

The Violation of the Principle of Equality in the Iraqi Penal Code

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The concept of criminal equality is highly associated with the development of criminal law function; it has acquired a new concept that goes in line with the diversity of methods and objectives of criminal law. Equality is no more referring to only that kind of solid equality which is limited to criminalisation and punishment, but its content has expanded to include, in addition to punishment, social qualification by seeking to achieve best methods of reforming and qualifying the convicted in order to redress him, which leads us to think that not achieving equality in some cases is, in fact, the achievement of its real equality. The legislator made it sure to set many guarantees that achieve equality in criminal law, but there are cases that depart from the equality principle in criminal law which the legislator did not interfere in or fix. This raises the questions about the reasons why he corrects some cases of equality violation in order to achieve specific considerations that can be justified in specific cases and cannot in others. Violation of the principle of equality in some cases can be intentionally acceptable for the legislator to achieve particular purposes, and it can happen unintentionally, which would be unacceptable in other cases.

Key words: *Equality, Punishment, Excuses, Interpretation, Breach.*

Introduction

The principle of equality is one of the fundamental principles of criminal law and is the basis for the achievement of criminal justice and the supreme objective that the peoples aspire to achieve. This is a reflection of the State's respect of human rights. On the other hand, the rules of criminal law violate the most fundamental rights, which are enjoyed by man as a human right in his life and his right of his body and freedom. Therefore, those who hold power should respect the principle of equality in criminal law.

This principle can be achieved only by ensuring that persons are not discriminated against by race, nationality, origin, colour, religion, opinion or economic or social situation, by the equality before the law. Applying this in an abstract manner is very difficult in criminal law because of the difference in the legal status of persons or the nature of interests protected by criminal texts.

Cases of Intentional Violation of the Principle of Equality

Risk of violation (Boyle, 1994): the principle of equality can be acceptable to the legislator, and he doesn't see that it's necessary to correct it due to many considerations that may not be convenient with the principle of equality. However, this violation remains acceptable to the legislator in order to achieve these considerations that he sees worthy of protection. This deviation from the principle of equality takes different manifestations, and on top of them are immunities determined by the criminal legislator for some natural and legal persons. Some cases of violation of the principle of equality that are acceptable to the legislator are represented by psychological or physical vulnerability and exemption from punishment (Daly, 1987). Such as young people and those with mental disabilities, because they are in a position that is unequal with others, in order to ensure real equality for everyone. Modern criminal legislations pay special attention to juvenile offenders for their young age, but most of them did not take into consideration other cases like old age (Whitman, 2009). Such old people are weak in controlling their actions, and most of their organs become weak and vulnerable including the brain which is the controlling power of human actions (Hindelang, 1969).

The legislator did not set specific rules for the older person that would ensure his protection if he was a victim by increasing penalty on the offender, or by allowing for extenuating circumstances and decreasing the penalty if he was guilty. This ignoring of the old person's status will not lead to achieving real equality among individuals (Klein & Steiker, 2002). As to the Iraqi legislator's attitude, he didn't set a special law for old people's protection as he did for juveniles, when he set Juvenile Welfare Act No. 76 for the year 1983 or under special provisions as he did for those lacking in awareness or will because of madness, or mental disorder, (Article 60 of the Iraqi Penal Code) or those war-wounded, (Article 444/10 of the Iraqi Penal Code).

Arguably, older people's protection in the Iraqi law is subject to public rules. Article 135/2 of the Iraqi Penal Code stipulated to increase penalty on the offender who seizes the opportunity of a victim's impaired cognition, disability or being in circumstances that don't let others protect him. This general aggravating circumstance includes older persons for their inability to resist and impaired cognition that the offender might take the opportunity of to commit the crime. As for mitigation of punishment if the old person was guilty, the punishment can be

reduced under the discretionary authority of criminal judge granted under judicial mitigating circumstances.

The legislator did not identify judicial mitigating circumstances and did not put regulations that could help the judge on extracting them, but left all of this to the judge's insight and discretion, because these situations are unlimited in number and unidentified in content, and the Iraqi law did not go into counting or limiting judicial mitigating circumstances (Frey & Zhao, 2011). If most criminal legislations didn't expressly provide for the consideration of old-age of the offender under special provisions, some legislations took into consideration age in later life, such as Portuguese law which requires punishment mitigation for offenders whose age is over seventy years old (39/3) (Gerard, & Terry, 1970), and French law which followed a more organised and effective approach in protecting older persons, as the new French Penal Code for the year 1992 is characterised by granting the judge a significant authority in the individualization of punishment.

Codification confirmed this approach by expressly stipulating in Article 132/24 of the Iraqi Penal Code that: in the determined limits in law, judicature spells penalties and defines their system in accordance with the circumstances of the crime committed and the personality of the offender. Thus, he uses a double standard to determine the offender's penal treatment, represented in crime circumstances and the personality of the offender. The French legislator has taken into consideration old age, on the grounds that vulnerability resulted from aging puts the person in an unequal position compared to others that justifies showing mercy and forgiveness towards him (Negri, 2005).

