

THE IMPACT OF CRIMINAL LAW CODIFICATION ON SOCIAL JUSTICE IN SAUDI ARABIA



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Abstract

It is known that Saudi Arabia is the only country in the world that did not codify the penal law and left it up to judge Jurisprudence. This increases the judge's burden in criminal issues for Jurisprudence in the absence of the text.

Therefore, the criminal law should be codified to achieve judiciary judgments unity and social justice, which ensures no conflict of judicial judgments or contradictory. while in the case of non- codification the application of juristic judgments will be left to the judges' Jurisprudence in the Kingdom of Saudi Arabia, the court judgments become in the state conflicting, and this causes confusion and wasting trust in courts, judiciary and its judgments .This is reflected negatively in social justice as in the absence of the codification of the criminal law as opposed to the principle of legality. Criminal offences and penalties are determined only by the law and leads to lack of a sense of justice, which increases the crime size.

Keywords: Codification; Justice; Criminal penalties; Saudi Legislation.

The Codification of Criminal Law in the Kingdom of Saudi Arabia, and its Impact on Coping with the International Legislation

First: Codification in language: source comes from "codified" meaning "established laws," and law "measure of anything and its method (Hamdi,1971).

Second: Codification idiomatically: drafting provisions in the form of number rank legal materials, similar to the modern civil, criminal and administrative laws ... etc.; so as to be easy reference, and could easily be abided by the judges, referred to by lawyers, and dealt on its basis by (Mahameed, 2001).

It is defined from the side of *Fiqh*: as " for drafting the provisions of the transactions and other contracts and smoothed as theories, collective framework, in the form of legal materials, easy to refer to (Zoheily 2014).

Another scholar of *Fiqh* defined it as: the drafting of single-topic jurisprudence, which was not left to apply by selection of people, by peremptory terms differentiated by sequential numbers and logically tidy arrangement away from redundancy and inconsistency (Ibn Hamid, 2002).

The principle of bringing people together in one opinion in the judiciary is the outcome of the idea of codification, firstly developed by Abdullah bin Mugaffa (as cited in Ibn Khalkan, 1972), who was a famous writer. It was included in his message to the Prince of believers of his time. So, once it is supposed to be correct, the idea can be rejected, as wisdom is the goal of believers, which means that if the opinion is proved valid, it is accepted.

The motives of authoring of “Majalat Al Ahkam Al Adlia”) are as follows:

1. The widening of business transactions and increased contacts with the outside world.

2. The presence of judges in the regular courts, and boards of rights distinctions to inform them to be aware of *Fiqh* and its provisions, for easier access to codification of provisions (Salim, 1986).

We think that codification is necessary, and it is time to implement it for the following reasons:

- 1- The growing number of judges, the increasing number of incidents and the increasing number of incidents, and the weakness of the scientific queen in many students at the legal colleges that bring the judges to justice, have been increasing at this time.
- 2- Our society is open to the rest of the world societies, especially as the Kingdom is close to joining the World Trade Organization and others demand a clear and specific judicial system

We believe that the idea of codification of criminal law in the Kingdom of Saudi Arabia achieves the unity of the provisions of the judiciary, and ensures non- conflicts or contradictory judicial ruling, because the judge has only to apply the unified provisions, which do not vary according to the judges or the courts. In the case of non-regulation, the application of jurisprudence will be left to the discretion of judges across the country's different regions , thus court rulings in one state become conflicting, and this causes confusion and turmoil, and wastes trust in the courts , the judiciary and the provisions, and the lack of regulation causes difference in the judicial ruling in one case between the trial judge , appellate judge, and a judge of cassation in terms of the application of *Fiqh* judgment on the same incident which is different from other Arab and foreign countries.

Legislation and the principle of legality:

The principle of legality in the Kingdom

Islamic penal system is only applied to the level of crimes against God (*Hudud crimes*) retribution and blood money only, because the criminalization and punishment is only proved with the explicit text of the Qur'an and 'Sunnah' where in this case the judge has classified measure criminal incident as a non-punishment of another out lawed estimated punishable by an explicit provision.

