

The Art of Not Punishing

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In a recent book, Harvard Professor of Law Intisar Rabb focuses on what she terms the ‘doubt canon’ in Islamic law, which instructs jurists to avoid criminal punishments in cases of doubt. In rediscovering the centrality of this concept, Rabb shines a light on an aspect of Islamic law that is too often ignored today.

Reviewed: Intisar A. Rabb, *Doubt in Islamic Law A History of Legal Maxims, Interpretation, and Islamic Criminal Law*, Cambridge UP, 2015.

Intisar Rabb’s *Doubt in Islamic Law* highlights the central role that doubt has played in the development of Islamic law. In particular, Rabb’s study is focused on what she terms the ‘doubt canon’ in Islamic law, which instructs jurists to “avoid criminal punishments in cases of doubt” (p. 4). She unearths the history of this canon and how it was used to avoid imposing severe criminal punishments. Doubt is a category that demonstrates the judiciary aspect of Islamic law often unseen in contemporary debates about Islamic law as an unyielding set of substantive rulings. In rediscovering the centrality of this concept, Rabb shines a light on an aspect of Islamic law that is too often ignored today. As she writes, “the most vehement advocates for Islamic criminal law [today] exhibit little to no understanding of its historical contours, and certainly not of the contextual definitions, functions, and used of doubt” (p. 321).

This book is a wonderfully nuanced portrayal of a millennium of Islamic criminal law from accounts of Muhammad’s life in the 7th century through the spread of the Ottoman and Safavid Empires in the 16th century. Rabb’s focus on the procedural use of doubt in the implementation of Islamic law demonstrates how many of its practitioners envisioned the law being put into practice. Her reading reveals a prevailing concern among Islamic jurists not to impose the harsh criminal punishments that the law codes seem to sanction. This concern had to do precisely with the gravity of the criminal punishments and a hesitation to impose such strict

measures when they were not fully applicable, i.e. in cases where doubt could arise about whether the commission of a crime warranted these harsh punishments. Rabb refers to this as “[p]unishment avoidance” that jurists could use to “mitigate their own moral anxieties about enforcing punishments that were unauthorized” (59). It was the very harshness of these rules that made their enforcement unpalatable. The use of the doubt canon began as a judicial practice, was later textualized as a foundation of law, and was then generalized to become common practice. This was based at first on historical accounts of the judicial practice of the Prophet and the early Muslim community. Once textualized, it became known as the doubt canon, and eventually it became an authoritative text from which jurists could generalize by interpreting it as a general principle.

Doubt and the Problems of Text

Islamic jurists claim Islamic law to be textual and that its textual foundations are the Qur’an and Hadith. The *ḥudūd* (fixed punishments, sg. *ḥadd*) and their punishments are said to be established explicitly in the Qur’an. Nevertheless, the precise identity of *ḥudūd* laws was often contested and there was only partial agreement as to their number and scope (p. 34). Because of the harshness of the punishments for committing these violations, judges felt uncomfortable imposing them, and so looked to doubt as a way of exculpating the accused. By creating situational doubt, jurists could exculpate the perpetrator and avoid applying *ḥudūd* punishments. Not only did jurists use doubt to create high burdens of proof, but they also sought to avoid applying punishments to cases that could not factually be established as *ḥudūd* offenses. It would be a violation of the divine law not to impose penalties on a proven crime, just as it would be to impose those same penalties on other crimes not specified by God. While evidentiary doubt could be used to avoid enforcing punishments when the identity of the perpetrator was uncertain, jurists also recognized legal and interpretive doubt as vitiating the required *ḥudūd* punishments. In speaking of legal doubt, jurists excused people who did not know the illegality of their act, a situation that could readily arise in the legally pluralistic environment of medieval Islamic law. Interpretive doubt could also occur at the level of jurists, wherein different valid interpretations of a legal text could lead to different rulings.

An illustrative example from the life of Muhammad is what Rabb calls the “Case of Mā’iz.” Mā’iz was a convert to Islam who committed adultery and confessed his crime to

Muhammad. Muhammad, however, refused to charge Mā'iz with adultery despite repeated confessions. On the fourth confession, Muhammad asked whether Mā'iz was of sound mind and if he had “merely kissed or winked or looked at’ another woman” and not actually committed adultery (p. 25). When Mā'iz insisted that he committed adultery in the full meaning of the term, Muhammad found him guilty but imposed no punishment. Later, Muhammad is informed that the townspeople stoned Mā'iz. On hearing this, Muhammad was crestfallen and cried that “they should have let Mā'iz go” (p. 26). This case was an early example of the use of doubt to avoid imposing the *ḥudūd* sanctions. Many jurists saw Muhammad’s refusal to punish Mā'iz as an indication of how they should adjudicate. In spite of a confession, Muhammad did not charge Mā'iz, then, after four confessions, Muhammad tried to create doubt as to his guilt by looking for exculpatory evidence. Muhammad’s dismay at his punishment was further seen as a rebuke of the punishments enforced on Mā'iz by the Meccans. While the prevailing trend was to read this as a text encouraging avoidance of the *ḥudūd*, a minority of jurists read this as a straightforward application of the prescribed punishment in the face of Muḥammad’s personal desire not to punish Mā'iz.

