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DISCRETIONARY DEATH: A COMPARATIVE ANALYSIS OF IMPOSING THE DEATH PENALTY IN THE UNITED STATES AND ISLAMIC REPUBLIC OF IRAN

Joshua Womack*

Distrust all in whom the impulse to punish is powerful!¹

- Friedrich Nietzsche

I. INTRODUCTION

On January 1, 2008, the Islamic Republic of Iran started the year by hanging thirteen prisoners.² The prisoners were executed for crimes ranging from murder to drug trafficking.³ Among those executed was Raheleh Zamani, a young woman convicted and sentenced to death for the murder of her husband.⁴ Raheleh, a twenty-seven year old mother of two, was married to an abusive husband at the age of fifteen.⁵ According to Raheleh, on the day she murdered her husband she caught him with another woman in their home.⁶ After

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³ Id.

⁴ Id.

⁵ Id. (reporting that a group of feminists were trying to save Raheleh by asking for the consent of the victim’s family).

⁶ Raheleh Zamani, Young Mother of 2, To Be Hanged, SAVE DELARA!, http://www.savedelara.com/Raheleh+Zamani.html (last visited Jan. 25, 2008) [hereinafter SAVE DELARA!].
confronting her husband about the other woman, Raheleh was threatened and beaten.\footnote{Id. (reporting that Raheleh had just given birth to her second child less than two months prior to the incident. Additionally, Raheleh appeared to suffer from post-partum depression from the birth of her child as well as battered-women's syndrome from the years of abuse at the hands of her senior husband. However, despite this information about her mental state Raheleh was still found guilty of pre-meditated murder and sentenced to death).} In an attempt to calm her, Raheleh was given some pills by her husband.\footnote{Id.} Raheleh, while feeling the effects of the pills and her distraught state, proceeded to attack her resting husband with a steel pipe, later proclaiming, "I didn’t know who I was beating with that steel pipe. I saw him as a monster. . . . I was terrified."\footnote{Id.}

Cases like Raheleh’s are not uncommon in the Islamic Republic of Iran as Iran uses the death penalty more than any other country, apart from China.\footnote{Iran hangs 13, including mother: Reports, HAABA, http://www.haaba.com/news/2008/01/01/7-70503/iran-hangs-13-including-mother-reports.html (last visited Jan. 25, 2008) [hereinafter HAABA].} According to one local judiciary official, Hoda Torshizi, the use of the death penalty is for security: “[b]y implementing God’s law, we are increasing security in society and we are sending a message . . . [to] those who break the law.”\footnote{Id.} Iran’s reliance on the death penalty continues a growing tradition for the Islamic state.\footnote{Id.} It comes as no surprise that Iran recently opposed the abolition of the death penalty during a vote on the United Nations General Assembly resolution.\footnote{Id.; see also Maggie Farley, U.N. adopts death penalty moratorium, L.A. TIMES, Dec. 19, 2007, at A11 (reporting that the General Assembly of the United Nations adopted a moratorium on the death penalty with a 104-54 vote. This vote was opposed by the United States, China, Iran, and others charging that this interfered with country sovereignty. This moratorium was a victory to those that want to abolish the death penalty despite the fact that on two previous occasions' similar votes failed, 1994 and 1999. Proponents concluded that the resolution was adopted because “[t]here is no conclusive evidence of the death penalty’s deterrence value and . . . any miscarriage or failure of justice in the death penalty’s implementation is irreversible and irreparable.”; UN General Assembly approves resolution calling for death penalty moratorium, INT’L HERALD TRIB. (Paris), Dec. 19, 2007 [hereinafter Moratorium] available at http://www.iht.com/articles/ap/2007/12/19/news/UN-GEN-UN-Death-Penalty.php.} What is surprising is that the United States also opposed the
abolition of the death penalty, joining in a strange alliance with Iran.\(^\text{15}\) This raises the question of how the United States, as a democratic state, can agree with a fundamentalist Islamic nation like Iran on employing the death penalty.\(^\text{16}\)

This comment discusses the background, court structure, and the role of discretion in applying the death penalty in the Shari’\(\text{a}\) based criminal system of Iran. This comment also discusses the state of the death penalty in the United States. Few developed countries retain the operation of the death penalty as an act of punishment like the United States and Iran.\(^\text{17}\) These two nations have different legal systems, histories, and standards for when the death penalty is appropriate, but with the same outcome of state sanctioned death. The international view of the death penalty is to abolish the practice,\(^\text{18}\) and its continued implementation by the United States and Iran will be criticized. Ultimately, if the death penalty continues to be used in Iran it would benefit the country to modernize its legal system to a process similar to the United States with guided discretion in a bifurcated trial system. This modernization would be similar to other Islamic nations that have supplemented the law of Islam (Shari’\(\text{a}\)) within European modeled codes.\(^\text{19}\) However, as a result of the 1979 revolution, the current political position of Iran is a fundamentalist theocracy, and the ruling regime will most likely not change in the near future.

Section II of this comment takes a general look at the background and history of Iran and its use of Shari’\(\text{a}\) law. The discussion will focus on the effects of the regime change, from the modernist Pahlavi reign to the fundamentalist Islamic Republic of Iran and then to Iran’s legal and court system after the 1979 Revolution. Further, this section discusses the background and state of the death penalty in the United States. The discussion will focus on the use of the death penalty in the United States before and after the 1972 case of Furman v. Georgia. Section III will discuss the rights of defendants and the discretion that governs the ultimate decision of seeking the death penalty. The discussion will juxtapose the two legal systems with regard to procedure and prosecutorial discretion within the systems.

Section IV focuses on the case of Raheleh Zamani and will discuss her case as it theoretically would have progressed through each legal system and the

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15. See Fathi, *supra* note 2; Farley, *supra* note 14 (noting that the U.S. joined China, Iran, Sudan, and Syria in opposing the moratorium on the use of the death penalty); *Moratorium, supra* note 14.


19. HAMID R. KUSHA, THE SACRED LAW OF ISLAM 289 (2002) (hereinafter KUSHA, SACRED) (noting that the majority of Islamic nations do not strictly adhere to a fundamentalist view of the Shari’\(\text{a}\) as does Iran and Saudi Arabia. Also, the author notes that because of modern capitalism and interaction, an institutionalization of the Shari’\(\text{a}\) is almost impossible.).
possible outcomes. Section IV also explores how modernization of Iran’s legal system, to one similar to the United States, would help to alleviate concerns of inconsistent and arbitrary application of the death penalty by taking discretion out of the hands of the victimized families and channeling the relevant information of the crime and criminal within a bifurcated trial. With a process similar to one utilized by the United States, the likelihood of arbitrary application of the death penalty in Iran would be narrowed by limiting the criminals subject to the death penalty. Finally, this section will conclude with why Iran will most likely not modernize its legal system or re-structure its court system to reflect a more westernized legal approach due to its history and fundamentalist ruling regime.

II. BACKGROUND

A. Relevant History of Iran

Muslim Arabs arrived in Persia, now the Islamic Republic of Iran, with Islamic notions of justice and law. Muslim rulers were deemed to follow a model of justice, law, and punishment that the Qur’an (Koran) advised. The Koran, along with the sayings and deeds of the Prophet Muhammad and Shi’i Imams, is the primary source for Islamic Sacred Law or Shari’a. Shari’a is the Arabic name for Islamic legal tradition. The sacrosanct nature of the Shari’a, as viewed by Islamic jurists, is due to the belief that Allah, as the absolute creator, is the supreme authority on true judgment. Before the modernization of Iran’s legal system under Reza Shah and Muhammad Reza Shah, known as the Pahlavi Era, Iran used the dictates of Shari’a law to govern their daily lives. The complex tradition embodied in the Shari’a seeks to strike a balance between law, justice, and morality in dealing with the criminally accused. Today only two countries strictly follow Islam’s sacred law, the Islamic Republic of Iran and


21. Id. at 86 (noting that the Koran is Islam’s sacred text and primary source underlying the Shari’a. Additional sources underlying the Shari’a are the sayings (hadith) and deeds (sunna) of the Prophet Muhammad and Shi’i Imams, juristic or judicial opinions (ra’y) based on human rationality (“aql) and analogy (qiyas)).

22. Id.


24. Kusha, Sacred supra note 19, at 62 (2002) (noting that Islamic judges are believed to encompass the aspects of Allah with regard to his guidance, justice, righteousness and judgment in order to properly adjudicate legal matters. “[A]n Islamic judge must be impartial and of the highest moral integrity, schooled in prophetic precedents in the application of the law”).


26. Kusha, Defendant supra note 23, at 120.
the Kingdom of Saudi Arabia; other Islamic countries have adopted modern constitutional laws and procedures.\textsuperscript{27} Although Iran has a long and cultured history, the events of the last century have culminated in the strict fundamentalist nature of present day Iran.\textsuperscript{28}

1. Pahlavi Era

To understand how Iran has come to be an ardent user of the Shari'a one has to understand the relevant history of the last century.\textsuperscript{29} The process of secularizing the legal system in Iran began with the Iranian Constitution of 1906 and the first Iranian Penal Code of 1912.\textsuperscript{30} Modernism, in the legal sense, took hold in Iran during the Pahlavi Era beginning in 1925.\textsuperscript{31} During this era and the reign of Reza Shah Pahlavi, a separation of the judiciary and the religious establishment created fundamental changes.\textsuperscript{32} Reza Shah enacted laws that drew upon the Islamic tradition of Shari'a as well as modern aspects of legal practice.\textsuperscript{33} Under Reza Shah's rule, little was done to establish human rights or a democracy, but the expansion of education and reform of women's rights had begun.\textsuperscript{34} This expansion of rights, particularly women's rights, directly challenged the Shari'a dictate that a woman is not equal to a man in the eyes of the law.\textsuperscript{35} During the Pahlavi era, the judiciary came to recognize three types of modern law including civil, criminal, and administrative.\textsuperscript{36} This movement upset the fundamentalist pro-Shari'a groups who used the liberation of women against Reza Shah, forcing him to abdicate in 1941.\textsuperscript{37} Reza Shah's son, Shah Muhammad Reza Pahlavi, replaced him and continued the modernization movement until 1979.\textsuperscript{38}