The discretionary crimes (*Ta'zīr*), it seems that the principle of *Sharia* does not find a common law of application where the judge punishes what he sees dangerous to safety and security of society, as he is the one who determines the punishment and the manner of implementation, all according to his personal conviction of the horror of the crime. Which means that the judge in the discretionary crimes (*Ta'zīr*), may create a crime and punishment on the perpetrator.

The Kingdom of Saudi Arabia has thus proposed the idea of dividing sanctions according to the comparative laws of the situation, in terms of dividing crimes into crime, misdemeanor and contravention, and it has come to take the division of crimes according to the seriousness of the penalty prescribed in Islamic law into three sections:

Section I: *Hudūd* crimes (Awdeh.A., 2008): It is the crime punishable by the *Had*. The *Hadd* is the crime which punishment is really estimated by God. The crimes of the estimated *Hudūd* of God are known and limited to seven crimes: (1) adultery. (2) Ejaculation. (3) Drinking Alcohol. (4) Theft. (5) Banditry. (6) Apostasy. (7) Prostitution. And scholars call them *Hudūd* without adding word "crime" to it, and their sanctions are also called *Hudūd* as well, but they are marked by the crime that was imposed on it, so it is said: *Hadd* of theft, *Hadd* of drinking, and that means the penalty of theft and the penalty of drinking (Awdeh, 2008)

Section II: Retribution and blood money crimes:

the punishment of crimes and blood money, which is a punishment of individuals and not as stated in the *Hudūd*, which are estimated by God, and this means that the victim has the right to forgive, if he wanted, if he did so, the penalty drops. And retribution and blood money crimes are five: (1) murder. (2) Semi-premeditated murder. (3) Killing by mistake. (4) Deliberate crime less than killing. (5) The crime below the killing by mistake. And the meaning of crime below the killing is: attack, which does not lead to death, such as beating or hurting (Alzuheli.W, 2011).

Section III: discretionary crimes (*Ta'zīr*), the judge is free to choose punishment or penalties for each crime, in a way to suit the circumstances of the crime and the circumstances of the offender, the sanctions are not estimated.

Discretionary crimes are not estimated, as is the case in *Hudūd* crimes or crimes of retribution and blood money, and they cannot restrict (Najm.S, 2018).

The bottom line for this is that the principle of legality is found in the *Hudūd*, retribution and blood money crimes ,but in discretionary crimes - Ta'zīr- we cannot talk about the principle of legality in the current sense, so the Saudi legislator must immediately intervene and codify discretionary crimes to keep up with the movement of global legislation and the challenges of the century (21th.) ,to offer the world a legal model of criminal law, to ensure social justice and the establishment of the principle of legality, on one part , and on the other hand not codification , increases the burden on the judge in criminal matters for the discretion, in the absence of text , and this leads to a contradiction in judgments, which is reflected negatively on social justice (Ahad.G, 1974) .

The role of the Panel of Experts in codification

The expert body under the Council of Ministers contributed in the completion of a number of national projects, such as participation with a number of state institutions to terminate need to create specialized commercial courts arrangements, as the current situation in Saudi Arabia, cases of trade issues are referred to the judicial committees, and these committees do not have jurisdictions capacity. And thus, not efficient as the judiciary authority and the presence of the Commercial Court (Algamdi.M, 2004).

the potential challenges related to the implementation and enforcement of new criminal law in urban areas

The criminalization of acts and punishment are the most serious issues that exercised by the legislative authority, due to the prejudice of criminalization and punishment, to the remarkable encroachment of freedom of individuals as this remains under threat, if there is no criminal law, which draws to them to the limits of their behavior and giving them all sorts of acts forbidden intercourse with, because of what social unrest it causes, especially among young people, it is known that

Crime is primary "young person's game" (Peak, 2016).

The principle of legality is one of the most important restrictions listed in the state of law, in the exercise of its authority in punishment. This principle involves the citizens for the benefit of the of guarantees that would rein in the country and prevent it from criminal interference outside the limits and conditions that concerns the law. It also restricts the power of the judge, to ensure the rights and freedoms of individuals and this, as a result of the content of the principle of legality (Stefano.R., 2015).

The principle of legality is considered as one of the fundamental guarantees for individuals in the face of the judiciary as this principle represents a reduction of

the powers of the judge, where he practiced in the past, the authority of punishment and prohibition, as that the principle of legality is an initial and basic control on the freedom of the judge, as long as the latter is committed to what is determined by what is stated in law in the context of the real objectives of the legislator (Latifa.M, 2007) .

