

## CRIMINAL LEGALITY AFFECTING CYBERCRIMES IN YEMEN

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**Abstract.** Criminal legality is a principle that promotes justice and stability. In Yemen, a judge cannot expand the interpretation of any existing laws to criminalise new actions that are not provided by the legislature as it is expressly prohibited by the Yemeni Constitution 1990 as well as the Yemeni Penal Code 1994. Unfortunately, cybercrime is one of the new offences that are not specifically regulated by Yemeni laws. Since cybercrime is one of the greatest threats facing international community, this paper attempts to examine the criminal legality affecting cybercrime in Yemen. This study is a purely doctrinal legal research and data are collected from both primary and secondary sources like statutes, books, scholarly articles, legal doctrines and many others. To sum up, though the existing laws generally cover traditional offences that are committed on the Internet such as online pornography and online defamation, serious issues arise with regard to new offences that can only be committed in the cyber world such as hacking and spamming as they are nowhere provided in the Yemeni legal framework.

**Keywords:** Criminal legality, Cybercrime, Legal Framework, Yemen.

**Introduction.** The principle of criminal legality stipulates that the legislature only has the right to identify criminal acts and determine penalties for such acts.<sup>1</sup> This is one of the basic principles recognised in the modern criminal legislations including in Yemen.<sup>2</sup> The principle asserts the separation of powers between the three main bodies; parliament, executive and judiciary. The parliament has the sole power to enact laws and such power cannot be exercised by other bodies.<sup>3</sup> As a result, a judge's power is limited to applying the existing criminal rules formulated by the legislature and he is not allowed to punish an act which is not declared as a crime even if he is fully convinced that such act is contrary to morality or public interest.<sup>4</sup>

The criminal legality principle is designed to protect individual's rights and freedoms by assigning the task of identifying crimes and punishments to the legislative bodies.<sup>5</sup> This principle is exclusively established to promote justice and stability as when all people are under the law without discrimination and bias in punishment, justice can be attained among community members.<sup>6</sup>

Nonetheless, the principle of criminal legality has been criticised by its opponents as it appears to restrict the power of judges and constitutes a stumbling block for judicial and social development. Consequently, adherence to the strict and narrow interpretation of legislations provides chances for criminals to commit harmful acts that are beyond the scope of offenses recognised by laws.<sup>7</sup> In relation thereof, this paper attempts to examine the principle of criminal legality affecting cybercrime in the Yemeni legal framework, in particular on criminalisation and punishment.

#### The Principle of Criminal Legality in the Yemeni Legal Framework

The principle of criminal legality is provided in the Yemeni Constitution 1990 (Constitution) and the Yemeni Penal Code 1994 (Penal Code). Article 47 of the Constitution states:

"Criminal liability is personal. No crime or punishment shall be undertaken without a provision of Shari'ah or law. The accused is innocent until proven guilty by a final judicial sentence, and no law may be enacted to put a person to trial for acts committed retroactively".

Further, section 2 of the Penal Code provides that "criminal liability is personal and any crime and punishment must be defined by law as such". As such, it has been argued that in Yemen no crime or punishment can exist without text law.<sup>8</sup> There is no difference whether the act is prohibited by Shari'ah or law as the Constitution used the word 'or' which indicates an equal status between the two. It is pertinent to note at this point that the Penal Code is a codification of the provisions of Islamic Shari'ah.<sup>9</sup> In addition, the term 'Shari'ah' is indeed very wide in scope and covers all harmful acts that are prohibited by the Shari'ah. However, it should be noted that section 2 of the Penal Code is not similar with article 47 of the Constitution which states that "... no crime or punishment except by law". This means the sources of criminalisation and punishment are limited to law. The act may be permissible unless prohibited by law even

<sup>1</sup> Al Khalaf A H, Chaoui A Q. The general principles of the Penal Code. Kuwait: Al Resalah for Print; 1982.

<sup>2</sup> Al-Sharaf A H. The general theory of crime, Sana'a; 1998.

<sup>3</sup> Article 62 of Yemeni Constitution states that "The parliament is the legislative authority of the state. It shall enact laws...etc."

<sup>4</sup> al-Hadithi F R. Explanation of the Penal Code (Public Section). Baghdad; 1992.

<sup>5</sup> Aklan M M S. The origins of criminology and punishment. Sana'a: Dar Al-Hekmah; 1990.

<sup>6</sup> Al Khalaf A H, Chaoui A Q. The general principles of the Penal Code. Kuwait: Al Resalah for Print; 1982.

<sup>7</sup> Ibid.

<sup>8</sup> Al Maamari M S. Explanation of the Yemeni penal code, general section. Taiz, Yemen: Nice for Media Services; 2005.

<sup>9</sup> Al-Sharaf A H. Explanation of the Yemeni Penal Code. Sana'a; 1997