The Death Penalty in the United States of America and the Islamic Republic of Iran: A Comparative Study

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I. Introduction

The United States (U.S.) and Iran are two political models very different, with important disagreements in multiples areas. The first one is characterized by being a western democracy and a rule model for other democratic States around the world. The second one is a theocratic State whose political model is commonly rejected by the majority of the democracies at this moment. However, despite the advances in civil rights that have characterized the turbulent history of the U.S., the country still have something very common with Iran: the application of the death penalty. How the U.S. can be the only western democracy in still applying the death penalty? What are the main reasons for this? What are the reasons for Iran to share this cruel punishment in some way with a political enemy like the U.S.? What are the similarities and differences between them? This work aims to investigate, *grosso modo*, the death penalty in the U.S. and Iran in order to compare and contrast these two types of capital punishment. We will not study the specific processes of imposition of the death penalty in these countries (their most technical specifications), but we will analyze generally their models of death penalty and the legal grounds that still support this punishment.

II. The Death Penalty in the United States legal system

Of all the western democracies United States is the only one to still support the death penalty as the worst punishment in the criminal legal system.[2] For abolitionists this is definitively a shame and an uncivilized atrocity; but for supporters generally this is part of an old and profound tradition from the very beginning of the country. Since 1976 –year when the contemporary death penalty regime in the U.S. took place- 1,392 people have been executed by the State as the last step of the very long and tortuous process of death penalty cases.[3] Of all of them, 1133 of these executions occurred in the south of the country, and to be more precise 629 of them have been in the southern states of Texas and Oklahoma.[4] Notwithstanding, the number of executions in recent years has decreased progressively. For example, in the year of 1999 the U.S. criminal justice system executed 98 people sentenced to death penalty, whereas in 2013 only 39 suffered this extreme punishment and just 33 people did it until November of the current year.[5] The trend has been to decrease in the use of the death penalty, and this is evident in some individual states. For instance, recently

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[2] F.E. Siring, *The Contradictions of American Capital Punishment* 5 (2003).
[3] Death Penalty Information Center, *see* http://www.deathpenaltyinfo.org/executions-year.
[4] *Id.*, *see* http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976.
[5] *Id.*, *see* note 1.

the states of New Jersey[6] (2007), New Mexico[7] (2009), Illinois[8] (2011), and Maryland (2013) legislatively abolished the death penalty.[9] The case of New York (2004) is peculiar, because the state's legislature declined to approve another bill establishing the death penalty after the last one was struck down by the New York Court of Appeals.[10]

Until the ratification of the Fifth Amendment of the Bill of Rights in 1791, the death penalty as punishment was used arbitrarily from the very beginning of the Thirteen Colonies in 17th Century and the pre-constitutional period of 18th Century.[11] The Fifth Amendment limited the power of the federal Government in several areas, and one of them is the faculty of the State to take someone's life. Specifically, this constitutional precept established, *inter alia*, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury … nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law…"[12] However, the early use and implementation of the death penalty remained in the scope of the police power of individual states, not exclusively in the hands of the federal Government.[13] After World War II, nevertheless, the apathy toward the death penalty increased. Apparently the world, and also the U.S., had seen too much blood during the entire first half of 20th Century. For that reason, as Zimring establishes, these variations regarding the death penalty regulation and its implementation decreased notably after World War II.[14]

Notwithstanding, although the U.S. experienced an important period of possible abolition of the death penalty during the post-war, from the decade of 1960 the opposite happened. Certainly there are several causes for this, but one is obviously the main. Since the beginning of 1960s the country suffered a long period of increase in violent crimes, and this period lasted without any substantial relief until the 1990s.[15]This criminal wave period –influenced by the introduction of new illegal drugs and the increase number of addicts- turned most of the urban centers into serious dangerous spaces, and the political response was immediate.[16] Professors Carol and Jordan Steiker described this situation as follows:

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[6] N.J. Stat. Ann. § 2C:11-3 (West 2007).
[7] N.M. Stat. Ann. § 31-18-14 (West 2009)
[8] 725 Ill. Comp. Stat. Ann. 5/119-1 (West 2011).
[9] L.S. Entzeroth, *The End of the Beginning: The Politics of Death and the American Death Penalty Regime in the Twenty-First Century*, 90 Or. L. Rev. 797, 799 (2011-2012).
[10] *See People v. Lavalle*, 817 N.E.2d 341 (N.Y. 2004).
[11] K.L. Patterson, *Acculturation and the Development of Death Penalty Doctrine in the United States*, 55 Duke L.J. 1217, 1224 (2006); R. Coyne & L.S. Entzeroth, *Capital Punishment and the Judicial Process* 5 (2d ed. 2001).
[12] U.S. Const. amend. V.
[13] Patterson, *supra* note 10, at 1224.
[14] Zimring, *supra* note 1, at 5.
[15] *See* State-by-state and national crime estimates by years, Bureau of Justice Statistics, http://www.bjs.gov/ucrdata/Search/Crime/State/RunCrimeStatebyState.cfm.
[16] *See* W.J. Stuntz, *The Collapse of American Crime Justice* 2 (2011); G.P. Fletcher, *A Crime of Self Defense: Bernard Goetz and the Law on Trial* (1990) (analyzing the legal process that ended with the acquittal of Goetz when he was accused of killing four black men when allegedly they were going to steal him). *Se also* M. Gladwell, The Tipping Point: How Little Things Can Make a Big Difference 137 (2002).