The legitimacy governing law is not limited to the identification of crimes and punishments, but also is a legitimacy that governs all stages of the intervention of the criminal law since the occurrence of the crime, until the trial of the offender and the implementation of punishment, and the meaning of this is that the legitimacy of crime and punishment represents the first episode of criminal legitimacy followed legitimacy of procedural means ,it is not permissible to take any action against any person unless the law is the source of this procedure, and this action was permitted by law, it is not permissible to judge people and convict them , only by a lawsuit going according to the procedures set by law and then comes after this the third phase of the criminal legality stages i.e. punitive implementation phase, which means the necessity that the law is the source of the rules governing the treatment of offenders and procedures for the implementation of sanctions in general.

We mean by the principle of criminal legality or legal corner of crime, existence of a text criminalizing the act and estimating its sentence before it takes place, and no act enjoys forgiveness for any permitted reasons, meaning "no crime or punishment except by law (John.R, 2014).

1. A provision criminalizes the act before it happens: the existence of the text precedes the occurrence of the act, the principle regards prohibiting punishing the person for something he did, only if there is a text criminalizing the act before the occurrence of the act, and it should be a written criminal legislative text.

2. The lack of a cause permit ion which permits.

The first acknowledgment of the principle was after the emergence of The Magna Carta after a major revolt against King John I in Britain ,where was said : "No free man will lose his property or be imprisoned by the hands of other men equal to him, unless he undergoes a fair trial or, we will not sell justice for anyone ,and will not denounce it from anyone , or postpone it for any one " (Clause 39 of the Magna Cart Judiciary of England and Wales – June 2015). However, this was not such a clear image but is was calls of trying to limit the crimes and to text them, then came after that the appearance of a wave of jurists after the tyranny of the Middle Ages, called for the consideration of the judges authorities and trying to restrict this by listing the crimes and assessing penalties, this was said by the French philosopher Montesquieu in his famous book *'The spirit of the law'*, published in 1748. The Italian jurist, philosopher, Beccaria was the theory creator of this principle ,where he pointed out in his book *'Crimes and punishments'* that the legislator sets the penalty, to protect the rights of individuals and to restrict the

authority of the judge, "only laws can determine penalties of crimes, and this power cannot be handled by only the legislature himself, who represents the whole of society under the social contract (Saroor. 2002).

The United States adopted in its Constitution for the year 1774 this principle, and then the French Revolution in 1789 made it one of the most important principles of the Declaration of Human Rights. Recently it deemed to be one of the principles of the rights enshrined in the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948, so it became a cornerstone of any legal system (Elliot.W, 1986).

As the French Revolution came after a quarter century of the issuance of the book of Beccaria, made the crimes and punishments one of its main principles declared to the world in a document of human rights and the citizen on August 26th 1789.

This principle had great importance by the United Nations, where we find quotes on all the findings in the Universal Declaration of Human Rights and the citizen 10 December 1984 in Articles 9 to 18.1, and then this principle was set out in all States and was spelled out in the heart of the penal code, with the exception of Saudi legislator who followed not to codify criminal law and has his reasons to do so.

It is based on the principle of Criminal legality is established on important principles:

1- The principle of separation of powers:

The independence of each authority in its jurisdiction, Legislative Power is that which sets the laws (defines crimes and estimates punishments), and the judiciary applies it practically in the provisions and decisions issued by it, and the role of the executive branch is implementation (Alhafeez, 2005).

2- The guarantees of the rule of law:

The legal system is linked to the state's respect of law, and its meaningful efforts to protect the community and the individual alike, and when it takes the criminalization and punishment authority, it does this without the tyranny of the executive authority.

Then, the fact that criminalization and punishment of legal texts are written in a distinct way like other legal laws, in a general form and abstraction, which earns the respect of everyone.

The principle of legality is of paramount importance, whether at the international , constitutional, regional or practical .At the international level, we see that there are many agreements and protocols that emphasized the importance of this principle, as countries consider this as one of the basic principles and stipulate it in their constitutions as well as the practical importance of the principle

of legality, in that it is a guarantee of the rights of individuals and the community as well, under this principle, individual is safe from the public authorities, which cannot punish him, except in accordance with the legal text, after it became clear to him what is forbidden to do at that how to preserve the individual liberties from the arbitrariness of public authorities. The principle of the legitimacy of criminalization and punishment is the fence that protects individual liberty.

