An Application of The Islamic Methodology in The Enactment of Criminal Laws and Policy Formulation

Dr. Majdi Saeed Almarashi
msmarashi@uqu.edu.sa
Assistant Professor of Law at Collage of Judicial Studies and Regulations – Law Department,
Umm Al-Qura University, Makkah, Saudi Arabia.

Summary:
Public policies are subject to the general strategies and agendas of the state and the enactment of law is subject to the superior laws. This paper will clarify in a practical way how the strategies and agenda of an Islamic state and the superior law (the primary sources of Sharia law) affect the mechanism of enacting laws and creating policies in an Islamic government. Especially, in the field of criminal law.

Keywords:
Criminal law, enactment of law, Islamic law, Government, politics. Policy formulation.

1. Introduction

Some of the Islamic provisions were stipulated directly by the primary sources, while others were not stipulated directly. The paper shows the sources on which lawmakers depend when enacting a law that includes stipulated provisions. The source on which lawmakers rely when establishing a law including unstipulated provisions is strictly Sharia law.
It is a practical illustration of how to align the dominance of Sharia with the consideration of the interests of the people, which the policymaker should follow through a legitimate methodology. The focus of this chapter should, therefore, be on Sharia's ability to remain stable, resilient, flexible, and consistent. To this end, the application will be limited to criminal branch of law.

2. Islamic Criminal Law and The Controversial Debate of its Implementation

. One of the most sensitive issues related to the subject of human rights is criminal law. This issue is commonly misunderstood, especially by those who do not study Sharia or by those who consider these sanctions come from a high tower and do not realize the details. Sharia must be comprehended as a whole, particularly as it relates to criminal law.

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Criminal law in Islam is a broad and independent discipline in the context of research. Based on the research question related to drafting policies and enacting laws, there is concern among many who have not been acquainted with the Islamic legal criminal system on several central issues closely related to the topic of the research, including:

2.1 Harshness of Punishment and Human Rights

Penalties in Islamic jurisprudence may seem very harsh, cruel, and unusual. According to their perspective, they are incompatible with human rights and human dignity – such as stoning, cutting, and whipping – keeping in mind that the perpetrators are not few in number. How can the Sharia claim that it takes into account public interest, even though these penalties cause terror in people's hearts and appear to be unjust?

2.2 Circumstances of Crime and Fixed Punishments

Criminal penalties cannot be fixed or on one level; they are subject to a large and intricate group of factors that affect the amount, type, severity, and commutation of the penalty. These factors include whether the perpetrator was previously convicted or whether he has criminal records. Also, some acts may be a crime according to a certain custom in a particular country and not in another country. The evidence against the perpetrator may be strong or weak, and the crime may be premeditated, and therefore the level of punishment varies. There are other huge factors that are studied in their own field. Thus, if the penalties are fixed in Sharia, how can they take into account such changes?

2.3 New Forms of Crime and The Inflexibility

New forms of crime may appear that were not present at the time of the Prophet, so how can the Sharia deal with these new crimes, and how does the Islamic government take into account the need to enact new sanctions and formulate public policies that preserve public order? In short, anxiety revolves around these three points of severity, rigidity, and inflexibility. Is Sharia really characterized by these traits, or does Sharia say otherwise?

Islamic philosophy of punishment is based on a dual method, which is the division of penalties into three types. This division helps in reducing the severity of penalties, accommodating the different circumstances accompanying the crime, and creating a type of flexibility in the penalties. This division is as follows:

- First: Ḥudūd penalties, where the penalty is fixed and stipulated by Sharia.
- Second: Ta'zīr penalties (discretionary), where the penalty is not defined by the Sharia, but is determined by legal authority.
- Third: Qiṣāṣ punishment (retribution), which literally means "retaliation in kind." When the perpetrator causes intentional bodily injury, then the victim or victim's heirs have the exclusive right to one of the three: retribution, recompense, or pardon. Each of these divisions have completely different intrinsic characteristics and have a different core function.
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3. The Division of Punishments in Islamic Law:

3.1 Ḥudūd penalties:

Among these penalties are severing for st**ealin**g, stoning for sex outside of marriage, and execution for apostasy. Some of the characteristics for these penalties are that the punishment cannot be decreased or increased, changed, or waived. This is the most severe area of Islamic law. For these penalties, their scope of application is very narrow, specific, and extremely rare. The main purpose of these penalties is deterrence. It tends to protect the ethics of the Muslim community more than it addresses the situation of the criminal himself.

