

Comparison Between Islamic Criminal Law and Man-Made Law

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Abstract

Laws can be broadly categorized into two main types: private laws and public laws. Criminal law falls under the umbrella of public laws and deals with offenses that are considered violations of public rights and responsibilities within a community. It encompasses a set of rules that define and punish various crimes committed by individuals against the state, aiming to deter criminal behavior and maintain social order. When comparing Islamic Criminal Law with Man-made Law, it becomes apparent that they differ significantly. Man-made law refers to provisions that have been formulated by humans and are not derived from any divine revelation. On the other hand, Islamic Criminal Law is rooted in a sacred source, as it is deduced from divine guidance and considered sacred itself. Due to this fundamental disparity, finding common ground between these two legal systems become challenging. To gain a comprehensive understanding of these differences, a thorough analysis of their characteristics and principles becomes necessary. This article aims to explore and compare the similarities and disparities between Islamic Criminal Law and Man-made Law, shedding light on why Islamic law should be considered a suitable and applicable legal framework in the world today.

Keywords: Comparison, Islamic Criminal Law and Man-made Law

Introduction

Islamic criminal law encompasses three main categories of punishments: *Hudud*, *Qisas*, and *Ta'zir*. The implementation of these punishments reflects the commission of specific crimes. For instance, amputation of a limb is prescribed for highway robbery and theft, stoning to death for adultery, flogging for adultery, false accusation and consumption of alcohol, fighting against rebels for rebellion, and execution for apostasy and intentional murder. In cases of unintentional murder and quasi-intentional murder, compensation should be paid. *Ta'zir*

punishments, on the other hand, are applied when crimes or offenses lack a specified punishment in Islamic sources. It is important to acknowledge that some of the mentioned punishments are severe and stringent. However, it is crucial to understand that their purpose is to safeguard Islam, life, dignity, human intellect, and wealth from interference or disruption. Neglecting these punishments could lead to societal disorder, chaos, and harm.

Literature Review

In Arabic, the term for crime is commonly referred to as *jarimah* or *jinayah*. Both of these terms carry the connotation of crime or offense. The root word of *jarimah* literally translates to "cut off" (Anwarullah, 2005). Additionally, it signifies sin, crime, fault, offense, or an act of disobedience, encompassing intentional transgressions as well as those committed unintentionally or inadvertently (Lane, 1968). From a technical standpoint, *jarimah* refers to the act of committing something that has been prohibited by Shariah or failing to adhere to what has been commanded by Shariah, consequently warranting the prescribed punishments of *hudud* or *ta'zir* (Abu Zahrah, 1980).

In other words, the commission of a prohibited act or the omission of an obligatory act constitutes a violation of the legal order and prohibition. For instance, adultery (*al-zina*) serves as an example of a prohibited act. The primary sources of Islamic law stipulate specific punishments for this offense, such as a hundred lashes for unmarried individuals and stoning to death for married individuals. On the other hand, disobedience to the *Khalifah* or leader of the Islamic state (*al-baghyu*) exemplifies an act of omission. In such cases, al-Quran and al-Sunnah determine that the individual in question may be fought or killed. Negligence in fulfilling religious duties, such as obligatory prayers or fasting during the month of Ramadan, also incurs punishments (Zaydan, 1993).

The term *jinayah* refers to a prohibited act committed against another person, such as murder or causing harm. Some scholars argue that it encompasses all types of prohibited acts that result in injury, whether it pertains to the human body, property, or other violations (Ibnu Nujaim, 1997). On the other hand, according to other scholars, *jinayah* specifically refers to offenses that are subject to punishments of *Hudud* or *Qisas* (Ibnu Farhun, 1995). In general, jurists do not differentiate between *jarimah* and *jinayah*, as both words essentially carry the same meaning and are synonymous with each other (Audah, 1997).

In addition to the aforementioned terms, there are other words that are used to refer to crime, such as "disobedience" (*ma'siyyah*) and "sin" (*ithm*). The term "disobedience" (*ma'siyyah*) is a broad term that encompasses both punishable and non-punishable offenses. It signifies acts of disobedience towards Allah or the commission of actions that contradict Shariah. From this definition, we can infer that all forms of crime can be categorized as *ma'siyyah* ("disobedience"), but not all instances of *ma'siyyah* can be considered crimes, as the latter refers specifically to punishable forms of disobedience. On the other hand, the term "sin" (*ithm*) denotes actions for which retribution or punishment will be imposed on offenders in the hereafter if they are not pardoned or forgiven (Anwarullah, 2005).