> … the strong emotions of fear and anger that rising crime rates evoked from the public led politicians to seek to capitalize on these developments through self-consciously crime-driven campaign strategies. Starting in the 1960s, politicians like the then-California Governor Ronald Reagan and President Nixon pushed the issue of crime to the forefront of their successful campaigns in state and national politics… The combination of campaign and media attention to the intrinsically gripping problem of violent crime ensured the ongoing high salience of crime in the public mind and the steady popularity of "tough on crime" policies. In this atmosphere, the death penalty became a particularly potent symbol, offering politicians a way to signal in powerful shorthand their claims of toughness.[17]

The capital punishment returned with a lot of power as a measure of criminal policy to stem the serious criminal wave. Politicians like Reagan and Nixon –both former presidents of the nation- were the symbols of a political class that took advantage of the crime to get more political power.[18] In addition, the emergence in this period of the figure of the victim and the victims' rights and its increasingly important presence in the political and judicial spheres helped to legitimize the greater presence of extreme measures of criminal policy as the death penalty.[19] In summary, the three main factors that led to the resurgence of the death penalty in the 1960s were the following: (1) the serious increase in crime during this period; (2) the use of crime as a political tool to obtain more political power, and (3) the emergence of the victim –and victims' rights- in the judicial stage. This was, *grosso modo*, the political scenario behind the increasing use of death penalty since 1960s and the first intervention of the U.S. Supreme Court in the capital punishment regime.

For a long time, the Supreme Court never addressed constitutional controversies about the death penalty, while the state and federal courts imposed few restrictions to this punishment.[20] Notwithstanding, this period ended in 1972 with one of the most important decisions, if not the most important, on the death penalty, *Furman v. Georgia*[21]. According to a remarkable number of academics, this decision was based on the grounds that the death penalty is not equal to any other punishment ("death is different").[22] In essence, in *Ferguson* the Supreme Court finally examined the capital punishment in the light of the Eight Amendment, which provides, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted"[23]. The case

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[17] C.S. Steiker & J.M. Steiker, *Death Penalty and Mass Incarceration: Convergences and Divergences*, 41 Am. J. Crim. L. 189, 192 (2013-2014). *See also* M. Mauer, *Race to Incarcerate* 9, (rev. ed. 2006), at chs. 3, 4, 10.

[18] *See* C. Burnett, *The Failed Failsafe: The Politics of Executive Clemency*, 8 Tex. J. C.L. & C.R. 191, 194 (2003); W.W. Wilkins, *The Legal, Political, and Social Implications of the Death Penalty*, 41 U. Rich. L. Rev. 793, 803 (2007).

[19] *See* D.E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. Rev. 255 (2005).

[20] *See* Part I: *History of the Death Penalty*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/part-i-history-death-penalty

[21] *Furman v. Georgia*, 408 U.S. 238 (1972).

[22] Steiker & Steiker, *supra* note 16, at 200. See also *Furman*, 408 U.S. at 286 (1972) (Brennan, J., concurring); *id*. at 306 (Stewart, J., concurring).

[23] U.S. Const. amend VIII.

arrived to the Supreme Court because in the early 1970s several states had discarded mandatory sentences, and each legal system allowed juries practically complete discretion to decide whether to sentence de defendant to die or not in capital punishment cases.[24] In other words, the arbitrariness in the imposition of death penalty –particularly against racial minorities like the black people in southern Georgia- was legally unsustainable. For this reason, in a five-to-four decision, the Supreme Court determined that allowing unfettered discretion in imposing the capital punishment violated the Eight Amendment of the Constitution.[25]

Nevertheless, and this is one of the most controversial points of this remarkable case, the Supreme Court never found unconstitutional *per se* the death penalty under the Eight Amendment of the Bill of Rights.[26] However, the Supreme Court invalidated (in *praxis*) 39 laws of death penalty in this *per curiam* Opinion, which eliminated the possibility of applying the death penalty in the next few years. In a decision where the judges issued individual concurring and dissident opinions, Justice Douglas concluded that, "…these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual" punishments".[27] On the other hand, Justice Brennan has found the death penalty a unique case of punishment in the U.S. criminal legal system, which violate *per se* the Eight Amendment of the Constitution. Specifically, in his concurring Opinion he mentioned, "… Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than those the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not"[28].

