



Exploring Alternatives to Imprisonment: Implementation Strategies in Afghanistan's Criminal Law

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Abstract

Imprisonment was once one of the most popular punishments in human societies. This punishment, justified for various reasons, became entrenched in criminal law and, alongside two other punishments (execution and fines), carried much of the burden of combating crime for a long time. However, over time, criminologists' evaluations have shown that the initial goals justifying this popular punishment are not only unachievable but also that its negative consequences have become more apparent. To address these negative outcomes, alternatives to imprisonment have been incorporated into the criminal law framework, reducing some of the burden of imprisonment. Alternatives to imprisonment have a successful history worldwide, and for the first time, they have been accepted in the Afghan Penal Code for misdemeanors under certain conditions. The legitimacy of these alternatives lies in ensuring that the offender is not left unpunished while also mitigating the serious adverse effects of imprisonment. The important focus of this paper is to explore what alternatives to imprisonment are and how they can be implemented in Afghanistan. The research method employed is analytical-descriptive, based on library data.

Keywords: *Exploring Alternatives; Afghanistan's Criminal Law*

Introduction

The history of developments in criminal law narrates the bitter events of societies confronting the phenomenon of crime. Collective responsibility for crime, collective retaliation against offenders, unclear punishments, and the heavy costs of tribal enmity were evident in the early dim history of criminal law. Torture and humiliation of offenders, harsh punishments coupled with torture, and long-term imprisonment in dark and terrifying prisons were common punishments in the nineteenth century.

Imprisonment, a concept born from human thought, was initially aimed at preventing and reducing crime; however, this harsh approach towards offenders and the terrifying prison systems drew the criticism of philosophers, thinkers, and scholars of law and ethics. The French Revolution and subsequent reforms significantly impacted the nature and type of punishments for offenders. Reforms in prisons, the abolition of harsh punishments, and humane treatment of offenders were the gifts of travelers on the path of reforming criminal justice, leading to progress in the nineteenth and twentieth centuries, where modern humanity turned to proposing alternatives to classical punishment.

As the disadvantages of imprisonment became evident and the complete inefficacy of prison systems in social rehabilitation was recognized, influenced by the teachings of criminology and findings such as increased recidivism and crime generation from prisons, the designers of the alternative to imprisonment institution increasingly leaned towards limiting the instances and scope of imprisonment.

Short-term imprisonment has lost its effectiveness due to its crime-generating nature and adverse effects on the personality and family of the imprisoned individual, imposing costs on society and creating livelihood issues for the prisoner's family. Therefore, it should be seen as a last resort and applied only when other measures are not feasible. Reducing the prison population, lowering the costs associated with the implementation of imprisonment, and decreasing recidivism are important goals that criminal justice systems pursue by restricting imprisonment and substituting alternatives. This paper seeks to hold up a mirror to the alternatives to imprisonment in Afghan criminal law, reflecting the nature of these alternatives and explaining how they can be implemented according to legal standards.

What Are Alternatives to Imprisonment/Alternatives to Prison?

Under the title of the nature of alternatives to imprisonment, an attempt is made to highlight the essence of alternatives to imprisonment through the definitions of punishment and alternatives to imprisonment, followed by the introduction of various types of alternatives.

1) The Nature of Alternatives to Imprisonment

The Penal Code defines punishment as a measure prescribed by law for a crime and adjudicated by a court in accordance with the principles of this law. Types of punishment are divided into primary, subsidiary, and supplementary punishments, with primary punishments defined as those specified in the Penal Code for committing crimes that are not complementary or subordinate to other punishments. These include:

1. Fines
2. Imprisonment
3. Execution

According to Article 138 of the Penal Code, alternatives to imprisonment are not punishments since they do not fall under the category of primary punishments. Therefore, "alternatives to imprisonment" are not independent punishments. Nonetheless, Section Three of Chapter Four of the General Part of the Penal Code is titled "Punishments as Alternatives to Imprisonment." Similarly, the Penal Code, in defining minor offenses, considers "alternatives to imprisonment" alongside medium and short imprisonment and fines as forms of punishment. This means that alternatives to imprisonment are, in themselves, forms of punishment and not merely substitutes for punishment. Article 148 of the Penal Code and Section 1 of Article 2 of Annex No. (2) of the Criminal Procedure Law also define alternatives to imprisonment as punishments: "An alternative to imprisonment is a penalty imposed on the offender instead of imprisonment, manifested as conditional release by the court." With this definition, the legislator has presented a dual nature of alternatives to imprisonment:

- 1. Criminal Nature:** This means that alternatives to imprisonment are defined as punishments. In a broad sense, the Penal Code considers punishment as a "sanction." Thus, alternatives to imprisonment are also a form of sanction. In summary: punishment in place of punishment.
- 2. Non-Criminal Nature:** This refers to conditional release; the offender under an alternative to imprisonment is not imprisoned but is also not completely free; rather, they are released conditionally and under specific terms. Hence, the name of this enforcement mechanism is punishment, and its form is conditional release.