The protection of society seems that it plays preventive role of criminal base in crime prevention, where it is clear that orders and punishment leads specific individuals to refrain from criminality and therefore, we find that the Saudi legislator did not codify the criminal law.

Therefore, we cannot say for sure that the Saudi legislator accompanied the global legislation, in the absence of modern criminal law, with appearance of various types of transnational crimes. As criminal judge it based only on his own discretion. And criminal judge in his diligence could create a crime which is inconsistent with the concept of codifying and social justice.

The kingdom has become in an urgent need to regulate the modern criminal law to keep pace with the movement of global legislation, and to keep pace with the global civilized areas and as a result the organization of the division of the courts and the abandonment of the judicial committees as soon as possible to ensure social justice, the fact that these committees follow the executive branch, as we find in the Ministry of Health and the Ministry of Industry and Trade etc.. .. and they issue provisions, instead of the judiciary, and that these committees lack neutrality, as the person -the victim -finds himself in front of these committees "the quarrel, a judge and a defendant," so the abolition of the work of the judicial committees is a necessity (Barakat.R.2014) where jurisdiction goes some courts and not to others. for example: the perpetrator of the offense of issuing a check without balance is referred to the committee of commercial disputes in the Ministry of Industry and trade Commission, it is imperative that he should be referred to the commercial Court as the competent spatially and qualitatively (Alfozane.M, 2010) as should prisoners be classified, detainees should be isolated from the imprisoned, and that the prisoners should be classified into categories by age and type of crime, the severity and duration of the penalty prescribed them, in order to isolate each category from the other, this is from one part, on the other hand, it is necessary to create special court for juveniles, an a special court for them to keep up with the global social justice movement.

At the end of this research, we found that it is high time for the Saudi legislator to resolve the issue of deregulation, and move towards codification of criminal law in order to keep pace with global legislation movement in the field of criminal law. This is reflected positively on social justice and fits it with the principle of legality and the modern challenges of the era of speed, which is characterized by complicated transactions and diversified and multiplied crimes and pending cases before the courts. We are in front of an urgent need to codify

criminal law in the Kingdom. This achieves the unity of the provisions of the judiciary, and ensures that no conflicts of judicial rulings or contradictory matters will occur, because the judge have nothing but only the application of the provisions of the unified laws, which does not vary according to the judges or the courts. In the case of non-regulation, the application of jurisprudence will be left to the discretion of judges in various parts of the Kingdom, court rulings in one state will become conflicting, and makes trouble, and waste trust in courts, the judiciary and the provisions of the judiciary, and violates the principle of legality.

Conclusion:

1. The absence of a codified criminal law in the Kingdom of Saudi Arabia in discretionary crimes, resulting in the creation of crime and punishment by the judge discretionary.

2. The legalization of a modern criminal law in Saudi Arabia, adjusts legal provisions by a statement of opinion which is likely to be judged by the work done, and the provisions of the unity of the judiciary, and ensures that no conflicts of judicial rulings or contradictory judges will occur.

3. The question of codification is not of a question of this time, and codification has been applied practically across the judicial provisions of magazine of Law Provisions (Majalat Al ahkam Aladlia) in the late times of the reign of the Ottoman Empire, but the Saudi legislator did not codify discretionary crimes, and left to the discretion to the judge, which complicated matter, in the absence of text and causes inconsistencies in court rulings.

4. To find legal texts in the new codifying of alternative sanctions.

5. Cancellation of judicial committees and to make jurisdiction only to the courts.

6. The classification of criminals must be held on the basis of a grading system.

7. Adopting the principle of incentives offered to the prisoner to improve his behavior and to reward for this change.

8. Replace the term "prison administration" in the kingdom, by "reform and rehabilitation management" means that the prisoner realizes that his future and destiny is in his hand, and it depends on what good behavior shown by him inside the prison and the extent of his implementation of the instructions and regulations adopted in correctional institution.

9. Work on the development of buildings of reform and rehabilitation, and access to the founding of modern institutions with healthy conditions and building a private hospital in each prison.

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