\textsuperscript{27} Id.
\textsuperscript{28} See S.H. AMIN, MIDDLE EAST LEGAL SYSTEMS 51-59 (Royston Limited 1985) (noting that the author goes through extensive eras of the influence of Islam on the country of Iran).
\textsuperscript{29} Id. at 57.
\textsuperscript{30} Id. (noting that Iranian laws, in the early twentieth century, were inspired and imported from European countries. Adolph Pierny, a French jurist, drafted the first Iranian Penal Code).
\textsuperscript{31} KAR, supra note 25, at 45.
\textsuperscript{32} Id. (noting that some of the most sensitive and pivotal changes that were made under Reza Shah were in the realm of women's rights. The rights of women to be unveiled, be educated, and enter the workforce created tension and confrontation from the pious pro-Shari'a groups. Under the auspices of protecting and honoring Muslim women, these groups gained support from the fundamentalists of Iran. They attacked the modernization of the country and legal system under Reza Shah forcing him to abdicate his throne in 1941.).
\textsuperscript{33} Id.
\textsuperscript{34} Id. at 46.
\textsuperscript{35} KUSHA, SACRED supra note 19, at 130.
\textsuperscript{36} Id. at 134.
\textsuperscript{37} KAR, supra note 25, at 45.
\textsuperscript{38} Id.; AMIN, supra note 28, at 60.
Shah Muhammad Reza Pahlavi, like his father before him, attempted to adapt foreign models of law into a workable system in Iran. However, the underlying premise based on foreign models was not adaptable to practice in Iran. The Pahlavi shahs did not respect the Iranian justice system, which was based on these foreign models. This oversight, along with the foreign influence behind their power and use of the judiciary as a political instrument, ultimately led to revolution.

2. Islamic Republic of Iran

Revolution resulted from the tensions in Iran between the modernists, who backed the Pahlavi regime, and the Shari’a fundamentalists in 1979. The Shari’a fundamentalists were able to overthrow the Pahlavi dynasty by proclaiming that they were fighting for freedom and protecting Islam. Additionally, the revolution had popular support from groups outside of the fundamentalists due in part to the perceived corruption of the Pahlavi regime. The victory of the fundamentalists, led by Ayatollah Khomeini, ended a century-long struggle waged between the modern Western movement and Islamic revivalists.

After the revolution, the principles of the Shari’a became the basis for the law of Iran and, subsequently, the tools of oppression. The Khomeini regime was able to control nearly all aspects of the Iranian people’s lives through the use of violent measures and punishments. This power was reinforced and strengthened through Iran’s Constitution, ratified in 1979. The Constitution

39. KUSHA, SACRED supra note 19, at 139.
40. Id. (noting that the basis for the Iranian criminal code were the Napoleonic code used by the French, but the concepts in France were based on the French Judiciary rather than a traditionally Islamic nation).
41. Id.
42. Id. at 139-40; Louise Halper, Law, Authority, and Gender in Post-Revolutionary Iran, 54 BUFF. L. REV. 1137, 1163-64 (2007) (noting that by the seventies, the Pahlavi dynasty was seen as pursuing the interest of their supporters such as the United States and its elite while neglecting the plight of its poor).
43. KAR, supra note 25, at 46.; AMIN, supra note 28, at 62.
44. KAR, supra note 25, at 46 (noting that the new regime used slogans and rhetoric to suppress the modernity of the Pahlavi era of rule).
45. KUSH, SACRED supra note 19, at 139-40; Halper, supra note 42, at 1163-64.
47. KAR, supra note 25, at 46.
48. Id.
49. Id.
proclaimed the Shi’a school of Islamic law the primary law source in Iran and the supreme jurisprudent, Ayatollah Khomeini, as the most senior political figure in Iran. Under Articles 4 and 170 of the new Constitution, all secular laws that conflicted with Islamic norms and the Shari’a were not enforceable. Where the laws conflicted with the Shari’a or where the Shari’a was silent, the Iranian courts were directed to enforce the juridical views of Ayatollah Khomeini. Additionally, Iran’s Supreme Court, under the direction of Khomeini, abolished the judicial system that was established under the Pahlavi regime because the laws and the system were not based on Shari’a law. Khomeini further empowered the ruling regime in 1988 by declaring that the Islamic state was an absolute trusteeship of the Prophet. This ruling explicitly declared that the Muslim ruler was ordained by God to stand above all divine ordinances, even the most basic rules, if it was in the best interest of the Muslim people and state. Under Khomeini’s reign and the newly ratified constitution, Iran established a theocratic state where the illusion of civil rights, passage of laws, and even the ability to participate in the government were all conditioned on “conformity with Islamic standards.”

50. AMIN, supra note 28, at 62.
52. AMIN, supra note 28, at 63; Qanuni Assassi Jumhuri’i Isla’mai Iran [The Constitution of the Islamic Republic of Iran] 1358 art. 4, 170 [1980] (stating the relevant text as follows:

Article 4

All civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the fuqahā of the Guardian Council are judges in this matter.

Article 170

Judges of courts are obliged to refrain from executing statutes and regulations of the government that are in conflict with the laws or the norms of Islam, or lie outside the competence of the executive power. Everyone has the right to demand the annulment of any such regulation from the Court of Administrative Justice.)

[hereinafter Iran Constitution].

53. See AMIN, supra note 28, at 63 (noting that the juridical views of Ayatollah Khomeini are known as fatwas. These views, although transitory in nature until the Majlis (legislature or general assembly) could pass new legislation, in practice became the law in Iran.).

54. See Kusha, Crime supra note 20, at 97-98 (noting that Iran’s Supreme Court is the Judicial Council and as the secular laws were deemed null and void so were the courts).

56. Id.
57. Kar, supra note 25, at 51.
3. Crime & Punishment in the Islamic Republic of Iran

The Islamic regime under Ayatollah Khomeini has held a monopoly on the judicial power in Iran since taking control in 1979.\(^{58}\) The area of crime and punishment saw a return to the Islamic model of the medieval period in Iran as the categories of the criminal justice system were organized by behaviors that violate God’s law and the general public’s rights.\(^{59}\)

In addition, crimes are further distinguished as either pardonable or non-pardonable.\(^{60}\) The distinction is that crimes against God, such as anti-state or anti-Islamic activities, are non-pardonable whereas crimes against the general public are pardonable.\(^{61}\) Furthermore, the type of crime committed determines the type of punishment that is applicable and conforms to the Shari’a.\(^{62}\) In 1982, the Parliament of Iran implemented four types of punishment in accordance with the Shari’a: the \textit{hudud} (boundaries), the \textit{qisad} (retaliation), the \textit{diyyat} (blood money), and the \textit{t’a zirat} (corporal).\(^{63}\) The codification of Shari’a law into the Law of Islamic Punishments was initially implemented for a five year trial period.\(^{64}\) In 1991, the Islamic Parliament approved an Islamic Penal Code of Iran which was subsequently ratified later that same year.\(^{65}\) This codification of Shari’a law added a fifth category of punishments as Article Twelve of Iran’s Islamic Criminal Law calls for deterrent punishments.\(^{66}\) Deterrent punishments are imposed by the government in order to maintain public order.\(^{67}\) Punishments in this fifth category are similar to \textit{t’a zirat} in that the punishment forms can range from imprisonment and fines to flogging.\(^{68}\)

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58. KUSHA, CRIME supra note 20, at 98.
59. Id.
60. Id.
61. Id. (noting that these crimes are mentioned only because the current political regime of Iran has deemed these crimes as crimes against God. In addition, the person who is convicted of these types of crimes is considered to be a Muharib or “one who wages war against God.” These crimes also are subject to the death penalty.).
62. KUSHA, SACRED supra note 19, at 160-62.
63. Id. at 157; KUSHA, CRIME supra note 20, at 98-99 (noting that qisad or retaliation is the equivalent to \textit{lex talionis} or “a tooth for a tooth, an eye for an eye, and a life for a life”).
64. ZUBAIDA, supra note 55, at 208-09 (noting that it is difficult to judge how the penal code is applied in post revolutionary Iran. It is difficult to obtain detailed information from adjudicated cases due to the lack of statistics on frequency of penalty applications. Most of the information, including the penal code, comes from secondary sources like human rights groups.).
67. Id. at art. 17.
68. Id.
a. Shari'a Punishments

The hudud, or the singular hadd, are punishments for crimes against boundaries established by the Koran as God's laws ranging from adultery and homosexuality to drinking alcoholic beverages.\(^{69}\) The punishment for hudud crimes range in application and severity depending on the crime and what the Shari'a outlines as punishment; for example, the penalty for male homosexuality is beheading where the penalty for female homosexuality is public flogging.\(^{70}\)

Qisad is a punishment for capital crimes that are retributive in nature and follow the view of “a tooth for a tooth, an eye for an eye, and a life for a life.”\(^{71}\) These crimes are categorized as crimes against a person or the public rather than against God and require retributive punishments or compensation to the victim or the victim’s family.\(^{72}\) The victim or his family may require the perpetrator to either pay monetary compensation or suffer a similar loss comparable to the damage caused by the crime committed.\(^{73}\) This category of punishment leaves the government in the position of enforcing the punishment on behalf of the victim within the guidelines of Shari'a.\(^{74}\) When the crime is put into this category of punishment, one’s religious affiliation and gender become relevant, as a Muslim male receives a less severe punishment than a non-Muslim male and a female’s life is less than that of a Muslim male.\(^{75}\)

The final two types of punishments promulgated by Shari’a law cover a wider range of crimes for which lesser penalties are issued, but generally in a harsh and degrading manner.\(^{76}\) Diyyat cover crimes for which monetary compensation would cover the injury inflicted upon another as a particular body part is given a monetary value. Again the disparity between males and females is evident as a male’s organs are valued higher than a female’s organs.\(^{77}\) The t'a zirat covers a range of infractions from street crimes to white collar crimes. The punishments for these crimes can be in the form of public flogging, imprisonment, fines, or a combination.\(^{78}\) The Shari’a based code specifies exact punishments for major crimes against God and the public, as determined by Islam, while also setting limitations on crimes left to the discretion of Islamic