This depends on the deterrence theory which discourages the crime and limits its occurrence in order to protect public order. The severity of the punishment is clear in these penalties. These penalties also apply very strict rules **of e**vidence. It is impossible to prove the occurrence of the crime except in rare cases. Sharia is so keen on avoiding Ḥudūd as much as possible. It strives to take the path that prevents the application of Ḥudūd. If the perpetrator is not punished due to the lack of criminal evidence that is required for Ḥudūd, he may be punished according to the rules of evidence in Ta`zīr, which are less strict.[1]

3.2 Ta`zīr penalties (discretionary)

These penalties are not fixed by Islamic Law; rather, Allāh left the decision to the legal authorities within the general framework of Islamic Law. They must follow the universal purposes of Islam that create a balance between the right of society to be protected from crime and the right of the individual to have his freedoms protected. This type of punishment can be decreased, increased, changed, or waived, and the ruler has the right to pardon the criminal according to public interest. Examples include the penalties for bribery, forgery, and traffic violations. Also, the punishment itself is not specific in Sharia. It may be reprimanding, flogging, imprisonment, a fine, or others.

Its primary goal is to reform the criminal person by looking at the factors that led to the crime. Ta`zīr creates a balance between the deterrence theory and the criminal's condition. As it takes into account the security of society and public order, it also takes into account the motivations of the criminal and whether he has records or not. Is it premeditated or not? Is it an organized crime or not? What was the level of damage caused by the crime? And there are other factors that judges consider when judging. Ta`zīr is flexible enough to realize the maximum general benefit to society, effectively reform the criminal, and reduce the harm that he causes.

As for the level of punishment, it does not really differ from the majority of contemporary global legal systems around the world. Because Sharia has left the decision of determining the appropriate punishment to the legal authority when the punishment is not related to Ḥudūd, they can draw inspiration from any legal criminal system that does not contradict with Sharia. With regard to evidence, strict rules of evidence may not apply.[2] The question is “Can discretionary punishments be more severe than Ḥudūd punishments”?

It is very important to figure out whether the Sharia has put an end to governments enacting severe and brutal penalties that may not be commensurate with the nature and level of crime. Most scholars say that discretionary punishments do not exceed the boundary punishment in any case. Ibn Taymiyyah adds an important restriction on this view, which is also the opinion of the Mālikī school, which is that the Ta`zīr punishment in a specific crime must not reach the fixed punishment when both crimes are of the same type. However, discretionary punishments may be more severe than the fixed punishment if the crime committed is of another type. For further clarification, any discretionary punishment for any crime related to sex outside of marriage (adultery) must not reach the level of the fixed punishment for sex outside of marriage (adultery). Similarly, for any crime that has the same nature of theft crime, the discretionary punishment must not reach the level of the fixed punishment for theft, and so on. On the other hand, there may be discretionary punishments for crimes that have the nature of stealing that have a more severe punishment than the punishment for defamation, because the nature of the crime of stealing is not similar to that of defamation.

This is the opinion of the Mālikīyyah, Ibn Taymiyyah and Ibn Qayyim. However, most other schools consider that the discretionary punishment shall not reach the level of the lowest fixed punishment.

The lowest fixed punishment stipulated in the Qur'ān is the punishment for defamation, which is eighty lashes. By this, they see that any punishment of any kind, if it is not specified (Ḥudūd) by the Sharia, shall not reach eighty lashes. This statement, although it significantly limits the authority of the government to enact penalties, is not practically and historically applicable. According to this opinion, the penalties will often be less than what the criminal deserves. In any case, both statements limit the brutality of the sanctions that the authorities could enact. They both ensure that the penalties are carried out in a measure of reasonableness commensurate with the level of the crime. Under these sanctions, each punishment will not reach the level of fixed penalties or the highest limit of each punishment.

Also, among the determinants that limit the legal authority from enacting severe and violent punishments, is that Sharia prohibits any form of mutilation, burning, and indecent exposure in any way.

With regard to the death penalty, which is the most severe punishment in Sharia, Sharia limits it to three cases. These are fixed punishments and not Ta`zīr punishments and were mentioned in the ḥadīth narrated by Ibn Mas`ūd, who said: "The Messenger of Allāh said, 'It is not permissible to spill the blood of a Muslim except in three [instances]: the married person who commits adultery, a life for a life, and the one who forsakes his religion and separates from the community.'"[3]

The first case is the punishment for sex outside of marriage, which be discussed soon. What is meant by "a life for a life" is the third type of punishment, which is retribution. This third case is what is known in the contemporary language as "high treason", which is a punishment applied in most modern countries of the world.

3.3 Qiṣāṣ penalties

The third case in which the death penalty is permitted is called "Qiṣāṣ", which means "retaliation in kind". When there is an intentional murder or intentional bodily injury, the victim or his clan have the right to choose one of three: retribution, recompense, or pardon.

