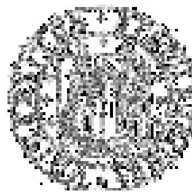
UNIVERSITÀ DEGLI STUDI DI PADOVA

DEPARTMENT OF POLITICAL SCIENCE, LAW,
AND INTERNATIONAL STUDIES

**Master's degree in
Human Rights and Multi-Level
Governance**



CAPITAL PUNISHMNET IN THE CONSTITUTION AND CRIMINAL CODE OF IRAN: A HUMAN RIGHTS ANALYSIS

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A.Y. 2021/2022

ACKNOWLEDGEMENT

Writing a graduation thesis is indeed a painstaking experience for me that demands a great deal of self-development, self-motivation, and self-reflection to reach the very end. After a year suspension of my studies and resolving several issues, I finally finalized the thesis and reached to the end of my journey. Along that journey, I feel fortunate to have and immensely grateful to:

My thesis supervisor, Prof. Sara Pennicino for ushering me from the very beginning into a clear direction and reforming the thesis when I was shifting the thesis from legal objects to sociological; for continuously supporting me in revising and improving the arguments in my dissertation with valuable advice on theoretical frameworks; and especially for always being available and supportive to assist me in administrative procedures that incurred due to my lateness in registering for the graduation thesis defense; for supporting me during a tough situation of my life and paving my way to continue my studies in PhD.

My spouse for all of her caring and tolerance that I felt deeply indebted for throughout this painstaking writing experience; and especially for always being part of my ongoing self-development and self-motivation journey.

My mom for always accompanying me on every step that I take throughout my life, with utmost love and trust devoted to her son;

My friend, dr. Claudio Cardone, for his presence in difficult situations of my life in Italy and for his sincere friendship.

And all of my other family members and all of my friends for being always present to embrace me with their love and support.

My special heartfelt thanks go to professor Paolo De Stefani for his kind and sincere efforts to develop human rights and professor Amir Samavati Pirooz for teaching me the way of thinking freely and fairly.

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INTRODUCTION

Capital punishment with a prolonged history in human life, is considered as one of the tough and inhumane punishments in international community. Death penalty was implemented among many civilizations with different methods and people was tortured by inhumane executions. Although capital punishment was arbitrary used between some ancient states, it was determined legally in the first world legal code, Code of Hammurabi. Some other civilizations determined it in their criminal codes by resorting to the *lex talionis* principle. While in the majority of ancient civilizations death penalty was used for grave crimes, it was exercised for minor offenses.

In international community and human rights instruments, death penalty is debated when the right to life is under reviewed. After considering the right to life as a fundamental right, using death penalty is severely criticized by international community and human rights activists. After establishment of human rights instruments such as Universal Declaration of Human Rights or International Covenant on Civil and Political Rights, innumerable efforts have been made to abolish death penalty or constrain it. The right to life is considered as a basic right, however, it is not an absolute right in international human rights instruments. Article 6 of the International Covenant on Civil and Political Rights, proscribes arbitrary deprivation of life. Therefore, right to life which is a fundamental right, can be disregarded if the deprivation of it is not arbitrary. Although the Covenant determines the right to life as a non-absolute right and recognizes capital punishment for states that have not abolished death penalty, it must be applied only for serious crimes.

Capital punishment is still used by a number of states on the basis of deterrence, social solidarity and retribution theories. There is no consensus among scholars that whether capital punishment can deter other people from committing severe crimes or not. However, in traditional and undeveloped societies, capital punishment is used to mitigate a revengeful feeling of people which protects public order and safety of the society from chaos. Therefore, the penalty would save public order, safety and health. The retribution avers that punishment is required to correct a moral imbalance created by wrongdoing and to maintain a legitimate moral and legal order. Retribution is the notion that punishment is imposed because the criminal deserved. Murderers are to be given the death penalty because it is the penalty they have earned by their offense.

For a long time, capital punishment has been implementing in the multicultural society of Iran. Iran with a prolonged history, various race and ethnicity, has been used death penalty. Before the Persian Constitution, there were no codified legal codes; and judgement was done arbitrary. During the Qajar realm, punishment was applied in different ways and types: ear or hand cutting, beard burning, blinding and executing. The Persian Constitution of 1906 was a great achievement for Iranian that paved the way of enacting legal codes and regulating laws. It revived criminal law principles such as principle of legality of crimes and punishments, assigned judicial systems and terminated inhumane punishments and executions were done without torturous methods.

Islamic religion has played a pivotal role in the community of Iran and it has influenced many aspects of people's lives. In fact, Iranian legal codes have intertwined with Islamic principles and norms. Even before the Iranian revolution, the importance of Islamic principles was emphasized in the Persian Constitution of 1906. Both before and after the Iranian revolution, capital punishment has been determined in penal codes of Iran. However, after the revolution, death penalty is extended to other crimes such as sexual crimes. While before the Islamic revolution, Sharia or Islamic law was exercised in Iranian's community, it became as the corner stone of legal codes after that. Sharia or Islamic law is taken from four main sources: Quran, Sunnah or tradition, Ijma or consensus and wisdom; and Islamic principles are created from these sources. All Islamic punishments are codified by Sharia to the penal code of Iran. However, there are disparities between Islamic jurists (Ayatollahs) to implement some Islamic punishments under certain circumstances.

The Constitution of the Islamic republic of Iran protects the right to life from any third violation but it is not absolutely determined in the constitution and the right to life may be derogated by law. This is considered as a justification and authorization for legislator to adopt capital punishment in penal laws. As the constitution of Iran is highly regarded Islamic principles and values and they are prioritized among all laws and principles by article 4, implementation of capital punishment for specific crimes is against Islamic principles and therefore, it violates article 4. In fact, by resorting to article 4 of the Constitution, capital punishment can be restricted to few number of crimes. All crimes which are punishable by capital punishment are taken from Sharia to Islamic penal code of Iran as Hodud and Qisas. Regardless of Qisas which is in accordance with *lex talionis* principle and more justifiable, exercising Hodud crimes is in contrary to Islamic principles and it violates article 4 of the constitution.

The main goal of this study is to analyze capital punishment through the Constitution and Islamic penal code of Iran to find restrictions of implementing capital punishment. In other words, it considers the role of the Constitution of Iran in restricting capital punishment. As the Constitution of Iran is established by Islamic principles and it highly emphasizes the importance of them, the major role of the Islamic principles to constrain capital punishment will be considered. In fact, although Sharia determines capital punishment for certain crimes, implementation of the punishment is required to fulfil several criteria. This study also examines those Hodud crimes which are punishable by death penalty and tries to elucidate any restrictions in Hodud crimes regarding capital punishment.

This study will exercise content analysis. Content analysis can be considered as a flexible research method that many studies with different goals and objects can take advantage of it. Content analysis is a worthwhile research technique for creating valid inferences from texts, to the contexts of their use. In the content analysis, a broad range of 'texts' from transcripts of interviews and discussions in clinical and social research to the narrative and form of films, TV programs and the editorial and advertising content of newspapers and magazines is used to study. This study at first will focus on literatures to make structure and analyze definitions, concepts, ideologies and theories; then make inferences about the messages within the texts, the writers and the audience.

This study is structured in three chapters. The first chapter will consider the history of capital punishment. It includes the history of capital punishment in ancient civilization, Europe, US, international law and human rights, Islam and Iran. Having considered the history of capital punishment, the execution methods, legalization and abolishment of capital punishment will be found out. In this chapter the trends and reasons of determining death penalty in Iran, Islam vis-a-vis the abolishment justifications of it in international law and human rights will be explained.

The second chapter will discuss penological analysis of capital punishment and objects of it. It will analyze the major benefits and advocates of capital punishment: deterrence, retribution and social solidarity. The penological analysis of death penalty is worthwhile in this study because there is considerable overlap between human rights obligations and punishments. In other words, does capital punishment protect human rights by cracking down criminals? Can death penalty be a solution to fulfil the positive human rights obligations and protect public welfare, health and public order? Capital punishment is considered the only solution to protect public order in less developed communities and to

prevent any anarchism in those societies. In this chapter, the views and discretion of Iranian authorities regarding capital punishment will be elucidated.

The third and final chapter will review capital punishment in the Constitution and Islamic penal code of Iran. The constitution has protected the right to life but not absolutely, and it can be derogated by law. However, the most prominent article of the Constitution which is superior than other articles, emphasizes the role and importance of Islamic principles which should be regarded in all legal codes. by resorting to Islamic principles, capital punishment can be terminated or abolished in certain crimes.

CHAPTER I. BRIEF HISTORY OF CAPITAL PUNISHMENT

1.1. In the past, ancient civilizations

Death penalty with a long history of humankind has targeted the most fundamental human rights, the right to life. It is considered as the grave punishment in societies and states. Having regarded the history of human civilizations, it can be fully grasped that all civilizations exercised the death penalty against perpetrators in somehow and for illegal acts.

The death penalty has long been used as a form of punishment and it has a long history in human life. Death penalty is one of the oldest types of punishment and it was exercised by innumerable people, ethnics and civilizations. The history of death penalty and the first stablished capital punishment laws date back to the eighteenth century B.C., the Code of Hammurabi. Hammurabi identified by most Assyriologists with the Amraphel of Genesis 14:1 was the sixth king of the first dynasty of Babylon and reigned for fifty-five years, about 2250 B.C. We have a good account of his life and deeds in the letters which he wrote to Sin-idinnam and in The Chronicle of the kings of Babylon, both of which have been edited with great care by Mr.L.W. King[1]. The first written record of the *lex talionis* is more ancient still than Mosaic law, perhaps a millennium order. It has been traced to the code of Hammurabi, sixth king of the first dynasty of Babylonia, in approximately 1760 B.C. The *lex talionis* permeates the sections of Hammurabi's Code dealing with what we would now call 'crimes' and was its governing principle[2]. The *lex talionis* was the punishment rule in the code of Hammurabi implemented for some crimes and inflicted the death penalty for twenty-five of the crimes[3].

In ancient China, the death penalty was exercised about 475-221 BCE. It was written to the first Chinese criminal code. Before Confucianism became the dominant philosophy in the Chinese society, the criminal laws and punishments in ancient China were indeed harsh and cruel. The first recorded penal code was created in the slavery dynasty of Shang (1700 – 1027 BCE) which included Five Punishments for misconduct: Mo (permanent branding on the offender’s face), Yi (amputation of the offender’s nose), Fei (feet amputation), Gong

[1] George H. Gilbert, The Code of Hammurabi, The American Journal of Theology Vol. 8, No. 3, (1904), 601.

[2] Morris J. Fish, An Eye for an Eye: Proportionality as a Moral Principle of Punishment, Oxford Journal of Legal Studies, Vol. 28, No. 1 (2008), 58.

[3] Rebecca Stefoff, Furman v. Georgia: debating the death penalty, Tarrytown, NY: Marshall Cavendish Benchmark (2008), 20.

(amputation of a male's reproductive organ or locking a woman up for life), and Da Pi (the death penalty). The Five Punishments had been constantly used for nearly 1000 years thereafter. During the Warring States (475– 221 BCE), there were approximately 200 crimes punishable by the death penalty[4].

In other ancient civilizations, death penalty was exercised even for insignificant crimes. The penal law was so tough that implemented death penalty for almost every crime. The first codified constitution of Athens, known as "Draconian Law" after the man that wrote it, was written in seventh century B.C. Draconian Law had stringent codes that almost every offence regardless of the harshness or insignificance of its act was punished by death penalty[5]. Death penalty without any doubt was the popular punishment among ancient civilizations and many antique nations exercised it by several methods. The death penalty itself, by several methods: drowning, burning or by impalement, was quite usual in the ancient Near East, and appears regularly in the various law codes from earlier times[6]. At the Hatra ancient city which is now a city in Iraq, capital punishment was implemented with two different forms, lapidation and the "death of the god". Death by stoning is famous both from Hebrew bible and from the new testament. The so-called "death of the god" is much more enigmatic, and it remains unknown how it was inflicted. In fact, the only thing one can be certain of is that it was not death by stoning, as the two forms of capital punishment are put in contrast to each other in H336 and H343. As we have seen, H342 proclaims that the "death of the god" will be inflicted both on the female singers and wailing women of the Hatrene triad who attempt to escape and on those that provide them with shelter, and the god Nergol plays an active part in this decree[7].

In ancient Iran, there is no concrete evidence of penal code and methods of punishment before Sasanian empire. According to transcripts and manuscripts of Herodotus, an ancient Greek historian, the following principle of punishment was exercised by Achaemenid:

" the Law will never permit death penalty for perpetrator of a crime and no Iranian has a right of exercising an inhuman and brutal punishment against his slave"[8]. However, there are more information about death penalty in ancient Iran after Sasanian empire. The origin

[4] Lilou Jiang, Capital Punishment in China: Toward effective public policy and law, PhD thesis, Faculty of Law, University of Ottawa (2020), 30.

[5] Ellis, E., & Horne, Charles F, The Story of the Greatest Nations With One Thousand of the World's Famous Events, Portrayed in Word and Picture, Francis R. Niglutsch, New York, Vol 5, (1914).

[6] Russ VerSteeg, Early Mesopotamian Law, Carolina Academic Press, Durham, NC (2000), 8

[7] Ted Kaizer, Capital Punishment at Hatra: Gods, Magistrates and Laws in the Roman-Parthian Period, British Institute for the Study of Iraq, Vol. 68 (2006), 149.

[8] Nasr Taghi, The history of punishment in Iran from ancient Iran to Islam, Legal Collection No. 57 (1940), 21.

of the information is derived from the Avesta which is the primary collection of religious texts. Nevertheless, all the penal-codes does not contain in the Avesta and there is no proportionality between the prime punishments mentioned in the book and committed crimes as the former were insignificant or grave. Three types of crimes are punishable in the Avesta: crime against god (heresy, apostasy, blasphemy), crime against the king (insurrection, riot), crime against persons (murder, battery etc.). For the third crime, the *Talion* principle or the principle of reciprocal justice was exercised. If someone commits battery, he is beaten or if a criminal perpetrates robbery, his hands will be cut off[9]. Ardashir I who was the founder of Sasanian, proclaimed procedures for the mentioned crimes. For the first crime (crime against god), the criminal was imprisoned for one year while he was preached by clerics and after that if he was still against god, he was executed[10].

The interesting fact about exercising capital punishment by ancient civilizations is albeit they implemented capital punishment somehow in tough and brutal approaches, few of those had penal policy reformist acts. The abolition of capital punishment is not a new achievement between states and nations. Although after adoption of International Covenant on Civil and Political Rights (ICCPR) by United Nations General Assembly in 1960, the death penalty had begun to be limited as mentioned "nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant"[11], the international community's effort was not the first constraint. In the Roman Republic the death penalty had discontinued in practice. Proscriptions might be carried out in a wholesale fashion or political offenders executed under such extraordinary grant of powers as Cicero exercised in dealing with the accomplices of Catiline, but of executions in the regular course of judicial procedure, there is no sign after that of Manlius, 384 B.C.[12]. Polybius declared of the Romance of his day that "whenever those on trial for their lives are convicted, their custom gives them the right to depart openly as long as a single tribe of those that are confirming the verdict is still left to vote"[13].

[9] Nasr Taghi, The history of punishment in Iran from ancient Iran to Islam, Legal Collection No. 57 (1940), 22.
[10] IBID.
[11] Article 6 of the ICCPR.
[12] William McAllen Green, An Ancient Debate on Capital Punishment, The Classical Association of the Middle West and South, Inc. (CAMWS), Vol. 24, No. 4 (1929), 267.

[13] IBID.

1.2. In Europe

Considering comprehensive history of capital punishment in Europe between Middle Ages and the nineteenth century is beyond scope of the current writing. It will briefly analyze the change of European countries' views about death penalty.

The abolition of death penalty in Europe has been applied gradually in a slow manner despite severities that European societies were imposed. Medieval Europe was full of violence that decelerated the abolition of capital punishment. It boasted a long-standing reputation for brutality and disorder. In this narrative, violence was a normal part of everyday life in medieval Europe[14]. In the violence atmosphere of medieval European societies, states tried to pacify public order and safety by using punishments. The major purpose of European states to use punishments was to prevent society from people's retaliation. Between 5th and 11th centuries, Western European states tended to pacify social relations and the pacification processes were hampered by the rudimentary nature of law enforcement, the belief in a man's right to settle personal disputes as he saw fit, and the Church's opposition to the death penalty[15]. Therefore, the justice system strove not to apply tough punishment against violent acts but instead keep the society from personal revenges. The Frankish civil law code specified in 507-511:

"The Salic Law was a pact (pactus) "concluded between the Franks and their chiefs," for the specific purpose of ensuring peace among the people by "cutting short the development of brawls." This term evidently means private acts of vengeance, the traditional vendettas that went on from generation to generation. In place of the vengeance henceforth forbidden, the law obliged the guilty party to pay the victim (or, in the case of murder, his family) monetary compensation. This was an indemnity whose amount was very precisely set by the law, which described with much detail all of the possible damages, this being to avoid any discussion between the parties and to make settlement as fast, easy and peaceful as possible"[16].

After the 11th punishment policy modifications were made to strengthen the control of the Western Europe. Some jurists and legal scholars insisted the king to punish the villain and criminal to secure society and to differentiate them from good people. This trend, changed the church's punishment policy: " a reaction began to arise in the 11th century against the previous system of monetary compensation. Henceforth, increasingly, it was felt that

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[14] Sara M. Butler, Violence and Murder in Europe, Cambridge University Press, from Part III - Social, Interpersonal and Collective Violence (2020), 330.

[15] Peter Frost, Western Europe, State Formation, and Genetic Pacification, Evolutionary Psychology, Volume 13(1) (2015), 230.

[16] IBID, 231.

money could not be a sufficient compensation for such an infraction. The idea that the murder of a man is a crime too serious, an offence too manifest to the order of Creation, to be simply “compensated” by a sum of money was present from the early 11th century onward in the thinking of some bishops[17]. Tomas Aquinas which was a famous Italian philosopher and theologian upheld the death penalty during 11th century by exemplifying common good: "it is lawful to kill an evildoer in so far as it is directed to the welfare of the whole community, so that it belongs to him alone who has charge of the community's welfare. Thus it belongs to a physician to cut off a decayed limb, when he has been entrusted with the care of the health of the whole body. Now the care of the common good is entrusted to persons of rank having public authority: wherefore they alone, and not private individuals, can lawfully put evildoers to death"[18].

The death penalty reached the highest rate after 11th and it exercised extremely. It was implemented not only for murder but also for other crimes such as rape, abortion, theft, counterfeiting etc. The way of execution was horrific. Criminals were executed by drawing and quartering, breaking on the wheel, and burning at the stake. Beginning in the 13th and 14th centuries, there were even cases of the convicted murderer being buried alive under the victim’s casket[19]. The European states reaction by execution of murderers reached its apex in England and Flanders by the 16th century. Over a lifetime, one or two out of every two hundred men would end up being executed[20]. Typical estimates referring to the late Middle Ages range between 20 and 40 homicides per 100,000, while respective data for the mid twentieth century are between 0.5 and 1 per 100,000. the early seventeenth century may be regarded as a decisive turning point. The average rates already decline somewhat from the fourteenth to the sixteenth centuries[21]. In 16th century, death penalty was considered as a state rights. The rights that reserved for states to purge societies from murderers. Murderers were assumed as villains that endangered states security and peoples' lives and the only way to get rid of them in 16th century was to kill them. This theory was intensified not only by lawyers, philosophers and theologians but also was sanctified by church. It was regarded as a present that given by God. John Locke supported the rights of states to use death penalty against murderers by arguing: " every man, in the state of

[17] Peter Frost, Western Europe, State Formation, and Genetic Pacification, Evolutionary Psychology, Volume 13(1) (2015), 232.
[18] Tomas, Aquinas, The summa theologica of St. Thomas Aquinas, New York: Benziger Bros (1947-48).
[19] Peter Frost, Western Europe, State Formation, and Genetic Pacification, Evolutionary Psychology, Volume 13(1) (2015), 233.
[20] IBID.
[21] Manuel, Eisner, Modernization, self-control and lethal violence: The long-term dynamic of European homicide rates in theoretical perspective, British Journal of Criminology, 41 (2001), 628-629.

nature, has a power to kill a murderer, both to deter others from doing the like injury, which no reparation can compensate, by the example of the punishment that attends it from everybody, and also to secure men from the attempts of a criminal, who having renounced reason, the common rule and measure God hath given to mankind, hath, by the unjust violence and slaughter he hath committed upon one, declared war against all mankind, and therefore may be destroyed as a lion or a tyger, one of those wild savage beasts, with whom men can have no society nor security: and upon this is grounded that great law of nature, Whoso sheddeth man's blood, by man shall his blood be shed"[22].

By the mid-18th century, the abolition of death penalty and restrictive movements begun. The movements against capital punishment was rising among judges and lawyers. The England courts tried to restrict death penalty by making new decisions about criminals unlike previous verdicts in the mid-17th century. On at least eight occasions between 1840 and 1869 the commons voted on measures to abolish death penalty. Despite repeated defeats in Parliament, the advocates of abolition were confident that victory lay within their grasp. In 1848 one reformer, George Thompson, optimistically predicted that "the time would soon come" for the final overthrow of the allows[23]. Despite attempts of opponents of death penalty in England, the result of the three decade efforts was not abolition of it. Instead, the efforts were obstacles to death penalty and due to that execution in public was abolished. These years saw the installation of a regime that would remain in place for nearly a century. The end of public executions in 1868, far from marking another advance on the road to elimination, rather brought to a halt the robust debate that had been associated with the issue[24]. Although this new penal policy was rising from the mid-18th and 19th century, in the seventeenth century a quarter of those who stood trial were hanged, this had halved by the mid-eighteenth century, and fell further by 1800[25]. In the early 19th century, the trend towards not executing was far more among judges than the law. for instance, hanging was still mandatory for theft of goods worth at least 40 shillings. To save a condemned man, a jury decided that a stolen 10-pound note was worth only 39 shillings. Another jury came to the same decision for a theft of 100 pounds. A similar change of mood could be observed in French law courts. In Dijon, the death penalty accounted for 13 to 14.5% of all sentences

[22] John, Locke, Second Treaties of Government, Hackett Publishing Company, Indianapolis and Cambridge, (1980), 7.
[23] Randall McGowen, History, Culture and the Death Penalty: The British Debates, 1840-70, Historical Reflections / Réflexions Historiques ,Vol. 29, No. 2 (2003), 229.
[24] IBID, 230
[25] Gwenda Morgan, Peter Rushton, Rogues, thieves and the rule of law. The problem of law enforcement in north-east England1718-1800, Crime, Histoire & Sociétés / Crime, History & Societies, London, UCL Press (1999), 68.

before 1750, 8.5% in 1758–1760, 6% in 1764-1766, and less than 5% after 1770. This abolition de facto was followed by abolition de jure in one European country after another from the mid-18th century onward[26].

