The Causes of Penalty Aggravation in the Penal Code of Afghanistan, and the Islamic Penal Law of Iran: A Comparative Study

Mahfuzullah Arify¹ and Noorullah Noori Mojaddadi²*
¹Department of Criminal Law, Faculty of Law and Political Science, Nangarhar University, Jalalabad, Afghanistan.
²Department of Criminal Law, Faculty of Law and Political Science, Nangarhar University, Jalalabad, Afghanistan, and Lecturer at Alfalah University, Jalalabad, Afghanistan.

*Corresponding Author’s Email: noorullah.moj@gmail.com

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Abstract

Aim: The primary aim of this study was to examine the causes of the aggravation of punishment in the penal code of Afghanistan and compares it to the Islamic penal Law of Iran to specify additional causes of aggravation.

Methods: This study is qualitative in nature and was conducted using a comparative research design, in which the penal code of Afghanistan was compared with the Islamic Penal Law of Iran. In addition to the laws of both countries, various legal books have been used to investigate this issue.

Results: The penal code of Afghanistan has covered many necessary causes in terms of penalty aggravation, but some other causes, such as crimes on sacred days and places, removing the amount from the use of explosives, committing some crimes by foreign nationals and others are not considered as causes of aggravation, such as in the Islamic Penal law.

Conclusion: The penal code Afghanistan had neglected some important issues, which is included in the Islamic penal law of Iran, which made it easy for the criminals to commit some heavy and serious crimes.

Recommendation: As the new interim government need to have the penal code, they should consider all those important causes which have identified in this study and another literature.

Keywords: Penalty aggravation, objective causes, personal causes
INTRODUCTION

Crime has existed in society since the start of human life in the world and fight against it has been carried out in different forms until now. In general, the fight against this evil phenomenon is done in two ways, one is against crime, which has a preventive form, and the other is the fight against criminality, which has a therapeutic form (Danish, 2020).

An effective way to fight crime is to punish criminals. However, the school of absolute justice, especially Immanuel Kant, believes that punishments have only one purpose of destroying the mental balance and satisfaction of criminals. Criminals should be punished (Shamidiati, 2018). The objectives of punishments as a whole, apart from reforming criminals, are to scare criminals and other members of society (Saffary, 2015), to chasten them (Salahi, 2013), to sake justice (Akbari, 2017), and revenge and appease of the victim (Sabzevarinezhad, 2015).

The old concept of taking revenge on the victim is different from the current one. Previously, revenge had no limits, the principle of personal sovereignty was not respected, and the proportion was not taken into consideration. Why now scholars, especially the scholars of the school of absolute justice, believe that there should be a proportion between the severity of the crime and the punishment (Sabzevarinezhad & Sabzevarinezhad, 2017). Accordingly, if a person commits a crime severely and harshly, that person is sentenced to severe punishments, considering the principle of proportion, and what causes the punishment to be intensified is considered the cause of penalty aggravation.

The cases of penalty aggravation are the features and qualities which the legislature determined, and when it takes place the judge decides on the maximum or beyond the maximum of the punishment, according to the provisions of the law (Ardebili, 2016). The aggravation should be in the form of a quantity or changing one penalty to another (Zaraat, 2014). In Afghanistan, the penal code has been in abeyance, and efforts are underway to create a new Penal Code. This identified the additional points of the Islamic Penal Law of Iran in terms of the causes of penalty aggravation, which is neglected in the penal code of Afghanistan. In this study, The Penal code of Afghanistan (2017) was compared with the Islamic Penal Law of Iran (2013).

THE CAUSES OF PENALTY AGGRAVATION

The causes of penalty aggravation (The severity of punishment) are divided into two types, which are objective and personal causes (Kazimi, 2017). This paper discusses both types separately, first in the Islamic Penal Law of Iran and then in the Penal code of Afghanistan:

THE OBJECTIVE CAUSES OF PENALTY AGGRAVATION

The objective causes for the severity of the punishment are those external events that, if combined with the material functions of the crime, increase the severity and dangerous condition of the crime (Tabsum, 2019). These are as follows:

From the Perspective of the Islamic Penal Law of Iran

The existence of prior decisions, the frequency of criminals, the existence of violence, pain, and suffering, the specific time and place, the means of committing the crime, the personality of the accused, the severity of the effects of committing the crime, the abuses of victims use and profit, the presence of a foreign citizen and some other reasons are considered as the objective reasons for the severity of punishments in the Islamic penal law of Iran, which are discussed in order:
Frequency of Offenders with Prior Devise

When two or more people commit a criminal act based on a prior conspiracy, it is considered an aggravated situation, such as in crimes related to railways (Islamic Penal Law, 2013).