\(^{69}\) KUSHA, CRIME supra note 20, at 99.
\(^{70}\) Id.
\(^{71}\) Id.
\(^{72}\) ZUBAIDA, supra note 55, at 208.
\(^{73}\) Id.
\(^{74}\) Id.
\(^{75}\) KUSHA, CRIME supra note 20, at 99.
\(^{76}\) Id. at 99-100.
\(^{77}\) Id.
\(^{78}\) Id.
judges and courts. The discretion and interpretation of the fractured judiciary in Iran has led to arbitrary and inconsistent punishments, often without the right to an appeal.

b. Shari'a Judiciary

The role of the judiciary in Iran was not left unscathed by the regime change because its structure underwent reorganization to conform to traditional Shari’a principles. The administration of justice is encompassed by and provided oversight by the Ministry of Justice. The Ministry of Justice is not a part of the judicial branch, but a part of the executive branch. According to Article 160 of the 1979 Constitution, the Minister adjudicates issues that arise between the executive, legislative, and the judicial branches. Under the helm of the Ministry of Justice, the judicial system is categorized into five categories of courts, some of which have sub-courts. The courts that adjudicate criminal matters are broken into the Supreme Judicial Council, Court of Cassation,

79. AMIN, supra note 28, at 113.
80. See id. at 128-34 (detailing the court structure or lack thereof by listing the courts and functions); see Karadsheh, supra note 46, at 266-272 (summarizing a general court structure for Iran following the 1979 revolution).
81. See generally AMIN, supra note 28, at 128-29 (outlining the post-revolutionary developments in the Iranian judiciary).
82. See id.; see also Karadsheh, supra note 46, at 268.
83. AMIN, supra note 28, at 129.
84. Iran Constitution, supra note 52, at art. 160 (quoting relevant language as follows: “The Minister of Justice owes responsibility in all matters concerning the relationship between the judiciary, on the one hand, and the executive and legislative branches, on the other hand.”).
85. AMIN, supra note 28, at 130; see also Karadsheh, supra note 46, at 268-70 (noting that the five distinct regular courts in operation in Iran are as follows:
   Revolutionary Courts
   Public Courts- 2 Subsets
   Civil Courts
   Criminal Courts
   First Class Criminal Courts (Major Crimes)
   Second Class Criminal Courts (Minor Crimes)
   Courts of Peace
   Ordinary Courts of Peace
   Independent Courts of Peace (wider jurisdiction)
   Special Civil Courts
   Court of Cassation (limited criminal appeals except for Capital Punishment cases)).
Revolutionary Courts, and Public Courts that are divided into two classes of criminal cases. The Supreme Judicial Council has the ultimate authority over all judges in Iran and interprets the Shari’a. The Court is made up of five members, all of whom must be mujtahid or learned scholars of Islamic law. The Court is the supreme authority of the judiciary in that it is charged with administering and supervising the proper application and consistency of judgments of the lower courts. In addition, the Supreme Judicial Council is the only appellate court for a defendant who has been given the death penalty. This limited appeal is in accordance with Shari’a practiced by the Khomeini regime.

Below the Supreme Judicial Council are the Court of Cassation and the special criminal courts known as the Revolutionary Courts. The Court of Cassation was the highest court of appeals before the 1979 revolution, but was relegated to an intermediate appellate court afterwards. The Court of Cassation’s main function is like the Supreme Judicial Council, as it “supervise[s] the proper application of [the] laws by the lower courts.” The Court of Cassation also tentatively adjudicates most criminal appeals, except for cases involving the death penalty. Unlike the Court of Cassation, the Revolutionary Courts were not holdovers from pre-revolutionary Iran; these courts were promulgated during the interim between the revolution and ratification of Iran’s constitution. The Revolutionary Courts were political courts temporarily instituted to adjudicate offenders who were deemed to have been counter-revolutionaries and a part of the Pahlavi regime. Although originally only a temporary measure, this court became part of the judicial system in 1981 when the Iranian Parliament passed the Administration of Justice Act which gave the Revolutionary Courts legal status. The Revolutionary Courts now have a wide jurisdiction with the ability

86. Id.; Karadsheh, supra note 46, at 268-70.
87. Karadsheh, supra note 46, at 268-69.
88. Id. at 268-69. (additionally, the Chief Justice and one other member are appointed by the “Just Jurist” or Khomeini and his predecessors, while the other three members are elected by sitting judges).
89. ZUBAIDA, supra note 55, at 200.
90. Karadsheh, supra note 46, at 268-69.
91. Id.; ZUBAIDA, supra note 55, at 200.
92. ZUBAIDA, supra note 55, at 200; Karadsheh, supra note 46, at 268-69; AMIN, supra note 28, at 130-31.
93. Karadsheh, supra note 46, at 269.
94. Id.
95. Id.
96. AMIN, supra note 28, at 130-31.
97. Id.; ZUBAIDA, supra note 55, at 200.
to hear all criminal appeals, particularly in the area of political or religious opposition.\textsuperscript{98} The Revolutionary Courts also have the power of being a final appellate court as there is no general right to an appeal.\textsuperscript{99} This court has been seen as a religious court due to the fact that its dominant judge is a religious judge appointed by Khomeini and his predecessors.\textsuperscript{100}

The courts of first instance are known as the Public Courts and consist of both civil and criminal courts.\textsuperscript{101} All judgments, except imprisonment, handed out by the criminal side are considered final and there is no right to an appeal.\textsuperscript{102} The criminal court subset is divided into two classes: the First Class Criminal Court and the Second Class Criminal Court.\textsuperscript{103} The First Class court hears cases involving major crimes for which death penalty appeals are heard by the Supreme Judicial Council and imprisonment of more than two months are heard by the Courts of Cassation.\textsuperscript{104} The Second Class courts deal mainly with minor crimes such as vagrancy so the penalties are much lighter, but still not worthy of appeal.\textsuperscript{105} Overall, the court system of Iran has become a confusing jumble as different courts have been granted the ability to overstep jurisdictions and sit in judgment without the absolute right to an appeal.\textsuperscript{106}

The Islamic concept of crime and punishment is different from Western notions, such as that of the United States, because many times the subject of the law is not just a single person but that person’s family as well.\textsuperscript{107} Because crimes such as murder are viewed as crimes against the family rather than society, the family may seek retribution through qisad or compensation through diyyat.\textsuperscript{108} The difference between the two is whether a person wants to inflict punishment, such as the death penalty, on the transgressor or receive compensation for the loss of the family member.\textsuperscript{109} This system of vendettas

\begin{itemize}
\item \textsuperscript{98} AMIN, supra note 28, at 130-31; ZUBAIDA, supra note 55, at 200; Karadsheh, supra note 46, at 270.
\item \textsuperscript{99} Karadsheh, supra note 46, at 270.
\item \textsuperscript{100} Id.
\item \textsuperscript{101} AMIN, supra note 28, at 131.
\item \textsuperscript{102} Id.
\item \textsuperscript{103} Karadsheh, supra note 46, at 269.
\item \textsuperscript{104} Id.
\item \textsuperscript{105} Id. at 269-70.
\item \textsuperscript{106} AMIN, supra note 28, at 132; ZUBAIDA, supra note 55, at 200-01.
\item \textsuperscript{107} Nader Entessar, Criminal Law and the Legal System in Revolutionary Iran, 8 B.C. THIRD WORLD L.J. 91, 96 (1988).
\item \textsuperscript{108} Id. at 97-98.
\item \textsuperscript{109} Id.
\end{itemize}
and retaliation underlies the Shari’a and has for many years as the Shari’a of Iran is considered supreme and permanent in the Iranian government.  

B. State of the Death Penalty in the United States

Among westernized democracies, the United States is the only country to continue the tradition of implementing the death penalty. The death penalty has been used in the United States since its inception, with the first recorded execution occurring in 1608 and the first execution for murder in 1630. The death penalty was a practice of colonial America with indications of tolerance by early Americans, as the Constitution lacked an express prohibition of its practice. Early use of the death penalty remained primarily in the hands of states, as popular opinion and state legislators determined local development of the practice. However, the variations among death penalty legislation and implementation declined after the international conflict of World War II.

1. Pre-Furman

After World War II, the United States’ use of the death penalty declined much along the same lines as European countries of the same period. The thought is that after the atrocities and the regime changes following the conclusion of World War II, European countries lost the appetite for the death penalty. The United States continued the trend toward abolishment of the death penalty until the late 1960s. In 1967, a moratorium on the death penalty, lasting for a decade, was issued as federal courts sought to address the principles and procedures associated with the practice of capital punishment.

10. See id. at 95-96 (noting that the author states that the purpose of the judiciary and legislation of Iran is to codify and apply the laws of shari’a, not originate them).


12. Krista L. Patterson, Acculturation and the Development of Death Penalty Doctrine in the United States, 55 DUKE L.J. 1217, 1224 (2006); RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 5 (2d ed. 2001) (noting that the first execution in 1608 was of George Kendall, who was a councilor for the colony of Virginia convicted of spying for the Spanish and executed by firing squad, and the first execution for murder in 1630 was of a pilgrim named John Billington, who died by hanging. Additionally, the first woman to be executed was Jane Champion who was hung in James City, Virginia, in 1632.).

13. Patterson, supra note 112, at 1224.

14. Id. at 1224-27.

15. ZIMRING, supra note 111, at 5.

16. Id.

17. See id. at 20.


19. ZIMRING, supra note 111, at 5.
Although each state has its own substantive and procedural law in death cases, the United States Supreme Court has become the pre-eminent authority on the procedures and circumstances used by the states.\(^{120}\) Each autonomous state has the authority to implement its own specific death penalty statute within the boundaries of the Constitution.\(^{121}\) Although the Supreme Court seldom considered death penalty cases prior to the 1970's, the Court took the opportunity in 1972 to review death penalty statutes under the Eighth Amendment.\(^{122}\) After the 1972 decision in *Furman v. Georgia*\(^ {123}\) the Supreme Court, by requiring more structure and less arbitrariness in implementation, invalidated all death penalty statutes that did not comply.\(^ {124}\) Most of the major developments in the death penalty doctrine of the United States have since come from the federal judiciary and not from state legislators, as a result of the Supreme Court's decision in *Furman*\(^ {125}\).

