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ARTICLE

"Nowhere but Everywhere": The Principle of Legality and the Complexities of Judicial Discretion in Iran

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Abstract

To comply with Shiʿi theological-jurisprudential justifications and dogmatic traditions, the Iranian postrevolutionary legal system formally enshrined the principle of legality of crime and punishment within the Iranian Constitution and important legal provisions. Despite this formal entrenchment and codification of its criminal law, which together act as a legal constraint on the traditionally excessive power of Muslim judges, the Iranian theocratic system has exempted religious sins from this principle by blurring the distinction between crime and sin and criminalizing certain sinful acts with unclear language. These two legal mechanisms not only violate the principle of legality and amplify legal uncertainty, but their reference to Sharia law also binds the fate of the accused more tightly to the discretion of the judge than to the letter of the law. Consequently, the religiopolitical predilections of judges have become a determining factor in findings of criminal responsibility and imposition of punishment on citizens.

Keywords: crime; fatwa; Islamic law; jurists; law and religion; principle of legality; punishment; theocracy

> "Everyone strives to attain the Law," answers the man, "how does it come about, then, that in all these years no one has come seeking admittance but me?" The doorkeeper perceives that the man is nearing his end and his hearing is failing, so he bellows in his ear: "No one but you could gain admittance through this door, since this door was intended for you. I am now going to shut it."
> —Franz Kafka, *The Trial*

Many years ago, as a guest in the home of my friend in Mashhad, which is considered the holiest city in Iran, I was involved in a short but thought-provoking conversation that planted a seed and eventually became this article. During dinner on the night of the Persian New Year, my friend, Fardad, enthusiastically told his sister: "As you know, Sarah and I have been in a relationship for a long time . . . we recently decided to go on a trip together for the Norooz holidays." His sister, shocked by the news, with eyes full of apprehension, replied, "My God! Are you out of your mind? Do you want to get entangled in an inextricable and menacing prosecutorial process?" Fardad then turned his face to me and questioned me rhetorically: "As a man of law, you should know: where on earth does the law say that baecation[1] is a crime?"

[1] A term for a romantic vacation coined by the Internet that has become Iranian vernacular.

"Nowhere but everywhere," I replied immediately—a bizarre kind of answer that perhaps he did not expect from a jurist in such a serious conversation.

My concise, paradoxical response to him might initially strike readers as philosophical or poetic, or it might appear to be an attempt to parry the question. How can one conceive of a situation where a certain type of conduct is permitted and at the same time prohibited by the law? Perhaps in an imagined world, a poet could envision such a situation, but what about the real world, with its rules and procedures, all established in authoritative legal texts? There are at least two factors behind my equivocation: (a) the existence of an esoteric regulatory source that stands above the written law, and (b) vague criminal codification that supports countless individual interpretations. Both factors, I will argue, apply to the Iranian legal system.

Iranian citizens deal with a criminal justice system under which a range of actions are plausibly subject to criminal punishment even though they are not stipulated as offenses in the penal code or other codified legal provisions. Furthermore, a wide range of behavior has been criminalized in an extremely complex and nontransparent manner that threatens the orientation of citizens who are totally oblivious to their actions' criminality. This uncertain situation and existential insecurity caused by the Iranian legal system raises fundamental questions: Why and how far does this uncertainty prevail in the criminal justice system? What are the sociolegal consequences for individuals living in the nowhere-but-everywhere situation, when they are not able to rest assured that their intended action will not carry penal liability? And what factors negatively or positively affect the outcome of adjudication?

Perhaps the simplest way to address these questions is to offer an illuminating legal discussion, focusing only on the technical legal aspects of the questions from a normative point of view. Indeed, this method has merit and is necessary for the purpose of this paper, because the nature of the questions raised requires competent legal analysis together with a careful account of why and through what procedures the alleged uncertainty affects, sometimes disastrously, the autonomy and civic life of Iranian citizens. This approach will also contribute significantly to the body of scholarship on the Iranian legal system which, as some Iranologists have observed, has been neglected in contemporary Iranian studies.[2] This approach, however, would be wanting; it would be simplistic reductionism without consideration of the social and religious aspects involved. Indeed, the nowhere-but-everywhere dilemma is not a mere question of law when it comes to discussing the theocratic legal system, in which religious institutions and political ideology are deeply intertwined.