Many Forms of Doubt

Rabb shows how doubt could be read into reports of early legal cases in which a judge did not impose *ḥadd* or in which a judge imposed *ḥadd* only in the face of incontrovertible evidence. In “The Case of Mā'iz,” for instance, Muhammad never mentions doubt explicitly, but it was easy for jurists inclined towards punishment avoidance to read doubt into this case. In this and other early cases, judges supported an idea of privacy and non-judicial settlement in which a private morality took precedence over public enforcement. People were expected not to bring minor cases to trial if they could best be resolved privately. The repentance of the perpetrator could stand in for the ruling of a judge.

Early legal scholars used doubt, bolstered by the stories of doubt, as part of competing policies of *ḥadd* enforcement and avoidance. Texts could be read and mined for both imperatives; jurists could claim to be textualists rigorously enforcing the law while at the same

time finding texts (stories, precedent, contracts, etc.) for creating and finding doubt in order to avoid enforcing the *ḥadd* punishments. The different schools of law achieved this in different ways, but even those who claimed to be ardent in the application of *ḥadd* punishments were often able to dig up exculpatory doubt at legal proceedings in order not to enforce the severe punishment. As Islamic law developed, the doubt canon became an authoritative text attributed to Muhammad and became a recorded legal maxim. This attribution provided a textual basis for employing the doubt canon liberally and for “doubt jurisprudence” to expand. Rabb gives many examples of the kinds of doubt accepted and the cases in which this could arise, but the period from the 11th to the 16th centuries saw a large increase in the use of doubt for *ḥudūd* avoidance.

Against Doubt

Although Rabb demonstrates the prevalence of “doubt jurisprudence” among practitioners of Islamic law, there was nevertheless a minority trend against the use of doubt to avoid imposing punishments. This stemmed, in part, from a strict commitment to textualism and a belief that Islamic law always had one correct ruling to a legal question. A majority of jurists believed that more than one correct answer could be reached for a legal situation, based in part on differing interpretations of the Qur’an and the Hadith. Those who did not hold this view, however, seemed also to be less inclined to pursue a doubt jurisprudence.

Further, whereas doubt could be a way to avoid imposing overly harsh penalties, there was also a concern that doubt might be used to favor the elite. Rabb shows how the doubt maxim was used to attempt to counteract this trend, although it nevertheless was at times used in a corrupt fashion by the elite, a group of which jurists were part. She further addresses the elite-leniency maxim which urges judges to overlook the faults of the elite. This maxim was circulating at the same time as the doubt canon and it was only with a *ḥudūd* exception that the elite-leniency maxim came to be recorded, remembered, and retold. This was because of the way in which doubt canon won out and at the same time reinforced the idea of everyone being subject to *ḥudūd* penalties, elite or not.

Rabb describes a small but persistent trend against the doubt canon. It was seen most strongly in the Zāhirites, the ‘Literalist’ school of law, which existed in the 9th-10th centuries in Iraq and later in Islamic Spain in the 11th century. This trend was also found among the early Ḥanbalīs in the 9th and 10th centuries, although avoidance was still the dominant Ḥanbalī position

in the later school, i.e. after the 12th century, particularly as it was forced to operate within pluralistic empires and face living alongside other schools in a 'practical setting.' Nevertheless, these opponents did find the points of tension, since doubt was never uniformly applied and thus created inconsistencies, uncertainties in law, and was often used to favor those with social capital. Rabb also shows a similar trend playing out between tradition-oriented and rationalist Shi'i jurists, although this took place in the 15th and 16th centuries.

Rabb demonstrates convincingly the concern that Muslims jurists had to attempt to resolve legal disputes correctly, but moreover, their overwhelming concern with adhering to a plain-sense understanding of fairness, of a punishment fitting the crime. The portrait she paints of Islamic law is one of a system in which jurists seek out leniency and understanding. This is in sharp contrast to the pictures painted so often of Islamic law today, of an inflexible and unchanging system of harsh punishments to be meted out. This is a very important book for scholars and students of Islamic law, but as vital historical background those interested in the interactions between democracy, Islamic law, and modernity in the contemporary Middle East.