

Ghassem Ghassemi

Criminal Policy in Iran Following the Revolution of 1979

A Comparative Analysis of Criminal Punishment
and Sentencing in Iran and Germany



Duncker & Humblot • Berlin

Bibliografische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

Alle Rechte vorbehalten

© 2013 Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V.
c/o Max-Planck-Institut für ausländisches und internationales Strafrecht
Güterstalstraße 73, 79100 Freiburg i.Br.

<http://www.mpicc.de>

Vertrieb in Gemeinschaft mit Duncker & Humblot GmbH, Berlin
<http://www.duncker-humblot.de>

Druck: Stückle Druck und Verlag, Stückle-Straße 1, 77955 Ettenheim
Printed in Germany

ISSN 1861-5937
ISBN 978-3-86113-116-8 (Max-Planck-Institut)
ISBN 978-3-428-13888-3 (Duncker & Humblot)

Gedruckt auf alterungsbeständigem (säurefreiem) Papier
entsprechend ISO 9706

Contents

Acknowledgements	V
Contents	VII
Introduction.....	1

Chapter One:

History of modern justice: Discourses, transplantation, and irritation.....

1. History of legal change from without: Iran.....	7
1.1 Law versus arbitrary will.....	7
1.2 Centralization of judicial power: Limiting the judicial competence of Islamic jurists	7
1.2.1 <i>Early penal regulations</i>	8
1.2.1.1 The legal structure : Crimes and punishments	8
1.3 Centralization of punishment and the unification of criminal sentences.....	9
1.4 The division of judicial/penal competence.....	9
1.5 Intellectual environment of legal/judicial reforms in the Late 19 th and early 20 th Century	10
1.5.1 <i>Islam and Western values: Harmony or contradiction</i>	11
1.5.1.1 Flexible Islam and reducible values of the Enlightenment	11
1.5.1.2 Rigid Islam and irreducible values of the Enlightenment	12
1.5.1.3 Necessity of change and continuity of legal/penal modernism.....	12
1.5.2 <i>Debates over judicial authority: Who is a just judge? Confusion over judicial competence, disparity of sentence, and international pressures</i>	13
1.6 The Constitutional Revolution	17
1.6.1 <i>Debates over legislative authority: Who is a legislator?</i>	18
1.6.1.1 Secular law versus divine Shari'a.....	18
1.6.1.2 Equality before the law: A challenge for Shari'a.....	18
1.6.1.3 Intermediation between divine and secular: Birth of Supervisor Ulama	19
1.6.1.4 Shari'a punishments and political dissidents	20

1.6.2	<i>Shari'a on suspension: Path towards thorough legal modernization</i>	22
1.6.2.1	Progressive Ulama and the triumph of law	22
1.6.2.2	Towards comprehensive modernization with an iron fist (the first Pahlavi)	23
1.6.3	<i>Modernization during the second Pahlavi</i>	25
1.6.3.1	Law and justice on the road of modernization	26
1.6.3.1.1	Modern legal education and judicial training.....	27
1.6.3.1.2	Judicial independence and the budget of the ministry of justice.....	28
1.6.4	<i>Penal modernization</i>	28
1.6.4.1	Iranian Penal Codes: Borrowed civilization	28
1.6.4.2	The structure of the Penal Codes after the Constitutional Revolution	29
1.6.4.3	Relationship between Shari'a and state law.....	30
1.6.4.4	Penal Code of 1926.....	31
1.6.4.5	Some general rules of the Penal Code of 1926	32
1.6.4.5.1	Principle of legality	32
1.6.4.5.2	Penal responsibility	32
1.6.4.5.3	Categories of crime and types of punishment.....	32
1.6.4.5.4	Collateral punishment	33
1.6.4.5.5	Suspension of punishment.....	33
1.6.4.5.6	Capital punishment.....	33
1.6.4.5.7	Royal amnesty.....	34
1.6.4.6	Coexistence of Shari'a and state law in penal justice	34
1.6.4.7	Penal Code of 1974.....	34
1.6.4.8	Rehabilitative ideal and correctional purposes of punishment.....	35
1.6.4.9	Role of the victim in the criminal process	36
1.6.4.10	Amnesty	37
1.6.4.11	Juvenile courts and punishments	37
2.	History of punishment in Germany: Penal evolution from within.....	38
2.1	Early Criminal Codes.....	38
2.1.1	<i>Constitutio Criminalis Carolina</i>	38
2.1.2	<i>Criminal Code of 1871</i>	38
2.1.3	<i>Retributive justice versus utilitarian justice</i>	39
2.1.4	<i>Symbiosis of retribution and rehabilitation: Double-track system of punishment</i>	41
3.	Synthesizing changes from within and without: Modernity of tradition and tradition of modernity	42