Violence, Molestation, and Harm

If molestation, harm and violence end with hit and hurt or if the crime of theft is committed with excessive force, it causes the aggravation of criminal liability of the perpetrator (Islamic Penal Law, 2013).

Time and Place

Time and place due to sanctity, such as holy days (forbidden months in Islam including Dhul-Qa‘da, Dhul-Hijjah, Muharram, and Rajab) or holy places (such as Makkah), committing a crime leads to increased punishment (Islamic Penal Law, 2013).

Means of Committing a Crime

The weapon is the means that are usually lethal, whether it is cold or hot. If a person commits a crime using weapons, it is considered an aggravated situation (Ardebili, 2016). For example, in the crime of theft, even if the perpetrator did not use it and was only armed, the crime of theft is considered aggravated and causes the penalties to be intensified (Islamic Penal Law, 2013). Also, if explosives are used in crimes, it causes the penalties to be intensified (Islamic Penal Law, 2013).

The Personality of the Victim

The personality of the victim is one of the factors that causes the severity of the punishment by the legislator. The basis of this aggravation is more respect for the victim, his high status, his suffering, and his defense (Elham & Borhani, 2018). For example, if the crime of insult is committed against a government employee, as well as the crime of abduction against a child, in both cases the punishment will be intensified (Islamic Penal Law, 2013). In this case, the victim in both crimes has a special personality that is different from ordinary people, because in one place the victim is a government employee and, a child in other scenario.

The Severity of the Impact

The legislator has paid attention to the social damages of crimes (Elham & Borhani, 2018). If a person creates a fake decree, forges the signature of the highest authorities of the country, or digs in the historical places that are registered in the list of national monuments, all of these crimes will result in severe punishments (Islamic Penal Law, 2013). The Islamic Penal Law of Iran considers (Ja‘al and Tazveer) the crime of forgery (Goldouzian, 2018).

Criminal Abuse and Exploitation

Legislators in some cases have also considered some crimes worthy of harsher punishment, in which the criminal has his benefit. The penal section of Articles 556 and 598 are worth mentioning here (Elham et al., 2018).
Presence of a Foreign National in Crimes

If a foreigner commits the crime of selling historical-cultural property, the severity of the punishment for this person compared to the natives has been taken into consideration. Article 562 of the Islamic Penal Law has provisions for this (Islamic Penal Law, 2013).

From the Perspective of the Penal Code of Afghanistan

Dastardly Motive

If someone commits a crime with a dastardly motive, the punishment for the perpetrator should be aggravated (Penal Code, 2017). The dastardly motive is the situation that has exerted as a guiding force and has pushed the will of a person to reach a vile goal. For example, if a person commits the crime of murder to have an illicit relationship with the wife of killed, this crime is considered to have been committed with a dastard motive. (Explanation of Penal Code, 2019). In Article 46 of the Criminal Code of Afghanistan, the criminal motive is not considered to be effective in terms of the spiritual element, however, it is considered to be effective in determining the minimum and maximum punishment. So, this dastard motivation causes intensifying criminal liability of criminals.

Benefit from the Economic, Physical, or Mental Weakness of the Victim

If someone commits a crime by taking advantage of the physical or mental weakness of the victim, it is considered an aggravating circumstance for the perpetrator (Penal Code, 2017). For instance, if the perpetrator of the crime is an adult and the victim is a child, such as the crime of Pedophilia, or when a person commits illegal acts due to his inability to pay his debt. (Explanation of Penal Code, 2019). Here, the weakness of the victim has caused the criminal liability of the perpetrator to increase, because a person is facing a bad economic situation, or has a physical disability, for instance, being small, handicapped, or disabled, or has mental problems, such people are pitiable in society, they should be sympathized with. If someone abuses the weakness of such people, these people should be recognized as deserving of severe punishment because the legislature has done this.

