

Islamic Criminal Law and the Modern Right-Oriented Paradigm

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Abstract

Thomas Cohen's scientific paradigm theory has been developed from its main realm that is natural sciences to social sciences. Islamic criminal law can be studied from this point of view. This article seeks to review the factors involved in formation of the prominent paradigm in traditional Islamic criminal law. Relying upon historical-analytical methodology, the article examines the effects of factors such as the environment in which Islam emerged, the influence of Aristotle's philosophical and logical ideas on Islamic thought, metaphysical anthropology, the extreme literal interpretation and mainly a duty-based view of man. Referring to some challenges that the traditional view is facing in contact with modernity and Human Rights, the article suggests that some developments in paradigms can and even should be welcomed. It is because some parts of paradigmatic developments are a part of the conduct of the wise (bina al- oghala), which is recognized as a source of Islamic law. Of these paradigms is a right-based paradigm. According to the article, the openness of traditional Islamic criminal law to the idea of right and approaching a right-based criminal law will result in some positive and significant changes. Conversely, ignoring the idea of right will make Islamic criminal law far from realities and the requirements of the time.

Keywords

Islamic Punishments, Paradigm, Duty, Right

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A Study on Expressive Crimes in terms of Evolutionary Psychology and Rational Choice Theory

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Abstract

The simplicity and efficiency of rational choice theories are one of the most crucial issues in criminology but they are not successful in explaining expressive crimes. The dominant point of view believes that this failure is due to the irrational nature of expressive crimes; so, the defenders of this theory try to present an interactional and multiple method to cover the weaknesses of rational choice theory. Their attitude is to make a strong base for rational choice theory. This paper is supposed to show the reasons that make the rational choice theory weak in explanation of expressive crimes. Furthermore, it tries to reveal the possibility of understanding expressive crimes in the context of rational choice theory. This research is based on descriptive method and criminology literature. This paper shows that the economic human as a scientific sample is not in compliance with criminal decision-making process. The cognitive mechanism of human being cannot evaluate costs and benefits of behavior before committing a crime. In the opposite aspect, adaptive rationality can explain the psychological mechanisms that are related to expressive crimes and their role in criminal decision-making.

Keywords

Evolutionary Psychology, Expressive Crimes, Natural selection, Rational Choice, Adaptive Rationality

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Evidence in Marital Sexual Violence: Challenges and Solutions

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Abstract

One of the most prevalent forms of sexual violence against women is one which is perpetrated by husbands. The harm caused by such violence impels victims to seek ways to break free of violence. While some of the victims decide to divorce, others make an attempt to prevent their husbands from reusing violence by filing a criminal case. However, in order to achieve their desired outcome, both groups are required to firstly prove the violence, which is not straightforward given the private nature of sex. Therefore, the questions addressed in the present research are: what are the challenges faced by victims of marital sexual violence trying to prove their being subjected to sexual violence, and what are the solutions for facilitating the proof of such violence? To address these questions, a qualitative approach and a case-study method are used in in-depth semi-structured interviews with 18 judges, 10 lawyers and 35 victims. Also, non-participant observation technique is used by attending 16 hearings. The findings show that the proof of sexual violence is complicated by disappearance of physical evidence over time, the lack of eyewitness, courts' evasion of acceptance of scientific evidence, and the fact that sexual violence is not always accompanied by physical injuries. However, it appears that until the laws are amended and supplemented, the difficulty of proving marital sexual violence can be alleviated under the [existing] legal capacity of knowledge of the judge by using other countries' experiences on evidence in domestic violence, such as calling the victim as a witness, acceptance of expert testimony and child testimony, and considering the history of charged and uncharged crimes, and bad acts of perpetrator.

Keywords

Evidence, Marital Sexual Violence, Challenges, Solutions

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Islamist Parties' Approach to Islamization of Criminal Law in Post - Arab Spring Era: A Case Study of Alnahda Party

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Abstract

The Islamists following the Arab uprisings achieved legislative power., As a result, incompatibility between Islamic law and modern law actually became much more apparent. First, Islamists tend to Islamization of criminal law but then it seems that they have changed their scheme. Now, our question is, how and why have the positions and approaches of these movements and parties as political actors changed, especially in the legislation of issues related to criminal law? The scope of this paper is limited to moderate Islamists, which participate in politics through a party and electoral competitions. The paper tries to find an answer to the above question by focusing on Tunisia, as a case study. Islamists were faced with difficult choices between the norms of human rights and sharia law, and so the issues have become more controversial. The crimes of apostasy and blasphemy which violate freedom of opinion and expression, as well as various issues of women's rights such as sexual crimes and polygamy, are among their major challenges.

The Elnahda has eventually abandoned any attempt to Islamize criminal law. This change can be justified by the fact that, first, the party has adapted to the requirements of democracy. Second, the party, like any other political party, has changed its approach to secure its interests, that is, its presence in power.

