

The Impact of Kinship in Criminal Cases under the Saudi Criminal Law

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Abstract

Kinship is a permanent relationship which is likely to impact the regulations adopted by the legislator to deal with crimes involving close relatives. Accordingly, the title "Impact of Kinship on a Criminal Case" is intended to highlight the legal provisions related kinship, regarding such case, and the procedures associated therewith; as the legislator takes kinship into account, particularly with respect to the procedures related to crimes between relatives; and it is the legislator's aim to protect such relation.

Keywords: *Kinship, Criminal Cases, Criminal Law, Saudi Law*

1. Introduction

Islamic Law has a distinctive approach with respect to criminal legislation aiming to protect people's interests, and the society from vice; and whereas kinship is a basic requirement for building the society, as kinship is based on human values; therefore, the Saudi legislator is influenced by such relations upon adopting the various criminal regulations, taking into account family relations and connections.

Some crimes might be of certain social dimension, which is highly sensitive, given the relationship between the parties thereof; that is to say crimes may involve perpetrators who have kinship, or marriage relation with the victim; accordingly, the Saudi legislator is compelled to adopt certain legal rules which take kinship into account, and at the same time provides full protection for public interests in the society, which is the subject of criminal

protection; including, inter alia, the impact of kinship in criminal procedures, in connection with the filing.

2. Methodology

This study is based on a descriptive approach to the problem of The Impact of Kinship in Criminal Cases under Saudi Criminal Law. Additionally, it adopts the analytical method, which relies on gathering information, facts and legal texts, and judicial rulings related to The Impact of Kinship in Criminal Cases under the Saudi Criminal Law, and then analyzing them to determine their suitability for application to particular problems.

3. The Impact of Kinship on Filing a Public Criminal Case

3.1 The Concept of a Public Criminal Case

A public criminal case is a case that is related to the right of the state to prosecute a person accused of committing a crime, and to penalize him if his crime is established; however, Article (3) of the Saudi Law of Criminal Procedure, promulgated by the Royal Decree No. (M/2), dated 22/1/1435, provides as follows:

"No penalty shall be imposed on any person except upon conviction of an act in violation of Shari'a or law following a trial in accordance with Shari'a principles".

However, a criminal case usually has two parties: namely the offender and the victim, moreover, the plaintiff in a public crime shall be the community, in its capacity as

the body entitled to impose the penalty in respect of which the public criminal case has been filed, in order to reach the consequent legal conclusions; and whereas the community cannot pursue the case collectively, the public prosecutor shall act on behalf of the community, together with the prosecutor of the private right, if a case is initiated in respect of the private right.

In addition, there is the private criminal case, which is a case filed by the party, harmed by the crime or his heirs to claim the private right before the competent court, even if his request was not accepted during the investigation period. (Al-Otaibi, 2012)

Based on the above, a crime may give rise to two cases; the criminal case and the private right case, in the event that the crime has caused harm to someone.

As per the Islamic Law, a criminal case is a verbal and voluntary act, requiring the attendance of the opponent to provide his reply to such case, as well as other consequences, which are deemed to be the basics of such crime. (Yassin, 2015)

3.2 : The Impact of Kinship on filing the Criminal Case under the Law.

Filing a criminal case refers to the first procedure thereof; however, the Saudi Law of Criminal Procedure contains a number of provisions which determine the competent authorities to initiate the criminal case, such as the public prosecution. Notwithstanding, in certain cases, the law limits the power of the public prosecution to initiate the criminal case, unless a prior approval is obtained from another person or authority – then if the public prosecution can file the criminal case.

How does kinship impact filing such a case?

Article (16) of the Saudi Law of Criminal Procedure provides as follows:

“The victim (his representative) or his heirs – in case of death – may initiate a criminal action with respect to all cases involving a private right, and shall pursue such case or action before the competent court. In such a case, the court shall summon the public prosecutor.”