Following *Furman*, the Court worked to establish guidelines for the states to follow "that would satisfy the Eighth Amendment's prohibition against cruel and unusual punishment" when implementing the death penalty.\(^ {126}\) One of the major problems which the Court in *Furman* tried to alleviate was the unbridled discretion given to judges and juries in deciding who lives and dies.\(^ {127}\) Consequently, state legislatures, with little guidance, sought to draft a sentencing scheme which limited the discretion of judges and juries in order to avoid arbitrary and inconsistent sentences resulting from previous legislation.\(^ {128}\) In response to *Furman*, many states drafted an extreme approach of removing discretion from the jury and judge by implementing mandatory capital sentencing for certain crimes.\(^ {129}\)

\(^{120}\) Id. at 9-10.


\(^{122}\) Zimring, *supra* note 111, at 9.

\(^{123}\) Furman v. Ga., 408 U.S. 238 (1972).

\(^{124}\) Zimring, *supra* note 111, at 9.

\(^{125}\) Patterson, *supra* note 112, at 1227.


\(^{127}\) Id. at 290.

\(^{128}\) Id. at 291.

\(^{129}\) Id. (noting that in response to the decision in *Furman* twenty-two states implemented mandatory sentencing for certain crimes, which instead of causing the states to consider the suitability of the death penalty, caused the states to eliminate sentencing discretion with inflexible guidelines).
The states that did not use mandatory sentencing legislation tried to guide the discretion by modeling legislation on the Model Penal Code section 210.6. In 1976, the Supreme Court upheld Georgia’s death penalty statute in *Gregg v. Georgia*. Georgia’s revised death penalty statute provided standards similar to those of the Model Penal Code.

130. Id. at 292-93 (noting that the Model Penal Code approach used by a minority of states sought to strike a balance between providing guidance for sentencing juries and discretion when looking at factors unique to the particular defendant. Additionally, the author warrants that “[p]erhaps if more of the states had drafted their death penalty legislation using the Model Penal Code as a guide, the courts, including ultimately the Supreme Court, would not have increased their involvement in capital sentencing discretion issues.”); MODEL PENAL CODE §§ 210.6(1)-(2) (Proposed Official Draft 1962) (states in relevant parts:

(1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose a sentence for a felony of the first degree if it is satisfied that:

(a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or

(b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or

(c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or

(d) the defendant was under 18 years of age at the time of the commission of the crime; or

(e) the defendant’s physical or mental condition calls for leniency; or

(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant’s guilt.

(2) Determination by Court or by Court and Jury. Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. . . .

In the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant’s character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. . . .

. . . If the jury is unable to reach a unanimous verdict, the Court shall dismiss the jury and impose sentence for a felony of the first degree.

The Court, in exercising its discretion as to sentence, and the jury, in determining upon its verdict, shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant, but it shall not impose or recommend sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency. . . .

to Model Penal Code section 210.6 in guiding the decision maker’s discretion rather than implementing a mandatory sentence of death for specified crimes.\textsuperscript{132} The proposed 1962 draft of the Model Penal Code section 210.6 called for the sentence of death only for the crime of murder and after a finding of at least one aggravating circumstance that was not outweighed by any substantial mitigating circumstances within a bifurcated trial.\textsuperscript{133}

2. Post-Furman

The three-member plurality in \textit{Gregg} concluded that the Eighth Amendment did not \textit{per se} bar the death penalty as a means of punishment.\textsuperscript{134} The Court further upheld the Georgia death penalty statute as remedying the arbitrary and capricious concerns expressed in \textit{Furman}\textsuperscript{135} by providing for a bifurcated trial where the sentencing authority is given relevant information to guide the imposition of the sentence and standards to use this information.\textsuperscript{136} In addition, the Supreme Court in \textit{Woodson v. North Carolina} provided further discretion to states by invalidating mandatory death penalty statutes under the Eighth Amendment.\textsuperscript{137} In a plurality opinion, the Court in \textit{Woodson} explained that a defendant’s record, character, and the circumstances of the particular offense must be considered to fulfill \textit{Furman}’s basic premise of replacing arbitrary and misled sentencing discretion.\textsuperscript{138} As a result of the death penalty cases of the 1970’s, guided discretion, in the confines of a bifurcated trial, has empowered judges and juries to determine which capital defendants deserve the death penalty only after weighing aggravating and mitigating factors during the punishment phase of a capital trial.\textsuperscript{139} Ultimately, the Supreme Court created the basic Eighth Amendment parameters for states imposing the death penalty.\textsuperscript{140} States were given a limitation on when the death penalty can be imposed, but

\begin{itemize}
  \item[132.] \textit{COYNE \& ENTZEROTH, supra} note 112, at 117.
  \item[133.] \textit{MODEL PENAL CODE} § 210.6(1)-(4) (Proposed Official Draft 1962).
  \item[134.] \textit{COYNE \& ENTZEROTH, supra} note 112, at 143.
  \item[135.] \textit{Id.; Gregg}, 428 U.S. at 164-68 (The Georgia statute eliminated the arbitrary and capricious elements of sentencing discretion by resembling the Model Penal Code statute’s use of finding aggravating circumstances, beyond a reasonable doubt. However, finding of an aggravating circumstance did not require imposition of the death penalty).
  \item[136.] \textit{COYNE \& ENTZEROTH, supra} note 112, at 143.
  \item[137.] \textit{See Woodson v. N.C.}, 428 U.S. 280, 303-04 (1976) (Justice Stewart explained that the consideration of the character and record of each unique defendant and the circumstances of their offense are constitutionally indispensable as part of the death penalty process.).
  \item[138.] \textit{Id.} at 303.
  \item[139.] \textit{COYNE \& ENTZEROTH, supra} note 112, at 170-71.
  \item[140.] Schreiber, \textit{supra} note 126, at 295.
\end{itemize}
retained discretion in considering the unique, aggravating and mitigating circumstances of the defendant and crime when giving the sentence of death.\textsuperscript{141}

\textit{a. Aggravating & Mitigating Factors}

Since \textit{Furman} and \textit{Gregg}, the Supreme Court has articulated its preference for guided discretion by allowing the weighing of aggravating and mitigating factors during the sentencing phase of death penalty cases.\textsuperscript{142} In 1976, the Court in \textit{Lockett v. Ohio}\textsuperscript{143} indicated that a crucial element in capital cases is individualized sentencing.\textsuperscript{144} Within this system of guided discretion, aggravating factors seek to differentiate which crimes are identified to receive the harsher punishment of death,\textsuperscript{145} while mitigating factors seek to differentiate which defendants should receive punishment that is less than death.\textsuperscript{146}

The burden of proving any aggravating factor is on the prosecution during the sentencing phase of the trial and can vary among the different jurisdictions.\textsuperscript{147} However, before imposing a death sentence the sentencing entity must find at least one aggravating factor.\textsuperscript{148} Conversely, the burden of introducing mitigating factors during the sentencing phase of the trial is on the defendant.\textsuperscript{149} Mitigating factors act to reduce the moral culpability of the defendant to justify the jury imposing a lesser sentence than death.\textsuperscript{150} As a general rule, the defendant may introduce any relevant evidence to justify not being sentenced to death and may include statutory and non-statutory factors.\textsuperscript{151} Although states may statutorily create mitigating factors, it may not limit a defendant to only the statutory factors as was attempted in \textit{Lockett}.\textsuperscript{152}

\begin{itemize}
\item \textsuperscript{141} \textit{Id.}
\item \textsuperscript{142} \textit{Id. at} 295-96.
\item \textsuperscript{143} \textit{Lockett v. Ohio}, 438 U.S. 586 (1978).
\item \textsuperscript{144} \textit{Id. at} 604-05 (writing for the majority, Chief Justice Burger stated, "Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.").
\item \textsuperscript{145} COYNE \& ENTZEROTH, \textit{supra} note 112, at 329.
\item \textsuperscript{146} \textit{Id. at} 389.
\item \textsuperscript{147} \textit{Id. at} 329.
\item \textsuperscript{148} \textit{Id.}; PALMER, \textit{supra} note 121, at 97-98 (noting that statutory aggravating factors and special circumstances in some jurisdictions are created by legislators. Additionally, there are two conditions when a statutory aggravating factor is considered valid: 1) The factor must not be one, "that could be applied to every defendant convicted of murder" 2) The factor must not be vague that the jury would not understand it.).
\item \textsuperscript{149} \textit{See} COYNE \& ENTZEROTH, \textit{supra} note 112, at 389.
\item \textsuperscript{150} \textit{Id.}
\item \textsuperscript{151} PALMER, \textit{supra} note 121, at 115-16.
\item \textsuperscript{152} \textit{Id. at} 115-17.
\end{itemize}
In *Lockett*, the sentencing entity was required to implement the death penalty unless the entity was able to find one of the three mitigating factors.\(^{153}\) This limited range of mitigating factors was inconsistent with the Court's constitutional requirements under the Eighth and Fourteenth Amendments as it worked to bar relevant evidence proffered by the defendant.\(^{154}\) Accordingly, the underlying rationale of weighing aggravating and mitigating circumstances is to lessen the inconsistent and arbitrary application of the death penalty by narrowing the class of felons who should receive the death penalty and broadening the class who should not be put to death.\(^{155}\)

Although each state is allowed to choose the aggravating and mitigating factors, within limits, the authority on the ultimate standard is still the Supreme Court.\(^{156}\) Throughout the 1980’s, the Court sought to loosen its hold as the pre-eminent authority on the substantive law and procedures incorporated in implementing the death penalty.\(^{157}\) However, this has come about less from notions of federalism and more from the Court requiring clear evidence of constitutional errors that a defendant has been prejudiced and the Court determining how often a defendant may raise legal objections.\(^{158}\)

**b. Right to Counsel**

The ability of capital defendants to raise errors and legal objections as a result of their death penalty trials can be hampered when they cannot retain counsel on their behalf.\(^{159}\) Despite the Constitution, death penalty defendants

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153. Lockett v. Ohio, 438 U.S. 586, 607 (1978) (quoting *OHIO REV. CODE ANN. § 2929.04(B)* (West 1975)) (The mitigating factors are:

- The victim of the offense induced or facilitated it.
- It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
- The offense was primarily the product of the offender’s psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.).

