



The Evolution, Effectiveness, and Limitations of Principle of Legality: An Analytical Study

Fatima Sajid¹, Hafiz Muhammad Yousaf Khan²

¹ LLB (Hons), Gillani Law College, Bahauddin Zakariya University Multan, Pakistan. Email: fatimasajid1199@gmail.com

² LLB (Hons), Gillani Law College, Bahauddin Zakariya University Multan, Pakistan. Email: myousafkhan047@gmail.com

ARTICLE INFO

Article History:

Received: May 10, 2023

Revised: June 28, 2023

Accepted: June 29, 2023

Available Online: June 30, 2023

Keywords:

War Crimes

Retrospective Punishments

Ex Post Facto Laws

Funding:

This research received no specific grant from any funding agency in the public, commercial, or not-for-profit sectors.

ABSTRACT

The principle of legality has great significance in criminal law. The principle fundamentally evinces no punishment without Penal laws. With this purpose, this article endeavours to critically analyse the historical discourse of the principle to highlight its significance after World War II in the Nuremberg trials. This article inspects the reasons which German jurists criticise the effectiveness and retrospective nature of the principle. To this end, this article surveys the principle of legality in criminal law, Islamic law, International Human Rights laws and the Constitution of Pakistan by using the spectacles of qualitative research techniques with the intent to explore whether a fair trial is possible after neglecting the principle of legality.

© 2023 The Authors, Published by iRASD. This is an Open Access article distributed under the terms of the Creative Commons Attribution Non-Commercial License

Corresponding Author's Email: fatimasajid1199@gmail.com

1. Introduction

The principle of legality is not a novel concept as it has been derived from a Latin maxim *Nulla Poena Sine Lege* which means no person shall be punished for an act or omission except if such act is offence under penal law and there is a prescribed penalty for that particular act under the statute. The logic behind this principle is to put certain limitations on the power of legislature and judiciary in order to prevent them from abuse of power (Allan, 2003). The principle of legality is very much connected to fair trial and rule of law. A fair trial can only be followed when the principle of legality prevails. Rule of law in the context of the principle of legality states that an act is only declared as a crime until and unless prohibited by law. The declaration of the crime should be on a public level so that the public should be aware of what is allowed and what is prohibited. Historically, this principle can be found in Roman law (Hall, 2010). In England, it is found in the "Charter of Henry". In Europe, it is rooted in the Prussian code of 172 A.D., code of Bavarian 1757, the code of Austria 1769, the code of Joseph II 1787 and the French Penal Code of 1810. While, in America it is traced to the Virginia declaration in 1789.

This article investigates the concept of the legality principle to highlight its effectiveness and stability. This article is divided into various segments. The introduction is followed by the second segment which provides the historical discourse of the principle to pinpoint its evolving trends. The third segment critically scrutinises whether the existence of the legality principle in criminal law is beneficial or is better for the dispensation of justice and highlights the adjustment of the legality principle in criminal law. The fourth segment describes how international law recognises the legality principle. The fifth segment critically inspects the existence of the legality principle in the Constitution of Pakistan 1973. In the last, there is an Islamic law perspective on the legality principle followed by a conclusion and suggestions for future studies.

2. Research Methodology

Following steps are involved in research methodology for this study.

2.1. Review of Literature

An extensive literature review has been conducted to gather information on the importance and practical aspects of principle of legality primarily focusing on its significance in

criminal law. It will include review of academic journals, historical background, case laws and relevant material.

2.2. Data Collection

The data is collected through the secondary data source collection method by examining existing laws, historical discourse and relevant material. It will include the Constitution of Pakistan, statutes and regulations in Criminal Law, International Law and Islamic Law.

2.3. Data Analysis

The collected data will be analysed through qualitative research method to explore whether the fair trial is possible without the practical application of principle of legality. This approach is used to find the most relevant information by analysing it to add new ideas to the material being produced.