The Personality of the Victim

If a crime is committed against a public service employee during the performance of his duties or because of it, the punishment of the perpetrator will be aggravated (Penal Code, 2017). Here, the legislator considered the perpetrator of the crime to be severely punished due to the duty and position of the public service officer, his respect, and his defense.

Brutally Committing a Crime or Mutilating a Victim

In this case, the criminal behavior is in an aggravated state, such as the perpetrator cutting a part of the body of the victim with an ax (Explanation of Penal Code, 2019). When a person brutally commits a crime or mutilates a victim, it shows the parlous situation of the criminal. The legislators ordered severe punishment whereas this criminal cannot be chastised with ordinary punishment.

The Severity of the Impact

Due to the large social damage, the penal code accepted aggravation of penalty in some crimes. For instance, if the value of the Afghani (currency) decreased due to the crime of currency forgery or to shake the confidence of currency in the domestic or foreign markets. The perpetrator is
punishable by one degree higher than the main penalty of any kind of forgery crime (Penal Code, 2017). The reason for increasing the punishment is the greater social damage. To prevent such crimes, the legislator considered it better to apply severe punishments.

**Use of Weapons and Explosives**

If a person uses firearms or explosives in the commission of a crime in such a way that the number of firearms is more than five miles or its components, parts or ammunition is more than the requirement of five miles, or if the quantity of explosives is more than two kilograms, it is considered an aggravated circumstance (Penal code, 2017). The legislator considered the use of weapons as an aggravating situation due to the presence of clear intention and dangerous situation. The use of explosives itself shows the dangerous circumstance of the criminal, and the criminal would have been considered worthy of severe punishment. Due to the use of explosives in the commission of the crime, if it was any amount.

**The Presence of Harshness, Threat, and Anger**

The crime committed by force, threat, or duress also takes on an aggravated quality, such as illegal arrest, detention, or the crime of restriction of freedom, if this crime is committed by coercion, duress, or threat of death or physical torture. Moreover, the crime of land grabbing, if it has been done with threat or force, is considered an aggravated situation (Penal Code, 2017).

**Time and Place**

In some time or place, committing the crime causes the penalties to be aggravated, for example, if the crime of theft is committed at night, or if he entered through a hole in the house after making it into the wall. It is considered an aggravated situation (Penal Code, 2017). Although the legislator considered the time and place for committing the crime as a reason for increasing the punishment for the crime of theft, however, he should also consider holy days and holy places as reasons for increasing the punishment in the law. For example, if a person commits a crime in a mosque, then two bad actions are combined here, one is committing a crime and the second is not paying attention to the sanctity of masque (masjid), and for this reason, it should be considered severe punishment. Islamic Penal Law of Iran has paid attention to this issue.

**Absence of Legal License**

Crimes without a legal license in the section which needs a license, are considered aggravated circumstances, such as traffic crimes (Penal Code, 2017). A person is driving and commits hitting, injuring, or killing another person by car, the driver did two offenses, the first one is traffic crime, and the second is driving without a license. So, the Punishment is getting severe.

**Numerous Criminals or Organized Group**

A crime committed by two or more people, such as the crime of assault or theft causes the punishment to be aggravated. Moreover, a crime committed by an organized group is also considered an aggravating circumstance such as in financial crimes (Penal Code, 2017). The reason for increasing the punishment is that if a single person commits a crime, the harm to society and the people of the society cannot cause as much harm as when a crime is committed by a group. For this reason, to eliminate this dangerous situation, the legislature has ordered the severity of the punishment.
Presence of a Foreign National in the Crime

In the penal code of Afghanistan, there is no special order about the presence of foreign nationals in the crime, especially in the case of the crime of destruction and sale of historical-cultural property. Throughout history this property took and smuggled by both nationals and foreigners, if the foreigners do not help the locals in this area, it becomes difficult to do it, but the foreigners help the locals of Afghanistan to smuggle and sell the historical relics of this country. To protect these relics from illegal trade by foreigners, they should be mentioned in the penal code and considered an aggravated circumstance.