154. *Id.* at 608; Palmer, *supra* note 121, at 115-17 (noting the three *Lockett* principles as follows:

- A death penalty statute may create mitigating circumstances.
- To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating circumstances.
- Irrelevant mitigating circumstances may constitutionally be barred from use at capital penalty phase proceedings.).


157. *Id.* at 10.

158. *Id.*

159. See Palmer, *supra* note 121, at 92-93.
were not guaranteed the right to counsel until the case of *Gideon v. Wainwright*, where the Supreme Court held that defendants have a Sixth Amendment right to counsel, and if they cannot afford counsel, the prosecuting jurisdiction has to provide an attorney. The *Gideon* ruling only required counsel at the guilt phase of a capital proceedings bifurcated trial. Criminals obtained the right to counsel during the sentencing phase of a capital proceedings bifurcated trial four years later in the case of *Mempa v. Rhay*. Ultimately, the *Mempa* ruling led to a requirement of a right to an attorney at any sentencing portion of a hearing, even a hearing in a non-capital proceeding. The Court in *Mempa* concluded that “the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent.” Without the right of counsel to present a defendant’s case, even during the sentencing phase, the defendant may lose some legal rights and be deprived due process when his or her life hangs in the balance.

This section is a snapshot of the storied history of the death penalty in the United States. Consequently, the focus has been on the essential constitutional parameters of a bifurcated trial and guided discretion when a state seeks to condemn a defendant to death. The states ultimately use their own substantive law and procedures when putting a defendant to death and the state governor has the ability to grant clemency to death row defendants by pardoning the condemned.

III. APPLYING THE DEATH PENALTY

As noted earlier, the Iranian concept of criminal law is different from that of the United States and other Western nations. Due to the supremacy and permanency of the Shari'a as a set of laws, appeal to familial vendettas, and court system, the application of a death sentence in Iran will be different than a death sentence in the United States. Since the late 1970’s, the death penalty has been tempered by the United States Supreme Court following its decision in *Furman* and administered by state legislators as they seek a constitutional death penalty.

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161. PALMER, *supra* note 121, at 92.
162. *Id.* at 92-93.
166. See *id.* at 135-37.
169. *Id.* at 95-96.
A noticeable difference seems to emerge between the two systems. Even though both systems call for the death penalty in certain crimes, the Iranian system seems more apt to apply the penalty in a more arbitrary and inconsistent way due in part to Iran’s Islamic legal system and the discretion exercised by victims, victims’ families, and Iranian judges.

A. Discretion and Death in Iran

In returning to the use of Shari’a, the new regime of Iran was hoping to reshape Iran “into a moral and crime-free haven.” However, the reality is that Iran has become a crime-infested country with an increase in serious crimes and misdemeanors. This outcome is despite the often harsh and cruel punishments associated with crime and punishment in the administration of Shari’a law. This section will explore how the death penalty is instituted in Iran through its laws, court system and judiciary.

1. Judicial Discretion of Punishment

Under Iran’s criminal law, judges adjudicating crimes against God’s law have no discretion in applying punishment; they must apply the hadd or hudud punishments as outlined in the Koran. According to the law of Shari’a, some of the crimes delineated in the Koran as requiring a punishment of hadd are adultery, sodomy, homosexuality, consuming intoxicating liquors, and theft. Peculiarly, the crimes of consuming intoxicating liquors, lesbianism, and sodomy may all be punished with death. According to Iran’s criminal code sodomy can be punished with the execution of the active parties, provided there was consummation and no mitigating circumstances. On the other hand,

170. ZIMRING, supra note 111, at 9.
171. See KUSHA, SACRED supra note 19, at 157-65; KUSHA, CRIME supra note 20 at 100.
172. KUSHAI, CRIME supra note 20, at 97.
173. Id. at 100-01; KUSHA, SACRED supra note 19, at 175.
174. See KUSHA, SACRED supra note 19, at 160.
175. Entessar, supra note 107, at 97 (noting that the Iranian authorities have rebutted criticism of their harsh punishments as not wanting to treat a criminal as sick and the punishment as treatment for their sickness, but as a lesson to other criminals. Ayatollah Ardabili, the Islamic Republic’s Chief Justice contends, “Islam teaches us that it is equally important to punish a lawbreaker, as a punishment is considered to have three purposes — repentence [sic] of the crime, admonition to not repeat it, and a lesson to others”).
176. Id.; see Majmua-hi Qava’nini Jaza’l [Code of Criminal Laws] [Islamic Penal Code of Iran] 1991 (Iran).
177. See generally Majmua-hi Qava’nini Jaza’l [Code of Criminal Laws] [Islamic Penal Code of Iran] 1991 (Iran) (noting that the translation is of the Iranian criminal code based on the Shari’a).
178. See id. (noting that according to Article 111 of the criminal code only mature, sane, and consenting parties to sodomy will be executed. Additionally, the codes provide that only consummation of the relationship would lead to execution on the first conviction, whereas mere
female homosexuality and consuming alcohol are not summarily executable crimes on the first offense. However, a party that is convicted of female homosexuality three times and received penance will be executed on the fourth conviction. Additionally, a party convicted of consuming alcoholic liquors and given penance will be sentenced to execution on the third conviction. Accordingly, an Islamic judge practices no discernible discretion when it comes to implementing hadd punishments.

Similarly, Islamic judges also have a lack of discretion when doling out punishments based on retribution or qisad crimes. Qisad crimes date back to conflicts between the Bedouin tribes that made up Iran when it was Persia. These crimes are considered to be against the victim and his family, therefore the victims have the choice to seek retribution through the infliction of the same injury or from compensation of “blood money” known as diyyat.

Conversely, Islamic judges do have a discernable amount of discretion when it comes to implementing the lesser punishments provided under the t'a zirat. These punishments have no specific penalty as mentioned in the Koran leaving the judge with sole discretion in punishment. This discretion is tempered by the criminal code as it limits the type of punishment available to admonition, fines, or seizure of property. However, this type of offense could also include a public flogging sentence, which is often viewed as cruel punishment.

When it comes to dispensing punishments of Shari’a, judicial discretion is limited to applying the given law, not originating it. However, the judiciary and the ruling regime decide what the law is and how it is to be implemented.

179. See id.
180. See id. at art. 129, 131 (noting that the penance for lesbianism is one hundred lashes for each party involved).
181. See id. at art. 168-81 (noting that penance for consuming alcoholic liquors is one hundred lashes. However, a penance can be avoided by the accused by repenting his alleged crime before any witnesses testify against him.).
182. Entessar, supra note 107, at 97.
183. See id.
184. See id. at 97-98.
185. Id. (noting the author points out that the Koran recommends forgiveness, because the act pleases God. But the use of retribution is still allowed.).
186. Id. at 98.
187. Entessar, supra note 107, at 98.
188. Id.
189. Id.
190. Id. at 95.
based on their interpretation of the Shari'a and the Iranian Constitution. The interpretation of what warrants due process and constitutional rights of Iranian citizens is thus in the hands of the ruling regime and judiciary. As a result, the ruling dictate is that society should adapt to the requirements of the interpreted Shari'a law rather than society adapting an archaic system to modern needs of Iran.

2. Defendant’s Rights

Although Iran is a theocracy based on the Shi’a school of Islam, it also has a constitutional basis. In the judicial process, this constitution has created a number of rights guaranteed to a defendant. Among those are a presumption of innocence, right to a jury, right to a speedy trial, and a right to representation by competent counsel. In addition, all arrests and searches and seizures are subject to a valid warrant. However, in practice these rights, constitutionally issued by Iran, are subject to conformity to the Shari’a as interpreted by the ruling regime. An example of the incongruity of Iran’s judicial process with its constitutional guarantees is the right to a jury trial; in practice the judge acts as the sole fact-finder and decision-maker.

Therefore, determining the defendant’s rights from the judicial process is limited by the actual process as the constitution is subordinate to the interpretation of the Shari’a.

At trial the judge serves the dual role of determining facts and making final decisions; Iran does not recognize a jury system. The decisions are considered final as there is no general right to an appeal. However, where a defendant is facing the death penalty or more than two months of imprisonment, his case may be appealed. Only three forms of evidence are allowed in

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191. See Amin, supra note 28, at 63.
192. See Kusha, SACRED supra note 19, at 162-63.
193. Amin, supra note 28, at 107 (noting that under Article 4 of Iran’s 1979 Constitution all branches of the state, be it legislative or executive, must be subordinate to the interpreted Shari’a law).
194. Id. at 62.
195. Id.
196. See Kusha, SACRED supra note 19, at 162.
197. Id.
198. Id.
199. See id. at 162-63.
200. See Karadsheh, supra note 46, at 273.
201. Kusha, SACRED supra note 19, at 157, 162-63.
203. Id.
204. Entessar, supra note 107, at 99 (noting that only the Supreme Judicial Council may hear death penalty cases).
Iranian trials: religious oaths, eyewitness testimony, and confessions. Evidence is limited because of the assumption that evidence of this type is reliable. A defendant can be requested to pledge an oath of innocence if the plaintiff is unable to present enough evidence of a crime, which will dismiss the case. A confession, either in pretrial interrogation or in court, must be free and voluntary and, “describe the criminal act in detail and must be corroborated by other evidence.” Theoretically, a confession obtained by coercion or torture would be excluded at trial. Lastly, eyewitness accounts are limited to males of good Muslim character who can only testify to events directly observed, thus making hearsay inadmissible.

There are two ways for a lawsuit to be initiated in Iran. Either the plaintiff may allege a qisa crime, one which was committed against him or his family, or the state may bring the suit in the case of a hudud or t'a zirat offense. If the plaintiff brought suit, the judge questions the accused about the claim and requires the plaintiff to bear the burden of presenting evidence where a defendant pleads not guilty. For all other crimes, the state will initiate the claim, beginning with pretrial investigations, if a crime is believed to have been committed. One major aspect of the pretrial process is that a pretrial detention is not thought to be necessary as flight is perceived to be difficult for the accused.