According to Al-Zuhaily (2013), the term *ithm* encompasses both major and minor sins and can be understood as "disobedience" or *ma'siyyah*. Neglecting an obligatory prayer is an example of a major sin, while engaging in lustful gazes towards a non-mahram woman is an example of a minor sin. It is important to note that the concept of *ithm* or sin refers specifically to the commission of prohibited acts, without necessarily causing harm to others. However, if an act is harmful in nature, it would be classified as *al baghyu* or "transgression".

Research Methodology

This research employs a library research methodology with a qualitative approach that combines both exploratory and descriptive methods. The exploratory research aspect utilizes an investigative focus formula to provide initial insights and identify relevant results (Marican S., 2005). The research applies content analysis as the technique to examine the data, which includes Islamic sources such as Al-Quran and Hadith, as well as relevant journals, seminar proceedings, and scientific books that directly or indirectly relate to the study. The collected data is then processed, organized, and analyzed to draw conclusions.

Objectives

1. Examining the equations from the philosophical, principle, and conceptual perspectives between Islamic Criminal Law and Man-Made Law.
2. Analyzing the differences that exist in Islamic Criminal Law and Man-Made Law.

Findings and Research Discussion

1. Similarities between Islamic Criminal Law and Man-made Law

There exist certain similarities between Islamic Criminal Law and Man-made Law, which can be outlined as follows

1.1 Definition

Islamic Criminal Law and Man-made Law share a similar definition of crime or offense, primarily centered around the commission of a prohibited act or the omission of an obligatory act for which a prescribed punishment is determined or provided. In essence, the definition of crime or offense in Shariah aligns with the definition of crime under Malaysian Law (Anwarullah, 2005). In both legal systems, an act is not considered a crime until the corresponding punishment is determined (Audah, 1997).

1.2 Objective(s)

Both Islamic Criminal Law and Man-made Law share a similarity in their objectives. Both legal systems aim to achieve and uphold public interest, maintain social order, and ensure the well-being and continuity of society. Additionally, they both seek to protect individuals and their rights, promote justice, deter criminal behavior, and maintain the overall stability of the community. While Islamic law also emphasizes the objective of obeying Allah and seeking His pleasure, both legal systems ultimately strive to serve the broader goals of societal welfare and harmonious coexistence (Alotaibi, 2021).

1.3 Judicial Process

One significant point of convergence between both laws is the requirement of a judicial process for the determination of a crime. In other words, the presumption of a criminal offense cannot be considered valid until it is presented before a court for trial. Only after the accused has been proven guilty can the crime be established, and the offender should then be subjected to appropriate punishment. It is crucial to note that the accused is presumed innocent until the trial is conducted. This principle aligns with the legal maxim in Shariah law, which states that originally, one is innocent until proven otherwise (Alotaibi, 2021). This principle of presumption of innocence is also reflected in Malaysian law, demonstrating a parallel between the two legal systems.

1.4 Standard of Proof

In Islamic Criminal Law, an accusation made without sufficient proof or evidence cannot be considered reliable. The accuser, in such cases, is deemed sinful, and there may be instances where they themselves should be subject to punishment. The accused person, on the other hand, is presumed innocent in both the eyes of the law and the public until sufficient evidence is presented to prove otherwise. This principle is also recognized and upheld within Malaysian Law (Tajuddin & Hussin, 2021).

While there are similarities between the two legal systems, it is important to note that these similarities are not absolute. One notable distinction is the standard of proof employed in Islamic Law, which is considered fairer as it emphasizes the preservation of both personal and public interests simultaneously. In order to safeguard the public interest, the wrongdoer is subject to punishment. Conversely, to protect personal interests, the accused person is afforded an opportunity to defend themselves, and the accuser is required to provide evidence proving the guilt of the accused before the court. The court must exercise caution before convicting the accused, ensuring that the standard of proof is met to avoid punishing an innocent person. This approach ensures a balance between upholding public interest and protecting the rights of individuals involved (Anwarullah, 2005).