Therefore, from this perspective, alternatives to imprisonment, being sanctions with enforcement mechanisms, are punishments; and from the standpoint that, like other punishments, especially imprisonment, the freedom of the offender is not entirely revoked, they are considered substitutes for punishment and conditional release. It seems that the legislator has had doubts regarding the punitive nature of alternatives to imprisonment; otherwise, it would have included them in the category of primary punishments.

2) Types of Alternatives to Imprisonment

Alternatives to imprisonment are categorized into four types:

1. Community Service
2. Supervision Period
3. Deprivation of Social Rights
4. Home Confinement

First: Social Service

Social services, in linguistic terms, consist of two words: "services" (the plural of service) and "social" (pertaining to society). This refers to work and services that are realized within the context of society and human relations.

In this context, community service refers to an institution whereby the court proposes to the offender to compensate for their wrongdoing by performing work beneficial to the community instead of going to prison. In other words, community service is one option for sentencing that takes into account the level of danger posed by the offender, aiming to compensate the victim for damages and restore the disrupted order of the community through performing unpaid or semi-paid work for society.

Performing community service by the offender does not imply forced labor or compulsory work; rather, it is aimed at rehabilitation and reforming the offender by preventing the negative consequences of imprisonment, utilizing rehabilitative capacities, engaging in public welfare work, and compensating for the damages inflicted on society due to the crime.

Annex No. (2) of the Criminal Procedure Law specifies the following types of community service:

1. Educational activities: literacy programs.
2. Health-related activities: nursing the disabled, patients, drug addicts, and children in health centers.
3. Technical and vocational activities: service in technical, production, and training sectors in workshops and factories of handicrafts and machinery.
4. Service activities: construction work, guarding, cleaning public and government places, and maintaining green spaces, public parks, and sports facilities.

5. Agricultural activities: animal husbandry and forestry, including gardening, poultry farming, and working on farms and forests.

Second: Supervision Period

Supervision, in linguistic terms, means to guard, monitor, or oversee. The word "supervision" is synonymous with "monitoring." According to the Persian dictionary, supervision means monitoring the execution of a matter. Therefore, monitoring can be considered synonymous with supervision.

The supervision period, as an alternative to imprisonment, refers to granting freedom to the offender under the supervision and monitoring of supervisory officers instead of serving a prison sentence for a specified duration, preparing them for reintegration into social life.

Annex No. (2) of the Criminal Procedure Law also uses "supervision" instead of "monitoring." In Article 2, under the terminology section, it defines "supervision" as: "measures taken by the court based on the circumstances of the committed crime and the situation of the offender, in accordance with the provisions of this annex." Thus, the supervision period refers to a timeframe during which the offender is required to adhere to one or more actions specified in the law under the supervision of the implementing authority. It is considered an independent enforcement mechanism that encompasses the following features: the establishment of an independent organization within the criminal framework, judicial nature and duties, legal authority, and the exercise of oversight.

The Penal Code outlines ten conditions for the supervision period. The court can impose one or more of the following measures on the accused, considering the circumstances related to the committed crime:

1. Residence in a specified location.
2. Prohibition of residence or movement in specified areas.
3. Requirement for the offender to participate in counseling sessions.
4. Vocational training or completion of educational and skill development courses.
5. Assisting the victim in alleviating or eliminating material or moral damages caused by the crime.
6. Reporting to the police office or authority designated by the court.
7. Avoiding contact with individuals deemed harmful by the court.
8. Prohibition from engaging in specific occupations that may facilitate the commission of a crime.
9. Requirement to learn education and social etiquette, and adherence to it.
10. Undertaking treatment for psychological, behavioral, and physical disorders.

Third: Deprivation of Social Rights

The term "rights" is the plural form of "right." The word "right" does not have a singular meaning; rather, it encompasses a range of meanings that can be both profound and diverse. It is one of those words that can evoke complex and rich connotations, often requiring considerable time, attention, and care to fully understand. Consequently, we may find ourselves content using it with an unclear or vague notion.