The penalties for Qiṣāṣ crime assure the absolute right of an individual, "the victim or his clan", to 100% equal retaliation. No one, including the high judicial institution, can deprive the victim of his right to the three mentioned options. The authority has no right to grant pardon, only the individual does. If the legal authority thinks that the perpetrator violated the state right or "the public right", the prosecutor can file a separate claim.[4]

An offense may require Qiṣāṣ, Ta`zīr, and Ḥudūd at the same time. For example, if a perpetrator killed (Qiṣāṣ), stole (Ḥudūd), and broke into a property (Ta`zīr), then each type of these penalties would have its own ruling. And now that we have reviewed the characteristics of each of the three types of punishments, let us apply the rules of Ḥudūd and Ta`zīr punishments to one of the most severe penalties in the Islamic criminal system. Through this discussion, we can reach a conclusion regarding the objections mentioned above, which are severity, rigidity, and inflexibility in the Islamic system.

4. Sex outside of marriage:

The punishment for sex outside of marriage in Sharia is stoning to death if he or she is a Muḥsan (one who has experienced sexual intercourse through a valid marriage), and 100 stripes and exile for one year (imprisonment) for a non-Muḥsan. It is a punishment specified by Sharia, and thus it is one of the Ḥudūd punishments. It seems like an absolutely grave punishment.

If we apply the rules related to the Ḥudūd stipulated by jurists according to their understanding of the characteristics of Ḥudūd and Ta`zīr, then we will find that applying this punishment is almost impossible. How is that? In general, for the sex outside of marriage punishment to be enforced, the jurisprudential scholars require the following: the presence of four witnesses attending the case of sex outside of marriage at one time; the witnesses all watch the incident at the same time, not separately; their claims do not differ in the slightest detail; they testify in court together; and they have absolutely no doubt the crime was committed. With regard to the last one, the meaning of doubt concerning the Ḥudūd punishments is very wide. One example of doubt may be claiming that the relationship between the accused man and the accused woman was a type of marital relationship that the scholars differed upon in terms of its legality, such as temporary marriage or a marriage without a guardian.[5] In Sharia, it is not required that the marriage contract is registered officially by the government. It will be an enforceable contract as long as both parties agree upon it, and there is no need for the government to take any action. Taking all of this into consideration, Sharia encourages the witnesses to cover up the sex outside of marriage and not witness before the court, and the ruler should strive in every way to prove the existence of doubt. `Ā'ishah narrated that Allāh's Messenger said: "Avert infliction of the prescribed punishment (Ḥudūd) on the Muslims as much as you can. If he (the accused) has a way out (doubt), then let him go, then the imam (judge) is better to make a mistake in his forgiveness (dismiss) rather than the mistake in executing the punishment." Similarly, `Alī narrated, "Avert the prescribed punishment 'Ḥudūd by rejecting doubtful evidence." Because of this, contemporary scholars agreed to not use DNA, photography, and videos to prove the crime of sex outside of marriage, because even these tools used to prove the sex outside of marriage may contain some doubt. If even a small percentage of doubt arises in the Ḥudūd field the criminal case will be treated as Ta'zīr instead of Ḥudūd, and the Ḥudūd punishment will no longer be applied.

With the implementation of this rule, it is very difficult to impose the punishment of sex outside of marriage due to the rarity of finding a case free of doubt. This is proven by the historical reality of the punishment for sex outside of marriage. Historically, there are only a few number of cases of stoning due to sex outside of marriage.

The Saudi delegation to the International Islamic Forum for Dialogue enumerated the cases that occurred in Islamic history and found that there are no more than fourteen cases of stoning in Islamic history, which is an extreme probability. Also, most of the cases known in Islamic history were voluntary confessions by the accused and not proven through witnesses and investigations. This is a legal history spanning more than 1400 years in a land that extends from Morocco to northern Turkey and to the outskirts of China. However, it is rare to find an applied case. In fact, this strange rareness of the case of sex outside of marriage made some contemporary scholars such as Muḥammad Abū Zahra deny that the stoning punishment is applicable in Sharia law.

Here, a question arises: If the reality is as we mentioned, then what is the benefit of legislating such a punishment that cannot be imposed? Let's examine the aforementioned limited punishment characteristics. We have already shown that the Sharia does not seek to punish people; rather, the core purpose is the deterrence and the protection of public order from moral turmoil. This punishment prevents individuals from professing this crime in a public place, because the evidence of proof in this case would be easy to obtain, and, therefore, no one would aspire to practice vice in a public place or even encourage others to do so. In order to fulfill the purpose of deterrence, pardon of Ḥudūd punishments is impossible, and the punishment cannot be increased, decreased, or modified in any way. Through this punishment, it is apparent that the Sharia does not seek to control the personal behavior of individuals; rather, the purpose is to prevent them from committing this violation. There is no doubt that such a crucial punishment is sufficient to prevent it from spreading in public life.