Chapter Two:	
Criminal punishment in context: Islamic Republic of Iran and Federal Republic of Germany compared	45
1. Reappearance of Islamic Shari'a: Rise of state penal Shari'a	45
1.1 Islam: A critical tool against modern discipline.....	45
1.2 Rise of Islam as an alternative regime of governance	49
1.3 Islamic Republic: From republic of spirituality and fidelity to Shari'a and obedience	49
2. Penal ideology and penal practice in the Islamic Republic of Iran	50
2.1 Redefining penal discourse, institutions, and practices	50
2.2 Punishment and prison in view of the founders of the Islamic Republic	50
2.3 Structural context of criminal justice: Challenges, debates and changes.....	53
2.3.1 <i>Nature of the political regime and constitution</i>	53
2.3.2 <i>Reintroduction of Shari'a in public policy and law</i>	54
2.3.2.1 Restoring the traditional judicial authority	55
2.3.2.2 Reformation of penal authority and law	55
2.3.3 <i>Reformulation of crimes and punishments</i>	55
2.3.4 <i>Interplay of Shari'a, criminal law, and liberty in post-revolutionary constitution</i>	56
2.3.4.1 Shari'a and (criminal) law: Competition, accordance, negation, and conflict	56
2.3.4.2 Rule of Islamic jurists versus the rule of law.....	57
2.3.4.3 Reorganization of the justice system	58
2.3.4.4 Shari'a and liberty	59
2.3.4.5 Retaining the overall competence over judicial cases	59
2.3.4.6 Two legal training and plural judicial decisions	61
2.3.5 <i>Modernizing Shari'a: Clerical challenge and Taazir controversy</i>	62
2.3.6 <i>Centralization of Shari'a</i>	65
2.3.7 <i>Mujtahid versus the law: The challenge of judicial revision</i>	66
2.3.7.1 Law of criminal procedure: Story of the ever-changing law	67
3. Sentencing Laws, options and standards	69
3.1 Regulatory framework of sentencing in Iran.....	69
3.1.1 <i>Remodeling penal control policies</i>	69
3.1.1.1 General rules of the Islamic Penal Code.....	70
3.1.1.1.1 The principle of legality	71
3.1.1.1.2 Juvenile criminal justice.....	73
3.2 Criminal sentences in Iran.....	75
3.2.1 <i>The Act of Hudud and Qisas</i>	75
3.2.2 <i>Sacred rituals of the death penalty</i>	75

3.2.2.1	Laws of retaliation	75
3.2.2.2	Retaliation and categories of victim: religion, gender and parental authority	76
3.2.2.2.1	Religion and retaliation	76
3.2.2.2.2	Gender and retaliation	76
3.2.2.2.3	Parental authority and retaliation	77
3.2.2.2.4	Victim's crime and retaliation	77
3.2.2.2.5	Evidentiary rules of Qisas	77
3.2.2.2.6	Co-oath: An archaic evidential method.....	77
3.2.2.2.7	Rules of administering Qisas	78
3.2.2.2.8	Retaliation beyond the original crime	78
3.2.2.2.9	Weather and retaliation	79
3.2.3	<i>Diya: Deal over the revengeful feelings of the victim</i>	79
3.2.3.1	Types of Diya	79
3.2.3.2	Less valuable life: Diya of Muslim and non-Muslim	79
3.2.4	<i>Death Penalty as a Hadd punishment</i>	81
3.2.4.1	Evidentiary rules of Hadd death penalty.....	82
3.2.4.1	Crimes punished by Hadd death penalty	82
3.2.4.2.1	Fornication	82
3.2.4.2.2	Death punishment for deviant sexual identities	82
3.2.4.2.3	Muhariba: Waging war against God, his prophet, and the Islamic state	83
3.2.4.2.4	Types of punishment of Muharib.....	83
3.2.4.2.5	Evidentiary rules of Muhariba	84
3.2.4.2.6	Repentance and punishment of Muhariba.....	84
3.2.4.2.7	Extension of the scope of enemies of God and the Islamic state	84
3.2.5	<i>Taazir punishments: The free penal zone of the Islamic state</i>	86
3.2.5.1	Taazirat crimes and punishments	86
3.2.5.2	Bazdarandeh punishments.....	87
3.2.6	<i>The Regulations of administering capital punishment</i>	88
3.2.6.1	Early regulatory laws of administering the capital punishment and their historical development	88
3.2.6.2	Administration of Qisas and other death penalties: Post-revolutionary Iran	89
3.2.6.2.1	Presence of the public at the place of execution.....	89
3.2.6.2.2	The last religious prayer	90
3.2.6.2.3	Killing methods.....	90
3.2.6.3	Death penalty as Taazir.....	90
3.2.7	<i>Death penalty in practice</i>	91