The movements and efforts of opponents against death penalty in Europe led to abolition of it after 1900 in many European countries. The movement of criminologists and philosophers against capital punishment such as Cesare Beccaria and his followers who seriously criticized it began during 18th century and accelerated abolition of it in 19th century[27]. The major obstacle in 18th century that retained capital punishment in Europe was not only supportive views and acts of conservative parties and proponents of capital punishment, but also it was advocated by public opinion. Therefore, the abolitionist movement of capital punishment among the main French writers of the era like Victor Hugo, Alphonse de Lamartine, Félicité Robert de Lamennais, François Réné de Chateaubriand, and others tried to change public opinion regarding capital punishment[28]. The abolitionist movement affected French parliament. A law was passed by the parliament that allowed the juries of the felony courts to find extenuating circumstances for persons that they convicted of crimes, including capital ones. This obligated the three judges of the courd'assises to lower the penalty by at least one degree below the minimum prescribed by law. The result was a sharp decline in executions, as juries found extenuating circumstances for the overwhelming majority of persons they convicted of capital crime[29].

The abolition of death penalty in the Europe in many crimes begun in nineteenth century and capital punishment finally abolished almost in all the European states in 20th century. Even some European states abolished it in severe crimes such as murder in nineteenth century. Great Britain, France, and Germany, along with other European nations, all decreased the number of crimes subject to the death penalty from a large number at the end of the eighteenth century to only murder and crimes against the state and in the military by the mid-nineteenth century. Some moved quite swiftly to abolish it for murder, such as the Netherlands in 1870 and Norway in 1905. The last execution in England was in 1964, and capital punishment for murder was abolished in 1965; in Italy and Austria following the Second World War, the death penalty was abolished for murder in the same year that the last execution took place (1947 and 1950, respectively); and it was abolished for murder in

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[26] Peter Frost, Western Europe, State Formation, and Genetic Pacification, Evolutionary Psychology, Volume 13(1) (2015), 234.

[27] James M. Donovan, Public Opinion and the French Capital Punishment Debate of 1908, Law and History Review, Vol. 32, No. 3 (2014), 576.

[28] IBID.

[29] IBID, 577.

Finland in 1949, just four years after the last execution[30]. A milestone was reached with the adoption by the Council of Europe in 1982 of Protocol No 6 to the European Convention on Human Rights – the first legally binding instrument abolishing the death penalty in peacetime. This protocol has been ratified by 46 of the Council of Europe's 47 member states; all but Russia[31]. Death penalty finally abolished in many European countries by the end of twentieth century and in the following century. Belarus is the only country in Europe that continues to carry out executions. There is a moratorium in Russia.

1.3 In the US

The United States has implemented capital punishment as early as 1622. As it was a colony of England, America mimicked the England model of punishment and it used death penalty for many crimes ranging from minor ones such as picking pockets or stealing a loaf of bread to the grave crimes such as murder which death penalty for the latter remained in the US criminal policy by today. For much of US history, capital punishment was extended beyond the crime of murder to include, among other offences, arson, burglary, armed robbery, rape, kidnapping and possession of certain firearms in connection with crimes of violence. Although the US took capital punishment from England, it exercised the punishment much widespread than the UK which forsook it in 1973[32].

The America with almost sophisticated legal system used capital punishment for almost 400 years. The first execution of a criminal in the American colonies occurred in Virginia in 1622. During most of the 20th century, the vast majority of states in the country permitted execution of convicted criminals[33].

The abolition of capital punishment in the US encountered with complex processes as each state has distinct criminal justice systems and constitutions. Each state adopted its own law based on the state's tradition, necessity, security and welfare. While states enacted new laws based on their own necessities, as states had rigid constitutions, they were reluctant to abandon so traditional a practice as capital punishment. In this tough justice atmosphere, any change or diminution was applied by criminal justice system meticulously. The Pennsylvania legislature adopted a law on April 22, 1794, which divided murder into two degrees, providing a unique system for diminishing the number of cases to which the death penalty might be applied and setting an example to be followed by other states during the

[30] Roger Hood and Carolyn Hoyle, Abolishing the Death Penalty Worldwide: The Impact of a "New Dynamic, The University of Chicago Press Crime and Justice, Vol. 38, No. 1 (2009), 5.
[31] Ionel Zamfir, The death penalty and the EU's fight against it, European Parliamentary Research Service (2020).
[32] Paul Marcus, Capital Punishment in the United States, and Beyond, Melbourne University Law Review, Vol 31 (2007), 838.
[33] IBID.

next half century[34]. The importance of keeping death penalty for murder in US was profoundly undeniable in many states. The states court and even the supreme court were reluctant to limit capital punishment for grave crimes like murder. They Overemphasized the common law rules in the US legal system and mentioned the fact that the death penalty had a long history of acceptance in all states. The nature and existence of capital punishment as a punishment for serious crimes was unquestionable. In a serious case, Gregg vs Georgia, the supreme court was asked to decide whether the death penalty was against the US constitution or not. The court concluded that capital punishment would not violate the United Stated Constitution a jury had been given adequate guidance as to the exercise of its discretion (including having sufficient regard to particular aggravating and mitigating circumstances such as the nature of perpetrator)[35]. In the lead opinion, Stewart J wrote:

"The imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England. The common-law rule imposed a mandatory death sentence on all convicted murderers. And the penalty continued to be used into the 20th century by most American States, although the breadth of the common law rule was diminished, initially by narrowing the class of murders to be punished by death and subsequently by widespread adoption of laws expressly granting juries the discretion to recommend mercy. It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State. Indeed, the First Congress of the United States enacted legislation providing death as the penalty for specified crimes"[36].

While the supreme court apparently and clearly declared its discretion about death penalty, there would be limitations in exercising capital punishment between states as "a jury had been given adequate guidance as to the exercise of its discretion" and the constitution per se imposed constraints regarding the implementation of capital punishment. The implementation of constraints by states against capital punishment has rooted in various aspect. A jury would exercise its discretion based on the commission circumstances or perpetrator mental disability. A man would be saved from execution if his intellect had been only temporarily ignored or subverted, or if he had acted from great provocation. But

[34] David Brion Davis, The Movement to Abolish Capital Punishment in America, 1787-1861, The American Historical Review, Vol. 63, No. 1 (1957), 26.

[35] Paul Marcus, Capital Punishment in the United States, and Beyond, Melbourne University Law Review, Vol 31 (2007), 841.

[36] IBID.

when a murderer perpetrated the homicide with precedent of intention, it was evident to American jurists that his moral sense had been completely depraved, making him too dangerous to live. The persecutor plays an important role to influence the jury and to lead the offender to live or death. What is specified as a commission circumstances, a jury discretion and the persecutor's role has been argued by Walsh. Walsh explains that "the competing claims are evident in capital trials. In a capital case, prosecutors play on the jury's fear, disgust, anger, and sympathy for the victim, and ask that the defendant ''pay in full'' for what he or she has done. Similarly, defense attorneys ask juries to consider the humanity of the defendant, try to evoke sympathy by conveying his or her terribly abusive childhood, or some other mitigating factor that may tug on jurors' hearts, and plead for mercy. If the jury's verdict is guilty, the very emotional testimony of the families of both the victim and the defendant at the sentencing phase follows. The judge may instruct the jury to set their emotions aside and decide the defendant's fate by a rational deliberation of the law and the facts before them, but we know that they cannot"[37].

What is called capital punishment in fact exists in a different ontological forms in the United States. As a law on the books, as sentencing practice and as a practice of judicial execution. States like New Hampshire have the law on the books but do not impose death sentences, states like New Jersey imposed sentences but have not carried out and execution since the 1960s; states like California imposed many death sentences but execute only a few of them; and states like Texas or Oklahoma or Virginia have the law, impose sentences, and carry out frequent executions. Then there are the 12 states in which capital punishment doesn't exist[38]. The implemented constraints by states about capital punishment has rooted in various aspect.

Capital punishment in the US has been remained after 400 years and there have been a tremendous number of cases exploring the particular procedural points that must be followed in capital cases. The major justifications that advocate execution are the US supreme court's views that denies abolition of death penalty as it will not violate the United Stated constitution while it is crucial to make sure that the process is fair and the fact that capital punishment is implemented against offenders who committed the most serious crimes and whose extreme culpability makes them the most deserving of execution.

[37] Anthony Walsh and Virginia L. Hatch, Capital Punishment, Retribution and Emotion, New Criminal Law Review: An International and Interdisciplinary Journal, Vol. 21, No. 2, THE NEUROLAW ISSUE (2018), 274.

[38] David Garland, The Peculiar Forms of American Capital Punishment, Social Research, Vol. 74, No. 2, Punishment: The US Record (2007), 441.

1.4 In International Law and Human Rights

In international law and human rights, the discussion regarding capital punishment is closely intertwined with the right to life. It seems that the right to life was firstly affirmed in the 'little treaty of Versailles', adopted in 1919 at the Paris Peace Conference at the same time as the main peace treaty with Germany, Poland undertook 'to assure full and complete protection of life' to its inhabitants[39]. A decade later, Article 1 of the draft declaration adopted by the Institute de Droit International stated that " it is the duty of every State to recognize the equal right of every individual to life. A right to life was also formulated in the declaration proposed by the London International Assembly, but not in Hersch Lauterpacht's draft or in the submissions by Cuba and Panama to the San Francisco Conference[40].

The debate about capital punishment in international law dated back to the drafting of Universal Declaration of Human Rights in 1948. In the Declaration, right to life is recognized as a fundamental and basic right that everyone has it. While the right to life is considered in the Declaration as a fundamental right, it is not recognized as an absolute right. The right to life is mentioned in the Article 3 of declaration "Everyone has the right to life, liberty and the security of person"[41]. Although, the Declaration has specified the right to life, it has been quiet on the issue of capital punishment. This was a compromise between those who anticipated progressive development directed at abolition and the realities of states practice at that time. Schabas has resorted to the fact that even in 1948, many United Nation States implemented capital punishment. "In 1948, a large majority of United Nations Member States continued to employ the death penalty. Moreover, the 'international community' had recently endorsed its use for several of the war criminals convicted by the International Military Tribunal in October 1946"[42].

The first international instrument that has attempted to decide about capital punishment is the International Covenant on Civil and Political Rights adopted in 1966. Article 6 has specified "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life"[43]. The Covenant has protected the right to life while it is not recognized as an absolute right in the Covenant. Because taking a person's life arbitrarily is proscribed and the Covenant has tried to limit capital punishment

[39] William Schabas, The Customary International Law of Human Rights, Oxford University Press (2021), 109.
[40] IBID.
[41] Universal Declaration of Human Rights, (1948), Art 3.
[42] William Schabas, The Customary International Law of Human Rights, Oxford University Press (2021), 117.
[43] International Covenant on Civil and Political Rights (1966), Art 6. 1

by mentioning the ‘arbitrary’ clause. Although in the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty 1989, capital punishment was prohibited, it is ratified by minority of states[44].

The drafters of ICCPR considered the right to life as the most fundamental of all rights. This discretion has also been reflected by the Human Rights Committee which has stated that the right to life is the 'supreme right from which no derogation is permitted even in time of public emergency'. The Committee has further noted that the right to life is 'basic to all human rights'[45].

In the interpretation of acts that specify right to life in international instruments, it is determined that "The right to life is primarily concerned with preventing arbitrary deprivations of life. The Human Rights Committee has emphasized that ‘the protection against arbitrary deprivation of life … is of paramount importance. The term 'arbitrarily' is taken to mean not only 'illegally' but also 'unjustly', and includes a requirement to satisfy conditions of necessity and proportionality. The circumstances allowing for the deprivation of life must therefore be clearly established by law, capable of being articulated with certainty, and subject to due process. Moreover, they must be substantively just and comply with the principles of necessity and proportionality"[46]. From Human Rights Committee point of view, the right to life should not be interpreted narrowly and in a limited manner.

In the regional instruments, the right to life is recognized. After the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, the regional instruments also have provisions that recognize the right to life. All of the regional instruments apparently and explicitly verify the capital punishment as an exception to the protection of the right to life with an exception of the African Charter on Human and People's Rights[47]. The death penalty is recognized in four of the major human rights treaties, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention on Human Rights, and the Arab Charter of Human Rights, all recognize the death penalty as a permissible exception to the protection of the right to life[48]. However, the following protocols to the Covenant and to the European and American conventions have prohibited the death penalty.

[44] Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (1989) UN Treaty Collection, Status of Treaties, https://treaties.un.org/pages/ViewDetails.

[45] Human Rights and Discrimination Commissioner, The Right to Life, Act Government, 3. www.act.gov.au.

[46] IBID.

[4747] William Schabas, The Customary International Law of Human Rights, Oxford University Press (2021), 109.

[48] IBID, 117.

The European convention is striking among the regional instruments that explicitly recognized the death penalty as it strived to abolish de facto and legally death penalty in subsequent abolitionist protocols. At first the Article 2 § 1of the convention mentions "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law"[49]. An exception was included to the right to life in the Article 2 of the convention because it seemed that when the convention was drafted the death penalty was not considered to violate international standards[50]. However, in Protocol No. 6 to the convention, the death penalty except in regards to "acts committed in time of war or of imminent threat of war" was abolished and in Protocol No 13 which was signed on 3 May 2002, death penalty was abolished in all circumstances[51]. In 2010 all but two of the member States of the Council of Europe (Azerbaijan and Russia) had signed this Protocol and all but three of the States which had signed it have ratified it[52]. The convention has protected the right to life far beyond its nature by prohibiting he extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there.

In the European Convention on Human Rights, the right to life is protected even beyond border of the States parties. In other words, capital punishment is not only prohibited within border of the States parties, but also beyond that. The Article 1 delineated the states jurisdiction" The high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". Under exceptional circumstances facts occurred abroad are under the jurisdiction of a ECHR state party and extended territorial principle is applied when state officers operate in a foreign (European) state territory where it exercises "effective control" or when state officers operate in a state embassy abroad, in a ship in international waters, and in a military base or where state agents exercise "legal authority" on persons abroad. In all of the circumstances, if a state party execute a person, it will violate the convention. In the Al Skeini and Others v. The United Kingdom, the European Court of Human Rights concluded that "The Government further contended that the acts in question took place in southern Iraq and outside the United Kingdom's jurisdiction under Article 1 of the Convention. The sole exception was

[49] European Convention on Human Rights (1950).
[50] Guide on Article 2 of the European Convention on Human Rights, Council of Europe/European Court of Human Rights (2021), 20.
[51] IBID.
[52] IBID.

the killing of the sixth applicant 's son, which occurred in a British military prison over which the United Kingdom did have jurisdiction"[53].

The international and regional human rights instruments, institutions and treaties have developed the protection of right to life and the abolition of death penalty in many states. After drafting of a number of international treaties in the 1980s the abolitionist movement accelerated among states in international sphere. It influenced the countries criminal codes and ever since, death penalty has been abolished increasingly. Irrespective of countries that implement capital punishment under conservative, religious views, the number of countries to abolish capital punishment has increased remarkably since the end of 1988. A new dynamic has emerged that recognizes capital punishment as a denial of the universal human rights to life and to freedom from tortuous, cruel, and inhuman punishment[54].

1.5 In Islam

Although capital punishment in Islam will be considered in the chapter three as the constitution and criminal code of Iran intertwined with Islam and Islamic principles, it is critical to study the capital punishment in Arabian Peninsula before and during the emergence of Islam.

The pre- Islam community of Arabian Peninsula was full of violence, lack of knowledge, integrity and human moral principles. The barbarian society disregarded women rights and they were even considered as an inhuman. The uncivilized people were accustomed to live in the desert and the number of cities was few. There was no concrete law and regulation in Arabian Peninsula and it was ruled and governed by traditional tribal chiefs. An author describes the pre- Islam community of Arabian Peninsula that " it the pre- Islamic era in the Arabian Peninsula, and it is usually interested (a time of ignorance and lack of knowledge), and we look carefully at the Quranic verses in which the word " ignorance" is mentioned it becomes clear to us that the meaning of " ignorance" is not that corresponds to the lack of science or the little knowledge, but it is in the meaning of foolishness, anger and selfishness"[55].

This uncivilized and almost chaotic society was empty of a written law or regulation and even in big and main cities such as Mecca or Medina[56], there was no central authority. In

[53] European Court of Human Rights, Judgment, CASE OF AL-SKEINI AND OTHERS v. THE UNITED KINGDOM, (Application no. 55721/07) (2011), 46.

[54] Roger Hood and Carolyn Hoyle, Abolishing the Death Penalty Worldwide: The Impact of a “New Dynamic, Source: Crime and Justice, Vol. 38, No. 1 (2009), 1.

[55] Salahuddin Mohd Shamsuddin and Siti Sara Binti Hj Ahmad, Ancient History of Arabian Peninsula and Semitic Arab Tribes, Advances in Social Sciences Research Journal, Vol.7, No.5, (2020), 272, 270-282.

[56] The original name of the city before the advent of Islam was Yathrib.

general, tribes and clans were governed by the discretion of their own chief. In this lawlessness community and environment if a crime committed by the offender, his and his family and tribe would be punished. It was like the earliest crime and punishment era where there was the private revenge, in which the victim or the victim's kin retaliated for injury and the community did not interfere. The problem was that private revenge often escalated into blood feuds that could continue for many years until one or the other family was completely wiped out. There were two major tribes in Arabia, "Aws and Khazraj". As one of historian indicated, the conflict between these two tribes was prolonged, brutal and bloody. " A long standing enmity divided these two parties and the great exposer of their enmity and violence was probably the fourth and last battle between them, named the battle of "Bua`h", which took place just before the "Hijrah: of prophet. In this war both clans gave full vent to achieve victory over their enemy by any means. Khazraj won at first and then the Aws came back and fought so furiously that the Khazraj lost heavily. But as no clan was ready to go down, the battle remained and a great many of both parties were killed"[57].

The principle of the lex talionis which was implemented even in ancient civilizations, was not used in Pre-Islamic Arabian Peninsula and the region was in the private revenge era.

The advent of Islam in the Arabian Peninsula tried to change the barbarian society to the better one and many Islamic principles were implemented to alleviate the atrocity, brutality and a retaliatory atmosphere of the society. In a famous example which is indicated in Quran, the Arab men used to bury their alive female infants. This nasty behavior mentioned in Quran" And when the girl [who was] buried alive is asked, For what sin she was killed"[58].

In this barbarian community, Islam emerged to restore all missed humanity principles and morals, integrity. It can be taken from the history that some religions appeared in a society and among people that accustomed to do heinous and savage acts. Islam which is taken from the word 'Silm' which means peach and happiness[59], arose to deal with the brutalities, conflicts and savageries of Arabian Peninsula by stablishing mandates and finally by restoring human beings moral principles, integrity.

The retributive measures of Islam which are derived from Quran and Sunnah have tried to prevent the brutal society of Arabian Peninsula from violating human rights. Although the measures seemed a sort of tough justice in some cases, they were restoring the former traditional punishment against the barbarian society which was in the private revenge era.

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[57] Mustafa Monjur, An Analysis on the Practices of Prophet Muhammad (Pbuh) in Resolving Conflicts, Journal of the Bangladesh Association of Young Researchers (JBAYR), Volume 1, Number 1, (2011), 117.

[58] Holy Quran, Surah Takvir verse 8, 9 : https://quranonline.net/at-takwir/.

[59] Mustafa Monjur, IBID, 109.

The best example is the principle of the *lex talionis* which was implemented in former civilized states and communities. The principle of the *lex talionis* has mentioned in Quran in Surah al-Ma'idah verse 45 "And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. But whoever gives [up his right as] charity, it is an expiation for him. And whoever does not judge by what Allah has revealed - then it is those who are the wrongdoers"[60]. It is also clarified in Surah Al-Baqarah verse 178 " O you who have believed, prescribed for you is legal retribution for those murdered - the free for the free, the slave for the slave, and the female for the female. But whoever overlooks from his brother anything, then there should be a suitable follow-up and payment to him with good conduct. This is an alleviation from your Lord and a mercy. But whoever transgresses after that will have a painful punishment"[61].

The death penalty in Islam is used with various purposes. In general, it is implemented against crimes against persons and crimes against public order, public safety and health. In other words, one aspect of capital punishment is exercised to reciprocate and compensate the victim's rights, the rights to life, which is violated by offender who has taken the victim's life and because of this the former must be executed (the principle of the *lex talionis*). In this situation, the offender's rights to life will be given to the victim's next of kin and he/she or they decide about it. This principle of the *lex talionis* about people's rights to life is directly considered in Quran Surah Al-Isra verse 33 "And do not kill the soul which Allah has forbidden, except by right. And whoever is killed unjustly - We have given his heir authority, but let him not exceed limits in [the matter of] taking life. Indeed, he has been supported [by the law]"[62].

Some retributive punishments in Islam are used to save the society's security, public order and public health. In this case the hardest punishment was exercised to save Islamic society. In Surah al-Ma'idah the death penalty is considered for criminals who endanger the public security and order of the Islamic society. "Indeed, the penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption is none but that they be killed or crucified or that their hands and feet be cut off from opposite sides or that they be exiled from the land. That is for them a disgrace in this world; and for them in the Hereafter is a great punishment"[63].

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[60] Holy Quran, Surah al-Ma'idah, verse 45: https://quranonline.net/al-maidah.
[61] Holy Quran, Surah Al-Baqarah, verse 178: https://quranonline.net/al-maidah.
[62] IBID, Surah Al-Isra, verse 33.
[63] Holy Quran, Surah al-Ma'idah, verse 33.

The death penalty in Islamic law or Sharia was used for a barbarian society to restore primitive human integrity and morals principles. It was exercised in almost illiterate people who were in in the private revenge era.

1.6. The history of capital punishment in Iran

The establishment of constitution, laws and legal codes was a great achievement to improve public order, safe and health of Iranian society. It had positive consequences on reforming capital punishment and elimination of arbitrary trials that implemented death penalty.

The overview of Iranian legal evolution has certified the gradual modification of capital punishment and methods of execution. The changes in the methods of execution mitigated the pain and agony of execution and the elimination of the public execution had been a development in the history of capital punishment in Iran.

1.6.1. Persian Constitutional Revolution 1905–1911

Before the Persian Constitutional Revolution, the general situation of Iran in terms of governing, rule of law and legality codes was infrastructurally weak. There was no rule of law, written legal codes (civil and criminal codes) and a constitution that demarcated and determined people rights, responsibility of executive power, judiciary and legislature. The Qajar monarchy displayed many of the features of classical patrimonialism identified by Weber. The kingdom was an extension of the shah's household and subject to his personal authority. There was no distinction between property and office and offices were often sold as a source of revenue and patronage by the shah and his officials. Nor was there a standing army which meant that the shah had to rely on often unpredictable tribal levies. The state was despotically strong in that, there was no formal law or constitution to limit its power. The normative framework of the shari'a was an important factor in measuring the legitimacy of the rulers in the eyes of the populace, but did not generate institutional or legal checks on the power of the shah which was in practice arbitrary and sometimes brutal[64].

During the Qajar realm, punishment was applied in different ways and types: ear or hand cutting, beard burning, blinding and executing. There was a square which was called 'Paghapogh' where execution was applied by the most brutal executioner who was named 'Mirghazab'. He worn a red dress and was selected among unusual and brutal persons and they used to do execution when they were drunk[65]. One of the famous methods of execution during Qajar was crucifixion. Live entombment was another method that a live person was

[64] Hadi, Enayat, The formation of the modern legal subject and the development of citizenship in Iran between two revolutions (1906-1979), Historical and Comparative Macrosociology of Middle Eastern Legal Systems Onati Socio-Legal Series Volume 10, Issue 5 (2020), 1024, 1025.