Once the trial begins, the focus is on the judge and the litigants. Although the constitution guarantees the right to counsel, this right depends on the particular offense for which a defendant is accused. Counsel is permitted in qisa and t'a zirat offenses, but is not permitted where the

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205. Karadsheh, supra note 46, at 272.
206. Id.
207. Id. at 273.
208. Id.
209. Id. at 271.
210. Karadsheh, supra note 46, at 272-73 (noting that Muslim women are allowed to present eyewitness testimony in limited cases of special knowledge such as virginity and birth. Additionally, in these isolated instances, two women substitute as one man).
211. Id. at 270.
212. Id.
213. Id. at 271.
214. Id.
216. Id. at 272.
218. Karadsheh, supra note 46, at 272.
punishment is the harshest, *hudud* crimes.\(^{219}\) However, a judge in any type of trial encourages the litigants, even when represented by counsel, to give their input.\(^{220}\) Theoretically, this system affords the accused with due process rights, but in reality the process can be manipulated by judges and the ruling regime.\(^{221}\) Below is one example of blatant manipulation of the process.\(^{222}\)

Author Hamid R. Kusha has chronicled the power of the judiciary to supplant the guaranteed rights of the defendant with their own sense of judgment in a case adjudicated by the first judge, Khalkhali, whom Khomeini appointed after the 1979 Revolution.\(^{223}\) The daily *Etellaat* reported the following notice sent out by the Public Relations Office of the Revolutionary Prosecutor:

This morning a communiqué was issued by the Public Relation Office of the Revolutionary Prosecutor concerning convicts who have been arrested in recent anti-revolutionary activities and for whom the verdict of the court has been carried out, [this communiqué is] as follows: It is brought to the attention of the families whose offspring . . . have been arrested in recent anti-revolutionary events and against whom the verdict of the court has been carried out: please contact the Central Office of the Evin Prison with appropriate pictured birth certificates to identify your offspring whose pictures have been published herewith in order to receive them.\(^{224}\)

The notice asked for the parents of the anti-revolutionaries to bring identification of their offspring in order to receive their bodies.\(^{225}\) Therefore, the defendants, most of whom were juveniles, had not been identified prior.\(^{226}\) Kusha points out that the judge and participants in the execution of these teens would have to claim the procedural protection of Islamic law that allows a defendant to be executed for an alleged crime without being properly identified.\(^{227}\) Otherwise, under the tenets of Islam, these arbitrary executions would be considered pre-meditated murder for which those involved could also

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\(^{219}\) *Id.* (noting an exception to the general rule of no counsel, for *hudud* crimes involving theft and defamation).

\(^{220}\) *Id.*

\(^{221}\) *Kusha,* *Sacred* supra note 19, at 162-64.

\(^{222}\) *Id.* at 163

\(^{223}\) *Kusha,* *Sacred* supra note 19, at 162-64 (noting that the first judge appointed by Khomeini was Ayatollah Sadiq Khalkhali).

\(^{224}\) *Id.* at 163 (noting that the notice was reported by the daily *Etellaat* on June 24, 1981).

\(^{225}\) *Id.*

\(^{226}\) *Id.*

\(^{227}\) *Id.*
receive the death penalty.\textsuperscript{228} None of those involved were ever reprimanded and the judge, Khalkhali, was eventually elected to a seat in the parliament.\textsuperscript{229}

The preceding case involved juveniles who were participating in actions against the government.\textsuperscript{230} Even then, the process was patently subverted in order to serve the interests of the fundamentalist regime.\textsuperscript{231} Likewise, a case like Raheleh Zumani’s would not be treated any differently and probably worse because she is a female who murdered her husband.\textsuperscript{232} In Iran, being a female is considered to be less than that of a male in the eyes of the law, particularly in the payment of diyyat.\textsuperscript{233}

\textbf{B. Discretion and Death in the United States}

Since Furman, the Supreme Court has instituted constitutional parameters which the states must configure their death penalty statutes to be administered within.\textsuperscript{234} To remedy the arbitrariness in which the death penalty was imposed prior to the decision in Furman, the Court devised a scheme in which sentencing entities guided discretion of when to impose the death penalty based on aggravating factors and when death would be too severe a penalty based on mitigating factors.\textsuperscript{235} However, sentencing entities, be it judge or jury, have discretion in weighing the aggravating and mitigating factors according to the respective state statute as no specific balancing method of the factors is constitutionally required.\textsuperscript{236}

\begin{itemize}
\item \textsuperscript{228} Id.
\item \textsuperscript{229} Kusha, Sacred \textit{supra} note 19, at 163-65. Khalkhali went on to be elected to a seat in parliament. When asked how he could be in charge of the whole judiciary of Iran, presumably in conflict with Islam, Khalkhali said:
\begin{quote}
Nonsense. How is it that there can be the Imam or a president for the whole country, but not a judge? Even if there is such a law in Islam my case is an exception. On Imam Khomeini’s orders, I became the Islamic judge of Iran. The Imam is the only person I take orders from and report back to. I went to every part of this country. I executed, imprisoned, and confiscated. I have done the job of eight judges. All the others have one jurisdiction, while I covered eight regions.
\end{quote}
\item Id.
\item \textsuperscript{230} Id. at 163-64.
\item \textsuperscript{231} See id.
\item \textsuperscript{232} See Kusha, Sacred \textit{supra} note 19, at 259 (noting that when a Muslim male murders a Muslim woman upon his execution he is entitled to blood money whereas the same is not true if a Muslim woman murders a Muslim male).
\item \textsuperscript{233} See id.
\item \textsuperscript{234} Schreiber, \textit{supra} note 126, at 290-91.
\item \textsuperscript{235} Coyne & Entzeroth, \textit{supra} note 112, at 329, 389.
\item \textsuperscript{236} Palmer, \textit{supra} note 121, at 130-33 (noting that there are two types of sentencing phase determination of statutory aggravating and mitigating factors: Weighing and Non-weighing
\end{itemize}
As the death penalty is currently valid under the Constitution, the ultimate discretion of whether or not the death penalty will be sought to punish a criminal is in the hands of state legislators and governors.\textsuperscript{237} The death penalty statutes, which determine the process and what statutory aggravating and mitigating factors can be argued, govern the process and how convicted capital criminals will be punished.\textsuperscript{238} However, the discretion to seek the death penalty lies in the hands of the prosecutor, who also holds the ability to negotiate and accept plea bargains for which a lesser penalty is normally given.\textsuperscript{239} Once the death penalty has been authorized, normally by state statute, and sought as a means of punishment, by prosecutorial discretion, it is up to the discretion of the sentencing entity to determine whether the criminal deserves the punishment of death based on the circumstances of the crime and the criminal.\textsuperscript{240} Finally, the last level of discretion ultimately is held by the President of the United States or state governor as they may grant pardons and clemency to those criminals awaiting death.\textsuperscript{241}

1. Prosecutorial Discretion

The prosecutor's ability to influence any adjudication is apparent from his discretion to charge and plea bargain.\textsuperscript{242} It is unlikely that this discretion will change, as the Supreme Court has held that the decision to prosecute or not and the belief that an accused committed an offense, based on probable cause, is generally in the prosecutor's discretion.\textsuperscript{243} This discretion is limited by the Constitution and statute as a prosecutor shall not discriminate based on race or become vindictive in their prosecutions.\textsuperscript{244} Equally, a prosecutor may choose to not seek the death penalty, even where a statute may allow the imposition of jurisdictions. Some jurisdictions required only that aggravating factors outweigh mitigating factors or that mitigating factors outweigh aggravating factors. Conversely, standard of proof jurisdictions required either that the aggravating factors outweigh the mitigating factors by preponderance of the evidence or in some jurisdictions beyond a reasonable doubt. Here the prosecutor has the burden of proof of proving that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt which is favorable to capital defendants. In non-weighing jurisdictions the factfinder merely has to consider the sufficiency of the circumstances. Three different methods of non-weighing has developed: sufficiency of mitigating factors, mitigating not sufficient beyond a reasonable doubt, and determination of whether mitigating exist).

\textsuperscript{237} Schreiber, \textit{supra} note 126, at 301.
\textsuperscript{238} See \textit{id.} at 301-03.
\textsuperscript{239} \textit{Id.} at 301-02.
\textsuperscript{240} See \textit{id.} at 303.
\textsuperscript{241} Id. at 297-98.
\textsuperscript{242} COYNE & ENTZEROTH, \textit{supra} note 112, at 173.
\textsuperscript{243} \textit{Id.}
\textsuperscript{244} \textit{Id.}
However, a prosecutor's discretion can be tempered by his political ambitions and the public's view of the use of the death penalty. A prosecutor is more likely to seek the death penalty where support of the punishment is high, the crime particularly heinous, and the criminal generally unknown to the public at large.

2. Sentencing Entity Discretion

Once a capital trial has reached the penalty phase of a bifurcated trial the discretion to impose the death penalty remains with the sentencing entity, be it judge or jury. There is no constitutional right to a jury trial during the penalty phase of a capital proceeding; however, a majority of jurisdictions that still use the death penalty utilize a twelve person jury. This jury can be the same jury as used at the guilt phase of a capital proceeding. Similarly, there is no constitutional right to have a unanimous jury; nevertheless a majority of courts require either a unanimous or a majority vote on when death is appropriate.

The discretion of the jury as a sentencing entity is limited by legislation in accordance with the constitutional parameters of the death penalty. Despite specific legislation that dictates statutory requirements when weighing aggravating and mitigating factors, sentencing juries retain broad discretion in this area since categories of mitigating factors tend to be very broad, and juries in many states are not required to explain their decision. This broad discretion may open the door to arbitrary or inconsistent applications of the death penalty, but the risk is much less than before Furman.

As there is no constitutional right to a jury at the penalty phase of a capital proceeding, some cases are tried to the judge as the fact-finder during this  

245. Schreiber, supra note 126, at 301-02.
246. See id.
247. Id. at 301 n.210 (noting the author's comparison of the O.J. Simpson and the Susan Smith case. Here the author notes that where the criminal was known, O.J. Simpson, and the crime of murder committed in California the prosecutors elected to not seek the death penalty. On the other hand, in South Carolina the death penalty was sought where a relatively unknown woman was accused of drowning her children).
248. See PALMER, supra note 121, at 85-92.
249. Id. at 89-90.
250. Id. at 90.
251. Id.
252. Schreiber, supra note 126, at 303.
253. Id.
254. Id. (noting that the ultimate decision to decide life and death is with the jury; however, some states allow a judge to overrule a jury's recommendation of life imprisonment with the death penalty).
In some cases, a defendant may waive his right to a jury during the penalty phase. Additionally, some jurisdictions prohibit juries during the penalty phase, thereby prohibiting the jury *per se* and choosing to adhere to common law principles of investing sentencing discretion solely with the judge. Other courts seek to strike a balance by having a panel of three judges determine the punishment of convicted defendants.