As for exemption from punishment, criminal legislations include two types of lawful excuses (Cassese, 2006), mitigated and exempted from punishment lawful excuses. Mitigated lawful excuses are identified as the state, action and dependent elements that double the gravity of the crime and reveal how dangerous an offender is, the legislator has mentioned in an explicit provision, they require mitigation of punishment to lower than its determined legal minimum level or ruling with a measurement that is suitable for the gravity (Akande, 2004). Some of the general mitigating lawful causes are, honourable, provocative and impaired cognition or will, in addition, special mitigating excuses stipulated by the legislator regarding some crimes Articles (256, 311, 426/1, 398, 427 and 462 of the Iraqi Penal Code). Mitigating lawful causes do not constitute infringement to the principle of equality despite the inequality in punishment among the accused for the same crime, because the difference in circumstances of the one crime from a condition to another, besides the difference in the circumstances of the accused. Therefore, the judge determines the suitable penalty for each crime because of the difference in circumstances of the offender and the crime, and justifies the difference in penalties and inequality among them.

Thus, this is not considered as a violation of the principle equality in punishment (Moore, 2010), and there's no conflict between equality and individualisation in penal principles, for they have the same objective, which is achieving proportionality in penalties from one side and between the crime and the perpetrator from the other (Frankel, 1972). As for lawful causes exempted from punishment, they are reasons stipulated by law and can exempt the offender from punishment, and they don't affect the elements of the crime nor erase the responsibility of the offender. There's no excuse unless for cases determined by law which ought to have narrow interpretations (Breitel, 1966). The principle of equality may be sacrificed in order for exemption from punishment to be a reward for the person who reports some crimes or who identifies the rest of the offenders and helps to arrest them, and also exempting the offender from crimes of imitation or counterfeit of seals, bonds, stamps, currency, banknotes, securities and official instruments if he reported them to public authorities before completing them, and if he identified the perpetrators before public authorities conducted investigations on the offenders (Article 303 of the Iraqi Penal Code and Article 205/1 of the Egyptian Penal Code). Also he will be exempted from punishment if he has committed crimes of imitation, counterfeit or forgery, if he destroyed the material of the crime before using it and before they start searching for the perpetrators, (Article 311 of the Iraqi Penal Code). The briber or mediator is exempt from punishment if he reported the crime to the judicial or administrative authorities or confessed before the court started the case.

The perpetrator will be exempted from penalty who reports all that he knows about crimes against the internal and external security of the State if the reporting happened before carrying out the crime and before the investigations were started. The court may also exempt someone from punishment if the reporting happened after the carrying out and before investigations were started. Or he may be exempt if the informer facilitated the way for public authorities or a trial to arrest one of the perpetrators, (Articles 187 and 218 of the Iraqi Penal Code & 84/A of the Egyptian Penal Code). Exemption from punishment may be due to the relationship between the perpetrator and the person who enjoys the exemption taking into account the family bonds. Kinship includes blood and affinity kinships, (Articles 434/1, 434/6 and 434/11 of the French Penal Code). The French legislator in the new law has also added the relation between the boyfriend and his girlfriend, but the latter case is unacceptable in our laws, (Article 434/1 of the French Penal Code). The violation in the principle of equality may be interpreted as the difficulty in confirming these serious crimes that are being committed in secret. They are stripped of the material manifestations that could draw the public authority's attention when the legislator sacrifices the principle of equality in punishment in order to encourage the perpetrators of such serious crimes to report them. This leads to the socially significant benefit of preventing such crimes or getting to know the perpetrators (Cunneen, 2006).

There are those who see that exempted excuses cannot be justified and are prejudicial to the principle of equality on the basis that these crimes are not the only difficult crimes to improve,

and exceptions to the rule of equality will not help in extending legislation authority (Zedner, 2014). However, the legislator's position can be justified given the seriousness of these crimes and the gravity of their impacts on public interest and State security. Furthermore, the legislator did not set those exempted excuses unconditionally, but he identified certain conditions that needed to be met to benefit from the exempted excuse.

Cases of Unintentional Violation of the Principle of Equality

The criminal rule is considered the first cell of the criminal legal system and the basic resource for criminal legislation, and it can be defined as the expression by which the legislator can pose his will on the members of the group and can identify the types of behaviour, be it an action or omission, that he considers crimes (Jin, 2007). He also clarifies lawful penalties that he sets due to the violation of this will. Criminal rule is characterised by the general features of the legal rule; it's a general stripped rule as it doesn't connect to actual cases but sets a substantive organisation for the behaviours that are also described as being equal, because everyone is equal before the law. This is a peremptory and conditional norm; it has punitive force and it's one of the rules of public law (Burman, 2010). Another case of unintentional violation to equality before criminal jurisdiction is retroactivity of the Penal Code. That is most favourable to the accused, with precise judicial interpretation for some criminal provisions and attempted offences (Fagan & Bakhshi, 2007).