[65] Shirzad Khazayi, Evolution in the Rituals of execution in the transition from the Qajar era to constitution and Pahlavi: from Terrible death to Zero Point torture, Journal of Historical Researches of Iran and Islam, N 23 (2017), 85.

sealed within an enclosed space with no exits until death[66]. Before the Persian Constitution Revolution, the change in the ways of execution dated back to Naser al-din shah Qajar who traveled to the west countries and found out modernization. He was influenced by the west modernized countries and societies and abolished a brutal execution or crucifixion and after that the way of execution was implemented by hanging or by decapitation [67].

During the early 1900s the only way to save country from government corruption and foreign manipulation was to make a written code of laws. This sentiment caused the Constitutional Revolution. There had been a series of ongoing covert and overt activities against Naser o-Din Shah’s despotic rule, for which many had lost their lives. The efforts of freedom fighters finally bore fruit during the reign of Moazaferedin Shah. Mozafaro-Din Shah ascended to throne on June 1896. In the wake of the relentless efforts of freedom fighters, Mozafaro-Din Shah of Qajar dynasty was forced to issue the decree for the constitution and the creation of an elected parliament (the Majlis) in August 5, 1906. The royal power limited and a parliamentary system established.

On August 18, 1906, the first Legislative assembly (called as Supreme National Assembly), was formed in the Military Academy to make the preparations for the opening of the first Term of the National Consultative Assembly and drafting the election law thereof. During this meeting, Prime Minister Moshirul Doleh delivered a speech as the head of the cabinet. The session concluded with the address made by Malek Al Motokalemin. On December 30th, 1906, the first National Consultative Assembly ratified the Constitution. This great achievement was the result of freedom fighters' efforts who created the first National Consultative Assembly or Majlis.

The Persian Constitutional Revolution 1906, was a great achievement for the judicial system of Iran by influencing the establishment of several Iranian major codes and laws. The principle law of criminal trials adopted in 1911, general criminal code adopted in 1925, civil code adopted in 1928 and the next law developments were the outcome of the Persian Constitutional Revolution. The Persian Constitutional Revolution was in fact the revitalization of law and people's basic rights. It revived the people's rights to access to fair and unbiased trials and protected them from arbitrary governmental decisions.

As the vast majority population of Iran was Muslims, the Constitution was stablished in lights of Islamic principles. The establishment of a parliament which was the major goal of the Persian Constitutional Revolution should respect Islamic principles in any legal

[66] IBID.

[67] Shirzad Khazayi, IBID, 87

enactments. In the Supplementary Fundamental Laws of Constitution 1907 Article 2, it is written that none of the legal enactments of the National Consultative Assembly should be against the Islamic principles and the determination of any violations against Islamic rules is in charge of Ayatollah (Islamic jurists). The Art 2 mentions:
"At no time must any legal enactment of the Sacred National Consultative Assembly, established by the favour and assistance of His Holiness the Imama of the Age (may God Hasten his glad Advent!)a, the favour of His Majesty the Shahinshah, of Islam (may God multiply the like them!), and the whole people of the Persian Nation, be at variance with the sacred rules of Islam or the laws established by His Holiness the Best of Mankind (on whom and on whose household be the Blessings of God and His Peace). It is hereby declared that, it is for the learned doctors of theology (the 'ulama) – may God prolong the blessing of their existence! – to determine whether such laws as may be proposed are or are not conformable to the rules of Islam; and it is therefore officially enacted that there shall at all times exist a committee composed of not less than five jujahids or other devout theologians, cognizant also of the requirements of the age, [which committee shall be elected] in this manner. The 'ulama and Proofs of Islam shall present to the National Consultative Assembly the names of Twenty of the 'ulama possessing the attributes mentioned above; and the Members of the National Consultative Assembly shall, either by unanimous acclamation, or by vote, designate five or more of these, according to the exigencies of the time, and recognize these as Members, so that they may carefully discuss and consider all matters proposed in the Assembly, and reject and repudiate, wholly or in part, any such proposal which is at variance with the Sacred Laws of Islam, so that it shall not obtain the title of legality. In such matters the decision of this ecclesiastical committee shall be followed and obeyed and this article shall continue unchanged until the appearance of His Holiness the Proof of the Age (may God hasten his glad Advent!)"[68].
The constitution is silent about capital punishment as it is obvious that any constitutions demarcate and delineate the rights of the people and general rules about duties, responsibilities and mandates of executive power, judiciary and legislature. However, it can be interpreted from article 2 of the Constitution that as the majority population of Iranian was Muslims and any legal enactments by the parliament must be based on Islamic principles, capital punishment was verified and was a common punishment in Persian Constitution Revolution period. In the first criminal code of Iran (1926) which was the outcome of the Constitution Revolution, capital punishment was defined in Article 8. In the

[68] The Persian constitutional 1906, https://fis-iran.org/en/resources/legaldoc/iranconstitution.

Chapter two of criminal code of Iran adopted 1926 in Art 7 the types of crimes and punishments were determined as felonies, serious offences, minor offences and misdemeanors. In the Art 8, capital punishment is determined for felonies[69]. Capital punishment is mentioned in several articles of that criminal code.

1.6.2. Capital Punishment in Pahlavi

The change and evolution in the Iranian society after the Persian Constitution Revolution modified the way of capital punishment and execution. By the immergence of the Constitution, legal codes and written laws, the public order, safety and health of Iranian community improved. After Pahlavi, this achievement per se and cultural and legal evolution of punishments were more tangible. In fact, with the expansion of universities, development of industries and attention to the West in general, the community of Iran evolved and these changes had positive impact on punishment reformist measures.

With the establishment of the Pahlavi Monarchy in 1921 Reza Shah engaged in an authoritarian program of state-building and centralization funded by increasing oil revenues. This involved a range of reforms from military to financial and administrative to legal and judicial. Central to the aim of legal and judicial reform was the promulgation of new civil and penal codes. These codifications had begun earlier in the immediate post-constitutionalist period but were weakly instituted and largely opposed and undermined by the ulama. Under Reza Shah legal reform became central to his project of building a powerful centralized bureaucratic state and he appointed Ali Akbar Khan Davar (1885–1937) whose ideological outlook was the quintessential expression of authoritarian legality as the minister of justice tasked with implementing these reforms[70].

Following the establishment of the first Middle Eastern constitutional parliament and during the first few decades of the Twentieth Century, the Iranian criminal justice system experienced a number of changes. The two Pahlavi kings began to establish a monarchy with its own new laws and courts, modelled predominantly after the French system[71]. As part of this process, in 1959, juvenile courts were established. With the emergence of the United Nations system Iran became a signatory of the International Covenant on Civil and Political Rights (ICCPR)22 at its inception in 1966 and later when it entered into force on 23 March 1976[72].

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[69] Islamic Parliament Research Center Of The Islamic Republic Of IRAN, https://rc.majlis.ir/fa/law/print_version/91023.

[70] Hadi, Enayat, IBID, 1027.

[71] Kusha, H. Iran (Developing Nation-State). In: Barak, G., Crime and Crime Control: A Global View (2000), 96.

[72] United Nations Yearbook of the United Nations 1966, Martinus Nijhoff Publishers Dordrecht/London/Boston, (1966) 418.

The efforts of Pahlavi kings (Shah) to codify legal instruments and the consequent legal amendments were legal developments in the Pahlavi dynasty. The legal developments and unifications allowing Iranians to imagine themselves as equal citizens who carried the same rights and duties. By the enactment of civil codes, the legal rights of all residents of the country, including foreigners protected and each citizen is possessed of inalienable rights which no one can violate. In lights of these amendments, although the civil code maintained the patriarchal provisions of Shi'i fiqh which gave men and male guardians rights over women in the area of marriage and divorce, these provisions were reformed with the introduction of the Family Protection Law (FPL) of 1967 which gave women more equal rights in marriage and divorce. Crucially women were now granted the right to divorce (talaq) under certain listed conditions. Previously this right had to be negotiated by the wife and, in effect, her family which rarely happened in practice.

In Reza Shah governing, enactment of laws and criminal codes were expanded. In the new criminal codes, death penalty was used only for murder, treason and civil war unlike the past which was used for many crimes. There was a specific regulation for implementing death penalty which adopted in 1928. It contained 21 Arts and the first Art defines the way of execution which is hanging. The Art five explains that hanging should be executed in dawn and the next Art specifies that before implementation of death penalty, the general prosecutor and a forensic doctor appear in the place of execution and the doctor visits the condemned. After that if the condemned wants to visit anyone he can do that[73]. By considering these reformist measures, torturous execution was terminated.

During Pahlavi, death penalty was implemented in a private place which was a major town square (Maidan-e Toopkhaneh or "Artillery Barracks") and a neighborhood in the south of the central district of the city of Tehran and public execution was used just for specific criminals such as rapists or bandits. In this case, the corpse of executed condemn was hanged for one hours. As public hanging faced with women screaming, they were prohibited from attending the hanging. Some condemned persons put in the death row for one year. The supreme court maintained opening a case about three years and finally changed the case punishment from death penalty to life imprisonment. Under specific circumstances the condemned could appeal against the decision of the Appeal court and in this case, the king (Shah) could decide about the case[74].

[73] Shirzad Khazayi, IBID, 89.
[74] IBID, 91.

During Pahlavi, capital punishment in the penal code of Iran adopted in 1973 which was the revised criminal code of 1926, determined the death penalty in Article 7 as a punishment for felonies. The article 7 defines crimes of the penal code as felonies, serious offences, minor offences and misdemeanors. Capital punishment is determined in article 8 in response to felonies. Article 8 mentions that the retributions for felonies are: capital punishment, life imprisonment, criminal imprisonment degree one from three to fifteen-year imprisonment, criminal imprisonment degree two form two to ten-year imprisonment[75].

[75] General Criminal Code of Iran, Art7&8, https://rc.majlis.ir/fa/law/print_version/96940.

CHAPTER II. PENOLOGICAL ANALYSIS OF CAPITAL PUNISHMENT

2.1. The objects of capital punishment

One of the major objects of punishment is to protect human rights. In fact, when a criminal is punished, the rest of society and law abiding citizens will be protected from any violations. States have several obligations in human rights issues to protect them as human rights can be violated by any person or group. It is an obligation of state to protect, respect and fulfil human rights. In the obligation to protect, states require to protect individuals from abuses by any human rights violators. Obligation to protect means a state is thus obliged to enact legislation protecting human rights; to take action to protect individuals when it is aware (or could have been aware) of threats to their human rights; and also to ensure access to impartial legal remedies when human rights violations are alleged[76]. Therefore, by resorting to punishment, human rights can be respected.

The fact that punishment should fulfil human rights principles is unquestionable and whether capital punishment violate human rights norms as the rights to life is not absolute rights, is beyond the debate of the current study and there is no consensus among scholars about the authenticity and humanity of capital punishment. However, based on human rights principles and international human rights instruments, states should refrain from using any torture, cruel or inhuman punishments and acts. The abolitionist measures of states regarding capital punishments are creating a custom which obliges all states to respect it as a general human rights norm. Customary practices viewed as obligatory have been part of interaction within and between societies throughout history and until twentieth century, custom was the primary source of international legal obligation[77]. The custom is defined by International Court of Justice Statute Article 38 as " The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: b. international custom, as evidence of a general practice accepted as law;[78]". States practice constantly can create a custom that legally binding in international sphere and among international community. Shelton has explained that "Still, an increasing number of international human rights and obligations has been recognized in international and tribunals as having reached the status of custom. This includes the right to be free from genocide, torture and prolonged arbitrary

[76] Handbook for human rights, Parliamentarian N 26, Inter-parliamentary Union for Human rights, Office of The High Commissioner (2006), 32.
[77] Dinah L. Shelton, International Human Rights Law, Edward Elgar Publishing (2014), 76.
[78] Statute of International Court of Justice, Art 38: https://www.icj-cij.org/en/statute.

detention the guarantee of equality and non-discrimination, the right to life, including the prohibition on juvenile execution[79]". However, it seems that the arbitrary death penalty and deprivation of life has become a custom in international sphere and not using capital punishment which is recognized by law in a democratic society. The author has specified that "The right to life provisions in global and regional human rights instruments prohibit arbitrary deprivation of life and generally require that states protect life by law"[80]. In the International Law Commission, Charles Jalloh has pointed to an emerging custom but noted that the number of abolitionist countries might therefore fall short[81].

The inhibition of Capital punishment as the customary norm was regarded by Juan Méndez, the United Nations Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment. He stated of a rising concern at the irreconcilable debate between the legally imposed death penalty and the infliction of torture or cruel, inhuman or degrading treatment or punishment. The Special Rapporteur concluded that "there is an evolving standard whereby States and judiciaries consider the death penalty to be a violation per se of the prohibition of torture or cruel, inhuman or degrading treatment"[82]. He said he was convinced that a customary norm prohibiting the death penalty under all circumstances, if it has not already emerged, is at least in the process of formation. Even if the formation of the customary norm prohibiting capital punishment altogether has not yet occurred, wrote the Special Rapporteur, in most cases its imposition is tantamount to torture or to cruel, inhuman or degrading treatment[83].

Regardless of this fact that whether capital punishment satisfies human rights norms or not, capital punishment as a tough punishment per se has objects. Although all of the objects seem in favor of human rights goals such as public safe, public welfare, victim's right compensation and so forth, as the capital punishment is regarded unhuman punishment by the majority of states, it cannot be implemented to protect human rights. Because human rights principles and goals will never be attained by using human rights violating methods. In fact, the ways to achieve human rights should be authentic and it must be corresponded with human rights norms. The transparent example is a statement of Martin Luther King, Jr. He speaks about spread of violence and revenge which is manifested in capital punishment. He says " Instead

[79] Dinah L. Shelton, IBID, 77.
[80] Dinah L. Shelton, IBID, 149.
[81] William Schabas, The Customary International Law of Human Rights, Oxford University Press (2021), 118.
[82] Interim report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, A/67/279, 66.
[83] IBID.

of diminishing evil, it multiplies it. Through violence you may murder the liar, but cannot murder the lie, nor establish the truth. Through violence you may murder the hater, but you do not murder hate. In fact, violence merely increases hate. So it goes. Returning violence for violence multiplies violence, adding deeper darkness to a night already devoid of stars. Darkness cannot drive out darkness: only light can do that. Hate cannot drive out hate: only love can do that[84]. However, the author of the current study believes that although using capital punishment may spread violence or create a rough environment or area, it can be efficient in uncivilized and undeveloped societies. One should note that all punishments i.e. death penalty, imprisonment, financial penalty can be regarded as inhuman and anti-human rights principles. Because, as capital punishment is in contrary to the right to life, imprisonment would endanger the right to liberty.

In fact, resorting to punishment is usually along with violation of a right. In other words, depending on the rights of persons which deprive during implementation of punishment, the punishment can impose an inconvenient pain to them. Death penalty and flogging violate people's right to life and health and imprisonment ruins their right to liberty[85].

2.1.1 Retribution

The philosophy of retribution means a guilty should be punished as he did a wrongful or illegal act. In fact, he deserves to be punished because his act is against the justice and moralities. The idea of retributive justice denies this possibility of not punishing a criminal, asserting that punishment is required to correct a moral imbalance created by wrongdoing and to maintain a legitimate moral and legal order. Retribution is the notion that punishment is imposed because it is deserved. Murderers are to be given the death penalty because that is the penalty they have earned by their offense. The philosopher Immanuel Kant wrote that retribution is grounded in respect for the autonomy of the offender[86]. In the lack of retribution, there is no difference between law abiding citizens and criminals and human rights violators. According to retributive theory, the death penalty should be implemented in civil society even the penalty is less effective in it. As Kant famously put it, even if a civil society were to dissolve itself by common agreement, the last murderer remaining in prison must first be executed[87].

In retributive school, the offender deserves to be treated the exact and same behavior that he has done. The principle of *lex talionis*, an eye for an eye, or the principle of reciprocal justice

[84] https://centeronconscience.org/martin-luther-king-jr.
[85] Abdloreza Javan Jafari, Mohammad Javad Sadati, From Classical Retribution to the new Retribution, The Criminal Law Doctrines, Razavi University of Islamic Science, Volume 8, Issue 2, (2012). 120.
[86] Claire Finkelstein, Death and Retribution, Criminal Justice Ethics Volume, 21 (2002), 3.
[87] IBID

is rooted in retribution theory. Murderers should be executed as they committed homicide. In this theory, the use of punishment in per se is crucial. In other words, it is not important that whether capital punishment should be valuable or has positive consequences in a civil society or not. The importance of capital punishment in this theory is, the rights to life for example which is violated, should be retaliated and compensated by using death penalty. This is unquestionably a powerful idea, and public support for the death penalty is, at least on the surface, largely based on notions of retribution. In most pose, an eye for an eye or punishment should fit the crime, is the plurality reason offered by proponents for their support of capital punishment. In a 2001 Gallup pole, 48% respondents cited retribution as the basis for their support, more than twice the level of support offered for any other justification[88].

An essential presupposition of retribution is that the offender is fully responsible for his crime and the personality of him disregarded. In this theory, the offender has due to a civil society by committing a crime and by punishment his due will be paid.

The absolute justice has priority in retributive theory. So, even criminals with low IQs or mental health should be condemned to death penalty and justice should apply to them. The mentally ill are not exempt from the death penalty. Hugo Adam Bedau suggests that it is hypocritical for retributive defenders of the death penalty not to object with equal force to the execution of these less responsible individuals. The retributivist response to this claim is that even the mildly retarded and the mentally ill understand the difference between right and wrong and so long as they do understand this difference it is just to hold them accountable for their actions[89].

The principle of *lex talions* is a corner stone of the retributive theory. Most retributivists who advocate for death penalty overemphasize the principle of *lex talions*. That is, a criminal deserves to suffer some approximate match what he inflicted on his victim. Although the way of punishment is not important in retributive theory, the similarity of retribution and punishment is crucial in it. Therefore, criminal's life should be terminated if he committed homicide, his eyes should be blinded if he committed battery which blinded a victim vision and so on.

The true objection of retributive theory which undermines it is, the justice would not be satisfied in this theory. Although the justice in retributive theory fulfill in the capital punishment as it will terminate the criminal's life, it cannot be attained in many other crimes. How can retribution revenge a criminal who committee rape by implicating the same punishment? In many crimes such as rape, theft, burglary battery the retributive theory is

[88] Claire Finkelstein, 3.

[89] IBID.

useless in terms of achieving justice. Because based on the principle of *lex talions* which is the pillar of the theory, the offender should be treated the exact punishment that he committed. Therefore, the absolute justice it will never be attained in this theory when a criminal committed rape as he cannot be raped. Taken literally, *lex talions* is an absurd doctrine, no one thinks we should rape rapists, assault assailants, or burgle the homes of burglars. This difficultly making sense of *lex talions* has accordingly led some retributivists to suggest that retributivism is most compelling as a general justification for the institution as a whole, without thinking of it as containing a further theory of the major of punishment. But in the absence of its accompanying doctrine of *lex talions,* or any other way of giving content to the notion of desert, the retributivists will remain unable to justify any specific penalty, including the death penalty. Given that retributivism is absurd if accompanied by a literal interpretation of the principle of *lex talions*, and vacuous (for our purposes) if articulated without *lex talions,* the retributivists must attempt to cast his defense of the death penalty in terms of a more approximate system for matching crimes with punishment. One that does not insist that the punishment exactly fit the crime.

The retributive theory cannot correspond to human rights as the punishments that it considers is against human rights norms. The principle of *lex talions* which is the major principle of the retributive theory is against human rights norms. It will be more contradict with human rights if the death penalty assumes as an inhuman penalty. Albert Camus who was against retributive theory as he believed execution is too much for murderers, explained that "An execution is not simply death. It is just as different from the privation of life as a concentration camp is from prison. It adds to death a rule, a public premeditation known to the future victim, an organization which is itself a source of moral sufferings more terrible than death. Capital punishment is the most premeditated of murders, to which no criminal's deed, however calculated can be compared. For there to be an equivalency, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life.[90]"

2.1.2. Deterrence

Deterrence is the major benefit of punishment. In other words, all justice elements i.e. criminal justice, penal policy, judicial system strive to implement punishment to gain the deterrence. A punishment should have the deterrent characteristic for a civil society and this is the final goal

[90] Evan J. Mandery, Capital Punishment: A Balanced Examination, Jones & Bartlett Learning; 2nd edition (2011), 6.

of a punishment. Unlike retributive aim of punishment which asserts that a criminal should be punished as he is owed to a civil society by committing a crime, deterrence is considered the main object of punishment that advocates sustainable peace. In fact, the retributive theory is willing to stabilize and stablish absolute justice without noticing that the punishment is deterrent for a civil society or not. It does not deal with the fact of preventive measures per se. The attainment of absolute justice is the major object of retributive theory. A criminal should be condemned to a certain punishment just like the act that he did. The retributivists opined that infliction of punishment is justified in itself as the offender should receive as much pain and suffering as inflicted by him on his victim to pacify the angry sentiments of the victim and the community. However, in deterrent theory, a punishment should have a deterrent feature. An offender will be punished because susceptible people to commit a crime and people of civil society as a whole, deter from perpetrate a crime. The utilitarian regard punishment as an evil which should be used only if it serves some real purpose like deterrence from commission of crime. According to deterrent theory, the obvious way to prevent crime by punishment is to make the criminals fate a warning to the others and punishment will be justified only if it works as a means to an end. That end may be the prevention of future offences. Further putting forth the views in support of the deterrence purpose of punishment, he said that a sensible punishment will be one which is imposed on an offender as an example, design to deter other possible offender. He may be put out of action, once for all or for a space of time, by death or mutilation or imprisonment; he may be intimidated and so, himself, be deterred from offending again he may even be reformed. He will thus be made either unable or afraid or unwilling to repeat his crime.

The supporters of deterrence theory of punishment, in order to provide maximum protection for the individual and to achieve the greatest happiness for the greatest number, deal with the offender in an exacting manner through the application of definite scale of penalties. But, they also suggested that the optimum conditions envisaged under e classical deterrent model require severity, celerity and certainty of the punishment. They also believe that if individuals know that their undesirable acts will be punished, they will refrain from doing that act. Also, punishment must be swift in order to provide deterrence to the offender as well as the general public.

The discussion on the deterrent theory often results into the discussion on the quantum of deterrent value contained in the death penalty. The outcome of deterrent theory in regards to capital punishment is obvious. Nothing in the world is important than individual's lives. Capital punishment can dissuade people from committing homicide as they realize and predict their

illegal acts which is punishable by death penalty when they decide to commit homicide. The deterrence argument says that men deliberately choose among rival course of action in the light of foreseeable consequences. A person knows that he will be executed if he commits homicide. The essence of the theory is that the threat of being executed in the future will be sufficient to cause a significant number of people to refrain from committing a heinous crime they had otherwise planned.

Since people fear death more than anything else, the death penalty is the most effective deterrence, so it runs the deterrent argument. It is further alleged that the effectiveness of the death penalty as a deterrent depends both on its certain application and on knowledge of this fact in the population; hence, the argument continues, regular use of the death penalty increases its deterrent value. It was largely on grounds of this sort that the death penalty was restored in New Zealand after a ten year period of abolition, demonstrating that the deterrence line of reasoning still has considerable practical force[91].