2.4. Research Gap

The data available on record consists of analysis of principle of legality on broader term. This paper analyses the practical aspects of implication of principle of legality by analysing it from four different aspects and will discuss how this principle cannot be neglected in order to conduct fair trial.

2.5. Research Aims and Objectives

The aims and objectives of this research revolve around the applicability of principle of legality in law. The paper aims to discuss historical background followed by analysing it in terms of Criminal Law, International Law, Constitution of Pakistan and the Islamic Law. This research will give a detailed overview of legality principle in law.

3. Historical Discourse of Principle of legality

The principle of legality gained much importance after the end of World War II. As a consequence of World War II, the axis power was defeated by allies' powers. During the war, Hitler caused a grave violation of human rights and killed around six million Jews alone in death and concentration camps. They conducted unethical human experiments through the release of gases in death camps. In World War II, both allies and axis countries did not follow the ethics of war and committed war crimes on a larger scale as a result of which around fifteen million people including civilians, women, soldiers and children were killed. It was the first time in history that nuclear weapons were used as the USA dropped two nuclear bombs named "fat-man" and "little boy" on Hiroshima and Nagasaki and ultimately on August 15, 1945 Japanese Army surrendered before its allies countries and finally World War II ended.

In 1943, when the war attained its peak, major allied countries gathered at Kremlin in Moscow. The conference was attended by major diplomats, army generals and the ministers of allies' countries. The purpose of this conference was to discuss war efforts and cooperation between allied countries. This conference was of very much importance in history because it led to the formation of the world organization and the European Advisory Commission. Further, all the major allies countries passed an agreement known as the "Declaration on German Atrocities". In this declaration, allies' countries gave a final warning to axis powers that they will not spare them and will punish them for the violation of human rights, genocide, war crimes and the crime against humanity.

Later, allies' countries once again met in Tehran. This meeting is known as the Tehran Conference which held from November 28 to December 1, 1943 in the Soviet Union Embassy after the Soviet Anglo Invasion of Iran. The conference gained worth because Prime Minister of the United Kingdom Winston Churchill proposed an idea to punish the German Nazi party for their crimes at the place where such crimes were committed by axis powers.

In February 1945, the UK, the USA, and the USSR met at Yalta, Soviet Union. They finally decided to punish Nazi high officials at the place where they committed war crimes and crimes against humanity. For this purpose, they assigned a task to the European Advisory Commission to draft rules and procedures, for the trial of Nazi Germans. On August 8, 1945, European Advisory Commission issued London Charter also known as Nuremberg Charter in which International Military Tribunal was authorized to conduct trial of Nazi Germans at Nuremberg

Germany. Nuremberg charter declared the crime against humanity as an offence and prescribed punishment for such offences.

The Nuremberg trial began on November 20, 1945 and International Military Tribunal was authorized to take cognizance of crimes against humanity, war crimes and a crime against peace. Twenty four individuals and Seven Organizations were charged, out of which four organizations were found guilty. The organisations were the German Secret Police, Nazi Party and Hitler Cabinet. Three individuals were acquitted, charges were withdrawn against two individuals, seven were sentenced to imprisonment and twelve were sentenced to death but Hitler was not tried by IMT as he committed suicide (Simon).

Many objections were raised against the Nuremberg trial such as the jurisdiction of IMT was unknown before the Nuremberg Charter. Judges' composition is largely criticized because all judges belong to allies' countries and there was no neutral judge on the bench. Further crime against peace was a most controversial provision which means if a country wage war against another country, it will constitute an offence. This provision was controversial because it was difficult to figure out which country initiated the war.

