Comparative Studies on the Schools of Jurisprudence and its Principles

Volume 7. Issue 2 Autumn & Winter 2024-25

Research Paper

The Evolution of the Relationship between Crime and Punishment: A Comparative Study of Political Islam and Jurisprudential Islam

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HTTPS: 10.22034/MFU.2025.142875.1515

Received: May, 10, 2024
Accepted: September, 12, 2024
Available online: September, 30, 2024

Abstract

This article analyzes various opinions and interpretations regarding crime and punishment in pre-modern Islamic societies across the geographical expanse from the Nile region in Africa to the Amu Darya in Central Asia, and the mutual interaction between jurists (fuqaha) and caliphs on this matter. The emergence of Islam in the Arabian Peninsula and the formation of Islamic governments necessitated the formulation and implementation of rulings concerning crime and punishment of criminals in accordance with the Qur'an and narrations (hadith). Muslim rulers and politicians attempted to legitimize their reign by outwardly adhering to criminal jurisprudential rulings. However, the fluid requirements of politics alongside the fixed nature of jurisprudence (fiqh) led caliphs to effectively bypass criminal jurisprudential fatwas by creating extensive judicial and executive networks without jurisprudential precedent, such as the Court of Grievances (diwan al-mazalim), urban police, and market inspector (muhtasib). Although this situation was not to accepted by Sunni jurists, some of them, accepting existing political realities and believing that the presence of an oppressive yet Sharia-compliant ruler was better than no ruler at all, sought to mend the deficiency of politics with the needle of expediency, finding jurisprudential justifications for the penal actions of rulers. This way, a connection was established between jurisprudence and politics. However, due to the Sunni denomination of the caliphs, Imami jurists played no role in the game of politics. The present research, based on a descriptive-analytical method, seeks to provide contextual and interdisciplinary approaches to pre-modern Islamic criminal law.

Keywords:
Crime, Punishment, Jurisprudence (Fiqh), Politics, Islam, Pre-modern.

Sadeghi, M. and Jalilian, L. (2024). The Evolution of the Relationship between Crime and Punishment: A Comparative Study of Political Islam and Jurisprudential Islam. *Comparative Studies on the Schools of Jurisprudence and its Principles*, *7*(2), 139-114.

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Extended Abstract

1- Introduction

The understanding of jurisprudential rulings has been overly simplistic. Western scholars of Islamic law, studying it as an academic subject, tend to explain religious texts like Muslim jurists and Islamologists, but fail in this endeavor. With few exceptions, the central focus of analyses of rulings has been narrations, and due to the dependence of Islamic studies theorists on religious texts, little attention has been paid to evidence of how these rulings were implemented in practice. Conversely, those who have practically studied Islamic rulings often have little awareness of jurisprudential theories. Thus, some Western scholars of Islamic law have assumed that Islamic Sharia was mainly a theoretical plan unaffected by social realities, and that jurists did not provide any real public law to regulate the rights and duties of individuals towards the state, and consequently, no significant theory of criminal law. However, it should be known that the history of crime and punishment in Islam is not limited to jurisprudence, but is a history of competing interests between those who theorized, wrote about it, implemented the theories, and those who endured legal punishments. Therefore, examining the role of jurists in studying the history of crime and punishment in Islam and their relations with caliphs is important, as Muslim caliphs claimed to implement Islamic Sharia and, as the executive arm in combating criminals, emphasized the implementation of religious texts and jurisprudential fatwas in this path.

2- Method

This research is descriptive-analytical in terms of its method, and information has been gathered using books and articles. It is also of a theoretical fundamental nature, aiming to develop theoretical literature on the history of crime and punishment in Islamic societies and the theory of criminal law in Islam, particularly attempting to clarify the evolution from early Islam to the end of the middle period, which coincides with the emergence of the Ottoman state.

3- Result

Criminal law theories explain the nature of punishment and the objectives of state intervention in criminal law through various methods and punishment goals. In this sense, Islamic jurisprudence lacks a theory of criminal law, and the purpose of criminal law theory in jurisprudence is not to explain the philosophy of criminalization and punishment in Islam, but rather the jurists' interpretation of criminal rulings in the Quran and narrations and their efforts to categorize types of religious punishments. Islamic punishments are divided into three categories: *hudud*, *qisas*, and *ta'zir*, and jurists have set specific criteria for their implementation. *Hudud* and *qisas* are punishments whose type and extent are specified in the Qur'an and narrations, while *ta'zir* is a punishment whose type and extent are not determined and depend on the discretion of the religious judge. The majority of crimes in Islam are subject to *ta'zir* punishments. However, caliphs did not pay attention to these criteria in practice; they established new judicial and executive institutions such as the Court of Grievances, urban police, and hisbah, which lacked jurisprudential precedent, to carry out their arbitrary penal behaviors. A group of jurists, by raising the issue of political expediency and Sharia-based politics, supported the caliphs' actions and considered obedience to their orders obligatory. As a result, jurisprudence took on a political nature, and combating crimes and criminals provided a suitable ground

for establishing a link between jurists and caliphs.

4- Conclusion

The prominent feature of criminal justice implementation in pre-modern Islam was the separation of legal theory from practice and the bifurcation into a dual system of jurisdictions, namely the system of jurisprudence and religious courts on one side, and politics on the other. However, the relationship between the religious judge and state institutions executing punishments was unclear. Historians of Islamic law should consider both the relationship and functional overlap between different judicial areas of jurisprudence and politics, whose exact configuration varies from place to place and time to time.

The history of crime and punishment in Islam and the approach to these two phenomena have been a vehicle for the presence of two opposing forces at the theoretical and practical levels, shaping the mutual relationship between the two institutions of jurisprudence and politics. On one hand, the prosecution, trial, and punishment of criminals should be based on religious texts, the discovery and codification of which into specific and refined rulings is the responsibility of jurists. On the other hand, since the holders of political power possess criminal power and the right to impose punishment, the implementation of these rulings has been the duty of the rulers of the time. It was important for the caliphs to align Sunni jurists with themselves. Therefore, the organization of adopted policies in the field of punishment was influenced by political expediency considerations and jurisprudential opinions. In such circumstances, a group of jurists, mainly in response to the increasing use of *ta'zir* by arbitrary forces such as market inspectors and the indiscriminate reference to the verse of *moharebah* by the caliphate apparatus, aligned with the caliphs. From the eleventh century onwards, efforts were made to return "political expediency" to the realm of jurisprudence by presenting a model of politics and jurisprudence and with heavy reflection to involve judges in the prosecution of criminals. However, due to the Sunni denomination of the caliphs, Shia jurists played no role in the game of politics, and consequently, their jurisprudential fatwas were not implemented.

5- Funding

There is no funding support

6- Authors' contribution

Each of the two authors contributed in some way to writing this article; but the amount of their participation is as follows:
Mohamad Mehdi Sadeghi 85%
Leila Jalilian 15%

7- Conflict of Interest

Authors declared no conflict of interest.

8-Acknowledgements

We are grateful to all the officials of the Journal of Comparative Studies on the Schools of Jurisprudence and its Principles for their patience in all stages of our article and helping us to publish it.