2. Differences Between Islamic Criminal Law and Man-made Law

There are several notable differences between these two forms of laws:

2.1 Sources in Islamic Criminal Law

Indeed, the original source of Islamic Law is Allah. Shariah is the central component of the religion of Islam, which was introduced and revealed by Allah, who is the ultimate Lawgiver (Imran, 2000). Islamic Criminal Law is a subset of Islamic Law. While there may be variations in the standards of punishments, such as offenses subject to Hudud, offenses subject to Qisas, and other offenses subject to Ta'zir, all of them are ultimately derived from the primary source, which is Allah through the Quran. Allah states

And judge, [O Muhammad], between them by what Allah has revealed and do not follow their inclinations and beware of them, lest they tempt you away from some of what Allah has revealed to you.

Al Maidah: 49

He also says

Indeed, We have revealed to you the Book in truth so you may judge between the people by that which Allah has shown you. And do not be for the deceitful an advocate.

Al Nisa': 105

Perhaps there might be some confusion regarding certain punishments or sentences, which are derived from Prophetic Traditions, such as the punishment of stoning to death, and other punishments that may be decided by a judge as *ta'zir* punishments. These provisions, based on Prophetic Traditions and the decisions of judges in *ta'zir* cases, demonstrate that both the Prophet and judges act as interpreters and implementers of the law, alongside Allah. Addressing the first part of this suspicion, it should be noted that Prophetic Traditions (al-Sunnah al-Nabawiyah) are also considered sources of Islamic Law, providing guidance on

various societal issues. Numerous Quranic verses emphasize the importance of obeying the Prophet (pbuh) and warn about the consequences of disobedience to his teachings (Imran, 2000). Allah says:

O you who have believed, obey Allah and obey the Messenger and those in authority among you.

Al Nisa': 59

He also says

It is He who has sent among the unlettered a Messenger from themselves reciting to them His verses and purifying them and teaching them the Book and wisdom - although they were before in clear error.

Al Jumuah: 2

Additionally, He states

Nor does he (Muhammad) speak from [his own] inclination. It is not but a revelation revealed.

Al Najm: 3

Based on the aforementioned verses, it is incumbent upon us to wholeheartedly adhere to, emulate, and seek guidance from the Prophetic Traditions. The Prophetic Traditions encompass everything that originated from the Prophet, including his sayings, actions, tacit approvals, and teachings. Punishments like stoning to death or administering forty lashes to those who consume intoxicants are indeed part of Islamic Law, as they are derived from the sayings or actions of the Prophet himself (Kamali, 2003).

Regarding *ta'zir* punishments, it is undeniable that the judge holds authority to determine and impose an appropriate punishment, within the boundaries and guidelines set by Islamic sources. Such decisions must align with the overarching objectives of Islam, which include safeguarding religion, life, dignity, intellect, and wealth. It is crucial for the judge to exercise caution and ensure that their rulings do not contradict what is permissible under Islamic law (Audah, 1997; Tajuddin & Hussin, 2021).

Islamic law remains unalterable and immutable, regardless of changes in rulers, leadership styles, locations, or time. On the other hand, man-made laws can be modified and changed based on the preferences of leaders or rulers. Islamic Law holds a sacred and revered status because it is a divine law, revealed and ordained by Allah. Neither His angels nor the Prophet had any involvement in drafting the law. It is the divine revelation of Allah that guides and commands people, irrespective of their positions or authority, to show reverence and appreciation for it. Muslims who comprehend the significance of implementing Islamic Law are more devout and foster a closer connection with Allah, as they recognize its supreme importance (Kamal, 2013).

2.2 Sources of Man-Made Law

When it comes to the man-made legal system, it originates solely from human intellect, lacking the divine or sacred nature of Islamic law. Such laws are often influenced by racial sentiments that cater to specific races while neglecting others. They are also confined to limited circumstances, failing to accommodate different situations. Being formulated by human beings, man-made laws may be respected by certain groups of people but not by

others. They may be accepted by the affluent but not the underprivileged, satisfying the rulers but not the subordinates. Typically, man-made laws are created or legislated by powerful individuals in society to safeguard the interests of those in authority. Consequently, these laws are subject to frequent modifications to serve their own desires and objectives (Al-Qattan, 2018).