The theory of deterrence is consequential and effective in terms of preventing further homicide. If murderer is not executed, he would repeat his illegal act. In deterrence theory, the main cause of commission of the homicide which is the murderer should be eliminated. This idea is more understandable and tangible in specific crimes such as hate crime which is committed due to perpetrator's bias or hatred against the victim’s race, religion, disability, sexual orientation, ethnicity, gender, or gender identity. In such a crime, the offender would repeat his act as he would not change his mind and the only way to save a civil society from him is use of death penalty.

The death penalty proponent's appeal to deterrence usually goes something like this: Suppose each execution deterred eight future murders. That is surely sufficient reason to impose the death penalty, since rejecting the death penalty under such circumstances would imply that we value a criminal’s life at least eight times more than the life of each innocent person whose death could be prevented. As long as we value innocent life at least as much as guilty life, a demonstrated deterrent effect is arguably sufficient to justify use of the death penalty[92].

One of the scholars in capital punishment explained in his famous article on moral and ethical value of capital punishment also discussed the deterrence value of the death penalty. As a rule, the intention behind the execution of a criminal is to deter others to follow his evil example.

[91] Karl F. Schuessler, The Deterrent Influence of the Death Penalty, The Annals of the American Academy of Political and Social Science, Vol. 284, Murder and the Penalty of Death (1952), 55.
[92] Claire Oakes Finkelstein, A Contractarian Argument Against the Death Penalty, New York University Law Review (2006), 1289.

The threat to the gallows is an argument against committing murder or other capital offence which the meanest intelligence can grasp, since the will to live is a fundamental human instinct and death is traditionally the king of terrors. He quoted Castlereagh who had resisted the lightening of the Penal Code of England in 1819, "The great, the only object of punishment is to deter. Without this painful sacrifice to justice, there could be no sufficient protection for property, liberty or life. Let them break off the point from the spear of justice"[93].

The deterrence is a justification for death penalty. Capital punishment is consequentialist or utilitarian as it is based on the presumption of the social benefit consequences. It is assumed tendency to reduce serious crimes specifically homicide.

The credibility of deterrence theory to prevent serious crimes is questionable among scholars. In fact, although in theory capital punishment would probably dissuade potential criminals to commit homicide, the available data undermines the theory[94]. Thorsten Sellin's path-breaking study in the United States compared homicide rates over the period 1928-58 in states with and without death penalty statutes, and found no systematic difference in these rates. Isaac Ehrlich's (1975) study, which does find a favorable statistical correlation, has been criticised regarding its methodology. In India while no such detail studies exist, a comparison by M K Mangalam of figures for homicides in Travancore and Kochi during 1945-50, when capital punishment was not in the statute and during 1951-56, when it was reintroduced, again shows no decrease in homicide in the latter period[95]. However, the deterrence benefit of death penalty has proponents that support death penalty. Brian Forst who used some other scholars' data showing that death penalty had a deterrence feature that encourages the supreme court of the US to support death penalty. He explained that " Until 1975, belief in the deterrent value of capital punishment had no authoritative empirical support. The studies widely cited prior to that time, most notably those of Sellin' and Schuessler, had in fact found evidence consistent with the theory that the death penalty has no deterrent effect. Then Isaac Ehrlich reported results of a complex econometric analysis of aggregate United States times-series data, results indicating that capital punishment is an effective deterrent. While Ehrlich's study has received a considerable amount of criticism, it has also received some support, and was even cited by the United States Solicitor General in briefs to the Supreme Court supporting the death penalty"[96].

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[93] Sir Moberly Walter, The Ethics of Punishment, Faber & Faber (1968), 274.

[94] This issue will be discussed in depth in the section, advocates and critics arguments of capital punishments.

[95] Nishad Patnaik, On the Question of Capital Punishment, Economic and Political Weekly, Vol. 50, No. 32 (2015), 56.

[96] Brian Forst, Capital Punishment and Deterrence: Conflicting Evidence? The Journal of Criminal Law and Criminology, Vol. 74, No. 3 (1983), 927.

The deterrence theory is valuable from human rights point of view. The deterrence is one of the goals in human rights obligation to fulfil. In obligation to fulfil, states are obliged to do infrastructural measures in achieving human rights goals and objects. Those measures are legal and penal policy changes, educational reformist acts and so on that assist human rights to attain its objects gradually and fundamentally. If capital punishment is not regarded as inhuman punishment, the deterrence feature of it would benefit human rights by preventing one of the most heinous crimes which is homicide. If states improve and modify their judicial system and try to strengthen fair and unbiased judicial decisions, capital punishment can be implemented without violating justice and fair trial, and it would deter homicide and several heinous crimes.

2.1.3. Social solidarity

Social solidarity is considered as a condition in a civil society that people can interconnect properly with each other and in a peace manner that their rights will not violated. It is a degree to which individuals and groups in society are connected to, and supported by, one another; the strength of the social fabric in a given society. It emphasizes the interdependence between individuals in a society, which allows individuals to feel that they can enhance the lives of others. It is a core principle of collective action and is founded on shared values and beliefs among different groups in society.

Social solidarity emphasizes the interdependence between individuals in a society, which allows individuals to feel that they can enhance the lives of others. It is a core principle of collective action and is founded on shared values and beliefs among different groups in society. Social solidarity has been deemed essential to the realization of rights[97].

Many rights which is recognized universally and locally by human rights instruments has tried to enhance social solidarity. One should note that the limitation on the recognized rights is just a justification to keep the social solidarity. For instance, the International Covenant on Civil and Political Rights Article 18 explains the right to freedom of thought, conscience and religion, " Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching"[98]. In the section 3 when the Article considers constraints " Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order,

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[97] Renate douwes, Maria Stuttaford, and Leslie London, Social Solidarity, Human Rights, and Collective Action: Considerations in the Implementation of the National Health Insurance in South Africa, Health and Human Rights Journal, Vol 20, No 2 (2018), 186.

[98] International Covenant on Civil and Political Rights Article 18.

health, or morals or the fundamental rights and freedoms of others[99]", it regards social solidarity of a civil society. In fact, maintaining public safety, order, health and morals of a civil society is extremely essential which local and international human rights instruments approve to limit some rights to keep social solidarity of states. In regional sphere, the European Convention on Human rights specifies a limitation to freedom of expression. The Article 10 of the Convention says" Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary"[100].

The Convention has regarded even penalties or punishment to maintain national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals of a democratic society. In this issue, in the case Yaker V. France, the France had convicted a woman who wore a niqab (full face veil). On 6 October 2011, she was stopped for an identity check while wearing her niqab on the street in Nantes. She was then prosecuted and convicted of the minor offence of wearing a garment to conceal her face in public. Consequently, the author was convicted on 26 March 2012 and was ordered by the community court in Nantes to pay a fine of 150 euros, the maximum penalty for the offence in question, which was established by Act No. 2010-1192 of 11 October 2010. Article 1 of the Act stipulates that: "No one may, in a public space, wear any apparel intended to conceal the face. Article 2 of the Act, which specifies where the law is applicable, provides that "a public space shall mean public streets and walkways and places open to the public or designated for a public service". It also establishes that "the prohibition set out in article 1 does not apply if such clothing is prescribed or authorized by legislative or regulatory provisions …, is justified for health reasons or on professional grounds, or is part of sporting, artistic or traditional

[99] IBID, Article 18, No 3.
[100] European Convention on Human rights, Article 10, No 1, 2.

festivities or events"[101]. The Act has also established the more serious offence of forcing a person to conceal the face, which has been included in article 225-4-10 of the Criminal Code, as follows: The act, by any person, of forcing one or several other persons to conceal the face, by means of threats, violence, coercion, abuse of authority or of power, by reason of their sex, shall be punishable by one year of imprisonment and a fine of 30,000 euros. When such an act is committed against a minor, the penalties shall be increased to two years' imprisonment and a fine of 60,000 euros[102].

This decision was made by France to protect public safety, welfare, health and order of the society which in turn maintain social solidarity.

Punishment can be considered as a means to retain social solidarity and public order, health and safety of community. Its goes without saying that without punishment, the order, safety and security of society and people's rights will be endangered. In the lack of punishment, the civil society cannot evolve and the order of it will be weakened by revengeful people.

Punishment is considered as a means of keeping social solidarity. It is necessary either as a condition for the existence of a social order at all or as a condition for the kind of social order that makes possible just relationships among its members[103].

Punishment is often defended on the grounds that society has a moral obligation to protect the safety and welfare of its citizens. According to Durkheim, social evolution is related to the "punitiveness" of social controls. The explanation of this relationship is found in the changing nature of crime and moral sentiments. He argues that "since punishment results from crime and expresses the manner in which it affects the public conscience, it is in the evolution of crime that one must seek the cause determining the evolution of punishment[104]. In viewing punishment as a barometer of offended collective sentiments Durkheim assumed that harsh punishment was a response to feelings of indignation, horror and the desire for vengeance feelings which would be aroused under specific conditions of social organization[105].

It is conceived that punishment is implemented based on a civil society needs. To explain, there are extraordinary differences between societies in terms of people's knowledge, welfare, multiculturalism, uniculturalism and monoculturalism. Needless to say, it is complex and almost impossible to use the same punishment for all societies. Some societies are well

[101] Frédéric Vanneste, Wouter Vandenhole, Human Rights: Judgments and Documents, Acco Uitgeverij; No. 1 (2020), 38.
[102] Frédéric Vanneste, Wouter Vandenhole, IBID.
[103] David Boonin, The Problem of Punishment, Cambridge University Press (2008), 3.
[104] Steven Spitzer, Punishment and Social Organization: A Study of Durkheim's Theory of Penal Evolution, Law & Society Review, Vol. 9, No. 4 (1975), 614.
[105] IBID, 615.

educated, developed and civilized. Others are interconnected and intertwined with religious notions and traditions. Hence, a democratic and civil society will be defined in order to understand rationale of punishment and capital punishment in each society.
The first theorists including Plato and Aristotle, clarified civil society as who engage in the life of the polis and care about its development. John Locke, in his Second Treatise of Government, expresses his belief that a government derives from an agreement or social contract among men who agree to give up life in the state of nature, with its risks to survival-like war and civil disturbance, in favor of a more secure life in a civil society. Hegel defines it as a dialectical relationship that occurs between the macro-community of the state and the micro-community of the family. Rousseau goes so far as to equate civil society with the state. This discussion was reignited in the 20th century, during the 1980s, with the development of glasnost in the Soviet Union, the rapid expansion of economic globalization, and the rise of new civil movements across the world. Political theorists have shown on the basis of repeated historical experience that civil society plays a critical role in giving legitimacy to the state and also gives rise to movements that delegitimize states that do not follow or address their citizen's will[106].
Civil society is a way for citizens to contribute to the public discourse and shape the community in the way they would like it to see it, and in which they want to live.
A civil society can be defined when people and groups set out to challenge unresponsive and authoritarian states through peaceful and non-violent methods: strikes, protest marches, demonstrations, dissemination of information through informal networks and the formation of associational life by the establishing of clubs and discussion forums. In this issue a civil society can be demarcated by having two major aspects. The first one is the sustained demand for political rights, and more particularly civil rights ranging from freedom of expression to from association. The second characteristic is changing or revolutionizing authoritarian regimes[107].
A society whether civilized or not, should be prone to apply a certain punishment or the certain punishment must be implemented to it. In an uncivilized society which is full of religious notions or superstitious traditions and believes, the severe punishment should be applied to mitigate revengeful people. In that society, when a minor crime is committed, people will retaliate by killing, capital punishment would be appropriate react to decrease revengeful atmosphere of society which prone to rebel. Garland claims that enhanced demands for severe

[106] Jenik Radon and Lidia Cano Pecharroman, Civil Society: The Pulsating Heart of A country, Its Safety Valve, Journal of International Affairs Editorial Board, Vol. 71, No. 1 (2017), 31.
[107] Neera Chandhoke, Civil Society, Taylor & Francis, Ltd. on behalf of Oxfam GB, Development in Practice, Vol. 17, No. 4/5 (2007), 607.

punishment are produced by social disorganization, which may account for the presence of the death penalty after serious crime rates have been held constant in the multivariate analyses. Some violence that results from disorganization may not be captured by the violent crime or murder rates, but this violence may lead to greater public anxieties or resentments and enhanced political pressures for harsh punishment[108].

In rather undeveloped and multicultural society that religious believes play an important role in people's lives, a severe punishment is one of mitigating approaches to disappear the anger and revenge of society. In this society, if tough justice is not applied, there would be chaos. The best example in this issue is the case of the Iranian holder of powerlifter and strongman title, Rouhollah Dadashi. He was killed in Iran's northern city of Karaj while he was the strongman and a powerlifter athlete. Rouhollah Dadashi, Iranian Powerlifter, Bodybuilder and Strongman, was attacked by and stabbed to death Saturday night in the city of Karaj west of Tehran. Dadashi participated five times in Iran's Strongest Man competition, and he reached the final of all of them. He earned the champion title in 2009 and 2010.

According to ISNA, Dadashi was attacked and stabbed to death by three young men, and the murderers escaped the scene by a car. The case is being investigated by the special police units of Alborz and Tehran provinces[109]. The murderer was a 17-year old man who killed him and alleged that he was panic and he just did it in self-defense after the athlete attacked him in the dark. According to penal code of Iran[110], the *lex talionis* principle should be applied against the murderer while he could be rescued if the victim next of kin pardoned him. However, the will of people in the city did not allow the forgiveness. One of the victim next of kin who was his brother explained that" forgiveness could be applied. People and my brother's fans did not allow us to pardon the murderer. In fact, the case was out of our (next kin) control. We didn't have a role in his execution and the execution processes was implemented so fast. On the one hand, we were sorrowful of our brother killing. On the other hand, we didn't have enough time to make our decision about the execution of murderer. I and my family disagreed with execution. He must have been imprisoned. By executing him, he got rid of the killing impacts but we still are being annoyed (it means that if the murderer was pardoned by the next kin, he would be killed by fans and people). We received a lot of threating messages (that the next kin should ask for execution from the criminal court) and we were under pressure"[111].

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[108] Garland, David, The Culture of High Crime Societies, British Journal of Criminology, Vol. 40, No. 3 (2000), 349.

[109] https://www.isna.ir/news/97042011057.

[110] Capital punishment and criminal code of Iran will be totally reviewed in the chapter three.

[111] https://www.isna.ir/news/97042011057.

Finally, a 17-year old convicted of killing an athlete known as “Iran’s strongest man” was publicly hanged in the city of Karaj, near Tehran on Wednesday.Alireza Molla-Soltani was sentenced to death for stabbing Ruhollah Dadashi, a popular athlete during a driving dispute on 17 July. The 17-year old said he panicked and stabbed Ruhollah Dadashi in self-defence after the athlete attacked him in the dark, according to local media reports" The execution of a 17-year old is deeply shocking, particularly when carried out in public, which brutalizes all those involved, including those who witness it," said Hassiba Hadj Sahraoui, Amnesty International’s Deputy Director for the Middle East and North Africa[112].

That case is not an exemption. There are a lot of cases like it. In such a society when the will of people is to execution not only for serious crimes but also for minor ones, if capital punishment is not applied, there would be revengeful and chaotic environment that endangers public health, public order, welfare and social solidarity. It seems that some uncivilized societies are still in private revenge era albeit they have legal authority. When majority of people in such a society want to have capital punishment, the tough punishment should be implemented to save social solidarity.

Although using capital punishment in civilized and uncivilized societies depends on various factors, it seems that in uncivilized society, capital punishment can at least keep constant rate of committing heinous crimes such as murder and hold finally social order. It is crucial to hold the violent crime rates constant because greater support for capital punishment should be present where such crimes are more common.

A primary justification for the death penalty is its purported deterrent effect on those who are tempted to use illegal force to commit predatory acts. States with relatively high violent crime or murder rates therefore should be more likely to let their courts impose the death penalty[113].

2.2. Iran penal policy about capital punishment

The penal policy of Iran regarding capital punishment is extremely complex. As Islamic principles and Sharia play an important role in not only constitution of Iran but also in legal codes and texts of Iran, finding out the penal policy of Iran about capital punishment is so convoluted. The issue will be more sophisticated when capital punishment is influenced by several social factors such as multiculturalism, multi-religious and multiethnic community. It is also affected by religious leaders (ayatollah), legal authorities, judges and governments. It

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[112] https://www.amnesty.org/en/latest/news/2011/09/iran-executes-teenager-accused-killing-eciranes-strongest-maned.

[113] David Jacobs and Jason T. Carmichael, The Political Sociology of the Death Penalty: A Pooled Time-Series Analysis, American Sociological Review, Vol. 67, No. 1 (2002), 115.

seems that in several cases, the penal policy of Iran regarding capital punishment depends on political discretions than legal and judicial norms. Somehow, criminalization of acts which are punished by death penalty in penal policy of Iran depends on political discretions and governmental safeties than recognized objects of death penalty. Several offences in criminal codes of Iran which are punished by death penalty criminalized just to protect national security. The problem is those offences are enough specified and criminalized broadly that a minor illegal act can be punished by death penalty. However, some penal policies regarding death penalty have been constant in legal codes and judicial systems of Iran which follow the general objects of capital punishment. The aforementioned penal policy is more salient in Hudud and Qisa. The latter is more understandable in the *lex talions*. In these two crimes, specifically in Qisa, legislative of Iran has tried to take into account the objects of capital punishment and its features in penal policy of criminal code of Iran.

The death penalty has been in widespread use in Iran (Islamic Republic of Iran) for many years, the figures jumping drastically since the 1979 revolution. Immediately after the revolution, the new government of the Islamic Republic, whose leaders had previously sided with criticism of the Shah's human rights record, launched a wave of executions. The first year after the revolution bore witness to the execution of a number of politicians, generals and secret police agents of the former regime who had not managed to flee the country. A number of lower level police were reportedly not spared either.

In 1981 about 2,616 executions were recorded by Amnesty International [114]. Many of executions had done against opposition groups to suppress PMOI[115] or Monafeghin who fought against the IRI. Although the number of executions ranged around several hundred in the two years after the Islamic revolution, a sharp increase was registered in 1988 following the suppression of the opposition group, Monafeghin. The reason of executions of Monafeghin dated back to a few months before executions when they launched its military offensive against the Islamic Republic's armed forces. In 1988, Monafeghin or PMOI, started to invade Iran and Iraq was it allies. They attacked to the Iranian forces in the area around Mehran, killing or wounding 3,500 and nearly destroying a Revolutionary Guard division. The forces captured the city and took positions in the heights near Mehran, coming close to wiping the whole Iranian Revolutionary Guard division and taking most of its equipment[116]. After Monafeghin were defeated by Iran, many of them captured and imprisoned. In summer of 1988, however,

[114] Amnesty International Annual Reports 1982 and 1983.
[115] People's Mojahedin Organization of Iran.
[116] Anthony H. Cordesman, The Lessons of Modern War: The Iran-Iraq War (1990), 38.

the judicial authorities began organizing renewed summary trials for a large number of political prisoners, who had already stood trial and were serving their prison terms; many were then executed. The IRI authorities have never acknowledged the executions of that year and have consistently prevented attempts by families of the victims to mark the anniversary of the executions each year.

This mass execution event is one of nasty examples that attests arbitrary and biased use of capital punishment. In this section, several influential factors and actors that affect implementation of capital punishment will be discussed.

2.2.1. Government policies and interests

The purpose of government in this section refers to the presidents of Islamic Republic of Iran. In other words, the role of presidents and their politicizations about capital punishment will be discussed.

The president, the formal head of the executive branch, is ostensibly the second highest-ranking official next in line after the Supreme Leader. The president is elected by popular vote every four years for up to two terms, although the Guardian Council must approve all presidential candidates. As the chief executive, the president is responsible for the day-to-day administration of the country and for enforcing the constitution. Additionally, he heads the Council of Ministers and chairs the Supreme National Security Council (SNSC), implements laws passed by the Majles or by referenda, signs international treaties and agreements, takes responsibility for state budgetary and administrative matters, accepts the credentials of foreign ambassadors and signs the credentials of Iran's ambassadors, and nominates and terminates the tenure of cabinet ministers[117].

The role of government of Iran is demarcated in the Constitution of Iran. Although the government has no authority over the judicature, trials decisions and legislature based on the separation of powers rule which divides the government into separate branches and each of which has separate and independent powers, it can be effective and influential in terms of prevention of crimes. In fact, the government is an executive power which responsible to pave the way towards the creation of an Islamic society. The government of IRI is obliged to use all resources and do any efforts to attain objects of Islamic society which is mentioned in the Article three:

[117] David E. Thaler, Alireza Nader, Shahram Chubin, Jerrold D. Green, Charlotte Lynch and Frederic Wehrey, Mullahs, Guards, and Bonyads, RAND Corporation (2010), 25.

1. to create a suitable environment for the growth of moral virtues on the basis of faith, piety and struggle against all manifestations of vice and corruption.
2. raising the level of public awareness in all areas, through the proper use of the press, mass media, and other means.
3. free education and physical training for everyone at all levels, and the facilitation and expansion of higher education.
4. strengthening the spirit of inquiry, investigation, and innovation in all areas of science, technology, and culture, as well as Islamic studies, by establishing research centers and encouraging researchers.
5. the complete elimination of imperialism and the prevention of foreign influence.
6. the elimination of all forms of despotism and autocracy and all attempts to monopolize power.
7. ensuring political and social freedoms within the framework of the law;
8. the participation of the entire people in determining their political, economic, social, and cultural destiny;
9. the abolition of all forms of undesirable discrimination and the provision of equitable opportunities for all, in both the material and intellectual spheres;
10. the creation of a correct administrative system and elimination of superfluous government organizations;
11. all round strengthening of the foundations of national defence to the utmost degree by means of universal military training for the sake of safeguarding the independence, territorial integrity, and the Islamic order
of the country;
12. the planning of a correct and just economic system, in accordance with Islamic criteria in order to create welfare, eliminate poverty, and abolish all forms of deprivation with respect to food, housing, work, health care, and the provision of social insurance for all;
13. the attainment of self-sufficiency in scientific, technological, industrial, agricultural, and military domains, and other similar spheres;
14. securing the multifarious rights of all citizens, both women and men, and providing legal protection for all, as well as the equality of-all before the law;
15. the expansion and strengthening of Islamic brotherhood and public cooperation among all the people;

16. framing the foreign policy of the country on the basis of Islamic criteria, fraternal commitment to all Muslims, and unsparing support to the mustad'afiin of the world[118].

As it is transparent, the executive power (president) or government should endeavor to use all the resources to elevate the Islamic community and to strengthen wide infrastructural developments. The presidents' obligations in strengthening Islamic community will decrease perpetration of crimes which is convicted to the death penalty.