The most objectionable thing done in the Nuremberg trials was the violation of the principle of legality. Soldiers and other officials of Germany raised the plea that they surrendered on April 29, 1945 and the war ended in Europe before their surrender. No law existed in national and international capacity according to which crime and peace, war crime and crimes against humanity were offences under statute. These acts were declared offences in the Nuremberg Charter which was enacted on August 8, 1945. Moreover, there was no law which authorized international courts to conduct trials of German citizens. Hence, they claimed the Nuremberg Charter as an ex post facto law and against the principles of criminal jurisprudence (Boller, 2003). They further claimed a plea on the principle of legality and argued that retrospective punishments are always considered bad in the eye of the law. However, judges of the International Military Tribunal rejected their plea on the principle of legality and accepted the arguments of Chief Prosecutor Robert Jackson. He argued that although war crimes and crime against humanity are not defined in statutes but they are considered crimes according to the general principles of law recognized by nations of the world. According to him, every man of ordinary prudence knows that brutal killing, rape, genocide and torturing of human beings were known to be offences, (Tomuschat, 2006). This is why Nazi Germans would not claim shelter under the principle of legality. Robert Jackson's philosophy was later on enumerated under Article 15(2) of ICCPR.

4. Adjustment of Principle of Legality in Criminal Law

The principle of legality prohibits retrospective punishment as it is based on the maxim *Nulla Poena Sine Lege* as discussed earlier. This principle demands that the law of land should prescribe penalty for crimes it considers as offence. As per this principle if a person commits an act which is weird but such a particular act is not prohibited in any statutory law nor there is any punishment for such act, that person cannot be punished by the court for such act and the judge cannot use an analogy to punish such person.

"The requirement that the prohibited acts and the penalties must be defined by law beforehand, encapsulated in the maxims *nullum crimen sine lege* and *nulla poena sine lege*, is a manifestation of the substantive dimension of the legality principle in criminal law. According to this principle, the exercise of the of the State – or of the international community – is subject to the principle of legal certainty as an essential component of the fundamental rights of any person. In this way, the State or the international community must exercise their *ius puniendi* on the basis of previous criminal norms (*lex praevia*) defining the prohibited acts and the attached penalties (*lex certa*), which cannot be interpreted by analogy in *malam partem* (*lex stricta*). Hence, neither States nor the international community can exercise their *ius puniendi* beyond what they are allowed to by criminal norms" (Case, 2019).

In criminal jurisprudence, the principle of legality is a fundamental stone of fair trial and rule of law. If the state's law doesn't recognise this principle it will not only deprive the individual of his right to a fair trial but also grant the state unlimited punitive powers (Jonathan, 2012).

"In the context of national legal orders, the substantive dimension of the legality principle in criminal law, and in particular its manifestations encapsulated in the maxims *nullum crimen sine lege* and *nulla poena sine lege*, includes an additional formal safeguard whereby the prohibited acts and the penalties must be pre-established by norms that can be considered laws in formal terms and that can be issued only by a legislative power. Therefore, the possibility of criminalising certain behaviour or establishing penalties on the basis of non-written sources of law – such as custom or the general principles of law – which offer lesser safeguards from the perspective of specificity and foreseeability, is excluded." (Mun, 1998).

This principle put certain limitations on the power of the state and judiciary to not punish any individual in an arbitrary manner. The rule of legality requires that if the law declares any act or conduct as a criminal act it must specify that particular act in statute as an offence and define specific punishment. For that offence, if any act is not an offence under state law then such person shall not be punished and any such punishment which is inflicted upon any individual retrospectively is null and void in the eye of the law.

The first rationale behind the rule of legality is to provide protection to individuals against such punishment which is unknown to them and the principle demands giving fair warning to individuals about crimes through previously published law (Herring, 2014). So, the law cannot be enforced against an individual who is not aware of the offence. This fact is based on a reason that emphasizes the strict construction of the law of crimes.