Although the United States death penalty process may be open to arbitrary and inconsistent sentences, as the Supreme Court and states seek to strike a balance between guided discretion and individualized consideration of each criminal, the process has improved in these respects since *Furman*. Despite the fact that any moratorium of the death penalty was lifted after *Furman*, the frequency in which the death penalty has been used in the United States is lower now than ever before. Accordingly, the discretion juries and judges exert over the determination of life and death may seem unfettered; however, the reality is that this discretion has already been limited by constitutional and legislative guidelines.

**IV. THE CASE OF RAHELEH ZAMANI**

The story of Raheleh Zamani is an unfortunate case of a battered woman reaching the end of her ability to withstand the abuse and philandering of her husband. Raheleh was convicted of pre-meditated first degree murder of her husband. Raheleh was executed on January 1, 2008 despite efforts seeking a continued stay of execution to allow time to persuade Raheleh’s in-laws to accept a payment of *diyyat* for the life of their slain son. This payment of *diyyat* would have paved the way for Raheleh to escape the gallows of Evin prison and possibly to see her children grow into adults.

255. *PALMER*, *supra* note 121, at 92.
256. *Id.*
257. *Id.*
258. *Id.*
259. Patterson, *supra* note 112, at 1228 (noting a quote from Raymond Paternoster which the author relies upon asserting, “Since the reinstatement of capital punishment only a handful of offenders have been executed each year.” This decline is allocated to the Supreme Court restricting capital punishment, the discretion of judges and jurors, and legislative and executive action on behalf of the states.).
262. *Id.*
264. *See Majmua-hi Qava’nini Jaza’l [Code of Criminal Laws] [Islamic Penal Code of Iran] 1991* art. 257 (Iran) (noting that in the case of premeditated murder retaliation can be reduced to compensation of blood money by the agreement of the victim’s heirs).
A. In the System

The case of Raheleh Zamani and the majority of Iranian cases, from interrogation and arrest to trial and appeal, are not public record. Consequently, what rights or procedures were afforded to her and others before their deaths cannot be ascertained. But, a comparative analysis of the theoretical rights and procedures afforded by Iran and the rights and procedures that would have been afforded by the United States to Raheleh Zamani can distinguish the two criminal systems regarding the implementation of the death penalty.

1. Pre-Trial

Raheleh Zamani’s crime would be categorized as a qisad crime, requiring the family of her late husband to exercise prosecutorial discretion by bringing forth a complaint. The complaint would have come before a court of first appearance and due to the severity of the crime, before the First Class Criminal Court. Raheleh would then be questioned concerning the claim, permitting her to either confess and admit guilt or deny the claim. Any affirmative defense on Raheleh’s behalf would be limited to her providing evidence to prove that her husband deserved to die according to Islamic jurisprudence, thus limiting her plight as a battered spouse to the discretion of the court of what evidence is in accordance with the Shari’a. If Raheleh pled not guilty, the matter would commence in a trial and during the time between accusation and adjudication Raheleh would not be subject to pre-trial detention. Raheleh also has a theoretical right to retain counsel on her behalf, but there is no evidence that the right includes an attorney at an appeal or where she cannot afford one.

In the United States, the pre-trial process would differ from Iran in that the state, through a prosecutor and pursuant to state statutes, would have the

265. See Amin, supra note 28, at 66.
266. See id.
267. Save Delara!, supra note 6.
268. See Amin, supra note 28, at 130-32.
269. See Karadsheh, supra note 46, at 270-71.
270. See Majmua-hi Qava’ni Jaza’l [Code of Criminal Laws] [Islamic Penal Code of Iran] 1991 art. 226 (Iran) (noting that the article seems to read that the Islamic judge, as the fact finder, would determine whether or not Raheleh’s husband deserved to die and not on any affirmative defenses such as battered women’s syndrome or post-partum depression. Accordingly it is unclear whether Iran recognizes these defenses, or even self-defense, in the country’s jurisprudence.); Karadsheh, supra note 46, at 272 (noting that evidence is limited to religious oaths, confessions, and Muslim male eyewitnesses).
271. See Karadsheh, supra note 46, at 271.
272. Id. at 276.
Raheleh would most likely be detained upon an indictment and charged with the crime if enough evidence is presented to warrant probable cause. Similar to Iran, Raheleh would have the right to retain counsel; however, according to *Gideon* and *Mempa* she would be guaranteed that right even where she would be unable to afford one. In addition, Raheleh would have an opportunity to either enter a plea admitting her guilt or innocence and a determination of the verdict by plea, the court, or a jury. Even if Raheleh were to admit her guilt at this stage, she would be able to present evidence of her past abuse as mitigating evidence during the sentencing phase of the bifurcated trial.

2. **Trial**

In Iran, the focal point of the trial would be the litigants and the judge. The evidence would be limited to religious oaths, confessions, and eyewitnesses. As the fact-finder and decision-maker, the judge would weigh the evidence presented and determine the guilt or innocence of Raheleh. Once found guilty, Raheleh’s fate would be determined by her deceased husband’s family. The family would have sole discretion over Raheleh’s punishment, but their right would be to seek retribution by allowing the state to execute her. The other option for the family would be to seek monetary compensation from Raheleh in the form of diyyat, which would absolve her of the crime.

In the United States, the criminal proceeding would be separated into a bifurcated trial with the first phase to determine Raheleh’s guilt and the second phase, if necessary, to determine her punishment after a weighing of the aggravating and mitigating factors of the case. Throughout this process, the prosecution would retain the discretion to negotiate a plea deal with Raheleh.

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274. *Id.*
277. *Id.* at 86.
279. *Id.*
280. *Id.* at 273.
282. *See id.*
283. *See id.*
284. *See Coyne & Entzeroth*, supra note 112, at 143.
which could spare her death.\textsuperscript{285} If found guilty, the punishment phase of the trial would proceed along the same lines of the guilt phase as the aggravating and mitigating factors would be weighed at the discretion of the sentencing entity determining whether Raheleh deserved death or a lesser sentence.\textsuperscript{286} In a bifurcated trial system, Raheleh’s case would receive more due process as she is able to present mitigating evidence, even if found guilty during the first phase of the trial.\textsuperscript{287} This mitigating evidence would allow the sentencing entity, be it judge or jury, to lessen the class of criminals subject to death by individualizing the sentencing process.\textsuperscript{288} Lastly, an additional protection for Raheleh in proceeding through her capital trial is that she would have a right to retain counsel or compel the prosecutor to provide her one in order to marshal the facts and process so that she exercises her legal rights.\textsuperscript{289}

Essentially, there is no constitutional right to an appeal, but where a state has granted a right to an appeal, by statute, then constitutional protections attach.\textsuperscript{290} Therefore, Raheleh would be able to appeal a judgment against her at either the guilt or sentencing phase of her trial.\textsuperscript{291} Additionally, Raheleh originally would not have a right to counsel upon an appeal under the Sixth Amendment, but the Court determined that due process may be violated where a state is not required to provide counsel to indigents when it grants a right to an appeal.\textsuperscript{292} As a last resort, Raheleh may be able to seek a pardon or clemency from the governor of the prosecuting state.\textsuperscript{293}

\textsuperscript{285} Schreiber, \textit{supra} note 126, at 301 n.210, 302 (noting that although Raheleh is not a famous sports star, her plight in dealing with an abusive husband combined with post-partum depression and medication may lead strong public support for her and the prosecutor to not seek the death penalty and more likely negotiate a plea deal for a lesser sentence. Conversely, Raheleh may arouse more sentiment than Susan Smith where Raheleh’s crime was against an abusive, philandering husband and not against her own children.).

\textsuperscript{286} \textit{Id.} at 303.

\textsuperscript{287} \textit{See} \textit{PALMER, supra} note 121, at 116.

\textsuperscript{288} \textit{Id.}

\textsuperscript{289} \textit{Mempa v. Rhay, 389 U.S.128, at 135; PALMER, supra} note 121, at 92-93.

\textsuperscript{290} \textit{COYNE \\& ENTZEROTH, supra} note 112, at 607-08; \textit{see} \textit{PALMER, supra} note 121, at 137-39 (noting that a State is not required to provide appellant review of a death sentence, however, all jurisdictions do provide some type of appellate review).

\textsuperscript{291} \textit{See} \textit{PALMER, supra} note 121, at 137-39.

\textsuperscript{292} \textit{Id.} (noting that the right to counsel in an appeal is only required for an indigent’s first appeal, thus Raheleh would be given at least one appeal with counsel).

\textsuperscript{293} Schreiber, \textit{supra} note 126, at 297-99 (noting that the Constitution does not require clemency and the states have seemingly unfettered discretion in the clemency process. Despite this discretion, states must abide by due process and equal protection rights that ensure the procedures utilized are fair.).
3. Conclusion of Analysis

Raheleh Zamani ultimately was executed on January 1, 2008, despite efforts to obtain a stay of execution in order to seek a possible payment of _diyyat_. Once more the arrest, trial, and execution were not public; therefore any rights she may have been afforded as a criminal are not apparent. The limitations on the type of evidence she may present and when she can present it, as well as the discretion of the victim's family in ordering her execution, are not enough evidence to determine whether she was arbitrarily executed by Iran. However, the process taken as a whole continues to be a target of human rights groups that claim Iran, by these processes, arbitrarily and inconsistently implements the death penalty.