Unfortunately, the criterion of Justice Brennan, in one of his most remarkable concurring opinions, never prevailed in this decision or in any subsequent. Furthermore, this decision –that for many was a countermajoritarian one- has resulted in the requirement to each state and federal jurisdiction a system with less arbitrariness in the implementation of the death penalty, which means that this type of punishment could be perfectly constitutional if the states configure more specific schemes of adjudication in capital punishment cases.[29] Was this really countermajoritarian? Or this decision was the lighthouse that guided the states to make regulations of death penalty consistent with *Furman*? Evidently was countermajoritarian –at least in theory- for a little period of time. The states legislatures, and the federal Government, worked immediately on legal schemes according to the decision in Furman. For instance, several states drafted laws removing drastically discretion from the jury or judge in death penalty

[24] *Furman*, 408 U.S. at. 239-40.
[25] *Id.*
[26] *Id.*
[27] *Id*. at. 256-57.
[28] *Id.* at 305. In fact, only Justice Brennan and Justice Marshall concluded that the Eight Amendment prohibited the death penalty altogether an on that ground voted to reverse the judgments sustaining the death penalties. *See also* Id. at 370-371 (Marshall, J., concurring); *Lockett v. Ohio*, 438 U.S. 586, 598-99 (1978).
[29] Zimring, *supra* note 1, at 9.

cases, which resulted in new systems of mandatory capital punishment for some crimes.[30]

On the other hand, the rest of the states that never passed mandatory sentencing regulation worked into guides and rules based on section 210.6 of the Model Penal Code[31]. This was the case of Georgia –the same state in the decision of *Furman*- in 1976, when the Supreme Court in *Gregg v. Georgia*[32] upheld it's renew death penalty statute. Contrary to all the states that adopted models of mandatory sentences in accordance with the decision of *Furman*, *Georgia* changed its scheme of imposition of death penalty and adopted the Model Penal Code recommendation in section 210.6.[33] Basically, this precept of optional statute established that the sentence of capital punishment is adequate only to cases of murder and only after a finding of at least one aggravating circumstances not outweighed by some substantial mitigating factor within a bifurcated process.[34] Validating the new death penalty of Georgia, four years after the same Court struck down the previous one, the Supreme Court finally concluded:

> While Furman did not hold that the infliction of the death penalty per se violates the Constitution's ban on cruel and unusual punishment, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice.
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> While some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate, the fact is that such standards have been developed. When the drafters of the Model Penal Code faced this problem, they concluded "that it is within the realm of possibility to point to he main circumstances of aggravation and of mitigation that should be weighed and weighed against each other when they are presented in a concrete case [citations are omitted]. While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary.[35]

Based on this, the three-member –Justices Stevens, Powell, and Stewart- plurality decision in this controversial case determined that the death penalty is not *per se* unconstitutional under the Eighth Amendment of the Constitution. Moreover, the Supreme Court concluded that the modifications that Georgia introduced to its capital punishment statute prevented the arbitrary and capricious application of death penalty in this racially divided state of the South.

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[30] A.M. Schreiber, *States That Kill: Discretion and the Death Penalty- A Worldwide Perspective*, 29 Cornell Int'l L.J. 263, 291 (1996).

[31] Model Penal Code §§ 210.6(1)-(2) (Proposed Official Draft 1962). This was a statutory text made by the American Law Institute (an independent organization) with the intention of being a statutory guide for the states. However, in 2009 this model was abandoned as unworkable

[32] *Gregg v. Ga.*, 428 U.S. 153 (1976). *See* Am. Law. Int., *Report of the Council to the Membership of the American Law Institute on the Matter of the Death Penalty* 4 (2009). *See also* C.S. Steiker & J.M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 Tex. L. Rev. 353 (2010).

[33] Coyne & Entzeroth, *supra* note 10, at 117.

[34] Model Penal Code §§ 210.6(1)-(4).

[35] *Gregg*, 428 U.S. at 883, 886.

As a result of this leading decision, in 1976 the death penalty was restarted again throughout the country (35 states and the federal jurisdiction).[36]This was the moment in which the Supreme Court could be a countermajority institution, but rejected it. Ironically, one of the authors of the plurality Opinion in *Gregg*, Justice Stevens, commenting the case in 2008 –more than four decades later- said:

> In sum, just as Justice White ultimately based his conclusion in Furman on his extensive exposure to countless cases for which death is the authorized penalty, I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents "the pointless and needless extinction of the life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State patently excessive and cruel and unusual punishment violative of the Eight Amendment.[37]

Notwithstanding, the years after *Gregg,* when the states and the federal jurisdiction began to promote the death penalty dramatically to tackle the serious problem of criminality, were years in which the Supreme Court, although continued endorsing the constitutionality of the death penalty, had to limit it to its massive use. This happened firstly in 1978 in the case *Lockett v. Ohio*[38], in which the Supreme Court ruled that in the capital punishment cases the individualized sentencing according *Furman* and *Gregg* is a crucial and necessary element.[39] In this system, the burden of proving the aggravating factor is on the prosecution during the second part of the process (the sentencing phase), and this evidently can be different among the jurisdictions.[40] To effectively sentencing a person to death penalty, it is necessary to find al least one aggravating factor, but of course the defendant during this phase of the bifurcated process has the right of introducing mitigating factors to reduce his moral culpability and to convince the jury to impose a lesser sentence to death.[41] Further, the defendant may introduce as much evidence on mitigation factors as he understands necessary. He is not restricted to use only the factors established in the law, as was pretended in the controversy of *Lockett*.[42]