PERSONAL CAUSES OF PENALTY AGGRAVATION

Personal factors are related to the characteristics of the criminal. If the criminal has these attributes and commits a crime, the crime is considered aggravated and the penalties are too (Tabsum, 2019), which we discussed below:

From the Perspective of the Islamic Penal Law of Iran

Occupation and Designation

Sometimes the Islamic Penal Law of Iran considers occupation and designation as a reason for the severity of the punishments, for instance, if a government employee commits the crime of forgery, the legislature has considered him liable to severe punishment, as well as, a person who has guardianship, testamentary or patronage over a child and commits a crime against him, the perpetrator is considered to be severely punished (Islamic Penal Law, 2013). Guardianship (Walayat): It is the authority that a person acquires on the property of someone else, according to Sharia and law (Legal Glossary (Dari and Pashto Legal Terminology), 2019). Testamentary (Wasi): He is the person appointed by the testator to carry out his wills (Legal Glossary (Dari and Pashto Legal Terminology), 2019). Patronage (Qiamomyate): It is said to legally represent indigent persons who are appointed by the ruling court (Legal Glossary (Dari and Pashto Legal Terminology), 2019).

A specific Motive

Even though motive does not play a role in crimes in general, however, in exceptional cases, the presence of a special motive in some crimes causes the aggravation of punishment (Elham & Borhani, 2018). For example, if a person commits the crime of damaging the public using means and infrastructure, and the motive is to disrupt public security and order or oppose the Islamic government, considered to be severely punished (Islamic Penal Law, 2013).

Family Relationships

In some areas, the Islamic Penal Law of Iran considered the presence of family relationships as a reason for the severity of punishment. For example, if a person commits adultery with his relatives, such as his stepmother, considered to be severely punished (Islamic Penal Law, 2013).

Drug

Use Drugs are something that disrupts the consciousness of a person by using them (Ardebili, 2016). If a person commits murder or mayhem while intoxicated, especially the driver, the perpetrator is considered to be severely punished (Islamic Penal Law, 2013).
Disbelief

In some crimes, disbelief also causes severe punishment. For example, if the doer of pederasty (Liwat) is an infidel and the passive is a Muslim, the punishment for the doer is death. If both of them are Muslims and commit the crime of Liwat without difficulty or duress, then their punishment is 100 lashes. (Islamic Penal Law, 2013). The Islamic Penal Law allows for a difference in punishment between a Muslim and an infidel criminal. That is, if an infidel commits this crime as the doer, he will be punished with death.

From the Perspective of the Penal Code of Afghanistan

Use of government position and mission or official dress

Using a government position or mission for committing crimes, is considered an aggravating circumstance. For instance, in the crime of embezzlement, the treasurer, custodian, educational officer, cashier, warehouseman, cash or goods trustee, or other employees are obliged to protect the embezzled or hidden things by their duties. To commit the crime of embezzlement. Or if the crime of human trafficking is committed by a public services employee, and also if the crime is committed by using official clothes, without having the right to use them, by using false attributes, or if he has committed this crime using the authority of a government official, considered aggravated cases (Penal code, 2017).

Government position and official dress are worthy of respect and their cleanliness should be maintained. Anyone who does not respect cleanliness and commits a crime by using it should be considered a bad situation, as well as the presence of a government position or official dress using it helps the criminal to commit the crime easily. Also, the citizens of the society cannot easily protect themselves from being a victim, therefore, the occurrence of such situations should lead to an increase in the punishment of the criminal, which the legislature Consider the same in the penal code.

One issue that should be mentioned is that the penal code of Afghanistan has a different position in comparison with the Islamic Penal Law of Iran in terms of forgery. In this way, Afghanistan Penal code used the term forgery (Ja’al) for money and the term duplicity (Tazveer) for other documents (Wasiq Durania, 2020), both of which were considered separate crimes while the Islamic Penal Law of Iran has used the term forgery (Ja’al) for both.

Drug

If a person uses narcotics (drugs and alcohol) to commit a crime, this will increase the criminal responsibility of the perpetrator (Penal Code, 2017). There are two cases of drug use: First, when drugs are used to give one the courage to commit a crime. Second, when a person uses drugs normally and then in a state of intoxication commits a crime. These two are different situations, the first one is considered to be an aggravated situation, and however, some lawyers called the second a normal case. But some do not agree with this and have the opinion to consider it an aggravated situation in some special crimes, such as traffic crimes (Danish, 2020). In the penal code of Afghanistan, the first situation is recognized as aggravated, but in the second case, the law did not recognize it as an aggravated situation, it was needed that the legislator recognized it as an aggravated situation. It would have been better to have mentioned traffic crimes in the section on
aggravated cases to attract more attention and to frighten people to be careful, as the Islamic Penal Law has done.