Regarding the sources of law in Malaysia, including criminal law, the written law holds paramount importance. It encompasses the Federal and State Constitutions, legislation enacted by Parliament and State Assemblies, as well as subsidiary legislation established by individuals or bodies empowered by Acts of Parliament or State Assemblies. Additionally, Malaysian law draws from the unwritten law, which encompasses legal principles not enacted by Parliament or State Assemblies and is not explicitly stated in the written Federal or State Constitutions. The unwritten law emerges from court decisions, local customs, and other sources. It comprises English legal principles that are applicable to local circumstances, judicial rulings by superior courts, and customs of the local inhabitants that have been recognized as law by the courts (Trakic, 2021).

Islamic law, also known as Muslim law, holds significance as one of the sources of Malaysian law. In Malaysia, there is a growing trend of integrating Islamic principles into our local laws. For example, there have been recent efforts to incorporate Islamic principles into land law. Muslim law applies to every Muslim and holds particular importance in matters pertaining to family and inheritance laws.

3. Moral Virtues

One of the fundamental aspects of the religion of Islam is its foundation on moral virtues (Audah, 1997). In one of the Hadith narrations of the Prophet, he is reported to have said:

*I have been sent to perfect good character.
Narated by Imam Tirmidhi*

Practically speaking, the Prophet devoted more than ten years to cultivating excellence in the conduct and behavior of his initial followers. In order to uphold the primary objectives of Shariah, which encompass preserving religion, life, dignity, human intellect, and wealth, Islam establishes specific laws and corresponding punishments that should be implemented. Committing an act that runs counter to these objectives is considered a breach of proper behavior (*akhlaq*), and the offender is subject to appropriate sentencing.

In other words, it can be concluded that Islamic Criminal Law is established on the basis of *akhlaq* ("morality"), as crimes themselves contradict the values of *akhlaq* by their role in harming the soul, wealth, dignity, and other aspects. Regarding the matter of *akhlaq*, man-made law often overlooks the significance of *akhlaq* in its legal provisions and punishments. Acts that do not align with *akhlaq* may be permissible under man-made law as long as all parties involved provide consent and the act does not cause harm to others or disrupt public interest (Al-Bugha, 1997).

The crime of adultery, for example, is deemed both sinful and a crime in the eyes of Shariah. If a person is found guilty of committing this offense, they shall be subject to punishment as determined by the court. One of the reasons for prohibiting such an act is that it contradicts the standard of behavior (*akhlaq*). Conversely, under man-made law, adultery is not universally considered a crime unless it occurs under coercion or rape, despite being

inconsistent with societal standards of behavior. The label of guilt for the adulterer is only applied if the act of adultery poses a threat to social order and stability (Anwarullah, 2005).

Under Malaysian law, the offense of sexual intercourse between unmarried couples appears to be exempt from punishment if both parties provide consent. While this action is regarded as a serious crime in Islamic law, it is only considered an immoral act in Malaysian law and not necessarily criminal. However, if such act contributes to societal chaos, such as in cases of prostitution, it then may be treated as a crime (Trakic, 2021). Another example is gambling, which is clearly prohibited in the Quran as it infringes upon human rights and does not contribute to the improvement of life. However, Malaysian law does not entirely prohibit gambling, and it has even become a source of income for the country in recent times.

One situation that exemplifies this is the case of *Aspinall Curzon Ltd. v. Khoo Teng Hock* [1991] 2 MLJ 484. In this case, the plaintiff, who owned a licensed gambling casino, obtained a judgment in the High Court in Kuala Lumpur to enforce it in Malaysia. On appeal, the defendant argued that the cheques given to the plaintiff in exchange for cash and gaming chips were provided as illegal consideration, and therefore the judgment should not be enforced due to public policy or immorality. However, the judge dismissed the appeal and held that if the contract had been entered into in Malaysia, it would have been executed with lawful consideration, and Section 24 of the Contracts Act 1950 does not render it void. The use of gaming chips for the purpose of gambling is not unlawful as long as the gambling takes place in a licensed gambling premise. This principle is derived from the law in England and has been adopted in our country. Therefore, based on the facts of this case, we can conclude that gambling, despite being morally opposed, is not considered a crime in man-made law as long as it does not violate any legal provisions (Muda, 2010).