On the other hand, regarding the type of offender that is not allow to be punished with the death penalty, in the case *Coker v. Georgia*[43] the Supreme Court determined that a person guilty of raping an adult woman should not suffered the death penalty. In this decision, the Court concluded that the application of the death penalty to a rapist in Georgia –as well in the other states-is

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[36] This same year, the Supreme Court review the constitutionality of the revised capital punishment statutes of Georgia, Florida, Texas, Louisiana, and North Carolina. The Supreme Court concluded that the statutes of Georgia, Florida, and Texas were constitucional, but not the death penalty regulations of Louisiana and North Carolina. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Prollit v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

[37] *Baze v. Ress*, 553 U.S. 35, 86 (Stevens, J., concurring).

[38] *Lockett v. Ohio*, 438 U.S. 586, 598-99 (1978).

[39] *Id*. at 604-05.

[40] Coyne & Entzeroth, *supra* note 10, at 329.

[41] *Id.* at 389.

[42] L.J. Palmer, Jr., *The Death Penalty: An American Citizen's Guide to Understanding Federal and State Laws* 1, 115-17 (1998).

[43] Coker v. Georgia, 433 U.S. 584 (1977).

disproportionate according to the Eight Amendment. Defending the application of the capital punishment only to cases of murder, the Supreme Court said, "[r]ape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life… We have the abiding conviction that the death penalty, which "is unique in its severity and irrevocability [omitting citation] is an excessive penalty for the rapist who, as such, does not take human life"[44].

After these landmark cases, particularly *Furman* and *Gregg*, each state applied with great discretion the regulation on death penalty during the 1980s and 1990s. This was the period in which the cases of capital punishment rose in a vertiginous way and without precedent in the nearby history. The Supreme Court began to regulate more often controversies on death penalty from the beginning of the new century. In 2002, the Court addressed the crucial controversy regarding the imposition of the capital punishment to mentally retarded offenders. In *Atkins v. Virginia*[45] the Supreme Court have found unconstitutional under the Eight Amendment the imposition of death penalty to a mentally retarded person. This case struck down part of the precedent established in *Penry v. Lynaugh*[46], in which the Court upheld the death penalty for mentally retarded offenders. In *Atkins*, nevertheless, the Court's rationale was different. In a majority Opinion written by Justice Stevens, the Court found that mentally retarded persons are individuals with less capacity of guilt than the ordinary people. For this reason, the imposition of death penalty in these cases is considered an unusual and cruel punishment under the Eight Amendment.[47]

Later, in 2005 the Supreme Court decided the important case of *Roper v. Simmons*[48], in which the Court overturned the precedent of *Stanford v. Kentucky*[49]. In the latter case, the Court upheld the imposition of the capital punishment on sixteen and seventeen-years-olds. However, in *Roper* the Supreme Court examined the imposition of this punishment to minors under the Eight Amendment and concluded, "[a]s in Atkins, the objective indicia of consensus in this case –the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice provide sufficient evidence that today our society views juveniles, in the words Atkins used respecting the mentally retarded, as "categorically less culpable than the average criminal"[50]. The immaturity to understand the effects of criminal actions; the diminished culpability of juveniles and the general perception in the country to abolish this punishment to sixteen and seventeen years old were the main facts to sustain that the application of capital punishment to them violates the Constitution. This was consistent with the interpretation of the Eight Amendment according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in constitutional law.

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[44] *Id*. at 598.
[45] *Atkins v. Virginia*, 536 U.S. 304 (2002).
[46] *Penry v. Lynaugh*, 492 U.S. 302 (1989)
[47] *Atkins*, 536 U.S. at 319-21.
[48] *Roper v. Simmons*, 543 U.S. 551 (2005).
[49] *Standoford v. Kentucky*, 492 U.S. 361 (1989).
[50] *Roper*, 543 U.S. at 567.