It is the right of every individual that they must be aware of laws that are offensive. It is the responsibility of the state that it should give its inhabitants fair notice that such acts are offences. If anybody will commit these particular prohibited acts, they will be liable for sanctions/punishments. For the purpose of "Fair Warning" and "Fair Notice" to individuals about wrongs that are criminal in nature, it is the responsibility of the state to codify laws (Chen, 2015). Without the codification of laws, the purpose of the principle of legality cannot be achieved. In this regard, the first thing is to announce or publish laws that are offence. For this purpose, legislative bodies should draft laws and publish them in the Official Gazette and once a law is published, the responsibility of the state to give fair warning and fair notice to its people. This is what the rule of law demands that law must be accessible, clarified and intangible. The penal laws should be clear and accessible and must be gone through the process of legislation. If any person commits an offence which was prohibited in the published statutes, the courts are authorised to conduct a trial of that offender and may punish him accordingly. Such a punishment is in no way null and void.

The Second Rationale behind the principle of legality is the interpretation of the law in a narrow sense so there shall be no way for judicial creativity. The term 'judicial creativity' means 'judges made laws'. As per the general principles of law, judges-made laws are considered retrospective laws because judges make laws after the commitment of acts, and they are created after the conclusion of the trial. So the element of fair notice and fair warning remains absent in this perspective. Secondly, if the judges will make the laws then it will lead to a violation of the theory of separation of powers which is generally accepted by all the countries of the world (Chen, 2015).

The third rationale behind the principle of legality is to put limitations on the wide powers of judges. In this way, they could not punish an individual by way of analogy or arbitrariness. If offences are not clearly defined and there are no specific punishments, then judges will even punish individuals for minor wrongs. This way the element of arbitrary analogy will prevail and the liberty of individuals will be abolished. If states do not follow the principle of legality in the strict sense, there will be unlimited punitive powers to judges and they would punish any person according to their will. There will be no difference between moral wrongs and crimes.

According to the principles of Criminal jurisprudence, Actus Reus and Mens Rea are important elements of the offence. No person shall be punished unless Actus Reus and Mens Rea are found on its part. If a person committing an act is an offence, the element of Mens Rea is absent. This fact is very much relatable to the principle of legality as the principle also punishes an act only if it is declared as an offence in penal law (Ilyas, 2022).

Once an act is declared an offence, the public becomes aware of its prohibition. And in case an element of mens rea is not present, it ultimately means that the person committing it is not aware of the fact that this act is an offence. The rationale behind the principle of legality is that no punishment shall be imposed on an individual. Such an act is not recognised as an offence in law and by the general public. In this way, the elements of Actus Reus and Mens Rea are directly proportional to the declaration of an act as an offence by the penal law. This relation is connected through the awareness of people that an act is an offence or not.

5. Recognition of the Principle of legality in International law

International law recognizes the principle of legality in a way that it does not punish those acts which are not an offence as penal law at the time of the commission of that act. The sanctions for punishable offences are neither elevated nor deviant from that prescribed by penal law. After World War II, upon the conclusion of the Nuremberg Trial, the principle of legality was officially recognised in international law. Universal declaration on Human Rights (UDHR) was the first ever international instrument in which the principle of legality was clearly stated. The Article 11 of the UDHR states that no penalty has to be imposed upon an act which was not recognised as an offence at the commission, under national and international law (Convention, 1969).

Later on, in 1796 the United Nations adopted another human rights convention named an International Covenant on Civil and Political Rights (ICCPR). The Article 15 of this convention is in accordance with the principle of legality, but it does not follow it in a strict sense. This flexibility refers to the reason that although some acts are not punishable as per penal law but those particular acts or omissions could be punished through general principles of law recognised by the nation. The Article 15 elaborates that it is not necessary if an act is not declared offence or not clearly defined by penal law, the courts may punish such acts if they are recognised as offences according to general law. This concept is based on Robert Jackson's theory.

Another international convention named Protection of Human Rights and Freedoms (PHRFF) also follows the principle of legality and prohibits punishment of retrospective nature. Further, the American Convention on Human Rights also interdicts retrospective punishments. Moreover, the African convention known as The Charter on Human and People's rights abides by the principle of legality in a strict sense.