Basically, criminal norms are applied to the actions that take place after their effective date (Braman, 2005). Substantive non-retroactivity penal rule means that criminal provision is only applicable to actions that take place after the moment of its effectiveness, and it's inapplicable to the acts that occur before its effectiveness (Richards, 1978). The rule of non-retroactivity of law to the past is not absolute but has exceptions; interpretive law, express portion and law that is most favourable to the accused (Kadish, 1976). The legislator allows these rules in certain cases to have retrospective effect if they were the most favourable to the accused, this is known as "retroactivity of penal laws that are most favourable to the accused" (McNamara, 2006). The reason for this exception is that the penal sanctions authority of society is limited to social necessity and public interest; so if it's unnecessary or there's no interest from the public then there's no need to apply it (Peers, 2004). If the new law cancelled or mitigated the penalty then it's an admission from the legislator of the pointlessness of the penalty, thus, there's no justification for the insistence on imposing it (Goti, 2001). Nevertheless, the principle of equality may be violated when applying the law that is most favourable to the accused impartially and generally in some cases. It can happen that two crimes are being committed by two persons in one day. The first one will be convicted before applying the new law, while the second person won't be convicted for some reason and will be included in the law that is most favourable to the accused. This could lead to the violation of equality among the parties that

the criminal act provisions address. There's no way of fixing this violation unless through partial amnesty or by legislative intervention (Hart, 1958).

Some of legislative intervention forms what the Iraqi legislative provided for in Article 2/3-4 of Penal Act are:

1. The judgment becomes final, a law was enacted that makes the commission or omission for which the convicted was judged not punishable, the execution of the ruling shall be suspended and its penal impacts end.
2. This won't affect, in any way, the penalties that were executed unless otherwise specified by the new law, and the court that has first given the ruling shall suspend the execution at request of the convicted or the prosecutor.
3. The new law came to only mitigate the penalty then the court that has first given the ruling may reconsider the penalty in the light of the new law at the request of the convicted or the prosecutor (Hall, 2005).

Precise interpretation of criminal provisions that bans measurement in indictments may lead to inequality among those addressed by criminal law provisions. Interpretation is the definition of the meaning of words meant by the legislator to make it applicable in reality (Bone & Raihani, 2015). Interpretation could be narrow when there's compatibility between the purpose of the rule and the literal meaning of the words used and the direct usefulness of these words other than the other meanings that may belong to the same words (Goldman, 1982). Criminal judgement may not measure an act that has not been provided for as being criminal on an act that has been provided for. The latter ruling will be chosen for both have the same reason, the conflict with the principle of legality of crimes and sanctions, for example, someone who rents a car with the knowledge that it's impossible for him to pay the money (Whitman, 2009). The legislator interfered here to criminalise such acts under special provisions because these acts cannot be subject to sanctions compared to provisions of theft, fraud or breach of trust because they don't include the embezzlement of movable property owned by others without their acceptance to be subject to fraud crime provisions, nor do they include a trust contract to be subject to breach of trust provisions.

Therefore, the legislator criminalised such cases under special provisions attached by the Iraqi legislation to theft crime, (Article 449 of the Iraqi Penal Code). Nevertheless, there are cases that are not subject to these provisions, such as someone who uses an ambulance, because the ambulance is not made for rent, also someone who uses movable property owned by others with no right, without the intention of embezzlement, but his intention is to just use that non-expendable money like different vehicles, electronic devices and other things. This case isn't subject to theft provisions because the perpetrator doesn't have the intention to own that money. Therefore, the legislator criminalised these acts under special provisions. This crime was provided for in the Jordanian, Lebanese and Syrian Penal Codes. As for the Egyptian Penal

Code, this crime was limited to cars exclusively. The same applies for the Unified Arab Penal Code.

The Iraqi legislator did not criminalise these acts which was a legislative failure, because they are not subject to the provisions of theft crime for there is no intention of owning the money. They are also not subject to the provisions of theft crime especially the Articles, 449, 450 of the Penal Code, because the money in such cases was not rented or it was not made for renting, subject to the provisions of Article 449 of the Penal Code, and also it's not lost money. It could be in the hands of the perpetrator by mistake or coincidentally, according to the provision of Article 450 of the Penal Code (Dolovich, 2004).

Conclusion

Violation of the principle of equality in Criminal Code may be known and acceptable to the legislator in some cases, and it would be unnecessary to interfere to correct this violation for many reasons. There are cases of violation of the principle of equality in Criminal Code that occur due to the exaggeration in the application of criminal norms provisions partially by criminal jurisdiction that may indirectly lead to illogical diversity of judicial solutions. The legislator did not intend nor does he accept this violation because there are no reasons that justify it and no interests to realise it. They are unintentional violations that appear in judicial applications due to the justice resorting to narrow interpretation or restrictive legal texts methods.



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