Few years later, the limitations of the Supreme Court on the death penalty continued. In *Kentucky v. Louisiana*[51], in 2008, the Court addressed the issue on whether or not he state can apply death penalty to a person convicted of child rape. Again, the Supreme Court have found this unconstitutional and reiterated that the death penalty should be strictly limited to the worst and most egregious crimes and offenders.[52] In summary:

> The evidence of a national consensus with respect to the death penalty for child rapists, as with respect to juveniles, mentally retarded offenders, and vicarious felony murderers, shows divided opinion but, on balance, an opinion against it. Thirty-seven jurisdictions -36 States plus the Federal Government- have the death penalty. As mentioned above, only six of those jurisdictions authorize the death penalty for rape of a child. Though our review of national consensus is not confined to tallying the number of States with applicable death penalty legislation, it is of significance that, in 45 jurisdictions, petitioner could not be executed for child rape of any kind. That number surpasses the 30 States in Atkins and Roper and the 42 States in Edmund that prohibited the death penalty under the circumstances those cases considered.[53]

As we can see, the Supreme Court used again the decency analysis based on state legislation and the fact that only six states of fifty had the death penalty for child rape.[54] In addition to the fact that the Court reiterated that the capital punishment should be strictly restricted to cases of murder.[55] Nevertheless, we must to recognize it could be very dangerous sometimes that an important criterion to determine if a law is constitutional under the protection of the Eight Amendment depends on the movements of the state's legislatures. In recent times we have seen a decrease in the activity of the legislature to extend the application of the death penalty, but this does not mean it will remain the same. This pragmatic scope to understand the Eight Amendment and to interpret status and regulations of capital punishment will vary over the time depending on the different states legislatures and also the federal jurisdiction. What has been recently a movement of restrictions of the capital punishment in many legislatures could be in the future a force to expand the death penalty as it happened in the past (the post-Gregg period). However, fortunately the trend is another.

Several states like California[56], Connecticut[57], Indiana[58], Illinois[59], and New Jersey[60] have created special commissions to analyze the efficiency, fairness, cost-

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[51] *Kentucky v. Louisiana*, 554 U.S. 407 (2008).
[52] *Id.* at 420.
[53] *Id.* at 426.
[54] Entzeroth, *supra* note 8, at 816.
[55] *Kentucky*, 554 U.S. at 421.
[56] Cal. Comm'n on the Fair Adm. of Justice, *Report and Recommendations on the Administration of the Death Penalty in California* (2008).
[57] State of Conn. Comm'n the Death Penalty, *Study Pursuant to Public Act No. 01-151 of the Imposition of the Death Penalty in Conneticut* (2003).
[58] Ind. Criminal Law Study Comm'n, *The Application of Indiana's Capital Sentencing Law: Findings of the Indiana Criminal Law Study Commission* (2002).
[59] Ill. Comm'n on Capital Punishment, *Report of the Governor's Commission on Capital Punishment* (2002).

effectiveness, and appropriateness of the capital punishment. Several concerns emerged from these reports, for example the extremely high cost of death penalty, the quality of the defense counsel, the evidence of potential racial discrimination in the sentencing process, and the clear danger of executing an innocent.[61] It is important to mention the case of the state of Kansas, in which the Government conducted a further study after limiting the death penalty in this state, and found that the cost of every capital punishment case was seventy percent more than ordinary noncapital cases.[62] The reaction of the states to these reports was to advance legislative limitations to capital punishment, or the abolition of the death penalty as we mentioned earlier. Further, some judicial and executive branches of individual states have stopped in certain cases the application of the capital punishment.[63] For that reason in 1999 there were 98 executions, while in 2013 only 39.

Are we going to abolish de death penalty based on its social uselessness rather than by its excessiveness as punishment (including the violation of an international human right)? I think so. The pragmatism of the most recent decisions of the Supreme Court limiting the death penalty clearly shows that. This will not happen tomorrow, but very probably in the next two or three decades.

Let's see now the complex legal framework of the death penalty in the Islamic Republic of Iran and to compare it with the legal framework of the capital punishment of U.S.

III. Legal Framework of the Capital Punishment in the Islamic Republic of Iran

According to Amnesty International, in the year of 2013 Iran carried out 369 executions, becoming the second country in the world with more number of people executed by death penalty after China.[64] The application of this punishment is according to the Islamic Sacred Law or Shari' a, its Arabic name. This is the first difference between the U.S. and Iran on capital punishment; the legal systems are extremely different because the legal source of the capital punishment in the first is the Law (statutes –also regulations- and jurisprudence) within a democratic system of Government with separation of State and Church, and in the second the principal legal source is the Shari' a, which is a legal system directly inspired by the Qur'an (Koran). In this way, Iran is characterized for being a theocratic State in which the supreme figure of Allah is considered not only the divine creator of all things, but also the main judge of truth.[65] While in the U.S. the death penalty can be abolished by individual states and by the

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[60] N.J. Death Penalty Study Comm'n, *New Jersey Death Penalty Study Commission Report* (2007).
[61] Entzeroth, *supra* note 8, at 816.
[62] Legislative Div. of Post Audit, State of Kan., Performance Audit Report: Costs Incurred for Death Penalty Cases: A K-Goal Audit of the Department of Corrections 10-19 (2003).
[63] Entzeroth, *supra* note 8, at 817.
[64] Amnesty International Death Penalty Report, *in* http://www.amnesty.org/en/death-penalty/death-sentences-and-executions-in-2013. (last time visited: 12/2/2014). *See also* Human Rights Watch 2014 Report, *in* http://www.hrw.org/world-report/2014/country-chapters/iran.
[65] H.R. Kusha, *Crime and Crime Control: A Global View* 83, 85 (Gregg Barak ed., 2000).