In Arabic, the word "right" is used as a noun, verb, and adjective. As a noun, it conveys the meaning of existence or truth, and in its adjectival form, it signifies something that is established or certain. Thus, it is used to refer to God, as in: "And they know that Allah is the evident truth" (Nur 35),

since the existence of the Almighty is the highest form of truth that does not align with non-existence or ambiguity.

The concept of "rights" in Western history has been shaped by the differentiation between the notions of "being right" and "having rights." In the first sense, "right" is opposed to "falsehood" and signifies truth. When the phrase "a matter is right" is stated, it means that the matter is true and not false.

In essence, rights are the legal abilities and powers individuals have concerning a person or object, or generally regarding actions within society. Examples include the rights of spouses towards each other, property rights, rental rights (the tenant's right to the rented property and the landlord's right to demand rent), and the right to be elected or to vote in legislative bodies and other assemblies. In French, these are referred to as *Droits Subjectifs*, in English as Rights, and in Iran, they are called personal or individual rights.

Personal rights refer to the collection of privileges recognized by rules and laws that others in society are obligated to respect. When it is said that "the government must protect individuals' rights" or "no one should violate the rights of others," the term "rights" is used in this sense. Rights in this context refer to "privileges, authority, and power granted by law or other legal norms (customs, legal precedents, etc.) to individuals or legal entities, which others are obligated to respect," such as property rights, parental rights, the right to vote and participate politically, and the right to supervise and criticize.

The term "deprivation" is also not singular in meaning; rather, it has multiple interpretations. This multiplicity of meaning does not fit into a single framework. Here, however, we will focus on the term "deprivation" in a general sense, relying on the definition provided by the Persian dictionary for "deprived." The Persian dictionary defines "deprived" as being withheld from goodness, benefit, and advantage, or being without access to something. Thus, deprivation of social rights refers to the lack of rights encompassed by civil, political, and economic rights.

The notion of social rights mainly pertains to the right to a dignified life, which includes access to adequate food, suitable housing, the right to appropriate employment, humane working conditions, the right to rest and leisure, health insurance, and guarantees for a dignified life in retirement, among others.

Proponents of human social rights argue that neglecting these rights effectively accepts the ongoing structural contradictions of democracy. This means that democracy emphasizes equality in participation in democratic processes as a fundamental aspect of citizenship. However, if citizens are deprived of equal opportunities and resources for education, health, and a dignified life, how can they exercise their right to equality in political participation? Thus, contrary to the beliefs of liberal democracies, social democracy does not consider political participation alone sufficient for achieving democracy. In the social democratic approach, having equal conditions for political participation is a prerequisite for realizing citizenship democracy. According to Thomas Meyer, ensuring fundamental rights must be accompanied by providing the tools and conditions necessary for their realization; otherwise, democracy is reduced to a hollow process.

Fourth: Home Confinement

Home confinement refers to restrictions on movement and the ability to leave one's home. Under this punishment, the offender's freedom to enter and exit their residence is limited, requiring them to remain at home except during specific times that are pre-approved by the court. In this sense, the offender's home acts like a prison or a cell.

Home confinement, sometimes referred to as house arrest, involves a series of restrictive enforcement measures ranging from nighttime curfews to confinement in the home during non-working hours. In the United States, several states—such as Florida, Oklahoma, Oregon, Kentucky, and California—have adopted and expanded home confinement programs as an intermediate enforcement

measure. The concept of home confinement requires that convicted offenders spend a significant amount of their time at home as a substitute for prison sentences. Current estimates indicate that over ten thousand individuals are under home confinement in the country, with the state of Florida alone placing 40,000 people under house arrest over the past decade.

The notion of home confinement evokes memories of reformatory and rehabilitative institutions used in the 1950s and 1960s in the United States. Prisons were deemed so harmful to inmates that they needed to be replaced as much as possible with reform centers and halfway houses.

Social Rights

In developing countries, the focus on social human rights tends to be less prominent due to governmental inadequacies in providing social services. Primarily, those countries with a social market economy and social democratic approaches view the guarantee of citizens' social rights as equivalent to their political rights, considering it a requirement for democracy. Thomas Marshall, a British social scientist, articulates the principle of "social citizenship," stating that the realization of social human rights allows citizens to achieve not only a formal acknowledgment of these rights but also their substantive implementation. For example, the right to freedom of expression becomes problematic if a citizen lacks access to education and information, which hinders their ability to engage effectively in the formation of political ideas and social programs.