Keywords

Islamist Parties, Political Islam, Islamization of Criminal Law, Arab Spring, Elnahda Party, Tunisia

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The Role of Non-Retroactivity of Shari'a Criminal Law: Rereading Article 10 of the Islamic Penal Code on Shari'a Punishments

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Abstract

Although in the Islamic Penal Code of 1392, the principle of legality of crime and punishment, in general, and in the case of *Ta'zirat*, *Qisas* and *Diyat*, in particular, has been accepted, at the beginning of Article 10, dealing with the non-retroactivity of criminal law, there is a phrase that seems to exclude *Shari'a* punishments from this rule. In this study, first of all, it is stated that government regulations (*Nezamat & Mogharrarat*) encompass all statute codes, including the previous laws concerning *Shari'a* punishments, and these punishments are not retroactive. Secondly, considering the acceptance of the principle of legality of crime and punishment in *Ta'zir*, *Qisas* and *Diyat*, and considering the fact that the rule of non-retroactivity of criminal law is a definite and undeniable result of the principle of legality, the only exception to this rule is the inclusion of non-mentioned *Hodud* in the case of subsequent legalization. Third, the execution of a later *Shari'a* punishment is permissible only if the perpetrator has not been previously convicted and punished, for example, in the form of *Ta'zir*. In any case, the author suggests removing "government regulations" (*Nezamat & Mogharrarat*) from the beginning of the article 10.

Keywords

Prescribed *Tazir*, Non-mentioned *Hodud*, *Diyat*, *Qisas*, Article 220

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Challenges to the Semi-liberty System in Iran

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Abstract

The semi-liberal system is one of the innovations of the Islamic Penal Code of 1392, which has followed the changes in the criminal sciences in Western countries and in response to the shortcomings of imprisonment, has been incorporated into our country's criminal system. In this criminal institution, the convict spends some of his / her sentence period outside the prison's harmful environment with the aim of accelerating the process of rehabilitation and correction, as well as reducing the adverse consequences of imprisonment. This penal institution, like other penal beneficial although imported institutions, faces challenges despite all its constructive consequences. Legal challenges (lack of judicial procedure, ambiguity in enforcement, issuing authority, necessity or non-necessity of request by the convicted person, its connection with other penal institutions, dominance of criminal system imprisonment, less credibility to the criminal arbitrary institutions and also exclusion of some crimes from the scope of this criminal institution) and the extrajudicial that is divided into two categories of criminology (the challenge of the conventional functions of the criminal justice system and the post-release challenges of imprisonment in the semi-liberal system) as well as the executive aspects (lack of efficient and credible manpower and tending to the imprisonment of judges) are of high importance. This research, using a descriptive- analytical method, seeks to identify the most important challenges and offer appropriate solutions to them to the officials of the Iranian criminal justice system.

Key words

Semi-liberal System, Prison, Convict, Rehabilitation, Society

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A Study on the Feasibility of Applying Plea Bargain to Economic Crimes

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Abstract

Plea bargaining can be considered as one of the compromise-based methods in criminal cases. This approach, which originates from Commonwealth legal system, deals with the accused and the prosecution on the subject of the charge, and eventually reaches a certain structure and agreement. This approach has been taken into consideration by legal systems to address issues such as speeding up the process, reducing costs, and preventing further harm. Economic crimes also require a rigorous criminal approach, given the dangerous nature of the behavior, the pervasive consequences at the community level and the characteristics of the perpetrator. What is visible in most legal systems in the world regarding economic crimes is the subject of property restitution. This has given the plea bargaining a very important place in the economic crimes in countries such as the US, France and Japan. Today, such instrument is not available in the Iranian legal system. However, due to the crisis stemming from the slow pace of litigation and the growing volume of economic cases, it seems that processing and measuring plea bargaining's effectiveness against economic crimes can lead to an appropriate decision-making in dealing with crimes of such nature. In this study, we seek to address the question of possibility of using a plea bargain in economic crimes and the impact of it in the Iranian criminal legal system.

Keywords

Plea Bargain, Economic Crimes, Compensation, Common Law

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Conflict between the Prosecutor and the ICC Chambers about Understanding the Reasonable Basis and the Interests of Justice in the Afghanistan Situation

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Abstract

Initiating an investigation at the prosecutor discretion on Afghanistan situation is one of the mechanisms for exercising the ICC jurisdiction. This is the Prosecutor's approach to counteract the inaction of the Security Council and the Afghanistan state which do not seek to prosecute war crimes on its territory. The Prosecutor's consideration in this way relies on establishing a reasonable basis in article 15(3) of the Statute which must also be approved by the Pre-Trial Chamber. But the Pre-Trial Chamber's assessment of the Afghanistan situation is in line with the interests of justice in article 53(1)(c) of the Statute and has prevented to initiate an investigation the Afghanistan situation. Therefore, the analysis of the ICC jurisprudence of the Pre-Trial Chamber and the Appeal Chamber in this regard is of importance, originality and research innovation. The method of study in this article is descriptive-analytical and critical in order to answer a question: what is the function of the interests of justice in the ICC jurisprudence to initiate the Prosecutor investigation in the Afghanistan situation? Research findings show that the factor of interests of justice in article 53(1)(c) of the Statute is not related to the request of the prosecutor under article 15(3) of the Statute. Accordingly, the Pre-Trial Chamber's approach to the argument that there is no interest in justice in refusing to issue a permit to investigate in the Afghanistan situation is inconsistent with the components of article 15(4) of the Statute. Therefore, the Appeal Chamber as a result of the Prosecutor's appeal, considers to initiate an investigation in the Afghanistan situation without the need to pursue the interests of justice.