**Prejudices, social position, or political opinion**

If a person commits a crime due to racial, ethnic, religious, sexual, or directional prejudices, social position, or political thought, he deserves to be severely punished (Penal Code, 2017). Prejudice itself is a bad and rejected act, and if it is used in a criminal act, then two bad acts are combined, on this basis, it is a good measure that the legislator has considered as an aggravating situation.

**Parents, Descendent, Spouses, Teachers, Students, or Legal patronage**

If the perpetrator of the crime is the spouse, parents, descent, teachers, students, or legal patronage of the victim. For instance, if the crime of mayhem resulting in death is committed against parents, the crime of molesting a woman or child committed by a teacher, or the crime of human trafficking committed by the husband/wife, parent, or legal patronage of the victim. Moreover, if the perpetrator of the crime of pederasty (liwat) is one of the permanent or temporary bans (Maharim), if the perpetrator is a teacher or an administrator, or if he has influence and authority over the victim in one way or another, all of these are reasons for increasing the penalties. (Penal Code, 2017). The family relationship is very pure and sacred, it should be given more attention to its sanctity, if the members of this relationship commit crimes against each other, then it harms the sanctity of the relationship and it is also a dangerous situation. Based on this, considering aggravated circumstances is the best course of action.

**Being non-Muslim**

The Afghan Penal code does not have provisions regarding the difference in punishment between a Muslim and an infidel in terms of crimes, but both are subject to general provisions.

**Aggravation of punishment in general**

According to the penal code of Afghanistan, if there are aggravating circumstances in the crime, the punishment is determined by the court in the following form: If the penalty for the crime is 1st-degree continuous imprisonment (20-30 years), the maximum limit of the same penalty. Moreover, If the punishment for the crime is 2nd-degree continuous imprisonment (16-20 Years), 1st-degree continuous imprisonment. Also, if the punishment for the crime is long or medium imprisonment, the maximum punishment of this punishment is provided that the sum of the punishments does not exceed one and a half times the maximum of the original punishment. Finally, in case the offense is punishable by short imprisonment, the maximum limit of short imprisonment.

**CONCLUSION**

Finally, it can be concluded that the Islamic Penal Law of Iran and the Penal code of Afghanistan mention different causes for the aggravation of punishments. In the penal code of Afghanistan, dastardly motive, taking advantage of the economic, physical, or mental weakness of the victim, the character of the victim, brutally committing the crime, the severity of the effects of the crime, the presence of premeditated planning and the crimes frequency, the use of weapons and explosives, the existence of harshness, threats, and reluctance, the specificity of time and place, lack of legal license, the frequency of criminals or an organized group is considered as objective reasons for the severity of punishment. In comparison with the Islamic penal law of Iran, the penal code of Afghanistan has determined the amount of explosives in the commission of a crime. In the
case of the use of small amounts, the crime is not considered severe, while the use of explosives indicates a dangerous situation. In addition to this, the use of crime in sacred places is not considered a serious situation. Also, if a foreign citizen commits the crime of destroying and selling historical monuments, he will be sentenced to the same punishment as the locals.

Moreover, the Penal code of Afghanistan differs from the Islamic penal law of Iran in the use of the forgery and duplicity. The Islamic penal law of Iran uses the word forgery to refer to crimes related to documents in addition to money, while The Afghanistan penal code used the word Duplicity (Tazweer) for crimes related to documents.

**RECOMMENDATIONS**

1. Due to there being no effective penal law in the country, the government should codify a penal law or bring reforms into the existing penal code, to bring clarity to the criminal circumstance of the country, and for the observance of the principle of legitimacy of crimes and Penalties.
2. To establish a new penal law or to reform the existing law, the government should give a task to legal scholars to compare the criminal laws of the neighboring countries, the developed countries of the region, and some developed countries of the world. Compare the laws and share the result with the legislative body of the country.
3. In terms of the aggravating circumstances of the punishment, a comparative study of the penal laws of other countries should be done like this comparison, and after that, all the reasons that should lead to the aggravation of criminal liability should be included in the penal law of the country.

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