The presidents of IRI have indirectly influenced on capital punishment. On the one hand, they have no legal authority about implementation of capital punishment based on separation of powers rule and their roles are just indirect and subtle as they have no power. In regards to indirect role of presidents, they (at least one of them) have tried to limit capital punishment in Iran by restoring and reminding rights which are recognized in international instruments. Hassan Rouhani who served as the seventh president of Iran enacted a Citizenship Rights Charter to restore and innumerate the recognized rights in Constitution of Iran. In the general guideline of the Charter article 1 it is reaffirmed that " All Iranian citizens, regardless of their gender, ethnicity, wealth, social class, race, etc. enjoy citizenship rights and the foreseen guarantees in rules and regulations. This Charter will have no effect on the other rights of Iranian citizens and citizens of other countries as determined in other rights and regulations or international conventions (to which Iran has joined according to regulations)"[119]. The chapter two of the Charter determines the most important citizenship rights. In article three of the chapter (number 1), the right to life is protected and it is forbidden to deprive citizens right to life arbitrary. Article three mentions "Citizens have the right to life. No citizen can be deprived of the right to life, except in accordance with rulings issued by competent courts that are convened according to legal standards that observe the principles of fair trials"[120].

Rouhani strived to restore the rights which are recognized in the Constitution of Iran and to limit arbitrary and unfair death penalty.

On the other hand, as they have obligations in international sphere, they are spokespersons of government to elevate the state's prestige in international community, therefore, they are accountable to international community regarding the state (IRI) implementation of capital punishment. The best example is denial of execution of under the age 18 by presidents. President Ahmadinejad said: “In Iran youngsters are not executed. Where have they been

[118] Article 3, The Constitution of the Islamic Republic of Iran, Islamic Consultative Assembly, Public Relations & Cultural Affairs Department.

[119] The Citizenship Rights Charter, Office of Vice President-Legal Affairs, Translated by the Human Rights in Iran Unit City University of New York, Brooklyn College (2013), 2.

[120] IBID, 3.

executed? Our law actually sets 18 as the criminally liable age for capital punishment[121]. In another case when Ahmadinejad was asked to answer to the death penalty conviction of Sakineh Mohammadi, he redirected his response to an US woman criminal who was going to be executed. He stated " millions of Internet pages" have been devoted to Sakineh Mohammadi Ashtiani, whose stoning sentence was suspended in July and her case put under review. Meanwhile, nobody objects to the case of an American woman who is going to be executed. Today Western media are propaganda agents who continuously speak about democracy and human rights though their slogans are sheer lies". Meanwhile, nobody objects to the case of an American woman who is going to be executed "[122].

2.2.2. Legislature views and decisions

The legislature of Islamic Republic of Iran which is defined as Islamic Consultative Assembly or Majles, is constituted by representatives of people. The representatives are elected by direct vote of people. The major roles and powers of Islamic Constitution Assembly with 290-member are to pass laws and enact legal codes, consider and approve budget, suggest bills, ratify international treaties and monitor the performance of the president and his ministers. These obligations and authorities are mentioned in the Constitution of Iran from articles 71 to 99. All enacted laws and legal codes should be ratified by the Guardian Council in terms of accordance with the Constitution and religion of the country. The Guardian Council, an appointed body with a traditionally conservative outlook, consists of 12 jurists, six of whom are Foqaha (Islamic jurisprudents) selected for six-year terms by the Supreme Leader. The remaining members are non-clerical jurists appointed by the Islamic Consultative Assembly at the recommendation of the head of the judiciary, who is in turn appointed by the Supreme Leader. Article 71 and 72 of the Constitution determines that "The Islamic Consultative Assembly can establish laws on all matters, within the limits of its competence as laid down in the Constitution". The Islamic Consultative Assembly cannot enact laws contrary to the usual and ahkam of the official religion of the country or to the Constitution. It is the duty of the Guardian Council to determine whether a violation has occurred, in accordance with Article 96"[123].

The (penal) policy of Islamic Consultative Assembly regarding punishment particularly, capital punishment is confounded. On the one hand, it is obliged to correspond any laws and

[121] The New York Times interview, 26 September (2008).
[122] CBS News, Ahmadinejad: U.S. Kills Women, Too (2010).
[123] Article 71, 72. The Constitution of the Islamic Republic of Iran, IBID.

legal bills or any acts with Islamic principles and rules. On the other hand, it has obligations to protect and respect people's wills, safety, health and public order.

The legislation history of the Assembly has shown that it usually enacts laws and legal codes to use capital punishment when the public order and security of the state and society is in danger. In other words, when a criminal event or action occurred that has a wide unpleasant and negative impact in the Islamic society, the Assembly tried to solve it by resorting to capital punishment. It seems that from view point of the Assembly, capital punishment is an hurried and indispensable react to acts that in contrary to public order, safety and wellness of the country. But this penal policy has implemented without considering the root causes of illegal acts. While capital punishment in Criminal Codes of Iran (Islamic Penal Code) will be examined in chapter three, it has become a custom in the Islamic Consultative Assembly of Iran to enact legal bills and codes by extending an illegal act to the crime of Moharebeh. Moharebeh is an Arabic term that means "fighting" or "warring," and mohareb is a warrior/fighter. Iran's Islamic Penal Code defines moharebeh as "taking up arms against life, assets or honour of the people or with intent to intimidate them in a way that causes insecurity"[124]. While four punishments are assigned against moharebe in Islamic Penal Code, in many cases, the tough one which is execution is applied.

The penal policy of the Assembly to extend some acts to Moharebeh and permit the use of capital punishment, can be seen in several new and unique legal codes. One of the Assembly responses to suppress and combat human trafficking was enactment of the anti-human trafficking law. On July 2004, the Assembly enacted anti-human trafficking law. This law was quickly enacted after several women and girls had been trafficked to Emirate and some other Persian Gulf countries. Right after that heinous occurrence, the Assembly enacted the law and assigned capital punishment in Article 3. This Article specifies that if a criminal of human trafficking, is punishable by Islamic Penal Code, the aforementioned law will be applied to him otherwise he will be imprisoned from two to ten years. In the note one of this act, if the victim is under 18-year and the criminal act of offender is not Moharebeh, he will be punished the maximum punishment of this law[125]. The law making of the Assembly that extend a criminal act to Moharebeh is seen in several penal codes. While the Assembly should consider general principles of recognized penal policy and realize root causes of criminal phenomenon, in several penal codes and in a swift reaction to the phenomenon, it has determined capital punishment. Although the legislator of Iran criminalized human trafficking in 2004 in eight

[124] Islamic Penal Code, Article 279, (2013).
[125] Anti-Human Trafficking Law, Article 3 (2004). https://rc.majlis.ir/fa/law/print_version/94178.

articles, it seems that this law is impractical and indispensable as it is not comprehensive. The law is also vague unlike similar available legal international instruments which consider protective measures such as health, education, accommodation, victim probation and other protective and reparative plans[126].

As explained above, one of the obligations of the Assembly is law-making. Its role to be a legislator has priority and is the first duty among other mandates. Each law or bill should be ratified by the Guardian Council. This requirement is mentioned in the Constitution of Iran Article 94: "All legislation passed by the Islamic Consultative Assembly must be sent to the Guardian Council. The Guardian Council must review it within a maximum of ten days from its receipt with a view to ensuring its compatibility with the criteria of Islam and the Constitution. If it finds the legislation incompatible, it will return it to the Assembly for review. Otherwise the legislation will be deemed enforceable"[127]. Unfortunately, after several clashes and disparities between the Assembly and Guardian Council, the previous supreme leader of Iran ordered to stablish a council to resolve disparities between the two councils. This discretion was contrary to the Constitution of Iran and determined powers of the leader in the Constitution. The unconstitutional council, started to work on 6th of February 1988 by the statement of Ayatollah Khomeini who mentioned, for the highest caution, if there is a disagreement between the Guardian Council and the Assembly, a council for discernment of the Islamic government should be stablished. The Expediency Discerning Council was added to the amended Constitution of Iran in 1990[128]. In Article 112, the duty of the Discerning Council determined as " The Expediency Discerning Council shall be convened at the order of the Leader to determine such expedience in cases where the Guardian Council finds an approval of the Assembly against the principles of Sharia or the Constitution, and the Assembly in view of the expedience of the System is unable to satisfy the Guardian Council, as well as for consultation in matters referred to it by the Leader, and for discharging other functions laid down in this law"[129]. The creation of the Discerning Council was a political discretion than a legal act and before adding it to the amended Constitution in 1990, the Discerning Council was regarded as a political and legal mechanism without lawful authenticity. Unfortunately, unlike the Constitution of Iran, the Discerning Council attempted to legislate and the best example was legislation of Anti-Narcotics Law.

[126] Reza Eslami, Fatemeh Abutorabi, Critique of Legislative Measures to Combat Human Trafficking in Iran in Light of International Human Rights Law, International Law Review, Volume 36, Issue 61 (2019) 111.
[127] Article 94, The Constitution of the Islamic Republic of Iran, IBID.
[128] The Historical Establishment of the Council, http://maslahat.ir/index.jsp?fkeyid=&siteid=3&pageid=421.
[129] Article 112, The Constitution of the Islamic Republic of Iran, IBID.

At the end of 20th century when the number of addictions was rising in Iran, the Assembly decided to enact Anti-Narcotics Law. Capital punishment which is considered by the Assembly as a solution (without considering the principles of punishment) when a criminal phenomenon widely emerges in Iranian society, was assumed in that law to combat specific narcotics crimes. The law was sent to the Guardian Council, however, the Council rejected it and realized it contrary to the Constitution and Sharia. The Anti-Narcotics law returned to the Assembly for amendment, however, the Assembly insisted on the enactment of the law and as the Guardian Council disagreed again, the enactment of the law was sent to the Discerning Council and finally the council enacted and approved it. Therefore, once again, capital punishment was considered as a seldom solution in a critical situation of Iran.

In another law, the Assembly assigned capital punishment just based on quantity of porno productions. In the Law on the Punishment of Persons Who Engage in Unauthorized Audiovisual Activities, the legislator determined that the major factors in the production of pornographic will be punished as a crime of spreading corruption on Earth (efsad-e felarz) which has the capital punishment almost in all circumstances. In that law the word "major" is defined as the number of tapes or CDs and the like more than "ten copies" is considered "major"[130]. However, the "major" should be defined in qualitative approach instead of quantitative one.

This kind of the Assembly and legislator approach in law making and considering capital punishment in several codes of Iran, is common in penal policy of the legislature of Islamic Republic of Iran.

2.2.4. The supreme leader's vision

The Supreme Leader, who is appointed for life by the Assembly of Experts, sits at the apex of Iran's formal power structure. His authority is derived from Khomeini's principle of velayat e faqih, which was codified in the constitution after the Islamic Revolution. Under this principle, the Supreme Leader is the ultimate authority and the earthly trustee of the Shi'a "Hidden Imam" until the latter's reappearance on the Day of Judgment.

The role of supreme leader is regarded in the Constitution of Iran. The supreme leader's specific powers and duties is assumed in Article 110 of the Constitution:

1. Delineation of the general policies of the Islamic Republic of Iran after consultation with the Nation's Exigency Council.
2. Supervision over the proper execution of the general policies of the

[130] The Law on the Punishment of Persons Who Engage in Unauthorized Audiovisual Activities, Act 3, Note 1, exception 2. https://rc.majlis.ir/fa/law/show/130025.

system.
3. Issuing decrees for national referenda.
4. Assuming supreme command of the armed forces.
5. Declaration of war and peace, and the mobilization of the armed forces.
6. Appointment, dismissal, and acceptance of resignation of:
a. the fuqaha' on the Guardian Council.
b. the supreme judicial authority of the country.
c. the head of the radio and television network of the
Islamic Republic of Iran.
d. the chief of the joint staff.
e. the chief commander of the Islamic Revolution Guards
Corps.
f. the supreme commanders of the armed forces.
7. Resolving differences between the three wings of the armed forces and
regulation of their relations.
8. Resolving the problems, which cannot be solved by conventional
methods, through the Nation's Exigency Council
9. Signing the decree formalizing the election of the President of the Republic by the people. The suitability of candidates for the Presidency of the Republic, with respect to the qualifications specified in the Constitution, must be confirmed before elections take place by the Guardian Council; and, in the case of the first term [of the Presidency], by the Leadership;
10. Dismissal of the' President of the Republic, with due regard for the interests of the country, after the Supreme Court holds him guilty of the violation of his constitutional duties, or after a vote of the Islamic Consultative Assembly testifying to his incompetence on the basis of Article 89 of the Constitution[131].

The supreme leader has a power to appoint the head of Judiciary of Iran. Beside specific authorities which are specified by the Constitution, the supreme leader also appoints all Friday-prayer leaders, who disseminate his political message and ideology to the larger population. He also appoints the directors of Iran's bonyads [foundations], which function as independent economic entities and patronage networks unaccountable to the state. Finally, the Supreme Leader relies on his own powerful secretariat, the Office of the Supreme Leader [daftar-e maqam-e mo'azzam-e rahbari] for advice in all fields, including defense and foreign policy.

[131] Article 110, The Constitution of the Islamic Republic of Iran, IBID.

The major penal policy of the supreme leader regarding punishment and capital punishment is considerable in the leadership amnesty. The supreme leader can approve amnesty for specific crimes which is proposed by the head of judiciary. Some of those crimes are punishable by capital punishment. This penal policy is determined in the Article 110 note 11 of the Constitution. "Pardoning or reducing the sentences of convicts, within the framework of Islamic criteria, on a recommendation [to that effect] from the Head of judicial power"[132]. The leadership amnesty is also assigned in Article 96 of Islamic penal code.

The theory of leadership amnesty is rooted in Islamic principles as the leader is Imam of the Islamic society and under certain conditions, he can grant amnesty to specific criminals. In this regard, based on Islamic rules, in specific crimes, a criminal can be granted amnesty after his repentance. If a criminal of Hodud repents after his confession, the Imam can grants amnesty to him[133]. Hence, the supreme leader of Iran which is recognized as the Imam can grant amnesty in specific crimes. Although the leadership amnesty includes *Tazir* crimes, it contains only specific crimes of *Hodud*. Many crimes of Hodud are punishable by death penalty. According to criminal code of Iran, *Hodud* is a crime that the type, procedural retribution and amount of it are determined in Sharia[134]. In article 114 of Islamic penal code, some crimes of Hudod can be granted amnesty by the leader. The article 114 specifies that in crimes of Hodud except *Qadbf* which is an unfounded accusation of unlawful sexual intercourse (slander, calumny, defamation) and Moharebeh, when the accused repents before the proof of the crime and his regret and restoration acknowledged by the judge, the punishment (Had) will be aborted. If the crimes of Hodud except *Qadbf* is proven by confession and criminal repents after the proof of the crime, the court can ask for amnesty by the head of judiciary from the supreme leader[135]. In practice, the leadership amnesty will be granted after proposition of the Amnesty and Mitigation Commission of Convicts. There is a central Commission at the Capital and local commissions in provinces. The central Commission consists of five judges who are appointed by head of the judiciary, its task being to examine applications for amnesty from convicts or judicial officials in favour of convicts and to make recommendations to the Supreme Leader accordingly. It has the power to recommend the commuting of sentences or amnesty for convicts. Article 22 of the commission’s rules of procedure provides for 13 specific occasions each year, when the eligible persons may be pardoned and released. Some of them are religious

[132] IBID
[133] Qudsi Sayyid Ibrahim, Sujudi Sayyid Rida, Pardon in The Iranian Penal Code and Its Legal Examination JOURNAL OF ISLAMIC STUDIES, N 75, (2007), 133.
[134] Islamic Penal Code, Article 96, (2013).
[135] IBID, Article 114.

occasions, e.g. birthday of Prophet Mohammad and birthdays of some Shia imams. Some others are national occasions, e.g. the Iranian New Year (Noruz) at the start of the spring. One occasion (birthday of the prophet's daughter) is specifically designated for granting amnesty to female convicts. However, under the same Article, convicts may be pardoned on "other occasions that the Supreme Leader approves of." Under Article 23, policies governing amnesty and pardon include: "consideration of the impact of punishment on the convict and the latter's regret; consideration of social, political and regional necessities; consideration of the right of people and compensation for private complainants." These provisions have regularly been used to exert pressure on certain convicts. For example, political prisoners are expected to disavow their beliefs in order to qualify for amnesty. The provisions excluding certain categories of convicts from eligibility for amnesty are perhaps just as bad. According to Article 26, the following categories do not qualify for amnesty: professional drug traffickers; convicts facing punishment according to rights of people such as the *qesas* cases; armed robbery; rape; espionage, *moharebeh*, arms smuggling; embezzlement, bribery and kidnapping; convicts sentenced to death and stoning whose crime has been proved by testimony of witnesses[136].

The supreme leader penal policy about capital punishment is interconnected with Islamic rules and principles. On the one hand, the supreme leader's decisions about criminals who endanger public order and safety of the Islamic society is tough. On the other hand, some crimes of Hodud may be granted amnesty if the subject of the crime is not related to the public security and order. On 5 August 2008, the spokesperson of the Iranian judiciary announced that stoning sentences would no longer be implemented. He also said that the Supreme Leader had pardoned two people sentenced to stoning and reported that one other stoning sentence had been commuted to 10 years imprisonment and another to flogging. He noted the other stoning sentences were under review by the Amnesty and Pardon Commission of the Judiciary[137].

2.2.5. The sharia (Islamic law)

Before explaining Sharia discretion regarding capital punishment, it should be noted that Sharia is the corner stone of an Islamic society like Iran. Sharia has a prolonged history in Iran society. As it was explained in the history of capital punishment, before establishment of judiciary and legal codes in Iran, people's lawsuit was dealt with Sharia. Hence, at first, the nature and definition of Sharia will be discussed.

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[136] Regulations of the Amnesty and Mitigation Commission of Convicts, https://rc.majlis.ir/fa/law/print_version/135558.

[137] Iran Death Penalty, International Federation for Human Rights (2009), 40.

Sharia is generally believed by Muslims that covers all aspects of Muslim's life. For Muslims, it is the 'divine guidance' which, among other things, encompasses the moral code and religious law of Islam. Sharia governs many areas of a Muslim's behaviour, including those relating to crime, politics, taxes, inheritance, marriage, divorce, hygiene, diet, prayer, fasting and pilgrimage. It can be described as a system which is meant to guide how Muslims act in society and their interrelationship with those inside the Muslim faith as well as those outside of it.

Shari'a refers to the sacred laws and ways of life proscribed by Allah. From Muslims point of view, Sharia illuminates the way of living in a best manner without violating anyone's rights. it is a way of life which has been stablished by God from the beginning of Islam to the end of life. It highlights at first the rights of God which has hierarchical position among all rights and then the rights of people. The objectives of Sharia are to protect the 'five indispensables' (al-daruriyyat al-khamsa), which are the fundamental principles (kulliyyat) which underlie the application of law in Muslim society. Therefore, all laws (juz'iyyat) were revealed in the Quran to preserve the five indispensables, which are: the protection of life, the protection of religion, the protection of offspring or an individual's linage, the protection of property, the protection of individual's intellect[138].

Sharia is taken from Islamic sources by Ayatollahs or Faqīh. Islamic law arose out of various sources, but more specifically from the teachings of the prophet Muhammad. It developed in a formal sense during the seventh and eighth centuries (670-720 AD). The Quran is considered to be the primary source of guidance because it is regarded as the spoken word of Allah[139].

The primary sources are Quran, Sunnah which is ratified by both Sunni and Shia faiths. The secondary sources are Ijma or general consensus and intellect. As there are five prominent faiths in Islam which are: Hanafi, Maliki, Shafi'I, Hanbali and Jafari or Imimi, regarding the secondary sources, there is no consensus among faiths.

The first primary source of Sharia is Quran. The Holy Quran has 6236 verses that among them, 500 verses dealt with Islamic law and Ayatollahs use them for Islamic jurisprudence and issue of fatwa.

All the faiths of Islamic theology and law unanimously agree that the Quran is the primary source for all matters relating to theology and law. This is based on the belief among Muslims that the Quran is the exact word of God (kalam Allah) revealed to the Prophet Muhammad in

[138] Muhammad Zahid, Justice system of Islam in the form of Qisas, Diyat and Harabah for the protection of human dignity, International Research Journal on Islamic Studies (2019), 336.

[139] William A. Schabas, Islam and the Death Penalty, William & Marry Bill of Rights Journal, Vol 9 (2000), 231.

pure Arabic through the Archangel Gabriel, and has remained unchanged and protected from human interpolation up to this day[140]. The Islamic punishment such as *Hodud* that cannot be changed or altered or should not be postponed in terms of implementation, is taken from Quran. As Quran determined the type, amount and quality of punishment, it is considered *Hodud* that cannot be changed or postponed. This, however, does not mean that all matters relating to law are explicitly mentioned in or directly derived from the Quran. In fact, only a small fraction of Sharia laws can be said to have been directly derived from the Quran. The rest are based on interpretations of the Sunnah or hadith and other secondary sources of Sharia law.

The Sunnah refers to the words, actions, guidance of Prophet Mohammad. Here, there is a difference between Sunni and Shia faiths. The former considers not only the words, actions and messages of the Prophet, but also the Twelve Imams who are believed to be successor of the Prophet.

The Sunnah is a source which is taken from behavior, manner, practice and ideology of the Prophet. The Arabic term of Sunnah literally means ‘a habitual practice’, ‘an established course of conduct’, or ‘normative tradition’. In its Islamic juristic usage, the term Sunnah came to refer to the normative practices established by the Prophet Muhammad as a model to be followed by all Muslims: His verbal statements, actions, and tacit approval of other people’s statements and actions, all of which were later established to be legal precedents. Since the Prophet was believed to be the prime interpreter of the message of the Quran, His statements and deeds came to constitute a source of both Sharia law and the interpretation of the Quran (tafsir). Hence the Sunnah is considered to be primary Sharia law alongside the Quran[141].

Another term linked to the Sunnah is hadith. The term hadith in Arabic literally means ‘speech’, or ‘oral tradition’. Since the dominant method of transmitting reports containing the Sunnah of the Prophet was oral, the term hadith was used to refer to that process of transmission. Eventually the two terms Sunnah and hadith were used interchangeably[142].

Although there is only one version of Quran which is used by Ayatollahs to make Islamic law or Sharia, there are several version of hadith.

Sharia is rooted in different aspects of Iran. Since Islam has been accepted religion of Iran for decades, Sharia plays an important role not only in the society of Iran, but also in the

[140] Michael Mumisa, Sharia law and the death penalty: Would abolition of the death penalty be unfaithful to the message of Islam? Penal Reform International (2015), 8.
[141] Michael Mumisa, IBID, 8.
[142] IBID.