Congress in the case of federal jurisdiction, in Iran is different because there is no framework of discretion to abolish it according to the current legal system.

Nevertheless, not always this legal system of Iran was the same as nowadays. In 1906 the authorities of Iran began an important process of secularization, which had the result of the adoption of the Iranian Constitution of 1906 and the first Iranian Penal Code of 1912.[66] This opened the possibility that in 1925 began a period of modernization known as the Pahlavi Era.[67] As Kar says, this era was characterized by an innovative separation of the judiciary and the religion institutions (some kind of separation between State and Church in the majority of western countries), which was essential to achieve structural changes in the country.[68] However, this modernization movement created much discontent and anger in fundamentalist pro-Shari'a groups across the country. This was the beginning of the decline of the process of modernization and secularization of Iran, which lasted until the revolution of 1979.[69] Under Shah Muhammad Reza Pahlavi, the son of Reza Shah Pahlavi –who was forced to abdicate in 1941 primarily for his policies of education and women's rights- the judiciary came to recognized at least three types of modern law including criminal, civil, and administrative.[70]

Immediately this adoption of different types of law –in contradiction with the unique law system of Shari'a- provoked that the shahs of the Pahlavi regime were opposed to abbey this new legal scheme. Contrary to the Islamic Law, this renew justice system was based mostly on foreign legal models.[71] This was part of the triggers that caused harsh tensions between fundamentalist pro-Shari'a groups and followers (modernists) of the Pahlavi regime that led to the revolution in 1979.[72] In this was, the victory of the revolution led by Ayatollah Khomeini destroyed the possibility of further secularization of Law in Iran and placed the country in an pre-Pahlavi era. The Shari'a became again the only source of Law in the country, and the advances in the secularization of the State were repealed. The new regime after the revolution also used the Shari'a as the most optimal tool for instituting a repressive regime based on really cruel punishments (especially for dissidents). It was (it is) certainly an essential aspect in the domination or control of practically all the aspects of life of the Iranians. Let's see how it works in criminal law sphere.

The first fact that we must keep in mind is that under Articles 4 and 170 of the new Constitution of 1979 any secular norm conflicted with the Shari'a is not legally enforceable.[73] For example, Article 4 of the Constitution clearly establishes, "[a]ll civil, penal financial, economic, administrative, cultural, military, political, and other laws 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 fuqahã' of the Guardian

[66] S.H. Amin, *Middle East Systems* 51-59, 57 (Royston Limited 1985).
[67] M. Kar, *Shari'a Law in Iran, in Radical Islam's Rules* 41, 45 (Paul Marshall ed., 2005).
[68] *Id.*
[69] *Id.* at 46.
[70] H.R. Kusha, *The Sacred Law of Islam* 289, 134 (2002).
[71] *Id.* at 139.
[72] *Id*. at 139-40.
[73] Qanuni Assassi Jumhuri'I Isla 'mai Iran (The Constitution of the Islamic Republic of Iran) 1358 art. 4, 170 (1980).

Council are judges in this matter"[74]. In addition, under the regime of the Ayatollah Komeini all the courts created during the Pahlavi era were abolished by the new Supreme Court because they were contrary to the Islamic Law.[75] Furthermore, the new regime in 1988 declared that the Islamic Republic of Iran was a trusteeship of the Prophet, which empowered the Ayatollah Komeini as the Muslim ruler ordained by God to stand above all the divine rules and ordinances if it is in the best interests of the Muslim people and the State.[76] These were the foundations of the creation of the new theocratic State of Iran.

Unlike U.S., the criminal policy of Iran follows the rules of the Islamic Law system in which the behavior of individuals will be evaluated as they respect or not the rules of Allah through Islam. This is not the common western model of democracy in which the parliament is the only political institution authorized to pass bills on criminal law and punishments under the principle (constitutional principle in the case of the U.S.) of strictly separation of State and Church. In the criminal policy of Iran is quite the opposite. In this legal system, crimes are basically divided in pardonable or non-pardonable offenses.[77] The difference is quite simple. While the so-called crimes against God, like anti-state or anti-Islamic principles, are non-pardonable, the crimes against general public are considered pardonable.[78] In addition, the type of crime or offence determines the type of punishment according to the Shari'a.[79]

On the other hand, since 1982 the Parliament of Iran passed a regulation of penalties that are still part of the current criminal law system. These penalties according the Shari'a were incorporated into the first Islamic Penal Code of Iran of 1991. Basically, these types of punishments are divided into the following categories: (1) *Hadd* (boundaries); (2) *Qisas* (retaliation); (3) *Diya* (bloody money); (4) *Ta'zir* (corporal).[80] The current Islamic Penal Code of Iran (2013) defines Hadd as "… a punishment for which he grounds for, type, amount and conditions of execution are specified in holy Shari'a"[81]. This category imposed a specific and unmodified punishment for the different behaviors in the corresponding articles of the Islamic Penal Code.[82] In the Second Book of this Penal Code, the State punishes the offense of *Zina* under the category of *Hadd*[83]. Zina, according with this statute, "… is defined as sexual intercourse of a man and