Also, Article (17) of said law of Criminal Procedure provides as follows:

“No criminal action may be initiated nor investigation proceedings carried out in crimes involving a private right for individuals, except upon a complaint filed by the victim (or representative) or his heirs – in case of death – with the competent authority, unless the Bureau of Investigation and Public Prosecution decides that the filing of such action and the investigation into such crimes serve public interest.”

According to the two legal provisions cited above, it is clear that the parties to the criminal crime under Saudi Law are as follows:

First: The Offender “The accused”.

Any person accused of committing a criminal act, and he shall be held responsible for the same, and shall be subject to all the procedures prescribed by law, intended to investigate such suspicions, and to assess the value thereof, and then it will be determined whether such person is innocent or convicted. (Husni, 2017)

In case that a person is accused of committing a crime, this means that it will be possible to indict him, and to give jurisdiction to the investigation and trial and such authorities shall be exercised vis-à-vis the accused, who shall be subject to the conclusions resulting from this situation. However, the position of the accused is his status with respect to the criminal case, and his connection with the criminal act; however, such person is deemed to be subject to criminal procedure, and the focus of a number of authority practices and the obligations associated with such authority. (Zaid, 2010) Accordingly, the concept of the accused is different from that of the convict; because the first is still subject to criminal procedure, while the second

has already been found guilty and a penalty has been imposed on him. (Zaid, 2010)

The accused is a person who is charged by the prosecution authority of an act which is deemed to be a crime under law, whether he is directly involved in the offense, or he is a partner (Mohamed, 2015); and such person is sometimes defined as the opponent, who is the subject to the charge related to a criminal case (Sarror,2009).

However, charging a certain person means initiating the trial of such person before the competent court; the matter which requires the availability of sufficient evidence regarding the occurrence of the incident; which occurred as a result of the act of the accused; and sufficient evidence does not necessarily mean indicting the accused, because the investigator, at the public prosecution, does not have the jurisdiction to decide such indictment, as that is the task of the court; but sufficient evidence simply means that there are grounds to bring the accused before the court. In some cases the investigator may decide that the accused is innocent, but still he will have to bring him before the court, as an accused person, because he thinks that indictment is more likely than acquittal (Mohamed, 2015).

The persons, against whom a criminal case is filed in accordance with the law, are namely: the accused, if eligible, his guardian or trustee, in case that the accused does not have eligibility. However, if the accused does not have a guardian or trustee, the court before which the criminal case is filed, shall appoint a guardian for him; and this indeed reflects the impact of kinship on this issue.

Second: The Victim

As per the foregoing legal provisions, it is clear that kinship has a direct impact on filing a criminal case; however, the appropriate persons, who may file the criminal case, are:

- The victim, in person, because he is the entitled person, or he is the owner of the property against which an offence was committed by the criminal,

because he is the offender, and he is most often the person who has been personally harmed by the crime (Sarror, 2009).

- The victim's representative, who can be an agent or a lawyer (Sarror,2009).
- The heirs: this right does not pass to the heirs while the victim is still alive, however, upon the victim's death, the heirs shall have the right to claim the right arising from a criminal act; and they may appoint a legal representative for this purpose (Al-Hejailan, 2016).

4. The Impact of Kinship on the proceedings of a Public Criminal Case

4.1 : *The Concept of a Public Criminal Case Proceedings*

The proceedings of the case has several criminal procedures, which explain how to file the case before the competent judicial authorities, and to start handling it upon the occurrence of the crime; and such procedures also determine the authority which is responsible for initiating the criminal case, namely the public prosecution, or by the victim, or his duly authorized legal counsel. These procedures also contain the limitations with respect to initiating such case, and they determine the competent courts to consider and settle the criminal case, the trial and objection procedures, as well as the means of enforcing the judgment.