6. Principle of legality and Constitution of Pakistan

The Constitution of Pakistan 1973 sticks to the principle of legality through its article 12. The Article 12 of the Constitution states the protection against retrospective punishment and that no heavier penalty shall be imposed than the prescribed penalty. There is an exception stated in this article that only the offenders of high treason shall be punished with retrospective punishment (Pakistan, 1973a).

On the other hand, the Article 4(2b) of the Constitution states that no person shall be prevented to do an act which is not prohibited by law. This fact is connected to the principle of legality as an act done by an individual cannot be confused with an offence which was not formerly prevented by law. So an act is not punishable until and unless declared as an offence in statutory law (Pakistan, 1973b).

Furthermore, the Article 227 of the Constitution of Pakistan 1973 states that no such law shall be enacted which is contradictory to Quran, Sunnah and Islamic teachings. It is evident from the Quran that the principle of legality is absolute in accordance with Quranic teachings. This is why; the violation of principles of legality would be a clear contradiction to the teaching of Islam. Pakistan being an Islamic state strictly complies with the principle of legality and does not hold the capacity of its violation. Due to these very facts, retrospective punishments are prohibited as per the Constitution of Pakistan 1973.

The question arises on the practical implementation of the legality principle in Pakistan. Here, researchers discussed cases in which it is followed and other in which it is violated.

Firstly, the implementation of the principle of legality is discussed. Back in 2011, two cannibal brothers were caught in Darya Khan, Bhakkar. They used to fetch dead human bodies from the graves and ate the human flesh. They were seized by the local police but the law

enforcement agencies were stuck in a confusing situation because there was no provision enacted against cannibalism in the Pakistan Penal code. The court punished the cannibal brothers keeping in view the principle of legality and they were imprisoned for two years for committing the offence of trespassing of the burial place, under sec 297 of PPC. As cannibalism was not declared an offence so they were not punished for committing it (Ilyas, 2022).

Secondly, the violation of the principle of legality lies in the NAB Ordinance. The NAB was enacted in 1999 in order to deal with white-collar crimes. But, it enforced its implementation back to those corrupt practices which were formerly done since 1985 (Ordinance, 1999). Hence it attained a retrospective effect which was validated by the Supreme Court of Pakistan in the case of *Asfand Yarwali vs. Federation of Pakistan*. This retrospective nature of punishment through the NAB Ordinance is a clear violation of the principle of legality (FOP, 2001).

Another example lies in the case titles as *Javed Iqbal vs. The State* in which the principle of legality was violated. In this case, a person named Javed Iqbal raped 100 children, murdered them and threw them in an acid tank. The Court of Sessions, Lahore decided the case and ordered to hang of the accused and throw his body in an acid tank (John, 2022). The decision of the court and the nature of the punishment were different from that prescribed by the penal law. Death penalty to the accused was absolutely according to the penal law but throwing his dead body into an acid tank was a different punishment. This different punishment was a clear violation of the Article 12(2) of the principle of legality.

Another example of the violation of the Article 12(2) lies in the Musharraf case. In this case, Justice Waqar Seth passed a judgement that Pervez Musharraf shall be punished with the death penalty and shall be hanged in D-chowk, Islamabad or in case if he dies by a natural case, his body is to be hanged in D-chowk ("*Federation of Pakistan VS Pervaiz Musharraf*," 2019). This punishment was greater and different from the penal sanctions. Hence, this judgment infringed the legality principle.

7. Islamic Law and Principle of Legality

The Holy Quran is the book of Allah and it provides a complete code of life to the Muslim community. In Islam, Quran is a complete guidance and is a primary source of law which means the Quran is given priority while deriving Sharia rules. There are Quranic verses which deal with criminal law such as verses relating to Hadood cases and their punishments. Similarly, Quranic verses also prescribe principles of criminal jurisprudence such as clearly talking about the principle of legality.