Similarly, the consumption of intoxicants is deemed a crime under Shariah but not under common law. Shariah considers it a crime because it has the potential to impair or disrupt the functions of the human intellect, which is essential for activities such as thinking, seeking knowledge, organizing, and managing. Preserving human intellect is one of the five objectives of Shariah. However, in the Malaysian context, there is no prohibition on the consumption of liquor for individuals regardless of their beliefs. The law prioritizes freedom in personal choices, which means that Muslims who choose to consume alcohol will not be convicted as long as they do so within the permitted boundaries. From an Islamic perspective, the act of drinking alcohol is considered devoid of any benefit. It only serves to impair the mind and intellect, making it contradictory to moral values and public policy. In the case of drinking alcohol or other intoxicants, Islamic law discourages people from approaching them altogether, even in small quantities, considering the ethical implications and aiming to deter their consumption. Despite these facts, Malaysia continues to produce, manufacture, and sell alcohol. For this, in order to safeguard the well-being of society, Islamic law introduces the principle of *sadd al-zarai'*, which aims to prevent individuals from engaging in actions that may lead to crime or sin, even if they are technically permissible (Kamal, 2013).

The common law, being based on legal principles and societal customs rather than religion, does not inherently consider morality aspects. In the context of drinking liquor, it is only deemed unlawful under common law if it results in significant societal chaos or disorder. This reflects the approach of common law, which focuses on the practical considerations and actual circumstances rather than moral judgments (Al-Qattan, 2018).

Conclusion

Islamic criminal law is primarily focused on achieving the objectives of retribution, deterrence, reformation, and expiation of sin, rather than solely emphasizing punishment for offenders. Throughout Islamic history, it has been observed that the number of individuals who committed crimes falling under *hudud* and *qisas* offenses was relatively low. This serves as evidence that Islam has been successful in reducing crime rates. For instance, the occurrence of adultery cases has been minimal, with most instances being admitted through confessions made by the offenders themselves.

Here, it is clear that Islamic Criminal Law, which contains philosophies and principles ensuring the establishment of a peaceful and secure society, is applicable at all times and in any place where it is implemented. In Islamic Criminal Law, several interests (*masalih*) are safeguarded and protected from harm (*mafasid*), namely (1) Religion, such as the prohibition of apostasy; (2) Life, for instance, the prohibition of killing and causing harm; (3) Lineage (Good Name), such as the prohibition of adultery and false accusations (*al-qazaf*); (4) Intellect, for example, the prohibition of consuming alcohol and intoxicants; (5) Wealth, like the prohibition of theft and robbery; (6) Security and peace of the state, for instance, the prohibition of rebellion (*al-baghyu*) and the violation of human rights. Therefore, Islamic Criminal Law should be studied and refined by all parties to serve as the best model in shaping a legal system capable of ensuring security, justice, and eradicating all forms of escalating crimes in society today.

The Islamic Criminal Law system adheres to a comprehensive concept aimed at providing justice that ensures the well-being of human life. The implementation of Islamic Criminal Law revolves around four fundamental concepts: (1) Punitive, to punish/retaliate, as human nature is often driven by desires. Therefore, actions begin with imposing a punishment commensurate with the offense committed, so that a criminal feels the suffering endured by the victim or the victim's family. (2) Preventive, to prevent others from committing the same offense. Punishment also serves as an effective lesson to others to prevent them from committing the same mistake. (3) Deterrent, to prevent the criminal from repeating the same offense in the future with a harsh and severe punishment received. (4) Rehabilitative, the rehabilitation of the offender in the form of education for the soul and character of the criminal. It cannot be denied that the rehabilitation of offenders into useful members of the family and society is achievable through the imposed punishment.

In essence, the empowerment of the implementation of Islamic Criminal Law should be given attention, taking into account its historical and philosophical success factors. To achieve this, open dialogue on the implementation of Islamic criminal law, specifically, and Islamic law in general, must be fostered and given a place. Comprehensive actions and efforts are necessary because laws do not exist in a vacuum; instead, laws are an essential part of shaping the foundation of a civilization's policies.

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