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[74] Id. art. 4.
[75] Kusha, *supra* note 64, at 97-99.
[76] S. Zubaida, *Law and Power in the Islamic World* 210 (2003).
[77] Kusha, supra note 64, at 98.
[78] J. Womack, *Discretionary Death: A Comparative Analysis of Imposing the Death Penalty in the United States and Islamic Republic of Iran*, 16 Tulsa J. Comp. & Int'l L. 101, 108 (2008).
[79] Kusha, *supra* note 69, at 160-62.
[80] Iran Human Rights Documentation Center, *English Translation of Books I and II of the New Islamic Penal Code*, Art. 14, *see* http://www.iranhrdc.org/english/human-rights-documents/iranian-codes/1000000455-english-translation-of-books-1-and-2-of-the-new-islamic-penal-code.html#7. (last visited December 3, 2014).
[81] *Id.* art. 15.
[82] *Id.* art. 219.
[83] For the purpose of this work, it is necessary to know that Art. 136 of the Islamic Penal Code established that "[w]here anyone commits the same offense punishable by hadd three times, and each time the *hadd* punishments is executed upon him/her, the hadd punishment on the fourth occasion shall be the death penalty". *Id.* art. 136. In addition, we must to have in mind that drinking or smoking intoxicating drugs, like alcohol or cigars, are punishable by *hadd*. *Id.* art. 267-266.Therefore, the recidivism in these cases would entail the death penalty.

a woman who are not married to each other, and also provided that the intercourse is not done by mistake"[84]. And Article 224 specified:

> 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; in which case, the man who committed *zina* by coercion or force shall be sentenced to the death penalty.[85]

This is one example of crime and various modalities of commission that involve the imposition of the capital punishment. In fact, the Shari'a is extreme in cases involving sexual relations not permitted by Islam. In these cases the principle of proportionality practically doesn't exist. Neither in the case of the perpetration of *zina* when the man or the woman meets the conditions of *Ihsan*, which basically means that they are duly married people. In this situation (adultery), the punishment for both man and woman shall be stoning to death.[86] Furthermore, as we know Iran is one of the many countries in the world that criminalize homosexuality and the entire LGBT group. The use of criminal law to reproach practices associated with homosexuality is really drastic and extremely disproportionate (unjust, in fact). Article 233 of the Penal Code defines *Livat* "as penetration of a man's sex organ (penis), up to the point of circumcision, into another male person's anus"[87]. In relation to this, Art. 234 establishes "[t]he *hadd* punishment for *livat* shall be death penalty for the insertive/active party if he has committed *livat* 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 meets the conditions for *ihsan*) shall be the death penalty"[88].

In substantive terms, here is a big difference between U.S. and Iran. The U.S. Supreme Court has decided that the death penalty can only be applied to crimes of murder, as we explained earlier. On the other hand, Iran apply the death penalty at least to eight felonies, including murder, rape, drug trafficking, pedophilia, sodomy, armed robbery, treason, kidnapping, and terrorism. The mere act of adultery or homosexual intercourse must be punished with capital punishment. Of course this is part of a political system that uses the criminal law with the purpose of deterrence, retribution and indoctrination based on religious grounds. The excessiveness of these punishments, nevertheless, will not be so recognized by the judiciary or the important Guardian Council of the Constitution

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[84] *Id.* art. 221.
[85] *Id.* art. 224.
[86] *Id.* art. 225. It is important to mention that are several modalities of commission of *zina* and *ihsan* with different hard punishments in arts. 227-232.
[87] *Id.* art. 233.
[88] *Id.* art. 224. In the same article and in furthers the person that is non-Muslim is punished worst than a Muslim person. For example, in the case of *livat*, if the active person is non-Muslim he shall be sentenced to the death penalty. The same happened in the case of *Tafkhiz*, which is defined as putting a man's sex organ between the thighs or buttlocks of another male person (*Id.* art. 235).

(a 12-member institution of Islamic Law experts with the powers of some kind of Constitutional Court). That's because it is so ordered by the Shari'a. There is no room to be more lax on this, the offenses punished by *hadd* are attacks against the Koran and , therefore, against Allah.

On the other hand, *Qisas* is the second category of punishment contemplated in the Islamic Penal Code. The objective of this punishment is to punish capital crimes that are retributive "in nature". In this case, this category is very similar to the precept of Hammurabi Code "an eye for an eye, and a life for a life".[89] In summary, "[t]ese crimes are categorized as crimes against a person or the public rather than against God and require retributive punishments or compensation to the victim or the victim's family"[90]. In these cases, the Government is an intermediate of the desire of the victim or the family of the victim with regard to the punishment that should be inflicted to the offender.[91] In essence, here the victim or his family can choose the type of retribution within the limits of the Shari'a, either an economic compensation or damage equal to the one that was caused by the offender.[92] As well as in the case of *hadd* punishment, to the non-Muslim male and every women the State typically imposes much more drastic sentences.[93] The other two types of penalties are less severe than the previous ones, as we have already seen.