In the Holy Quran, Allah says "God does not destroy towns or cities unless he sent his Messenger in those towns or cities" (Surah Qisas, Verse 59). In this verse, Allah has communicated the rule through his Messenger to first explain his laws to the people and then the violation of any such law by an individual or all people shall lead them to punishments which may include destruction of their towns and cities.

Another Quranic verse says "O Messenger! Tell the infidels that if they cease to commit wrongs they will be forgiven even which they did in past. Otherwise, they are well aware of punishments from precedents" (Surah Anfal, Verse 38). This verse puts emphasis on the principle of legality. It is clearly depicted that those acts which are prohibited through Quran are punishable in their true sense. Through this verse, those non-believers who didn't receive guidance and continue to commit wrongs are exempted. But from now on, after it has been made clear through Allah's message that such particular acts are prohibited and punishable. It is related to the principle of legality that crimes are punishable after people have been made aware of the acts which are declared as an offence.

Quranic teachings about crimes and their punishments are absolutely in accordance with the principle of legality. Allah does not punish His people for what He has not declared as wrong. First, He prohibits it, and then He punishes it. The principle of legality is strictly followed in Hadood cases. Hadood crimes are those which are declared offences in Quran. Qadi (Judge) punishes offenders according to the rules prescribed through Quran and he cannot alter such laws or their punishments nor he is authorized to use discretion in Hadood cases.

8. Conclusion

The study gives the concluding opinion that the principle of legality is an important pillar of law. It highlights the various aspects of legality principle in terms of criminal law, international human rights law and the Islamic law. It is summed up that the practical implication of the principle of legality ultimately leads to a fair trial, which is the fundamental right of an individual. Imposing a punishment upon an individual for an act that the law does not consider an offence, is unfair. The neglecting of principle of legality in law gives a type of judicial creativity which is against the injunctions of Islam and the fundamental rights of the individual.

In this regard, strict steps need to be taken to control violation of the principle of legality. If the principle of legality will not be followed in a true sense, then it will lead today's modern states back to the times of kingdoms where kings enjoyed unlimited punitive powers to punish individuals for any act through unfair and arbitrary proceedings. In order to give an individual a right to a fair trial, the principle of legality must be followed in court proceedings in order to meet the ends of justice. Overall, the study provides valuable insights on principle of legality and serves as an essential reference for future research to promote the practical implication of legality principle in order to make the ends of justice meet.

References

- Allan, T. R. (2003). *Constitutional justice: a liberal theory of the rule of law*: Oxford University Press, USA.
- Boller, T. J. (2003). The International Criminal Court: Better Than Nuremberg. *Ind. Int'l & Comp. L. Rev.*, 14, 279.
- Case, L. (2019). *The Prosecutor v. Thomas Lubanga Dyilo*. Retrieved from
- Chen, B. (2015). The principle of legality: Issues of rationale and application. *Monash University Law Review*, 41(2), 329-376.
- Federation of Pakistan VS Pervaiz Musharraf. (2019). *IHC*.
- FOP, A. Y. W. V. S. (2001). 607.
- Hall, J. (2010). *General principles of criminal law*: The Lawbook Exchange, Ltd.
- Herring, J. (2014). *Criminal law: Text, cases, and materials*: Oxford University Press, USA.
- Ilyas, K. (2022). Macabre Meeting with Pakistan cannibal. *BBC News*.
- John, P. (2022). Javed Iqbal Serial Killer. (1999).
- "Protection against Retrospective Punishment" Art.12., (1973a).
- Right of Individuals to be dealt in accordance with Law. Art. 4 (2)(b). , (1973b).
- Simon, M. C. International Military Tribunal (Nuremberg). In *Elgar Encyclopedia of Crime and Criminal Justice*: Edward Elgar Publishing.
- Tomuschat, C. (2006). The legacy of Nuremberg. In: Oxford University Press.