The International Covenant on Civil and Political Rights, adopted in 1966, encompasses a range of civil, social, and cultural rights. This covenant views human rights not as separate entities but as an inseparable package of interrelated rights. Key aspects of social rights within this covenant, alongside fundamental political rights, can be summarized as follows:

- Equality of rights for women and men
- The right to work
- The right to social security
- Assurance of a minimum standard of living
- The right to adequate physical and mental health, including appropriate access to treatment
- The right to education for personal growth and respect for human rights and fundamental freedoms
- The right to participate in cultural life

In summary, the emphasis on social rights is crucial for achieving a comprehensive understanding of democracy, where political participation is not merely a formal process but is rooted in the equitable distribution of opportunities and resources for all citizens.

Implementation of Alternatives to Imprisonment

The criteria for implementing alternatives to imprisonment in Afghanistan include the duration of the prison sentence that the offender must serve, the offender's status, circumstances, and past behavior, the location for applying the alternatives, and other relevant factors. This section provides a brief overview of the implementation of alternatives to imprisonment without delving into the specifics of each type.

1) Users of Alternatives to Imprisonment and Conditions for Use

Article 325 of the Criminal Procedure Law states:

1. A person sentenced to imprisonment for a term of up to three years may request the Minister of Justice to be assigned to perform community service instead of serving their prison sentence.
2. Alternatives to imprisonment apply to the following offenders:
 - Those who are students, teachers, or caretakers of children or elderly individuals, or women without employment outside the home.
 - Offenders with a good past record, verified by a credible person.
3. Upon approval of the alternative to imprisonment, the offender is referred to a social service provider for community service.
4. The offender must comply with the laws and regulations of the service provider during their work.

2) Obligations of Offenders under Alternatives to Imprisonment and the Service Provider

Article 326 specifies:

1. The offender must commit to performing the assigned work on time and correctly, receiving 30% of the original wage for their work, and comply with the conditions outlined in paragraph 4 of Article 325.
2. If the service provider is a private institution, it is obligated to transfer 70% of the remaining daily wage of the offender to the government.
3. Other matters related to performing community services will be regulated by a separate directive.

Regarding the cancellation of alternatives to imprisonment, Article 327 states:

If the offender violates the restrictions outlined in paragraph 4 of Article 325 or related regulations, or if they are absent or perform poorly, the service provider must report this to the relevant ministry. In this case, the ministry will revoke the alternative to imprisonment, and the prosecutor will return the offender to serve the remaining prison sentence. The duration of service outside of prison will be counted towards their prison term.

3) Substitution of Imprisonment for Public Employees

Imprisonment can be substituted with work. According to Article 328 of the Criminal Procedure Law:

1. Substitution of imprisonment for public employees with work in government offices in the capital is proposed by the relevant minister and in provinces by the governor, subject to the approval of the Minister of Justice. Offenders convicted of corruption are excluded from this provision.
2. Substitution of imprisonment for other individuals is proposed by the prosecutor and confirmed by the province's governor, also requiring the approval of the Minister of Justice.
3. The type of work assigned to the offender, whose imprisonment has been substituted with work, is determined by the relevant administrative authorities and approved by the Minister of Justice.

The duration of the actual service performed outside of prison counts towards the prison sentence. Absences do not count towards this duration.

Conclusion

The following points summarize the conclusions drawn from this discussion:

1. Substantive Laws aim to define, explain, and legislate crimes and their punishments. These laws seek to prevent crimes by criminalizing violations of fundamental societal values and establishing penalties for infringing upon each value.
2. Procedural Laws are designed to ensure that the established penalties are properly enforced against offenders. Various authorities are tasked with integrating these rulings into judicial decisions (courts) and delegating enforcement to other bodies (prosecutors and police). Therefore, each criminal ruling has its own method of enforcement, which requires specific procedures. Among these, execution procedures are more time-consuming and complex, imprisonment procedures are less formal, and currently, the procedures for alternatives to imprisonment appear somewhat unfeasible, while monetary penalties are comparatively easier to implement.
3. A lawful society requires more than just the criminalization and penalization of offenses; it also necessitates the specification of how these punishments are to be executed. Institutions must be willing and able to carry out the legally prescribed punishments to both strengthen the rule of law and provide reassurance to victims, ultimately fostering public trust in the country's legal system.

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