Constitution and legal codes of Iran. Sharia is widely taken into account by Penal and civil codes of Iran. The determined punishments of Islamic penal code, are taken from Sharia.
The penal policy of Sharia regarding capital punishment has several aspects and its penal policy should be noted entirely. As it was explained, Sharia is believed by Muslims to encompass all aspects and areas of Muslims life. It is an instruction of how to live in a best manner. Sharia is assumed to have instructions for mundane life that elevates and strengthens physical, mental health and finally spiritual of people. The instructions are defined and established by Allah who has created humans and who knows wellbeing and weal of people. This theory is mentioned by Quran in several verses. For example, in the verse 70 of Sura Al-Isra the Allah ascertains that "Certainly We have honoured the Children of Adam, and carried them over land and sea, and provided them with all the good things, and preferred them with a complete preference over many of those We have created"[143]. Therefore, Muslims believe that when Sharia determines a punishment for people, it regards all circumstances, conditions and aspects of people's life.
Islamic (penal) law or Sharia, consists of four categories, however, capital punishment falls into two sections. The four categories are *Hodud, Qisas, Diya, Tazir*. Literally, capital punishment is implemented for two crimes which are *Hodud* and *Qisas*. Like most Western penal systems, capital punishment which is one of the recognized punishments in Islamic law, is justified by punishment theories such as deterrence, retribution, rehabilitation and, finally, the idea of protecting society by incapacitating the offender. In addition, the rules regarding punishment are closely intertwined with those of redress by means of damages, not only in the law of homicide, but also with regard to theft and unlawful sexual intercourse. Since the Shari is religious law, some of the laws of punishment also have a 'vertical' dimension, in that they relate to reward and punishment in the Hereafter. This is the case with the law of *Had*[144].
Hodud in plural or *Had* is crimes against the Allah or God. In *Hodud* crimes, the amount and quality of punishment is mentioned in Quran and Sunnah and should not be under any personal discretion and therefore, *Hudod* is considered immutable. For example, in Surah An-Nur verse second, the punishment for fornication is determined as "As for female and male fornicators, give each of them one hundred lashes, and do not let pity for them make you lenient in ˹enforcing˺ the law of Allah, if you ˹truly˺ believe in Allah and the Last Day. And let a number

[143] Surah Al-Isra, Verse 70. https://wiki.ahlolbait.com.
[144] Radoulph Peters, Crime and Punishment in Islamic Law, Theory and Practice from the Sixteenth to the Twenty-first Century, Cambridge University Press (2005), 30.

of believers witness their punishment"[145]. Hanafite and Shiite authors add another element to the definition, i.e. that a *Had* crime must be entirely or predominantly a violation of a claim of God, i.e. violation of a public interest, which excludes homicide and wounding, since retaliation is a claim of men. The distinguishing feature is that claims of God, unlike claims of men, cannot be waived by men[146].

The first category of crimes in Sharia law involves what are known as the hudud (or hadd – singular). Hadd means 'limit' in Arabic, and it indicates a 'fixed punishment'[147]. Hudud crimes are therefore those that are punishable by a pre-established or mandatory punishment that has been laid down in the Sharia for a specific act.

The principle of immutability in *Hudod* crimes is emphasized in Sharia. In the first, that of Haad or Houdoud, important crimes deemed to threaten the very existence of Islam are punishable pursuant to penalties set by the Koran itself, or by the Sunna or Sunnah. Islamic jurists consider that these sanctions are set and immutable, and conclude that the judge is left with no discretion[148].

As Hodud crimes are determined both in Quran and Sunnah which in the latter there is a disparity between Shia and Sunni faiths, Houdoud crimes consist of several crimes in Sharia. But the crimes which are accepted unanimously among Shia and Sunni faiths are adultery, defamation, theft, robbery, rebellion, drunkenness, and apostasy. Several Houdoud crimes are punishable by death, specifically Muharebeh, adultery, and apostasy.

In Islamic jurisprudence, the most famous crimes in Hudod category are six offences:

- Zina – adultery and fornication
- Riddah – apostasy
- Hirabah or Muharebeh – 'waging war against God and society' or brigandage/banditry
- Sariqa – theft
- Shurb al-Khamr – drinking alcohol
- Qadhf – slander/defamation (meaning false accusation of any of these things)

According to some Islamic jurists, punishment by death is raised in the first three hudud offences:

- Levat_ sodomy
- Zina – adultery

[145] Surah An-Nur, verse 2, https://quran.com/an-nur.
[146] Radoulph Peters, IBID, 53.
[147] Michael Mumisa, IBID, 13.
[148] William A. Schabas, Islam and the Death Penalty, IBID, 231.

• Riddah – apostasy

• Hirabah or Moharebeh – 'waging war against God and society' or brigandage/banditry[149].

Although Hodud crimes have severe punishments in Sharia, the crimes will be proven hardly. In fact, the crimes are assigned to protect Islamic society, however, the Islamic society should provide for Muslims all facilities to have a qualified life. If an Islamic society are suffering from poverty and Muslims are unable to provide even a loaf of bread, theft cannot be punished within the Hodud category. There is a prominent and well-known Hadith from the Prophet Mohammad that exempts punishment from specific group of Muslims. In the famous Hadith, Muslims are not responsible about nine objects[150]. One of the nine objects is exigencies. Therefore, if a man committed theft while he was under exigencies situation, like he stole a loaf of bread to save his life from starvation, he will not be punished.

As explained, when a crime of Hudod is ascertained, the punishment should be applied without any delay or amendment. However, the penal policy of Sharia in some crimes of Hudod is to grant amnesty. The amnesty will be usually granted before the proof of the crime. It should be noted that Hodud crimes are proven either by the criminal confession or testimonies, however, the methods of proof are complicated to protect Muslims credibility, respect and integrity. Regarding the confession, the penal policy of Sharia is to refrain the criminal from confession. Because, although Hudod are crimes in Sharia, the crimes are considered the terrible sins in nature and based on Islamic principles, the sins should be confessed just by perpetrator with God (in private). So, in order to keep Muslims integrity, credibility and honor, the Sharia Ruler (is a person in charge of the laws of sharia or jurisprudential rulings) should abstain the criminal from confession. Even after the proof of the crime, if a criminal repents, the Sharia Ruler may grant amnesty to him. The majority of Islamic jurists (Ayatollah or Imam) such as Shaykh Tusi, al-Muhaqqiq al-Hilli, Fakhr al-Mohagheghin, Sheikh Muhammad-Hasan al-Najafi, Zayn al-Dīn al-Juba'ī al'Amilī, agree that after the criminal's repentance, an Islamic jurist has the liberty to punish or pardon him. However, Ayatollah Khoei's opinion is contrary to the majority's view and he perceives the unconditionality of repentance after confession to the Imam authorization to perform Hadd or forgive it. Famous jurists reasons in this regard are consensus and some narrations that the survey of narrations shows that in addition to the weak document of some

[149] Michael Mumisa, IBID, 15.

[150] https://fa.wikifeqh.ir/%D8%AD%D8%AF%DB%8C%D8%AB_%D8%B1%D9%81%D8%B9.

of them, some of them and some cannot prove the claim and even in some narrations there is no discussion about the conditionality of repentance [151].

In regard to the way of proof by testimonies, penal policy of Sharia is more stringent. There are several requirements for testimonies to be attested. When a witness wants to testify a Had crime, he must pass several requirements. In some Hodud crimes, specifically, crimes against chastity such as, adultery, incest, fornication and sodomy, a number of testimonies should be reached to four persons in order to attest the crime. In this issue, further details about the date, location, hours and crime scene is enquired and if there are disparities about details of the crime between witnesses, not only the crimes will be attested but also witnesses will be punished as Qadhf or slander/defamation (meaning false accusation of any of these things).

Although capital punishment is determined by Sharia in several Hodud crimes, the implementing of punishments is difficult due to Islamic principles and condition of attestation in practice.

Qisas is another crime in Islamic law which is determined for crimes against the persons. It is mainly applied against murder. Qisas is a law follow the principle of 'an eye for an eye' or lex talionis and they cover murder or serious cases of intentional bodily harm. They are administered under strict conditions to fit with the sanctity of human life in Islam.

Human life is valuable. Man is the ultimate center of Allah's creation. A person can protect his own life by respecting the lives of other human beings. A person has no right to end up his own life too as his life is a gift from Almighty Allah. Killing an innocent person is like killing the whole mankind since this shows he has no sympathy and respect at all in his heart and there is no value of human life in front of him. Thus murder is the greatest sin in Islam. Allah forbids murder in Qura'an in several verses:

"O believers! ˹The law of˺ retaliation is set for you in cases of murder—a free man for a free man, a slave for a slave, and a female for a female. But if the offender is pardoned by the victim's guardian, then blood-money should be decided fairly and payment should be made courteously. This is a concession and a mercy from your Lord. But whoever transgresses after that will suffer a painful punishment"[152].

"O believers! Do not devour one another's wealth illegally, but rather trade by mutual consent. And do not kill ˹each other or˺ yourselves. Surely Allah is ever Merciful to you"[153].

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[151] Eisazadeh Seyed Masoud*, Naseri Moghaddam Hosein, Govahi Zahra, Unconditionality Of Repentance In Forgiveness Or Execution Of Hadd In Confession Of The Offender, Islamic Law and Jurisprudence Studies, Vol 12, No 23 (2021), 213.

[152] Al-Baqarah, Verse 178, https://quran.com/2?startingVerse=178.

[153] An-Nisa, Verse 29, IBID.

" Do not kill your children for fear of poverty. We provide for them and for you. Surely killing them is a heinous sin"[154].

" Do not take a ˹human˺ life—made sacred by Allah—except with ˹legal˺ right.1 If anyone is killed unjustly, We have given their heirs2 the authority, but do not let them exceed limits in retaliation,3 for they are already supported ˹by law˺"[155].

The theory of Qisas is taken from the principle of *lex talionis,* or 'eye for eye, tooth for tooth'. The forms of punishment mentioned in the Quran for qisas offences aim to seek justice and redress by their equivalence. Thus in the case of premeditated murder, the punishment as described in the Quran is death. This is mentioned in Quran verse 45 Al-Maidah:

" We ordained for them in the Torah, “A life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth—and for wounds equal retaliation.” But whoever waives it charitably, it will be atonement for them. And those who do not judge by what Allah has revealed are ˹truly˺ the wrongdoers"[156].

Qisas laws were introduced in a fragmented seventh century tribal Arabian society where state authorities did not yet exist to administer justice. Qisas laws were introduced as an attempt to impose limitations over tribal culture that promoted revenge and retribution. Under pre-Islamic tribal laws the guardians (awliya) of a victim could demand justice not only from the perpetrator of the offence but also from other members of his family or tribe. In murder cases, for example, the family of the victim or his guardians could retaliate by killing the perpetrator and his family. This often resulted in years and generations of violent conflicts and revenge attacks between families and tribes.

As we explained in Hodud, although the punishments are severe, the burden of proof is strict in Sharia. This principle is applied for Qisas as well. Sharia law has a high burden of proof. This means that punishment should be averted if any suspicion or doubt arises. Therefore, for any offence that cannot be proved beyond a reasonable doubt, the court should find in favour of the defendant. This equates to the established legal maxim 'presumption of innocence' which is generally observed as a key element of the right to a fair trial (Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR)).

As Islam is divided to two main faiths which are Sunni and Shia faiths, while they have similarities in principles of Islam and also in practicing Sharia, there are disparities in applying punishments. Therefore, each Muslim countries has applied Islamic law according to its own

[154] Al- Isra, Verse 31, https://quran.com/17?startingVerse=31.
[155] IBID, Verse, 33.
[156] Al-Maidah, Verse 45, IBID.

recognized faith. Although essentially all Moslem or Islamic countries retain the death penalty in their domestic law, practice varies considerably from one to another. Some, like Iran and Iraq, are enthusiastic practitioners, while others, such as Tunisia, conduct executions in only the rarest of cases. The religious argument is invoked frequently, yet the diversity of practice would suggest there is little consensus even among Moslems as to the scope of capital punishment. For example, Sudan has taken the position that offenders may be executed for crimes committed while under the age of eighteen, in accordance with provisions of Islamic law[157].

[157] William A. Schabas, Islam and the Death Penalty, IBID, 232.

III. CAPITAL PUNISHMENT IN IRAN CONSTITUTION AND CRIMINAL CODE

3.1. Capital Punishment in legal codes and Constitution of Islamic Republic of Iran

The Constitution of Islamic Republic of Iran cannot be analyzed without considering the Islamic Revolution. Because, many articles of the Constitution are rooted in the will of the people and objects, messages and theories of the revolutionary parties. The main objects of the revolution were integrity, equality, brotherhood, freedom and kind. These objects reflected in the Constitution. In the preamble of the Constitution, the justification of the revolution is explained:

"The essence of the great Islamic Revolution of Iran, and the course of the struggle of the Muslim people from its beginning to its victory, as manifested by the categorical and striking slogans used by all classes of the people, get their special character from this fundamental desire. Now our nation, with the whole of its being is in the vanguard of this great victory, and strives for the attainment of that desire"[158].

The constitution of Iran like many constitutions, sets forth the rights and wills of people in terms of the cultural, social, political and economic according to Islamic principles and rules, and reflecting the fundamental desires of the Islamic people.

Enjoying one of the most ancient and richest human civilizations, the Islamic Republic of Iran by inspiring from the constitution has managed to make unique contribution to the richness of human civilization and culture. With the triumph of the Islamic Revolution in 1979, Iranians massively voted in favor of the establishment of the Islamic Republic based upon the principles of independence, freedom and progressive Islamic teachings and rules on one hand, and democratic principles and rules, manifested in the three independent branches of Government and people’s direct and indirect supervision on all pillars of the establishment on the other. Iran is home to about 85 million people. Iran’s official language is Persian while Islam has been adopted as the official religion.

As a key human ideal, human rights is rooted in divine religions in addition to being a valuable achievement in global culture and civilization. The history and culture of the Iranian territory is dominated by numerous fundamentals and principles highlighting the significance of human

[158] The Constitution of the Islamic Republic of Iran, IBID.

right for Iranians. Islam, as the official religion, is fundamentally linked with human rights. All Islamic Sharia precepts, be it legal or not, are potentially rooted in human nature, and all human beings are equal in nature and origin. Notwithstanding religion, race and denomination, all humans share natural principles. for Islam, human is a valuable being whom should be respected on account of being conscious and enjoying willpower to decide.

The Constitution of the Islamic Republic of Iran leans credence to civil rights. Doubtlessly, the overall rights of every person – men and women – and providing just judicial security to everyone and guaranteeing equality of everyone before the law are among the most important programs and concerns of the Islamic Republic of Iran. As stipulated in the Constitution, the Islamic Republic of Iran is an establishment relying on faith in the dignity and high value of humanity and freedom with accountability to God. However, as Iran consists of various ethnical, racial and cultural groups, establishing a constitution that encompasses all the people's rights or the rights of minorities, is difficult. Because when a society comprises of different cultures with different local languages and races that comes from ancient civilization, making a constitution that determines all wills, rights and interests of people will not be easy at all. This difficulty is more severe when the society influences by distinct ideologies and theories. The Constitution of Iran has attempted to include all rights and interests while emphasizing Islamic rules and principles. Before the establishment of the Constitution, the constitution makers well knew the situation of Iran and Iranian society in terms of being multiculturalist. However, as the true Islam was the final will of Iranian and they wanted to be governed by Islam and Islamic principles, Islam and Sharia became the pillar of the Constitution and the country. Although Islam as an accepted religion in Iran was rooted in several decades before the revolution, the idea of having the Islamic government and state was the attempts of the Shia clerics and theorists. The political activities of militant Shi'ite clerics in the 1960s and 1970s impressed on its leading elements, such as the late Ayatollahs Motahhari and Beheshti, the need for a distinct Islamic ideology. In this enterprise they were decisively aided by such Islamic "modernists" as Bazargan, Shari'ati (d. 1977), and Bani-Sadr. These modernist laymen were their masters in the art of formulating and elaborating a coherent ideology. Nevertheless, deep down the Shi'ite hierocracy was suspicious of ideologies and considered them somewhat contaminated by the secular ideologies of liberalism, nationalism, and socialism. This is especially true of Ayatollah Khomeini himself, who wanted his movement to remain purely Islamic in orientation and membership. In 1972, in a typical statement that demonstrates his resolve on the creation of a theocracy, Ayatollah Khomeini warned that the problems of Iran

would not be solved so long as "the nation of Islam" remained attached to. "these colonial schools of thought[159].

The implementation of the Islamic principles in the body of the Constitution and Iranian society is mentioned in the preamble of the Constitution and several articles. " Now the Constitution of the Islamic Republic, as the announcement of the structure and political, social, cultural and economic relationships within society, must guide the way towards the consolidation of the foundations of Islamic Government, and produce the design for a new order of Government in substitution for the old idolatrous order "[160].

When resorting to Islamic principles and the fact that the Islamic law or Sharia has spread in every legal code, capital punishment will be assigned in criminal codes. However, based on Islamic principles which are against capital punishment under certain circumstances and those principles reflects into the Constitution, capital punishment can be abolished in some crimes in Islamic penal code of Iran and in specific criminal codes. In this chapter, this issue will be considered.

3.1.1. Capital punishment in Iran constitution

The status of capital punishment in the Constitution of Iran is not defined. The Constitution of Iran like almost all other constitutions of states, determined the people's rights, the government's duties, the form of governing and it distributed the powers.

The Constitution of Iran implicitly permits the implementation of capital punishment. Nevertheless, by considering some articles of the Constitution which highlight the role of Islamic principles and those rules and principles are in the highest hierarchical position in the Constitution and the principles are in contrary to the use of capital punishment under particular conditions, capital punishment can be restricted in some crimes of Iran penal codes.

3.1.2. Justification of the Constitution for Implementing Capital Punishment

The Constitution of Iran has applied the criminal policy regarding capital punishment like international instruments. It means that no one shall be deprived of his life intentionally and the death penalty must be provided in law. In article 22 of the Constitution, this penal policy has determined: The dignity, life, property, rights, residence, and occupation of the individual are inviolate, except in cases sanctioned by law[161].

The legislator of Iran has protected the people's life from any violation. The only exception is the permission of law. Therefore, the right to life is not absolutely protected and recognized by

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[159] June Starr, Jane F. Collier, History and Power in the Study of Law: New Directions in Legal Anthropology, Cornell University Press (1989), 119.

[160] The Constitution of the Islamic Republic of Iran, IBID.

[161] The Constitution of the Islamic Republic of Iran, Article 22, IBID

the Constitution and it allows to the enactment of any laws to limit the right to life under certain discretion.
Resorting to capital punishment has been enough justified in Iran that while in the interpretation of the article 22 the Guardian Council was asked for the legitimacy of getting information about the background of parliament members and whether this act is against the spirit of the article 22, it was tacit about any conditions or limitations of using capital punishment[162].
Based on the article 22, the people's life can be violated by law and they may be punishable by capital punishment if the law allows it. Moreover, the principles of legality of crime and punishment that justifies capital punishment in the Constitution is also mentioned in article 36 "A sentence to punishment and its execution must only be by the decision of a competent court, and by virtue of law"[163].

3.1.3. Constraints of the Constitution Against Capital Punishment

As the author has clarified, Sharia plays a pivotal role both in legal codes and the Constitution of Iran and Islamic principles and values are highly regarded by Iranian government. It is true that the most challenge of the legislator of Iran both in the current and passed constitutions is to correspond the criminal codes with Sharia. Mozafaro-Din Shah ordered for the Persian Constitution in August 1906 and emphasized the reformist measures and implementation of Sharia. Hence, in the Persian Constitution of 1906, there was an article that obliged the assembly to consider and correspond the Islamic principles in the law making process of any legal codes and this article was assigned unchangeable[164].
After the Islamic Revolution, the importance of implementing Sharia was strengthened. In the Constitution of Iran, the word Islam, religion, jurisprudence and Sharia is used for about 250 times in the Constitution[165]. There are two important articles of the Constitution that determine the role of Sharia in legislation and also in judgment: article 167 and 4.
The article 167 explains that " The judge is bound to endeavor to judge each case on the basis of the codified law. In case of the absence of any such law, he has to deliver his judgment on the basis of authoritative Islamic sources and authentic fatwa. He, on the pretext of the silence of or deficiency of law in the matter, or its brevity or contradictory nature, cannot refrain from

[162] Mohammad Fathi, The Principles of the Constitution in the Light of Guardian Council Opinions, article 22, Guardian Council Institute (2013), 4.
[163] The Constitution of the Islamic Republic of Iran, Article 36, IBID
[164] Hossein Soleymani, Criminal laws in the light of Islamic criteria: Rereading the fourth principle of the Constitution in the light of the rules, expediency, and human rights, The Journal of Human Rights Semi-Annual, Vol. 16, No.1 (2021), 54.
[165] IBID.

admitting and examining cases and delivering his judgment "[166]. The importance of Sharia and Fatwa is emphasized in this article. The Sharia is so important in the Constitution that the writers of the constitution disregarded the principle of legality of crimes and punishments by putting this article in the Constitution. Because this article is against the principle of legality of crimes and punishments. However, some scholars argued that the aim of the article is just civil laws and not criminal ones. Because the legislator determined the criminal subjects in article 36 of the Constitution where it says " A sentence to punishment and its execution must only be by the decision of a competent court, and by virtue of law"[167]. Second, if the legislator wanted to extend the purpose of article 167 (using fatwas instead of laws by judges) to criminal issues, it would not enact specific criminal codes[168]. Moreover, it is complicated to determine that which fatwas are authentic.

The importance of corresponding legal codes with Islamic principles is emphasized in the preamble and o of the Constitution. The Constitution mentions the role of Sharia in 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 fuqaha' of the Guardian Council are judges in this matter"[169]. The purpose of the article is clear that all laws and provisions should satisfy the Islamic criteria. Therefore, criminal law and any assigned punishment should be based on Sharia and Islamic principles. But, one should note that how can a criminal be punished by a law (Sharia) which is older than 1400 years?

The importance of being compatible with Islamic norms is highly regarded by the Constitution and Guardian Council that even the past legal codes of Iran, before the revolution, which had many similarities with Islamic revolutionary laws were realized illegal just because of enacting before the revolution and they had lack of adaptability with Islamic principles and the term Islam. In April 1981, the Supreme Judicial Council asked from the Guardian Council that the implementation of past laws and decrees (before the Revolution) that are against Islamic criteria and issuance of any verdicts based on those laws are not justified, especially when considering articles 4 and 167 of the Constitution. This opinion was suggested the Supreme Judicial Council that according to these two articles, all laws and decrees against Islam are repealed and the courts are obliged to decide about cases according to Islamic principles and

[166] The Constitution of the Islamic Republic of Iran, Article 4, IBID
[167] IBID, Article 36.
[168] Mansour Rahmdel, the Status of Criminal Law in the Constitution of Islamic Republic of Iran and the Persian Constitutional Revolution, the Judiciary's Law Journal, Volume 72, (2008), 133.
[169] IBID, Article 4.

according to article 167. These Islamic principles were taken by the Supreme Judicial Council form the Imam Khomeini's Fatwas and imparted to the courts. Therefore, until the enactment of the laws and legal bills by the Islamic Assembly (Majlis), the implementation of anti-Islamic rules and principles must be prevented[170]. Then the Supreme Judicial Council asked from the Guardian Council that whether aforementioned opinion is legal or not. The Guardian Council responded that according to article 4 of the Constitution, any laws, decrees and regulations must be compatible with Islamic principles and the determination of this is in due of the Guardian Council. Therefore, the laws and bills which are implemented in the courts and the Supreme Judicial Council realized that those law are against Islamic principles must be sent to the Guardian Council for further consideration[171].

After the Iranian revolution in 1979, broad changes made to the justice system stemmed from the need to root the institutions of government in Shi'i Islamic traditions. Thus, after the revolution, much of the systematization of the previous era was dissolved and replaced initially with revolutionary Sharia (Islamic) courts that gave judges broad jurisdiction over the kinds of cases they heard, with marked attention to crimes against the state and the aims of the revolution[172].