Keywords

Jurisprudence, Investigation, Reasonable Basis, Interests of Justice, War Crimes, Afghanistan Situation

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The Principle of Legality of Mode of Trial in Criminal Procedure

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Abstract

The principle of legality of mode of trial is one of the requirements of the principle of legality of criminal procedures that has been mentioned in the Principle 36 of the Constitution, the Article 12 of the Islamic Penal Code and the Article 2 of the Criminal Procedure Code. This principle requires that the criminal procedure authorities' operations and the mode of trial must be determined by law. Whereas this principle has been accepted by Iranian legal system, we should consider that whether its requirements has been given attention in practice? By studying the regulations in criminal procedure, it will be clarified that in some stages of criminal process, the regulations other than law have determined the mode of trial. In this case, we can mention some approvals of the head of judicial branch, especially after the adoption of the Criminal Procedure Code in 1392. Therefore, it seems that however the principle of legality of mode of trial in criminal procedure has been accepted in Iranian legal system, in some cases this principle has been breached in practice.

Keywords

The Principle of Legality of Criminal Procedure, Criminal Procedure, Article 2 of the Criminal Procedure Code, Mode of Trial

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A Study on the Applicability of Infliction of Alcohol Consumption Punishment on Consuming Psychedelics from an Islamic Jurisprudential-Legal Point of View

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Abstract

Unwillingness caused by consumption of alcohol is a harmful state that has forced Iranian criminal system and many of other criminal systems to react and legislate in order to control and prevent such state of mind. Iranian legislator has recently legislated a controversial regulation (Article 264 of Islamic Penal Code) which has led to a fairly wide disagreement about the infliction of alcohol consumption punishment on consuming psychedelics and psychedelic tablets like methamphetamine, amphetamine, L.S.D and Ecstasy; In a way that some criminal courts choose the punishment of *Hadd* and some choose discretionary punishment for unwillingness caused by willful consumption of psychedelics. This Article, with a descriptive-analytical method, argues that among two viewpoints, the viewpoint of opponents of *Hadd* punishment for consumption of psychedelics is more justifiable and more correct, because the first approach conforms with jurisprudence foundations and the rule of “*Ehtiat in Hodud*” and jurisprudential rules and penal policy of Islam in “*Hodud*” and because of its enjoyment from the support of famous jurisprudential views and majority of jurists; Article 264 of Islamic criminal law should be interpreted in light of the viewpoint of opponents.

Keywords

Unwillingness, Alcohol Consumption, Psychedelics, *Hadd* Punishment, Islamic Criminal Law

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Analytical Elements and Effects of Criminal Law Enforcement

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Abstract

Criminal law is a set of rules that defines a crime, determines its punishment, and determines the methods of proving the crime and the execution of the punishment. In the realm of criminal law, there exists written systems, in order to quantify the rational criminal law in their study of their claims. Our approach to statute- based systems is obviously formal and positive. Rational criminal law is an interdisciplinary approach that follows the examination of the criminal law and the legalization of the judicial process from which it derives through the logic of knowledge. Logical criminal law in the aftermath of military creation is a conditional and homogeneous proposition of self-substantiated, positive coherent, deductive and qualitative propositions. In our view, the logical rules of criminal procedure are also fundamental, formal, constitutional, disconnected from the origin of the law and are foreseeable.

Key words

Statute, Legislation, Criminal Law, Element of Law, Enforcement of Law

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An Investigation on the Extent and Factors of Fear of Crime in Kabul

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Abstract

Fear of crime among the citizens of a society is an important topic in the study of criminology and sociology of deviations, because the fear of crime, not only challenges the security of all countries, also affects individuals' private lives, to the point where it intensifies feelings of distrust and vulnerability in individuals and divides communities. Therefore, fear of crime must be carefully analyzed. The main question of this research is whether the residents of the district 13 of Kabul have been influenced by fear of crime? In what places, what are they afraid of and why?

This research has used a survey-based method and Pearson correlation type. The statistical population was all residents of district 13 of Kabul, which 285 people were interviewed by multi-stage cluster sampling. The main and the dependent variables were measured with multiple choice Likert scale.

The findings and results obtained from this study indicate that the total level of fear among the residents (from a minimum of 2 to a maximum of 5) was 3.43. Women with an average of 3.19 are more afraid of crime than men with an average of 2.95. There was a significant relationship between the variables of social disorganization, micro cultural diversity, neighborhood trust and neighborhood affiliation with the fear of crime variable. But there was no significant relationship between the variables of police and media practice with the variable of fear of crime.

Keywords

Disorganization, Fear of Crime, Gender, Social Media and Police Operations

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