3.2.7.1	Death sentences and executions from 2002 to 2006	91
3.2.7.1.1	Sex of the executed	94
3.2.7.1.2	Age of the executed.....	95
3.2.7.1.3	Capital punishment of juvenile offenders	96
3.2.7.1.4	Method of the execution in practice.....	96
3.2.8	<i>Public penal scaffolds: A device to preserve the internal security and to confront international (Western) sensitivity</i>	97
3.2.9	<i>Qisas: A life for a life</i>	99
3.2.10	<i>Drug dealers: Dealers of death</i>	99
3.2.11	<i>History of prison and imprisonment in Iran</i>	100
3.2.11.1	First prisons in Iran: Qajar dynasty	100
3.2.11.2	Modernizing prisons	101
3.2.11.2.1	Judicial supervision of prisons.....	101
3.2.11.2.2	Classification of prisoners	101
3.2.11.2.3	First panoptical prison in Iran	101
3.2.11.2.4	Work in prison	102
3.2.11.2.5	Ideal of rehabilitation and reform in prisons.....	103
3.2.11.2.6	Work in the prison in practice.....	103
3.2.11.3	Transplanted penal institutions, resistances, and continuity of discontinuities.....	104
3.2.12	<i>Imprisonment in post-revolutionary Iran</i>	105
3.2.12.1	Security prisoners: Arbitrary confinement.....	106
3.2.12.2	Prison regulations and instructions.....	107
3.2.12.3	Prison directives: A history of non-applied regulations.....	107
3.2.12.3.1	Prison regimes and categorization of prisoners.....	107
3.2.12.3.2	Daily program of the prisoners in prison	109
3.2.12.3.3	Disciplining the prisoners	110
3.2.12.4	Prison in practice	112
3.2.12.4.1	Overcrowded prisons: Overcriminalization or the lack of non-custodial sanctions or insufficient prisons.....	112
3.2.12.4.2	Public donation: a mechanism for reduction of default prisoners	116
3.2.12.5	Whipping.....	117
3.2.12.5.1	Whipping: Pre-revolutionary Iran	117
3.2.12.5.2	Whipping: Post-revolutionary Iran.....	117
3.2.12.5.3	Administration of whipping.....	118
3.2.12.5.4	Whipping in Taazirat Act	119
3.2.12.6	Suspension of the sentence	119
3.12.2.7	Suspension of the punishment in practice.....	121

3.2.12.8	Conditional release	121
3.2.12.9	Amnesty as a sovereign method for reducing the penal population.....	122
3.2.12.10	Amnesty in practice	125
3.3	Judicial penal choices and the discretionary power of penal judges in Iran	126
3.3.1	<i>Pre-revolutionary Iran</i>	126
3.3.2	<i>Post revolutionary Iran</i>	128
4.	Sentencing in Germany	130
4.1	Guilt as a normative framework of sentencing decision.....	130
4.2	Preventive consideration in criminal sentencing: Criminal risk and danger.....	130
4.3	Imprisonment versus custody in preventive detention: The double track system of sanctioning	131
4.4	Guilt, rehabilitation, and prevention: Triad justification of criminal sanctions	132
4.5	Types of criminal sentences in Germany	132
4.5.1	<i>Imprisonment</i>	133
4.5.1.1	Prison in Germany: History, philosophy, and goals.	133
4.5.1.2	Enforcement and continuous debates on the main goals of imprisonment	135
4.5.1.2.1	Retribution (guilt) versus rehabili- tation	135
4.5.1.2.2	Exclusion (incapacitation) versus rehabilitation	136
4.5.1.2.3	The function of work in prison	137
4.5.1.3	Public attitudes towards rehabilitation and their impact on the legislature	138
4.5.2	<i>Life imprisonment</i>	142
4.5.2.1	Life imprisonment and human dignity	142
4.5.3	<i>Preventive detention</i>	144
4.5.3.1	Forms of preventive detention.....	145
4.5.3.2	Historical development of preventive detention	145
4.5.3.3	Preventive detention in practice	147
4.5.3.4	Judicial discussions on preventive detention: Constitutional rights and preventive detention.....	147
4.5.3.5	Preventive detention: Treatment for rehabili- tation or combating of enemies?	148
4.5.4	<i>Psychiatric institutions</i>	149
4.5.5	<i>Fines</i>	150
4.6	Suspension of criminal sentences	150
4.7	Amnesty laws in Germany: Residual of sovereign authority.....	151
4.8	Criminal sentences in practice in Germany.....	153
4.8.1	<i>The most prevailing criminal sentence</i>	153
4.8.2	<i>The least prevailing criminal sentence</i>	154
4.8.3	<i>Increase of indeterminate detention</i>	155