In spite of law making in Iran based on Sharia during 44 years and inefficiency of this criminal system, two important queries arise about Sharia. Firstly, one of a substantial deficiencies of Sharia is its penal system which is against human rights norms and principles. Based on human rights instruments and rules, inhumane punishments are forbidden and must be abolished. The article 7 of the International Covenant on Civil and Political Rights specifies: " No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation ". As we know, some Islamic punishments are considered inhumane such as lashing, stoning or hands cutting. Even, although capital punishment has not been abolished unanimously among states, it is regarded an inhumane punishment[173].

The second fundamental challenge of the Sharia is that the compliance with Islamic norms has no clear criteria. In other words, is this criminal system (Islamic Penal System of Iran) really and practically compatible with Sharia? Which fatwa is authentic that makes Islamic principles and laws? Is there any priority among Fatwas?

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[170] Interpretation of Article 4 by the Guardian Council. https://www.shora-gc.ir/fa/news/1831.
[171] IBID, https://www.shora-gc.ir/fa/news/1831.
[172] Arzoo Osanloo, When Blood Has Spilled: Gender, Honor, and Compensation in Iranian Criminal Sanctioning, Political and Legal Anthropology Review, Vol. 35, No. 2 (2012), 312.
[173] See Chapter 2, The objects of capital punishment.

As the author discussed in the chapter two, Sharia and Islamic principles are mainly derived from Quran and Sunnah. Although all Islamic faiths have common principles and criteria both in Islamic law making and issuing Sharia rules, there are some disparities. Even in Shia faith there is no unanimity in making or applying some Islamic laws and Sharia rules. Reynaldo Galindo Pohl, formerly Special Rapporteur of the Commission on Human Rights on Iran, observed that " there are groups of Islamic legal scholars and practitioners who recommend the abolition of the death penalty for political crimes on the ground that it is contrary to Islamic law. They state that the number of crimes punishable by death is limited "[174]. Moreover, although Sharia rules are rigid and unamendable based on Islamic principles, it can be changed under rare conditions such as necessity term. Throughout the development of Islam and Islamic law, there have been times when theory and practice did not coincide. While it has been argued that Islamic law governs the social order of Islamic societies, this has not prevented the Shari'a from being amended or ignored when the environment dictated. This has been referred to as *darara*, the doctrine of necessity. The doctrine of necessity dispenses Moslems from observing religious laws when the situation or environment dictates[175].

As the phrase ' adaptability with Islamic norms' is the major goal of article 4 in the Constitution, and as this phrase is repeated several times throughout the Constitution of Iran[176], the criteria for compliance with Islamic norms and principles should be clarified. In Islamic penal laws, there are substantial disparities between Islamic clerics and jurists (Ayatollahs). The disparity is sometimes related to the element of Islamic penal system or the terms of implementation of Islamic punishments. In this section it will be considered that capital punishment can be restricted to just one Islamic punishment.

Among Islamic punishments which are assigned by Sharia, Hodud crimes such as sodomy, adultery, apostasy have inhumane punishments. However, the tough justice is required to meet severe conditions for the execution of punishments. In other words, although Sharia determined tough punishment, it must fulfill harsh conditions in order to be implemented. Hence, if just one condition is not satisfied, punishment will not be applied. In this issue, a critical question arose that whether executing Islamic laws and punishments nowadays, specifically Hodud, is compatible with Islamic principles which in turn meets the clause of article 4 of the Constitution?

[174] William A. Schabas, Islam and the Death Penalty, IBID, 233.
[175] IBID, 235.
[176] Articles: 4, 20, 21, 61, 72, 85, 94, 96, 105, 112.

Although some Islamic jurists (Ayatollahs) positively respond to the question, there are several famous and grand Ayatollahs who are against it. They believe that during the occultation of twelve Imam of Shia, the execution of Hodud should be ceased and no one is eligible or competent to implement Hodud punishments. Shi'a Muslims believe that after the death of the Prophet Mohammad, he was succeeded by 12 Imams, beginning with his son-in-law Ali, and then by his descendants through the Prophet's daughter Fatima. The 12th Imam is believed not to have died but to have gone into hiding or occultation, and will one day return to the world to regain his rightful position. Among opponent Islamic jurists, Ibn Zuhra, Muhammad ibn Idris Helli, Allamah Al‑Hilli, Muhaqqiq al-Hilli, Mohaghegh Ardabili, Ali Alkaraki, Mirza-ye Qomi, Ahmad Khonsari[177] can be enumerated who are against execution of Hodud during the occultation. They posit that implementation of Hodud during the occultation of twelve Imam of Shia is forbidden or Ḥarām and any law which is enacted to execute Hodud is incompatible with Islamic principles and Sharia criteria[178].
In the book of the rule of Islamic jurisprudence penal section, it is emphasized that no one is eligible to execute Hodud crimes other than the Imam or a person who is appointed by him[179]. In the book, the author articulates two justifications about Hodud crimes. In the first one, the author explains that as the Islamic society is in the occultation of twelve Imam of Shia, Hodud crimes should be suspended and ceased. He refers to several grand Islamic jurists in the past and the current centuries who are opponents of executing Hodud during the occultation of twelve Imam of Shia. According to him, Ayatollah Khansari excluded the execution of using Hodud punishments to just the twelve Infallibles Imams and therefore the implementation of Hodud during the occultation of twelve Imam (Muhammad ibn al-Hasan al-Mahdi) who disappeared from the public is forbidden. He also explains more that as Hodud is accompanied by corporal harassment, only the Prophet (Mohammad), Infallibles Imams and their privileged deputies are eligible to implement Hodud punishments[180].
In the second justification, the author at first enumerates the arguments of proponents of Hodud crimes execution during the occultation. He then specifies that even if Hodud crimes can be implemented during the occultation based on proponents' claims, both proponents and opponents unanimously agree that Hodud crimes are punishable just by Islamic jurists who are

[177] Hossein Soleymani, Criminal laws in the light of Islamic criteria: Rereading the fourth principle of the Constitution in the light of the rules, expediency, and human rights, IBID, 56.
[178] IBID, 57.
[179] Sayed Mostafa Mohaqeq Damad, the Rule of Islamic Jurisprudence Penal Section, Publication Center of Islamic Science (2008), 284.
[180] IBID, 288, 290.

grand Ayatollahs and not a simple judge[181]. It is transparent that in an Islamic Shia society such as Iran, there are a few number of grand Ayatollahs who can deal with Hodud crimes, therefore, in Iran with eighty million populations, it is impossible to execute Hodud crimes by just few grand Ayatollahs.

Based on many Islamic Shia jurists (Ayatollahs), if using Hodud crimes defames the reputation of Islam or dispels hatred environment against Islam, the crimes should be ceased and they are incompatible with Islamic criteria[182].

Thanks to disparities between Shia jurists regarding execution of Hodud crimes in the current era and in the occultation of twelve Imam of Shia, a critical question which challenges the clause of "compatibility with Islamic criteria" in Article 4 of the Constitution is, on what basis is the legislation of Hudud compatible with Islamic principles?

It seems that capital punishment which is determined in Hodud crimes can be ceased and abolished as the implementation of the crimes is against Islamic criteria under certain circumstances in Sharia and therefore the implementation of Hodud is against article 4 of the Constitution. To shed lights on, the following reasons would elaborate on this issue.

Frist, based on Shia jurists' theories, as the Islamic society is in the occultation of twelve Imam of Shia, any Hodud crimes which are implemented would be against Islamic principles and rules.

Second, those Shia jurists who are proponents of using Hodud crimes even during the occultation of twelve Imam of Shia verify that these crimes should be applied by grand Ayatollahs and not ordinary judges; and with few number of grand Ayatollahs or Islamic jurists, it is almost impossible to use the punishment.

Third, when using Hodud punishment defames the reputation of Islam or dispels hatred environment against Islam, the execution of Hodud should be ceased and implementation of them are incompatible with Islamic criteria. So the important clause in the Constitution of Iran "compatibility with Islamic principles and norms" will not be fulfilled and article 4 will be violated.

Forth, in Sharia, there is no consensus between Shia jurists about the way of proofing Hodud crimes. Some of them support just confession and testimony under specific circumstances and others believe the knowledge of the judge in proving Hodud crimes. It was considered in the chapter second, the way of proofing Hodud is complicated and difficult. In fact, all Hodud

[181] IBID, 292.
[182] Hossein Soleymani, Criminal laws in the light of Islamic criteria: Rereading the fourth principle of the Constitution in the light of the rules, expediency, and human rights, IBID, 57.

crimes can be proved by testimony. However, Sharia considered tough requirements for testimony. Grand Ayatollah Montazeri, for example, has stated that adultery is very difficult to prove according to Islamic law, on the grounds that it must be witnessed in person by four people, a condition that is almost impossible to fulfil[183].

The major requirement is ta witness should have a strong justice. Although Shia jurisprudents have given various views on the meaning of justice, based on Sharia, a person can be considered just and fair if he or she does not commit a major sin or does not insist on perpetrating minor sins[184]. This requirement is mentioned in article 181 of Islamic penal code: "A just person is a person that in the eyes of the judge, or the [third] person who testifies to confirm his/her justice, is not sinful. Testimony of a person who is infamous for corruption, or commits capital sins or insists on commission of minor sins, shall not be accepted, until it is confirmed that s/he had changed his/her behavior and there is no doubt about his/her competence and just nature[185]".

In Sharia, all Hodud crimes are considered substantial and terrible sins. Therefore, one should not that how is possible that a witness is watching a terrible sin which is recognized as a Had crime such as the adultery, incest, fornication or sodomy while the witness keeps his just? In other words, a person will lose his justice by watching those crimes which are heinous sins and therefore, he is ineligible for testimony. Therefore, some Hodud crimes which are punishable by the death penalty, may be ceased due to the lack of testimony.

Hodud crimes are not restricted to just offenses against chastity. Many criminals in Iran are sentenced to death penalty due to committing Moharebeh or a crime of spreading corruption on Earth (efsad-e felarz). The latter includes a wide range of illegal acts which are punishable by death penalty. The criminal acts in the crime of spreading corruption on Earth (efsad-e felarz) is the acts against the bodily entity of people, offenses against internal or international security of the state, spreading lies, disruption of the economic system of the state, arson and destruction of properties, distribution of poisonous and bacterial and dangerous materials, and establishment of, or aiding and abetting in, places of corruption and prostitution, [on a scale] that causes severe disruption in the public order of the state and insecurity, or causes harsh damage to the bodily entity of people or public or private properties, or causes distribution of corruption and prostitution on a large scale, shall be considered as mofsed-e-fel-arz [corrupt on

[183] Amnesty International, Iran: End executions by stoning, Amnesty International Publications (2008), 3.
[184] Zeinolabedin Najafi, Terminology of Justice in Imamiyyah Jurisprudence, Religious Anthropology Shahid Mahallati Higher Education, Volume 9, Issue 28 (2013), 145. 141-170
[185] Islamic Penal Code of the Islamic Republic of Iran – Book One & Book Two, Iran Human Rights Documentation Center, Iran Human Rights Documentation Center (2014).

earth] and shall be sentenced to death[186]. Determining death penalty for this kind of crime which includes a wide range of criminal behaviors such as 'spreading lies', is not compatible with Islamic principles and violates article 4 of the Constitution.

It seems that the phrase 'compatibility with Islamic principle' in article 4 can be adapted with the argues of those Islamic jurists (Ayatollahs) who believe Hodud crimes should be ceased in the occultation of the twelve Imam. Therefore, article 4 of the Constitution can be used for terminating Hodud crimes which are punishable by death penalty as the implementation of the crimes are against Islamic principle and in contrary to the clause of article 4 of the Constitution.

3.2. Capital punishment in Islamic Penal Code

The Islamic penal code is the main penal code of Iran that determines general principles of crimes and punishments, criminal responsibility, type of crimes and punishments. It was enacted April 2013.

According to the article 1 of Islamic penal code: The Islamic Penal Code consists of crimes and punishments of Hodud, Qisas, Diyat, Ta'zirat, the security and correctional measures, requirements and barriers of criminal responsibility and the rules that apply to them[187]. The only difference of this penal code with the previous versions, before the revolution, is the ' Islamic' word which established it based on Islamic principles and Sharia. It actually reflects the Islamic punishments in the penal code. In addition to the punishments and crimes of the penal code which are taken from Islamic principles, it includes several Islamic rules regarding criminal responsibility, aid and abet, granting amnesty and so on.

As one of the aspects of Sharia was explained, although the penal policy of Sharia is using tough justice and severe punishments, it assumes amnesty and repentance. For example, repentance in the penal code is derived from Islamic principles and is mentioned in Hodud and Tazir. A very special form of exemption from punishment can in some cases be brought about by repentance. It is an interesting defense that does not fit in Western theories of criminal law, because it is connected neither with the mens rea nor with the unlawfulness of the act. The explanation is that, if a criminal offence does not violate the claims of men, one of the objectives of the punishment is the rehabilitation of the offender. By showing his repentance, the offender actually proves that he has already been reformed and does not need to be punished anymore[188].

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[186] IBID.

[187] Islamic Penal Code of the Islamic Republic of Iran – Book One & Book Two, IBID.

[188] Radoulph Peters, Crime and Punishment in Islamic Law, Theory and Practice from the Sixteenth to the Twenty-first Century, IBID, 27.

Repentance may eliminate the punishment even in grave crimes which are punishable by death penalty. In article 114 of the Islamic penal code repentance may prevent the criminal who deserves death penalty from punishment. " In the case of offenses punishable by Hadd, with the exception of Qazf and Moharebeh, if the accused repents anytime before the commission of the offense is proved, and his/her regret and correction is certain in the eyes of the judge, the hadd punishment shall not be given. In addition, if the abovementioned offenses, except for qazf, are proved by confession, if the offender repents, even after the commission of the offense is proved, the court, through the Head of Judiciary, can apply for pardon of the offender by the Leader.

Note 1- If a moharebeh repents before s/he is arrested or held under control, the hadd punishment shall not be given.

Note 2- In the cases of Zina (fornication) and Livat (sodomy), when the offense is committed by force or coercion or deception of the victim, if the offender repents and the [hadd] punishment is not given according to this article, s/he shall be sentenced to ta'zir imprisonment or flogging, or both, of the sixth degree"[189].

It seems that repentance and amnesty which determined by Sharia and the Islamic penal code of Iran is compatible with human rights instruments. Article 6 note 4 of International Covenant on Civil and Political Rights tried to limit death penalty and it considered "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases".

Capital punishment in the Islamic penal code of Iran is determined in Hodud and Qisas. Based on Islamic principles, Tazirat is generally considered to be inferior than Hodud and therefore, capital punishment is excluded from it. However, there is a specific criminal code which extends capital punishment to specific criminal acts while it is considered Tazirat.

3.2.1. Capital punishment in Hudud

In Islamic penal code, "Hadd is a punishment for which the grounds for, type, amount and conditions of execution are specified in holy Shari'a"[190]. All Hodud crimes of Islamic penal code which are punishable by death penalty are exactly crimes which are determined and derived from Sharia to the penal code. However, some Hodud crimes are not mentioned in the penal code. In this case, the penal code has referred to the Constitution article 167. The penal code specifies that " Regarding the Hadd punishments that are not mentioned in this law Article one hundred and sixty seven (167) of the Islamic Republic of Iran's Constitution shall be

[189] Islamic Penal Code of the Islamic Republic of Iran – Book One & Book Two, IBID.
[190] IBID.

applicable"[191] and the article 167 is a problematic article which has not determined specific criteria of the authentic fatwas. In fact, in case of the absence of any law, the judge has to deliver his judgment on the basis of authoritative Islamic sources and authentic fatwas. So, the penal code is not mentioned all Hodud crimes and instead, it decided to resort to article 167 of the Constitution which emphasizes the role of Islamic sources and fatwas in judgment. However, this question is arisen once again that which fatwa is authentic that makes Islamic principles and can be used to punish criminals? Is there any priority among Fatwas? [192].

The specified Hodud crimes which are punishable by death penalty in the Islamic penal codes are: Zina or adultery and fornication, Levat or sodomy, Sabb-e nabi or Swearing at the Prophet, Moharebeh, Baqŷ or Rebellion and Efsad-e-fel-arz or Corruption on Earth. It should be noted that any Hodud crimes which are not punishable by death penalty such as Shurb al-Khamr or drinking alcohol, will be punishable by capital punishment after three times (recidivism) that the criminal is committed the crime and punished. Therefore, by the four commission, he will be punished to death penalty.

3.2.1.1. Zina

Zina or adultery and fornication is punishable by death penalty. It is defined in article 224.

"In the following cases the hadd punishment for zina is the death penalty:

(a) Zina with blood relatives who are prohibited to marry.

(b) Zina with a step-mother; in which case, the man who committed zina shall be sentenced to the death penalty.

(c) Zina of a non-Muslim man with a Muslim woman; in which case, the man who committed zina shall be sentenced to the death penalty.

(d) Zina committed by coercion or force [i.e. rape]; in which case, the man who committed zina by coercion or force shall be sentenced to the death penalty"[193].

If the perpetrator is married (Ihsan), he or she are punishable by stoning. This is mentioned in article 225. However, Where the execution of stoning is not possible, upon proposal of the court of final judgment and approval of the Head of Judiciary, if the offense is proved by testimony of witnesses, the man and a woman who have committed zina and meet the conditions of ihsan shall be sentenced to the death penalty [hanging]; otherwise, each one of them shall be given one hundred lashes[194]. The article assumes a possibility 'Where the execution of stoning is not possible'. The stoning was absolutely used in previous Islamic penal

[191] IBID, Article 220.
[192] See section 3.1.3.
[193] Islamic Penal Code of the Islamic Republic of Iran – Book One & Book Two, IBID.
[194] Article, 225Islamic Penal Code of the Islamic Republic of Iran – Book One & Book Two, IBID.

law which was enacted in 1991. By the end of October, Amnesty International had recorded more than 250 executions in Iran for consensual sexual acts since the beginning of 2007, far exceeding the 177 executions recorded in 2006[195]. However, it seems that under pressure and prolonged efforts of international community, the current penal law has considered a justification to prevent stoning from execution. The UN general assembly expressed its deep concerns at human rights violation in Iran by using stoning during years 1998 to 2014 and it recognized stoning and fingers amputation as inhuman and humiliating punishments[196]. The European Parliament adopted a resolution against Iran in 2006 and it extremely criticized stoning [197] . The report of Amnesty International regarding prevention of stoning is considerable. On 1 October 2006, a group of Iranian human rights defenders, lawyers and journalists, led by lawyer Shadi Sadr and journalist Asieh Amini, whose reporting of stonings inspired the idea, launched the Stop Stoning Forever campaign to abolish stoning in law and practice. Other organizers in Iran include Mahboubeh Abbasgholizadeh. They were spurred into action by the reported stoning in Mashhad in May that year and by a letter sent in June 2006 to a woman prisoner, Ashraf Kalhori, giving her 15 days notice of her execution by stoning. On 10 October 2006, the fourth World Day against the Death Penalty, Amnesty International's Secretary General, Irene Khan, expressed Amnesty International's support for the campaign and its organizers, and publicly called on the Iranian authorities to abolish stoning immediately[198].

Due to the efforts of international community, the current Islamic penal code in article 225 has considered an assumption that 'where the execution of stoning is not possible' the stoning punishment should be replaced to death penalty if the crime is proved by testimony of witnesses; otherwise, each one of them shall be given one hundred lashes. Although the article assumes capital punishment instead of stoning, the crime must be proved by testimony otherwise, the punishment will be one hundred lashes. As the author discussed in chapter three[199], it is almost impossible to prove the Hodud crimes by testimony. So in the current penal code, stoning and capital punishment in this case are severely restricted.

The query here is, on what basis and under what circumstances the execution of stoning is not possible?

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[195] Amnesty International, Iran: End executions by stoning, IBID, 2.
[196] Mohammad Nazari Nodoushan, Ardavan Arzhang, Stoning punishment in Light of the Second Titles, The Iranian Journal of Islamic Law, Jurisprudence and Methodology, Volume 3, Issue 2 (2017), 139.
[197] IBID, 140.
[198] Amnesty International, Iran: End executions by stoning, IBID.
[199] See 3.1.3.

It seems that the purpose of the article about impossibility of using stoning is to maintain prestige of Islam. Islam reputation and prestige will be ruined when its instructions and rules are considered illogically. Therefore, some Grand Ayatollahs believe that stoning punishment should be replaced as execution of it defames reputation of Islam[200]. Based on Islamic principles, when execution of an act such as stoning defames the reputation of Islam or dispels hatred environment against Islam, the punishment should be ceased and implementation of them are incompatible with Islamic criteria.

3.2.1.2. Levat

The second Had crime which is punishable by capital punishment is Levat or sodomy. It is mentioned in article 234: "The hadd punishment for levat shall be the death penalty for the insertive/active party if he has committed levat by using force, coercion, or in cases where he meets the conditions for ihsan; otherwise, he shall be sentenced to one hundred lashes. The hadd punishment for the receptive/passive party, in any case (whether or not he meets the conditions for ihsan) shall be the death penalty.

Note 1- If the insertive/active party is a non-Muslim and the receptive/passive party is a Muslim, the hadd punishment for the insertive/active party shall be the death penalty"[201].

In the previous penal code, the punishment for levat was stoning. However, due to aforementioned international community efforts, it has been changed to death penalty. The main difference between the previous and the current Islamic penal code about this crime is when the perpetrator is single and he is active party, he will not be punished by death penalty. While in the previous penal code, he was punishable by death penalty under any circumstances.

3.2.1.3. Sāb ul-nabi

Blasphemy is the third crime which is punishable by death penalty. It is mentioned in the penal code article 262: "Anyone who swears at or commits qazf against the Great Prophet [of Islam] (peace be upon him) or any of the Great Prophets, shall be considered as Sāb ul-nabi [a person who swears at the Prophet], and shall be sentenced to the death penalty.

Note- Commission of qazf against, or swearing at, the [twelve] Shi'ite Imams (peace be upon them) or the Holy Fatima (peace be upon her) shall be regarded as Sab-e nabi"[202].

The Islamic beliefs are substantially important for Muslims and Islamic states. In Islamic societies, Muslims are extremely sensitive about their prophet and even other prophets, specifically the great ones. Although the crime is assigned by Sharia and Shia jurists have made fatwas by resorting to Islamic resources (Quran, Sunnah or tradition, Ijma or consensus or

[200] Mohammad Nazari Nodoushan, Ardavan Arzhang, IBID, 145.
[201] Islamic Penal Code of the Islamic Republic of Iran – Book One & Book Two, IBID.
[202] IBID

agreement of the Islamic community and wisdom) and they regard any insulting to the prophet and the [twelve] Shi'ite Imams as a great sin which is punishable by tough punishment, any humiliating, hatred insulting remarks, acts and behaviors against Islamic beliefs or prophet will result in chaos in the Islamic society[203]. Even, when hatred acts or speech etc. against Islamic values or the prophet is committed by non-Muslims outside the Islamic states, there would be violent crimes and even terrorist acts. In 2005, after a Danish newspaper Jyllands-Posten depicted the prophet Muhammad with a turban-like bomb, protests were mobilized by radical Islamist movements moral threat posed by the blasphemous cartoons. There were clashes between rioters and security forces. Angry mobs torched Danish embassies in Syria, Lebanon, and Iran and attacked the Norwegian and Austrian embassies in Damascus, EU offices in Gaza, and the Italian consulate in Banghazi. In Nigeria, Pakistan, Libya, and Afghanistan, more than one hundred anti-Danish rioters died in riots and clashes with police. When police in Denmark and Germany exposed death threats, assassination attempts, and terror plots related to the affair, it became clear that the Muhammad cartoons had ceased to be a laughing matter. It was a biggest international crisis since world war two, according to Danish Prime Minister Anders Fogh Rasmussen, resulted in nearly two hundred fatalities and one thousand casualties across nine Muslim states[204].