As for the treatment of the problem of sex outside of marriage, it should be treated primarily by encouraging a moral and religious self-deterrent that would protect society before developing this deterrence through the execution of such a punishment.

5. Conclusion

If there is insufficient evidence to impose the Ḥudūd punishment, does this mean that the suspect is released? Not necessarily. If there is strong evidence indicating that the crime occurred but not enough to prove it as Ḥudūd, the criminal could be punished under the second tier of punishments (Ta`zīr). In any case, the sex outside of marriage punishment under Ta`zīr would not be greater than the punishment under Ḥudūd. If it is transferred to a Ta`zīr punishment, then the punishment will take the characteristics of the Ta`zīr punishments, which includes the possibility of increasing, decreasing, or pardoning the penalty, as required by the appropriate case. As we mentioned, it will be subject to the ordinary criminal system, which resembles the rest of the criminal systems around the world.[6]

In this dual way, Sharia could reconcile the goal of deterrence and protecting society with the goal of observing the right of the individual perpetrator, as well as give lawmakers and the legal authority appropriate opportunities to consider the different situations accompanying the crime. By this, we can conclude the wisdom of the cruelty of Ḥudūd punishments and answer the first concern that objectors of the Islamic criminal system claim. It is merely a nominal cruelty and not realistic. Furthermore, as Sharia prevents tampering with the origin of the crime and its punishment in any way, the legal punishment cannot be changed and the legal authority cannot grant pardon. In return, Sharia gives the government great flexibility in dealing with the crime, because the vast majority of crimes, as we have shown, will move from the field of Ḥudūd penalties to the field of Ta`zīr penalties.

Thus, we discussed the place of rigidity and the place of flexibility in Islamic criminal law and therefore the second concern is resolved. If the crime moves from the Ḥudūd field to Ta`zīr, the legal authority has the complete right to impose the appropriate penalty. In addition, they can enact laws regarding new forms of crimes that may appear that were not present at the time of the Prophet.

So, if we can grasp the extent that the Islamic government has to formulate public policies concerning criminal issues, then the third concern could be answered. This includes enacting a bribery law and its appropriate penalties; enacting a law for the crime of forgery and imposing the appropriate penalties; and enacting laws concerning money market manipulation, monopoly, commercial fraud, etc.

This provides an expansive opportunity for lawmakers to build the criminal system and develop the appropriate public policies. They only have to build it within the general framework of Ḥudūd principles.

Among those principles that guarantee that the legal authority cannot exaggerate in enacting severe and crucial penalties, most Islamic schools of jurisprudence believe that Ta`zīr in its severity cannot exceed Ḥudūd punishment. Therefore, Ḥudūd punishments were deemed as the maximum boundaries established by Sharia that are difficult to approach except in very narrow cases. And the rest of the Ḥudūd crimes are treated the same way as the punishment for sex outside of marriage, such as the punishment for theft and the punishment for apostasy. If we look at Ḥudūd in a historical context, we see that it was applied in a very narrow range. We cannot exclude any punishment from the method followed for Ḥudūd penalties, except the penalty of slander ("qadhf"). What is meant by slander is when a person accuses another person of committing a crime such as sex outside of marriage. The legal punishment of slander is to flog the person who committed such a crime with eighty lashes. Sharia considers slander an infringement on a personal right primarily before it affects the public; therefore, it resembles the Ta`zīr punishment. Also, the punishment imposed is not as severe as other Ḥudūd punishments, and thus similar to the Ta`zīr in this regard. Hence, it does not require strong conditions to prove the crime such as other Ḥudūd crimes. Overall, we can say that this punishment has both the characteristics of the Ḥudūd and the attributes of Ta`zīr punishments.

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Majdi Almarashi received the Bachelor's degree in Sharia (Islamic law) at Al-Imam Muhammad Ibn Saud Islamic University in Riyadh, Saudi Arabia in 2010, then he received the master's Degree in Legal Policy with a (Law) major from the Higher Institute for Judge Qualification at Al-Imam Muhammad Ibn Saud Islamic University in Riyadh in 2013. The master's thesis was (The Provision of The Consulting Contract For The Issuance Of Securities"). Majdi got his second Master's Degree (L.L.M) in Legal Studies with a (Law) major From Case Western Reserve University in The US in 2017. Also, He has a Diploma in Criminal Law from CWRU. In 2020 he received the S.J.D from CWRU. Now, he is an assistant professor at Umm Al-Qura University. He is the general Supervisor of the Correctional Alternatives Center, and vice dean of Collage of Judicial Studies And Regulations.