The *diya* punishment is characterized by crimes in which economic compensation remunerates the injury perpetrated upon other person. Commonly, every part of the body in these cases is given a monetary value.[94] Of course, the intrinsic religious and structural discrimination against women here it is also evident, as the bodies of the women are worth less than the males.[95] The last category, the *ta'zir*, "…covers a range of infractions from street crimes to white collar crimes. The punishments for these crimes can be in the form of public flogging, imprisonments, fines, or a combination"[96]. However, the two most important categories to study the death penalty in Iran are the *hudd* and *quisas*. As we have seen, in these two categories the State punish behaviors against the Islamic religious doctrine –what is considered a direct offense to Allah- and against particulars when the victim or the family of the victim has the power to choose whether the person must pay with death penalty or another sort of punishment. This brings us another important difference between the legal systems of U.S. and Iran regarding the application of the death penalty.

In the U.S. the only person who is punished in any criminal process, including a death penalty one, is the accused or the defendant. The principle of criminal responsibility lies in the person prosecuted. He or she is the only one that is held to answer for any crime exclusively against the State (recognizing that more and more the figure of the victim has greater preeminence in criminal proceedings, but the crime is against the public Law). On the contrary, in the basic scheme of criminal process in Iran the victim or the victim's family has a

[89] Womack, *supra* note 77, at 109.
[90] *Id.*
[91] Zubaida, *supra* note 75, at 208.
[92] *Id.*
[93] Womack, *supra* note 77, at 109.
[94] *Id.*
[95] Kusha, *supra* note 64, at 99-100.
[96] Womack, *supra* note 77, at 109

leading role in the imposition of several sentences, as it is in the cases of murder in the categories of *quisas* (retribution) or *diya* (compensation). While in Iran the family of a victim of murder can choose whether the defendant in a criminal process will suffered the death penalty or not, in the U.S. is the jury[97] or the judge who performs exclusively this task. In the case of Iran, the judge has no discretion in applying penalties and punishments, particularly in the offences punished by *hudd*, but also in the crimes under the category of *quisas* (that is more a family *vendetta* than a public punishment).[98]

IV. Conclusion

The two legal systems here compared are quite different. Notwithstanding, they agree for different reasons in the application of the death penalty, even when the majority of the countries of the world, especially the western States, have completely rejected this practice for being antiquated and useless. In the Common Law system of the U.S. the death penalty was restricted in the first 10 amendments of the Constitution, particularly in the 5th and 8th Amendments. While the first of these amendments contemplated the possibility that the State could take away the life of a person with a due process of law (for the federal jurisdiction; the equivalent for states jurisdiction is in the 14th Amendment), the second one limited the *ius puniendi* of the State and prohibited cruel and unusual punishments.

As we explained in this work, the interpretation of the important Eight Amendment regarding the constitutionality of the capital punishment has been developing progressively particularly from the 1970s. The U.S. Supreme Court, although has considered the capital punishment to be constitutional, has been increasingly limiting its application. Today any person under the age of 18, or if she is mentally handicapped during the commission of the offense, or if she is not charged for a crime against the life of other person can be sentenced to the death penalty. The social criterion of "decency" and the pragmatic approach of the Eight Amendment in death penalty cases will restrict furthermore in the future its application. There is a relevant opposition in many parts of the country; too much evidence upon innocents sentenced to capital punishment, and many studies that show that the death penalty cases are more expensive than ordinary criminal cases.

On the contrary, this kind of limitation is not actually plausible in the case of the application of death penalty in Iran. There are some punished behaviors against Allah and the Koran that necessarily carry the imposition of capital punishment under the Shari'a. The judge has no option or discretion here. As a theocratic State, it would be implausible a constitutional clause that would be contrary to the Islamic Law. Therefore, it is not possible for a judicial institution to restrict the application of the death penalty in the aforementioned crimes because this would be an act against the Islamic Law that is above every judge and human being in this legal system. If Iran continues being a theocratic State under the Islamic Law, I am afraid that the death penalty will be applied as has been implemented so far, in an extremely cruel way, by hanging, beheading,

[97] In fact, Iran does not recognize a jury system.
[98] Womack, *supra* note 77, at 120-122.

torture, and stoning. Contrary to the case of the U.S., in this system the opinion of the citizens is not really important on matters related to Shari'a. What matters is that the Islamic Law contemplates the death penalty as a necessary punishment for a big number of crimes from drinking alcohol repeatedly up to have a homosexual intercourse.

Unfortunately, while the U.S. is closer to abolish the death penalty, although not for human rights reasons, Iran is too far away.