

4. Conclusion

The researcher sees from the foregoing that the Saudi systems which have taken care of human rights in all fields, were interested in the principle of legitimacy as a guarantee that protects these rights out of its beliefs of the importance of the human rights, particularly in the criminal field which has great impact on the life, dignity and civil rights of the human being.

This is evident through the following:

1. Kingdom of Saudi Arabia applies rules of Islamic law (Shari'a) which approves the principle of legitimacy in consideration that its constitution is the Koran and Sunna.
2. The expressly provision of the principle of the criminal legitimacy in the basic system of ruling.
3. The provision in the basic system of ruling on protecting the private life of the human being.
4. Assignment of setting up rules and regulations to the regulatory authority which consists of the king, the cabinet and the Shoura Council. This matter is considered a result of the principle of criminal legitimacy.
5. The Saudi systems are characterized by clarity and determination, commitment to the principle of applying the provisions in terms of the time which will be addressed later.
6. Commitment of the judiciary to the rules of the Islamic law (Shari'a) in the field of criminalization and punishment as well as the systems of chastisement provisions issued from the regulatory authority.
7. The provision on the principle of criminal legitimacy in the penal procedures system.
8. Judges are not subject to anything save to the rules of the Islamic law (Shari'a).
9. The executive authority is not implementing the punishment on any person unless there is a criminal verdict.

All of the foregoing assures applying the principle of legitimacy in the Saudi laws as one guarantee that protects the human rights and reserves human dignity and value through the actual practice of the judiciary apparatus that is bound by this principle in their dealings with the citizens and residents and thus they comply with the rules of the Islamic law (Shari'a) which approve this principle since the dawn of Islam in consideration that the Islamic law (Shari'a) is the first source for these systems. They also comply with the principles of the criminal law which is applied by most of the world countries and in which the principle of criminal legitimacy is considered as of its most important principles and this in turn is reflected on protecting and maintaining human rights and not violating them unless according to the systems to which all are committed.

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