However, these procedures refer to the entire actions which are taken before any court, the public prosecutor, a judicial council or committee. (Al-Hejailan,2016)

The proceedings of a criminal case, in the Saudi legal system, is governed by the Law of Criminal Procedure, which contains the legal rules that explain the applicable procedures upon the occurrence of the crime, until a penalty is imposed on the criminal, including detention, release, inspection and trial of the wrong-doer; moreover, these

rules also provide for determining the competent criminal court, the trial procedures, issuing a judgment, the methods of objection to it, and how to enforce the same.

Indeed, the proceedings of the criminal case is closely related to the Saudi Penal Code, which contains very rigid provisions which cannot be applicable in the absence of regulations which determine the procedures to be observed before the public prosecution and the courts, as of the occurrence of the incident until it is settled, and an appropriate penalty is imposed for the committed crime.

The proceedings of the criminal case is also governed by the principle of criminal legality, which is provided for in all criminal regulations; and it is contained in and confirmed by the Saudi Law of Criminal Procedure Article (3) provides as follows: *“No penalty may be imposed on any person except upon conviction of an act in violation of Shari’a or law following a trial in accordance with Shari’a principles.”*; however, the principal of criminal legality consists of two aspects, which complement each other; whereas such principle, under the penal code, means that no crime may be determined or a penalty imposed except under a legal provision.

As for the criminal procedures related to the proceedings of the case, and the penal code, the principle of criminal legality means that no penalty shall be imposed without a judgment issued by the competent court, and in accordance with the provisions of the law; moreover, no judgment can be issued without the existence of a lawsuit, where the two concerned parties present their arguments, evidence and defences to the competent court, until a judgment is issued to realize the principles of justice; therefore the principle of criminal legality is important with respect to the proceedings of the criminal case. In other words, the proceedings of such case involves a series of procedures, which are determined by the legislator, as of the time when the crime occurs until a final and enforceable judgment is issued in such case; accordingly, it is important

to abide by these procedures as provided for and determined under the law, in order to protect individual’s rights, without using these rights arbitrarily. (Namoor,2015)

Additionally, the proceedings and validity of a criminal case are related to place; because the provisions of the Saudi Law of Criminal Procedure is applicable to any person who commits crime within the territories of Saudi Arabia, regardless of his nationality, whether he is Saudi or a foreigner.

Also, the proceedings of a criminal case is closely related to the applicability of the Saudi Law of Criminal Procedure with respect to time; this means that said law will be applicable to the crimes committed after the date the law became effective until it is revoked. Accordingly, if a new law is issued, such law will be applicable to crimes committed after the effective date thereof; that is to say the law will be applicable with an immediate and direct effect; and such law will not be applicable to crimes occurring prior to its issuance; however, the penal code opts for the law which is the most favorable for the accused in accordance with this principle.

Accordingly, the Law of Criminal Procedure is applicable to incidents occurring after the effective date thereof. In the event that a criminal case is filed, and its proceedings is in progress, until it is about to be settled, and a new Criminal Law is issued; all the procedures, taken under the old law, will be deemed valid, and the new law will apply to the following procedures.

4.2 : The Impact of Kinship on the Proceedings of a Public Criminal Case under the Law

This part comprised two issues:

First Issue: In case that a conflict exists between the victim and his/her representative

In this connection, Article (18) of the Saudi Law of Criminal Procedure provides as follows:

“Article 18: If the court finds a conflict between the interest of the victim, or his heirs, and the interest of his representative, such representative shall be prevented from continuing the proceedings and another representative shall be appointed.”

Additionally, Article (148) of the Saudi Law of Criminal Procedure provides as follows:

“If the person harmed by a crime lacks capacity and has no guardian or trustee, the court with which the criminal action has been filed shall appoint a guardian to claim his private right.”