5. Comparative perspectives and considerations	156
5.1 Legislative penal choices	156
5.2 The history of the death penalty in Germany	158
5.2.1 <i>Historical development</i>	158
5.2.2 <i>Public attitudes to capital punishment</i>	160
5.2.3 <i>Views of students on forms of punishment</i>	161
5.2.3.1 Death penalty.....	161
5.2.3.2 Life imprisonment	161
5.3 Just constraints on punishing power in Germany	162
5.4 Judicial knowledge: Iran and Germany	165
5.5 Human rights and criminal punishment in Germany (West).....	167
5.6 Punishment and Western sensitivities: The challenge of human rights ..	170
5.7 Human rights discourse in pre-revolutionary Iran	171
5.8 Criminal punishment: Clash of governing through Islam and governing through human rights.....	172
5.9 Punishment and human rights in Iran	173
5.9.1 <i>Their human rights and our human rights</i>	174
5.9.2 <i>The challenges between “their” human rights and “our” practices</i>	175
5.10 Challenging Islamic punishments: Human rights norms or public awareness	177
5.11 Punishment and crime victims	178
5.11.1 <i>Collective representation of individual victims</i>	178
5.11.2 <i>Iran</i>	180
5.11.2.1 Plural representation of victims.....	180
5.11.2.2 The revolutionary transformation of public claims to private claims and private to public	180
5.11.2.3 Iran and Germany	185
5.12 Concluding remarks.....	186
5.12.1 <i>Rule of political interests versus rule of legal norms</i>	186
5.12.2 <i>Rule of political law</i>	186
5.12.3 <i>Normative plurality</i>	188
5.12.4 <i>The demise of consensus over Shari'a penal laws</i>	189
5.12.5 <i>The meaning of punishment</i>	190

Chapter Three:

 Public attitudes to crime punishment and Sharia in Iran	199
1. Evolution of Punishment in Islamic Countries.....	199
2. Hypotheses of the Survey.....	201
3. Sampling and administration of the questionnaire	202
3.1 Students and Tulab.....	203
3.2 Justice Officials.....	204
4. Socio-demographic composition of respondents	204
4.1 Gender.....	204
4.2 Age.....	204

4.3	Profession.....	205
4.4	Place of Residence	205
5.	Findings of the survey.....	206
5.1	Attitudes to effective ways of crime prevention.....	206
5.2	Preferred punishment for specific crimes across genders and professions	207
5.2.1	<i>Gender and attitudes to suitable punishment for rape and homosexuality</i>	208
5.2.1.1	Rape.....	208
5.2.1.2	Homosexuality.....	209
5.2.2	<i>Gender and preferred punishment for murder, theft, improper Hijab, and attitudes to impunity of honor killing</i>	210
5.2.3	<i>Profession and preferred punishment for murder, theft, improper Hijab, and attitudes to impunity of honor killing</i>	212
5.3	Attitudes to the death penalty	212
5.3.1	<i>Gender and the death penalty.....</i>	212
5.3.2	<i>Profession and attitudes to the death penalty.....</i>	213
5.3.3	<i>Place of residence and attitudes to the death penalty</i>	214
5.4	Attitudes to corporal punishment.....	214
5.4.1	<i>Gender and attitudes to corporal punishment.....</i>	214
5.4.2	<i>Profession and attitudes to corporal punishment.....</i>	215
5.5	Attitudes to prison and imprisonment.....	216
5.6	Attitudes to the purposes of punishment.....	218
5.7	Criminal law and Shari'a	219
5.8	Effect of independent variables on respondents' attitudes	222
5.9	Latent analytical variables	223
5.9.1	<i>Progressive and dogmatic attitudes</i>	224
5.9.2	<i>The death penalty and views of Shari'a</i>	225
5.9.3	<i>Corporal punishment and views of Shari'a.....</i>	226
5.9.4	<i>Retaliatory death penalty and perceptions of Shari'a.....</i>	227
5.9.5	<i>Punishment of theft and views of Shari'a</i>	227
5.9.6	<i>Punishment of rape and views of Shari'a</i>	228
5.9.7	<i>Penal reform and perceptions of Shari'a</i>	229
5.9.8	<i>Punitive attitudes and perceptions of Shari'a</i>	230
5.9.9	<i>Views to separation of penal legislation and Islamic Shari'a</i>	231
5.9.10	<i>Goals of punishment and perception of Shari'a</i>	232
5.10	Discussion.....	234
6.	Conclusion.....	235
Chapter Four: Concluding Remarks of the Study.....		237
1.	Understanding the differences and contrasts between Iran and Germany	237
2.	Multi-factorial analysis of differences in sentencing law and practices ..	241

2.1	Consensual Normative Framework of Sentencing	241
2.2	Criminal punishment and institutionalized struggle over legitimate authority	242
2.3	Sentencing policies and practices: Patterns of decision-making	244
2.4	Penal reform: Ideals, challenges and methods	246
	Bibliography	249
	List of Tables	263
	List of Figures	263
	List of Charts	265
	List of Graphs	265