The international human rights instruments have well realized the outcome of blasphemy and hatred acts. Any hatred speech or act is forbidden by human rights instruments. In article 20, note 2 of International Covenant on Civil and Political Rights" Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". Even regarding the ascertained freedoms in the Covenant, there are some limitations which are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

It is obvious that considering death penalty for blasphemy or what the Islamic penal code criminalized as the Sab-e nabi is unfair. Regardless of determined punishment in Sharia for this crime, the legislator of Iran has found out negative impact of Sab-e nabi in Iran which is chaos. However, capital punishment is not deterrent and should not be regarded as a sole solution to protect the society from any violation. The fact that undeveloped states are ignorant about it.

[203] Rahman Saboohi, Seyed Hosein Hashemi, Refresh of Docuntatiomen the Principle of Legality in Criminal Law insulting Prophet, The Journal of Criminal Law, Vol 8, Number 15 (2017), 165.

[204] Ron E. Hassner, Blasphemy and Violence, International Studies Quarterly, Vol. 55, No. 1 (2011), 23, 24. pp. 23-45

3.2.1.4. Moharebeh

Moharebeh or ‘waging war against God and society’ or brigandage/banditry is the forth Had crime which is punishable by death penalty. The word Moharebeh is mentioned eight times in Quran[205] and It is directly derived from Quran: "Indeed, the penalty for those who wage war against Allah and His Messenger and spread mischief in the land is death, crucifixion, cutting off their hands and feet on opposite sides, or exile from the land. This ˹penalty˺ is a disgrace for them in this world, and they will suffer a tremendous punishment in the Hereafter"[206]. The Islamic penal code determined Moharebeh in article 279 as: "Moharebeh is defined as drawing a weapon on the life, property or chastity of people or to cause terror as it creates the atmosphere of insecurity. When a person draws a weapon on one or several specific persons because of personal enmities and his act is not against the public, and also a person who draws a weapon on people, but, due to inability does not cause insecurity, shall not be considered as a mohareb [i.e. a person who commits moharebeh]"[207]. In article 281 "Robbers, thieves, or smugglers who resort to weapons and disrupt public security or the security of roads, shall be considered as a mohareb"[208]. Finally, the penal code has determined four punishments for Moharebeh that the judge should decide one of the four punishments. Article 282: "The hadd punishment for moharebeh is one of the following four punishments:

(a) The death penalty (hanging)

(b) Crucifixion

(c) Amputation of right hand and left foot

(d) Banishment"[209].

Moharebeh is in fact a crime against public order and security. Mohareb or perpetrator uses weapon to intimidate people and to create insecure environment in the society. It is like the terrorism that intends to intimidate people. Many Shia jurists define it as anyone who draws weapon in order to intimidate people[210]. Moharebeh is punishable by four punishments and two of them are death penalty. The judge should decide to use one of them.

From legal principles point of view, the judge should consider all circumstances and the consequences of the crime to make decision. In other words, in Moharebeh, there must be proportionality between crime and punishment. If the criminal killed someone he may be

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205 Sayed Ali Musavi, Arm Rebelling in jurisprudence and law of Islamic republic of Iran, Biannual Journal of Studies of Islamic Jurisprudence and Basis of Law, Vol 8, No 3 (2015), 100.

206 Surah Al-Ma'idah, https://quran.com.

207 Islamic Penal Code of the Islamic Republic of Iran – Book One & Book Two, IBID.

208 IBID.

209 IBID.

210 Sayed Ali Musavi, IBID.

subject to death penalty or Crucifixion; if he just committed theft, amputation may be applied and he just intimidated people without causing any casualties, he may be sentenced to banishment.

In Quran, however, as it is not determined which punishment must be implemented, Shia jurists resort to Sunnah to find the resolution and therefore, there are two major theories. The first one is the freedom of judge. Based on this theory, the judge has freedom to use one of the four punishments regardless of the fact that whether criminal committed murder or theft or he only used weapon without causing any casualties[211]. The penal code considered this theory in article 282 by giving freedom to judge which is in contrary with human rights norms and legal principles.

The second theory is proportionality theory which there must be proportionality between crime and punishment to implement one of the four punishments[212].

3.2.1.5. Baqŷ

Baqŷ or Rebellion is the fifth Had crime which is punishable by death penalty. It is determined in article 287 that: "Any group that wages armed rebellion against the state of the Islamic Republic of Iran, shall be regarded as moharebs, and if they use [their] weapon, its members shall be sentenced to the death penalty"[213]. This article determines a punishment for political crimes in the Islamic state. In fact, in Islam and Sharia, rebels who rise up against the Islamic state by using weapon are considered Baqy and only if they use weapons they will be punishable by death penalty. In Sharia, Baqy is defined as rising up against a just Imam. Hence, while in Sharia there are tough punishments for Moharebeh to secure public order and safety, in Baqy the crime is committed against the Islamic state and has a soft punishment. So, unlike Moharebeh that even if the criminal does not use the weapon and he just take it (no casualties) he may be subject to death penalty. In Baqy, the rebels will be sentenced to capital punishment only if they use weapons. It should be noted that Baqy is committed only by group of people and not just a single person.

Baqy is per se a political crime in Sharia. Based on Islamic principles, Baqy is committed by group of armed rebels using weapon against a just and fair Islamic state (democratic state) and a just and wise Imam (governor)[214]. So, if the governor is tyrant or unjust or the crime is committed against an unfair Islamic state, the crime of Baqy is not committed.

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[211] Sayed Ali Musavi, IBID, 102.
[212] IBID.
[213] Islamic Penal Code of the Islamic Republic of Iran – Book One & Book Two, IBID.
[214] Saeed Ziaeifar, Jurisprudential Study of the Characteristics of Prostitution and Overthrow, Political Science, Bagher al-Olum University, Vol 24, No 95 (2021), 27.

3.2.1.6. Efsad-e-fel-arz

Efsad-e-fel-arz or Corruption on Earth is the sixth Had crime which is punishable by death penalty. This crime encompasses wide criminal acts which is against criminal law principles. Because a crime must have limitation border and define specific criminal acts. In the previous penal code, Moharebe and Efsad were considered as a one crime. However, in the current penal code, the two crimes are separated.

Like all Hodud crimes, Efsad is taken from Sharia. The source of criminalization is Quran 5:32: "That is why We ordained for the Children of Israel that whoever takes a life—unless as a punishment for murder or mischief in the land—it will be as if they killed all of humanity; and whoever saves a life, it will be as if they saved all of humanity. ˹Although˺ Our messengers already came to them with clear proofs, many of them still transgressed afterwards through the land"[215]. The word mischief in the land which is written in the verse is Efsad or corruption on Earth. Some Shia jurists believe that Efsad is broader than Moharebeh by referring to the aforementioned verse[216].

Efsad or corruption is punishable by death penalty. The criminal acts must be extensive or vast and they are in the article 286 as extensively commits felony against the bodily entity of people, offenses against internal or international security of the state, spreading lies, disruption of the economic system of the state, arson and destruction of properties, distribution of poisonous and bacterial and dangerous materials, and establishment of, or aiding and abetting in, places of corruption and prostitution, [on a scale] that causes severe disruption in the public order of the state and insecurity, or causes harsh damage to the bodily entity of people or public or private properties, or causes distribution of corruption and prostitution on a large scale[217].

This provision of the penal code has expanded the scope of the death penalty to all those who are convicted of "spreading corruption on Earth." Article 286 has failed to define this vague offense or the threshold of what constitutes an "extensive level" that is required for a certain conduct to amount to "spreading corruption on Earth." Therefore, judges have been given a high degree of discretion to interpret Article 286. Independent lawyers have frequently pointed out the flaws in such judgements. For example, veteran lawyer Mohammad Hossein Aghasi said he noticed that in many cases judges did not pay attention to the details of the law[218].

[215] Al-Ma'idah, Verse 32. https://quran.com.

[216] Ali Yazdani, Hosein Ahmari, Mostafa Farajipour, Social Health, Corruption on Earth and Moharebeh from Islamic Jurisprudence viewpoint, Ethical Research Journal (2021), 331.

[217] Islamic Penal Code of the Islamic Republic of Iran – Book One & Book Two, IBID.

[218] FIDH, The Widespread Use of the Death Penalty in Iran, LDDHI (2020), 14.

Many of the offensive acts in the article is severe crimes such as extensively commits felony against the bodily entity of people that can reach to the level of international crimes such as genocide or crime against humanity etc. In this case, determining capital punishment is more adaptable to human rights standards. Because although human rights instruments are against capital punishment, they define criteria for countries which have not abolished death penalty. In article 6 of International Covenant on Civil and Political Rights the severity of crime is a critical criterion for using capital punishment. "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court". Therefore, the crime which is punishable by death penalty must be the most serious crime. Some scholars argued that the phrase 'the most serious crimes' is vague and it cannot ensure universality for the protection of the right to life. Moreover, the article posits that this discretion allows states to undermine human dignity and the concept of universal human rights by challenging their universality[219]. However, the Human Rights Committee defines the phrase as "The term the most serious crimes" must be read restrictively and appertain only to crimes of extreme gravity, involving intentional killing. Crimes not resulting directly and intentionally in death, such as attempted murder, corruption and other economic and political crimes, armed robbery, piracy, abduction, drug and sexual offences, although serious in nature, can never serve as the basis, within the framework of article 6, for the imposition of the death penalty"[220]. It seems that the committee recognizes murder or crimes that result in killing intentionally in nature as the grave crimes which are punishable by death penalty for states who insists on using capital punishment as a penalty for some specific crimes. In the article 286 of Islamic penal code, only the act of 'extensively commits felony against the bodily entity of people' which results in killing is compatible with the committee's interpretation from article 6 of the Covenant. It is transparent that determining death penalty for such an illegal act of 'spreading lies' is totally against human rights norms even if it is committed widely.

[219] Billy Holmes, Non-universal Human Rights? How Article 6 (2) of the International Covenant on Civil and Political Rights Undermines Human Rights, International Human Rights Law Review (2020), 99.

[220] Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life (2018), 9.

3.2.2. Capital punishment in Qisas

Qisas is a punishment for crimes against bodily entity of individuals. It mainly encompasses homicide and determines punishments for murder and battery. Qisas per se is the implementation of *lex talion* or an eye for and aye. In the article 16 of Islamic penal code is it determined as: "Qisas is the main punishment for intentional bodily crimes against life, limbs, and abilities which shall be applied in accordance with Book three of this law"[221].

Qisas is taken from Quran and it codified in Islamic penal code of Iran by Sharia. Qisas is a punishment for an intentional homicide and the implementation of it is mentioned in several Verses and Surah of Quran such as 2:178, 179, 183, 4:92, 93, 5:32, 35, 17:33, 44:40, 41[222].

Unlike Hodud crimes which are a violation of a claim of God and committed against him, in Qisas the criminal behavior is against persons and it violates the people's rights, i.e. the right to life. In other words, it is a claim of men and not God. Therefore, unlike implementation of Hodud crimes which can be suspended or terminated in the occultation of twelve Imam of Shia[223], Qisas can be halted only by forgiveness of the victim (before his death) or his next kin. As the author explained, based on Shia jurisprudence, the implementation of Hodud crimes during occultation of twelve Imam of Shia is against Islamic principles which in turn is contrary to article 4 of the Constitution of Iran and therefore, Hodud punishments should be halted. However, regarding Qisas, there is no disparity between Islamic jurists about the punishment of Qisas. Capital punishment in Qisas is justified with the Constitution of Iran where article 22 of the Constitution excluded right to life under all circumstances and it can be derogated.

Although Qisas is considered by Islam and Sharia and the retaliation can be applied as a punishment, the Quran strongly persuades Muslims to forgive culprits. In Quran 2:178 where the Quran determines Qisas for intentional killing, it then immediately proposes forgiveness by saying "But if the offender is pardoned by the victim’s guardian" the penalty will change from Qisas to Diya or compensation which is the blood money.

Capital punishment is a penalty of murdering or killing intentionally in Islamic penal code of Iran. In crimes subject to the punishment of Qisas, Shia fiqh and the corresponding Iranian legal code affirm reciprocal death for homicide in intentional murder and Diya in unintentional homicides. The Iranian penal code stipulates that the surviving heirs of an intentional murder victim may also decide whether to demand like punishment or forgo it. In cases where the victim's next kin accepts Diya, the charge is effectively pled down to an unintentional murder.

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[221] Islamic Penal Code of the Islamic Republic of Iran – Book One & Book Two, IBID.

[222] Maryam Ashori, Mohsen Khoshnamvand, Qisas in Islam and its Educative Aspects, The Imam Khomeini Education & Research institute (2016), 45.

[223] See Chapter 3.1.3.

Should a man kill a woman and the victim's next of kin demand retribution, Shi'i jurisprudence and Iranian law require that they pay one half of the Diya to the offender's family because the Diya of a male is twice that of a female[224].

The Islamic penal code of Iran determines the crime of murder under four conditions[225].

First, when the criminal intends to kill specific or unspecified persons and the crime of murder committed. Second, when the perpetrator commits an act intentionally against a person which leads to homicide and he does not intend to kill him but he was aware that his act would lead to homicide. Third, when the criminal neither intends to kill a person nor his act is lethal typically but the victim has an unusual or specific characteristic such as infant, illness or old age or particular local or time condition that homicide is committed by criminal and the perpetrator knew the victim's characteristic or that condition. Forth, when the criminal intends to commit homicide without intending to kill a specific person or a group of individuals (randomly) and the murder is committed. The punishment of the crime of murder is death penalty in article 381 of the penal code.

As the author elaborated, based on international human rights instruments, capital punishment is justifiably for the most serious crimes and they are limited to murder or crimes that result in killing intentionally. However, even implementing capital punishment should not be in contrary to the provisions of international human rights instruments such as ICCPR. It means that the general human rights norms and standard such as non-discrimination, non-arbitrary deprivation of life or torture, satisfying legality and proportionality terms in limiting the rights, should be fulfilled. Therefore, even using capital punishment should be in accordance with human rights norms without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth and so forth.

In the Islamic penal code of Iran, there are several discriminations regarding using capital punishment. In the penal code, there are several impunities that prevent death penalty for certain perpetrators and discriminatory impunities are conferred. According to the article 301, if the murderer is father or grandfather of the victim, he will not be sentenced to death penalty. In another impunity, if the killer is Muslim and the victim is non-Muslim, the murderer will not be punished by death penalty. This discriminatory view results in anarchism in Iran's community. In many cases, fathers know the impunity which is given by the penal law. In February 2008, a man took the law into his own hands when he stoned his 14-year-old daughter,

[224] Arzoo Osanloo, When Blood Has Spilled: Gender, Honor, and Compensation in Iranian Criminal Sanctioning, IBID, 310.

[225] Article 290, Islamic Penal Code, (2013). https://rc.majlis.ir/fa/law/show/845048.

Sa’eedeh, for her relationship with a boy in Zahedan[226]. The man said that he had shot his daughter four times after stoning her.

3.2.3. Capital punishment in Tazirat

Tazirat per se is punishments which are inferior than Hodud and they are considered for minor crimes. Tazirat is taken from Shari to Islamic penal code and according to Islamic principles, minor sins are punishable by Tazirat punishments. In the article 18 of the penal code, Tazirai is defined as "Ta’zir is a punishment which does not fall under the categories of hadd, qisas, or Diya and is determined by law for commission of prohibited acts under Shari’a or violation of state rules. The type, amount, conditions of execution as well as mitigation, suspension, cancellation and other relevant rules of ta’zir crimes shall be determined by law"[227].

Islamic jurists define Tazirat as kind of Sharia punishments which unlike Hodud type, amount and conditions of execution are not specified by Sharia and they are under discretion of the Islamic judge. Muhaqqiq al-Hilli defined Tazirat in his book Mukhtasar al-sharayi' as, any act which has a certain punishment is Had and any act which has not a specific punishment is Tazir[228].

The importance of Tazirat in (Islamic) criminal justice and penal policy of Islam is when the punishment of those who have committed Hodud crimes or crimes against persons but cannot be sentenced to the appropriate punishment for procedural reasons (e.g. because of uncertainty, or pardon by the victim’s next of kin, or lack of legally required evidence) or for the punishment of those who have committed acts that resemble these crimes but do not fall under their legal definitions.

As Tazirat should be inferior penalty than Hodud and Qisas based on Islamic principles, capital punishment is excluded from Tazirat. In Islamic penal code, Tazirat is mainly determined for imprisonment or lashing which is gently than Hodud in quantity and quality.

However, in the penal code, the penal policy of Islamic republic is different from Islamic principles. In the penal code, if some Tazirat crimes reach to a level of intensity, it will change to the crime of Efsad-e-fel-arz or Corruption on Earth which is punishable by death penalty. For example, if the crime of fraud which is punishable by imprisonment, is committed extensively it is no longer Tazir crime, it is regarded as Efsad. This penal policy is totally in contrary to Islamic principles and norms. Because, firstly, Tazirat should be inferior than Hodud. Unlike Tazirat, the quantity and quality of Hodud punishments is defined by Sharia.

[226] Quds newspaper, 13 February 2008.
[227] Islamic Penal Code of the Islamic Republic of Iran – Book One & Book Two, IBID.
[228] M.J. Habibzadeh A. Alipour, The prohibition of capital punishment as an Islamic penalty (taâzir) in the Shia jurisprudence, Journal of Studies in Islamic Law and Jurisprudence, Vol 5, Issue 9 (2013), 44.

For example, in Tazirat the amount of lashing is flexible by 74 lashes and it is under discretion of the Islamic judge. But in Hodud, the quantity is defined by Sharia and it is unchanged. Changing the nature of certain Islamic punishments and reaching it to another criminal acts which are punishable by death penalty is against Islamic norms and article 4 of the Constitution of Iran. But, it is transparent that justice is usually under discretion of political discretion.

CONCLUSION

Capital punishment has been used in several societies as a punishment for committing crimes. Although in the past, methods of execution were used brutally against criminals and death penalty was used almost for perpetration of many crimes, it has been applied gradually only for grave crimes. After emergence of the human rights instruments which regarded the right to life as a fundamental right and efforts of the international community to restrict capital punishment, it has been criticized profoundly and states started to abolish it. However, as the International Covenant on Civil and Political Rights has proscribed deprivation of life arbitrary, the right to life can be derogated. Meanwhile, those states who have not abolished death penalty are obliged to use it only for serious crimes. The most serious crimes must be read restrictively

and appertain only to crimes of extreme gravity, involving intentional killing. Therefore, determining capital punishment for sexual acts is in contrary to the human rights instruments and human rights norms.

Capital punishment is applied under penal policy justifications in societies. The main penal policy of capital punishment is justified as: deterrence, social solidarity and retribution. Although it may seem that capital punishment can promote human rights as it protects people's rights, the right to life, by eliminating the violator or criminal, it is regarded inhuman punishment and in contrary to human rights norms. Moreover, the deterrence theory has been unable to terminate homicide. The second justification for resorting to capital punishment is social solidarity. In fact, capital punishment is regarded as a means to maintain public order, health and welfare of the society. In undeveloped societies where the revenge atmosphere is widespread, if the *lex talionis* is not applied, there may be a risk of chaos. Because in those societies, even imprisonment would not mitigate the anger of people. Moreover, in Islamic societies and states, implementation of capital punishment is justified by Islamic notions.

The majority people of Iran are Muslims. For a long time, Iranian have centralized around Islamic notions and values. Even before the Islamic revolution 1979, Islam had played an important role in the community of Iran. Before the Persian Constitution Revolution 1906, there was no written law and trials were held arbitrary. After the Persian revolution and establishment of Persian constitution, the legal codes were codified and it could improve public order, safe and health of the Iranian society. It had positive consequences on reforming capital punishment and eliminating arbitrary trials and torturous death penalty. Even in the Persian constitution 1906, Islamic principles, notions and values were highly prioritized and any legal codes should have been compatible with Islamic principles. This situation demonstrates the importance of Islamic principles in Iranian's community. After the Islamic revolution, the Constitution of Iran has followed the previous constitution and in article 4, the Islamic principles are prioritized for enacting any legal codes.

Capital punishment in Iran can be halted. Although the right to life can be derogated based on article 22 of the Constitution, death penalty can be terminated for certain crimes under specific circumstances. Because as the Islamic principles hold the highest hierarchical position among all other articles of the Constitution and legal codes of Iran, using capital punishment for certain crimes is against Islamic criteria and should be terminated. The aforementioned crimes are Hodud crimes which are punishable by death penalty. Many grand Ayatollahs or Islamic jurists

believe that during the occultation of twelve Imam of Shia, the execution of Hodud crimes is against Islamic principles and it must be ceased; and no one is eligible or competent to implement Hodud punishments. Many of Hodud crimes is crimes against chastity in Islam. As they are terrible sins, Sharia regards punishments for perpetrators. The Islamic penal code of Iran has taken Hodud crimes from Sharia. The specified Hodud crimes which are punishable by death penalty in the Islamic penal codes are: Zina or adultery and fornication, Levat or sodomy, Sabb-e nabi or Swearing at the Prophet, Moharebeh, Baqŷ or Rebellion and Efsad-e-fel-arz or Corruption on Earth.

Regardless of Qisas which is a punishment for crimes against bodily entity of individuals and a claim of men and not God, the implementation of capital punishment for Hodud crimes are in contrary to Islamic norms and principles. Because, firstly, according to many Islamic Shia jurists (Ayatollahs), using Hodud punishments during the occultation of twelve Imam of Shia defames the reputation of Islam or dispels hatred environment against Islam. Secondly, the way of proofing Hodud crimes is complicated and extremely difficult. All Hodud are proven by testimony of two or four fair persons or by four-time confessions of the criminal. According to Islamic criteria, the Islamic judge should dissuade the criminal from confession in Hodud crimes. Because, Hodud crimes are considered big sins and in Islam, the sinner should confess just in private with God. Regarding the testimony, the major requirement is that a witness should have a strong justice. Based on Sharia, a person can be considered just and fair if he or she does not commit a major sin or does not insist on perpetrating minor sins. This requirement is mentioned in article 181 of Islamic penal code. In this issue, a person will lose his justice by watching Hodud crimes which are heinous sins and therefore, he is ineligible for testimony. Finally, even those Shia jurists who are proponents of using Hodud crimes even during the occultation of twelve Imam of Shia verify that these crimes should be applied by grand Ayatollahs and not ordinary judges; and with few number of grand Ayatollahs or Islamic jurists, it is almost impossible to use the punishment. Therefore, capital punishment for certain crimes, Hodud crimes, should be terminated as using death penalty for them is in contrary with Islamic principles and article 4 of the Constitution of Iran.

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