Moreover, Article (5) of the Implementing Regulations of the Law of Criminal Procedure provides as follows:

1. *The victim and his heirs referred to in Article 18 of the Law shall mean those who partially or totally lack legal capacity.*
2. *A court considering a criminal action shall enter into the case minutes any action taken regarding any conflict of interest observed between the victim or his heirs, and their representative.*

According to the foregoing legal provision, in case that a conflict exists between the interest of the victim and that of his/her representative, because of a kinship leading to such conflict; such representative shall be stopped from continuing the pleading and shall be replaced by another person. However, in the event that the victim lacks capacity, and has no guardian or trustee, the court shall appoint a guardian to claim his/her private right. For example, if the guardian or the trustee is the offender, or if he has harmed a non-adult, or has stolen his funds. (Al-Hejailan,2016)

Second Issue: In case that a case is filed and the proceedings is suspended, or it is otherwise abandoned

Regarding this issue, Article 17 of the Saudi law of Criminal Procedure provides as follows:

“Article 17: No criminal action may be initiated nor investigation proceedings carried out in crimes involving a private right for individuals, except upon a complaint filed

by the victim (or representative) or his heirs – in case of death – with the competent authority, unless the Bureau of Investigation and Public Prosecution decides that the filing of such action and the investigation into such crimes serve public interest.”

As per this legal provision, it can be concluded that the legislator requires that a criminal action shall only be initiated, in certain crimes, after filing a complaint by the victim; however, in case that no complaint is filed, the public prosecution or the court shall discontinue the criminal investigation on the case for which the legislator requires filing a complaint by the victim in order to initiate the case.

A case is generally defined as the notification presented by the victim to the public authorities, in certain cases, with the aim of initiating a criminal case in respect of a crime to which he was a victim, and such crime is subject to filing a case, as per legislations, aiming to impose penalty on the offender. (Najm,2000)

A complaint is deemed a restriction to the freedom of the public prosecution with respect to initiating the case for various considerations; namely:

1. Considerations based on the interest of the victim to protect his honor and dignity; as in the case of crimes related to slander, disrespect and contempt befalling a person.
2. Considerations based on the private interest of the victim, as in the case of breaking into the sanctity of homes.
3. Considerations based on interests associated with kinship, as in the cases where the interest of the victim, in his capacity as a kin, to initiate the criminal case, is more apparent than the interest of the community. (Al-Hejailan,2016)

The purpose of the legislator, behind restricting criminal investigation by requiring the invitation of a criminal case, by way of complaint to be filed by the victim,

is to keep the kinship between the offender and the victim; nonetheless, the victim has discretion with respect to keeping such relationship, because he will have the option to file a public right case against the offender or to refrain from the same.

The Saudi legislator provides in Article (23) of the Law of Criminal Procedure for a case which depicts the impact of kinship on the proceedings of a private criminal case. This article provides as follows:

“Article 23: A private criminal action shall lapse in the following two cases:

1. *Issuance of a final judgment.*
2. *Grant of pardon by the victim or his heirs.*

The grant of pardon by the victim or his heirs shall not preclude proceedings of public criminal action.”

Moreover, Article 11 of the Implementing Regulations of the Saudi Law of Criminal Procedure provides as follows:

“Article 11

1. *In a civil criminal action involving multiple victims or heirs, a pardon by some shall not affect the rights of the others to proceed with the action.*
2. *When attesting the victim or the heirs' pardon, the provisions of Article 29 of the Law and Article 17 of the Regulations shall be taken into consideration.”*

5. Conclusion

The Most Important Results and Recommendations of this Study are:

5.1 : Results

1. The Saudi legislator has recognized family and kinship relations which have to be taken into account when settling forth regulations for some criminal procedures, particularly with respect to crimes involving relatives, in order to protect family relations.

2. The impact of kinship on criminal procedures, its proceedings.

5.2 : The Most Important Recommendations

1. It is necessary to amend the Law of Criminal Procedure to match the amendment to the name of the Bureau of Investigation and Public Prosecution, to “The Public Prosecution”.
2. It is proposed that the new Saudi Penal Code should contain the legal provisions related to the impact of kinship on the requirement to initiate a complaint with respect to certain crimes which are of private nature with respect to kinship; as well as the impact of kinship on the proceedings of the public criminal case, in the event that the victim forgives the accused in crimes where it is required to file a complaint in order to initiate a public criminal case.

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