If Raheleh's case had happened in the United States, it is debatable whether she would have been indicted for her crime or granted a lesser sentence in plea negotiations. However, had her case gone to trial, the courts would have protected her rights as a citizen with a guarantee of counsel, an ability to sway the jury with evidence of her situation, and it would have allowed a jury of her peers to determine her ultimate punishment. Further, she would have been permitted to introduce mitigating evidence in an attempt to receive leniency in her sentencing. Possible mitigating factors or defenses that Raheleh would have been able to introduce range from abuse inflicted by her husband to an altered mental state due to her battle with post-partum depression and her use of medication provided by her husband. Conversely, the jury would also hear evidence presented by the prosecution on aggravating circumstances connected to the commission of the crime, such as the timing of the murder and a subsequent cover-up indicating Raheleh's possible premeditation of the crime.

295. See *id*.
296. Cf. Kusha, *Sacred* *supra* note 19, at 162-65 (noting that Iran has created constitutional checks and balances that are often not employed by the judiciary. In reality the procedure has been described as “anomic at best.” Evidence of Iran's minimal use of constitutional checks and balances is analogous to an inability to properly determine whether a person under Iranian jurisdiction would be considered arbitrarily executed as Iran currently does not follow its own procedures).
298. See generally Schreiber, *supra* note 126, at 301 n.210, 302 (noting that the prosecutor has discretion to negotiate plea agreements as well as the ability to not seek the death penalty in a crime where the death penalty is applicable).
300. See Palmer, *supra* note 121, at 115-16.
301. See *id*.; Coyne & Entzeroth, *supra* note 112, at 389-90.
Ultimately, Raheleh would at least be granted an opportunity to present relevant evidence that would be weighed by an impartial jury in the defense of her life. Although the United States death penalty policy has its own dissidents, the situation could be worse as shown by the fundamental changes evident after the Supreme Court's ruling in Furman. Today, defendants that face the death penalty have several levels of discretion and constitutional protections that assist in alleviating concerns of arbitrary and inconsistent applications of death sentences.

B. Why Iran should Re-modernize their system

An impetus for Iran to change its current death penalty process to one similar to the United States, with the use of a bifurcated trial and guided discretion, is international pressure upon Iran for human rights violations. Currently, Iran receives attacks and the ire of human rights groups such as Amnesty International and Human Rights Watch. Iran has been singled out by these groups for its treatment of prisoners, repression of rights of expression and dissent, torture and ill treatment of detained prisoners, and the use of the death penalty. However, Iran's human rights violations may lessen as more defendants are granted fairer trials within a system that recognizes a defendant's relevant mitigating factors weighed against the state's aggravating factors when allocating punishment. Within a fairer system, fewer defendants would be punished arbitrarily by Iran. Additionally, the use of the death penalty in Iran may slow to a rate similar to that of the United States with the implementation of guided discretion within a bifurcated trial as evidenced by the United States own historical use of the death penalty.

303. See PALMER, supra note 121, at 115.
304. See ZIMRING, supra note 111, at 5-8.
305. See Patterson, supra note 112, at 1228; Schreiber, supra note 126, at 303-04.
306. See AMNESTY INT’L, supra note 297, at 141-43; HUMAN RIGHTS WATCH, supra note 297, at 463-68.
307. AMNESTY INT’L, supra note 297, at 141-43; HUMAN RIGHTS WATCH, supra note 297, at 463-68.
308. AMNESTY INT’L, supra note 297, at 141-43; HUMAN RIGHTS WATCH, supra note 297, at 463-68.
309. See PALMER, supra note 121, at 97, 115-16 (noting that with the use of aggravating and mitigating factors, the arbitrariness in which the death penalty was imposed was lessened more than during the pre-Furman era of the death penalty, as the class of felons eligible for the death penalty was lessened while the class of crimes eligible for the death penalty became more particular).
310. See id.
311. See ZIMRING, supra note 111, at 7-8 (noting that less death row inmates were executed from larger populations of death row inmates when compared to the 1950s. Typically there are long
1. How Iran Can Change

Reforming Iran’s use of the Shari’a into a workable and flexible system of laws is a monumental task as evidenced by Iran’s current inability to create modern guidelines. To create a coherent system, the solutions must not contradict or subvert the divinely revealed laws of Islam. However, discourse has begun among student associations and reformist groups in Iran that seek to create a workable Shari’a system that limits the harsh and brutal punishments by adhering to the Koran principles of forgiveness and regulatory penalties. Additionally, Iran has seen more liberal and reformist political leaders emerge to challenge the very notion of an Islamic government by favoring a separation of church and state. Accordingly, Iran has the ability to institute changes to their legal system that may not ultimately conform to revealed principles of Shari’a due to Ayatollah Khomeini’s 1988 ruling which exempted the Iranian government from religious provisions.

Historically, the Shari’a has been important in Muslim societies and governments mostly in relation to the private matters of the people. Its use as a basis for a modern legal system in Iran has been a failure due in part to gaps in its coverage and inflexible application to the complex problems facing modern societies. To remedy the shortcomings of the Shari’a with present day sensibilities in adjudicative societies, other Islamic nations have supplemented the Shari’a with criminal, civil, and commercial codes adapted from European models. These adaptations were meant to exist side by side with Shari’a law and not to supplant it. Iranian authorities have the ability to adapt Iranian law,

delays between a defendant receiving a death sentence and the actual implementation of that sentence.

312. See Kar, supra note 25, at 59.
313. Id.
314. Id. at 59-60.
315. Zubaida, supra note 55, at 211-16 (noting that in recent years the Iranian political field has seen the election of reformist and liberal politicians such as President Khatami and the 1999 election of a new majlis (legislature) that has been pitted against the current clerical establishment and regime. These liberal establishments led to a rise in newspapers and magazines that formulate a dissident message against the ruling regime. However, the dissent has also seen a rise in adjudication of these outspoken reformers in the form of banishment of the publications and imprisonment of journalists.).
316. Id. at 210-11.
317. Id. at 220.
318. Id. at 221-22.
319. Id. at 156-57 (noting that Egypt, Saudi Arabia, and Jordan currently supplement Shari’a with European modeled codes).
320. Id.
either through Khomeini’s 1988 ruling or through adapting European modeled codes, to support a dynamic and complex society.\textsuperscript{321}

In its death penalty adjudications, Iran should adopt a bifurcated trial system that would allow evidence to be channeled to the sentencing entity in an effort to obtain a less arbitrary application of the death penalty.\textsuperscript{322} Moreover, Iran should limit the discretion that victims and their families exercise over the criminal process by removing their ability to choose life or death for the defendant.\textsuperscript{323} As Iran has carried out the executions for the victims, it should also place the discretion to seek the death penalty within the power of the state.\textsuperscript{324}

2. Why Iran Will Not Change

Although Iran has the capability and religious directive of Khomeini to make necessary addendums to Iran’s current Shari’a law, the country will most likely not institute change in the near future.\textsuperscript{325} The 1979 Revolution in Iran, which established the current religious regime as the political driving force, was a popular rebellion against a perceived corrupt dynasty.\textsuperscript{326} After the popular revolution, the power vacuum was filled by a fundamental religious sect led by Ayatollah Khomeini that has empowered the ruling clerics to control all aspects of Iranian people’s lives through the Shari’a.\textsuperscript{327} To change the system now would require more open discourse about the political process and ability to change the laws of Iran.\textsuperscript{328} Currently, this type of discourse is not happening on a large scale due to the fear of reprisal from the government and assaults on the Iranian dissidents through imprisonment, fines, torture, and death.\textsuperscript{329} However,

\begin{itemize}
\item \textsuperscript{321} See Zubaida, supra note 55, at 156-57, 220-24.
\item \textsuperscript{322} See Coyne & Entzeroth, supra note 112, at 143.
\item \textsuperscript{323} Compare Schreiber, supra note 126, at 301-03 (noting that the discretion to seek the death penalty is in the hands of state legislatures and governors to choose whether or not to implement the death penalty and then the prosecutor to seek the death penalty. Even where the prosecutor has the ability to seek the death penalty, it cannot be sought for arbitrary reasons. Therefore, even the prosecutors have limited discretion when attempting to seek the death penalty), with Entessar, supra note 107, at 97 (noting that certain crimes are considered against the victim and his/her family allowing the family to seek retribution or compensation from the defendant).
\item \textsuperscript{324} See Schreiber, supra note 126, at 301-03.
\item \textsuperscript{325} See Zubaida, supra note 55, at 210-11 (noting that Khomeini’s 1988 ruling allows the Iranian ruler to stand above all divine ordinances if in the best interest of the Muslim people, while also allowing for the suppression of reform).
\item \textsuperscript{326} Halper, supra note 42, at 1163-64.
\item \textsuperscript{327} Id. at 1164-65; Kar, supra note 25, at 46.
\item \textsuperscript{328} Kar, supra note 25, at 59-61.
\item \textsuperscript{329} Id. at 60-61.
\end{itemize}
political dissent and retaliation against the religious regime is starting to gain a foothold in Iran, through the resistance of its people.\textsuperscript{330}

V. CONCLUSION

The debate over the death penalty is a historic battle that has plagued man since state sponsored executions were first put into practice.\textsuperscript{331} This debate is only intensifying as the international view is moving towards abolishing the practice altogether.\textsuperscript{332} Therefore, if Iran is to continue implementing the death penalty, it would benefit the country to standardize a death penalty procedure similar to that of the United States with the use of guided discretion within a bifurcated trial where the decision to seek the death penalty is in the hands of the state. This type of change would lessen the arbitrary and inconsistent use of the death penalty, as the class of criminals deserving of the punishment could be narrowed and the discretion of the state to seek the death penalty likely to be more consistent.\textsuperscript{333} This type of reform would be similar to other Islamic countries such as Saudi Arabia, Egypt, and Jordan where the Shari’a has been supplemented with codes based on European models.\textsuperscript{334} Additionally, Iran’s ruling regime has the authority, following Ayatollah Khomeini’s 1988 ruling, to allow such reform as long as it is in the best interest of the Muslim people.\textsuperscript{335} However, due to the fundamentalist nature of the current ruling regime following the popular revolution of 1979 and the regime’s lack of toleration of political dissent, these changes will most likely not come to fruition.

\textsuperscript{330} Id.
\textsuperscript{332} Id. at 223-24; \textit{Moratorium}, supra note 14.
\textsuperscript{333} See \textit{Coyne & Entzeroth}, supra note 112, at 329, 389.
\textsuperscript{334} \textit{Zubaida}, supra note 55, at 156-57.
\textsuperscript{335} Id. at 210-11.