Taking an interdisciplinary approach, I will first explore the normative status of the principle of legality within the Iranian legal and theological frameworks. I will explain my concerns regarding how the Iranian legal system infringes upon this key principle. I adduce some pivotal statutory provisions as relevant pieces of evidence around which I organize my critique, without intending to confine this paper to mere discussion of a list of articles. I then illuminate important voices in the debate on the principle of legality that continues to unfold in Iran. Finally, I discuss the muscular agency of the judge as a decisive and determinative factor concerning violation or observance of the principle of legality by focusing on the dichotomy between cleric and university-educated jurists and their knowledge.

The Rise of Shiʿi Constitutional Theocracy in Iran: Nothing Beyond the Codified Law

The principle of legality is one of the most important principles in modern criminal law, which was born of liberalism in the eighteenth century and since then has been recognized in Western law. This did not happen overnight; history reveals a difficult path to establishment of the principle of legality. In the Age of Enlightenment, intellectuals such as Cesare Beccaria put much effort into propagating humanitarian ideology and incorporating a

[2] Fujinaga, "Islamic Law in Post-Revolutionary Iran," 629.

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wide array of ethical political principles into fundamental law, including the principle of "no crime without punishment" (*nullum crimen sine lege*).[3] Regardless of the political apparatus of power, the principle of legality, along with the principle of nonretroactivity, is today the very rule of law in the sphere of criminal law, a core value, and a fundamental defense in criminal law prosecution.[4] Further, it is widely considered a keystone and the central principle of all legal systems. According to this principle, no conduct is held criminal unless it is specifically and clearly described in the behavior or circumstance element of a penal statute, and penal statutes must be strictly construed. This principle allows citizens to be free insofar as the government is restrained from infringing upon an inviolable realm of personal autonomy.

The principle of legality also entails that immoral acts, called "sins" in the terminology of clerics, are not the business of criminal law because they are *not* stipulated in penal statutes.[5] However, the distinction between legal order and the religious and moral world that is a bastion of post-Enlightenment liberal legality did not exist in the Sharia tradition. This lack of distinction followed from the well-known rule of *ta'zīr*, according to which every religiously forbidden act was to be punished by Muslim judges. This traditional Islamic punitive mechanism obliterated the distinctive border that modern criminal justice systems draw between a wrongdoing that is punishable under the law (a crime) and an offense against religious or moral law (a sin).[6]

Briefly speaking, there are three main differences between the two approaches, in sphere, constituent elements, and punitive reactions. The concept of sin in an Islamic context includes any transgression of the far-reaching law of God by commission, omission, or even an internal state of mind (e.g., atheism), and the concept of crime is restricted to the government's sphere of criminal law. Second, according to Islamic teachings, sin might be committed under any circumstance—that is, even without committing a physical act. To illustrate, there are many narratives and verses in the Quran stipulating that merely bearing ill will is considered a sin.[7] This brings to mind Matthew (5: 27–28): "You have heard that it was said, 'You shall not commit adultery.' But I tell you that anyone who looks at a woman lustfully has already committed adultery with her in his heart." It also recalls the words of Immanuel Kant: "In law, a man is guilty when he violates the rights of others. In ethics, he is guilty if he only thinks of doing so."[8] Third, disobedience to God can be prevented or reacted to by different means, which are not necessarily based on coercive or even security measures, including intercession, repentance, and atonement.[9]

[3] See Beccaria, *Crimes and Punishments*, 165–93.

[4] See Woodhouse, "Principle of Retroactivity," 69–89. Although many legal theorists hold that the elusive notion of the rule of law is "an essentially contested concept" that has become meaningless due to "ideological abuse and general over-use," the fact remains that the rule of law, generally speaking, is the non-negotiable demand for inalienable human rights and human dignity, without which both can easily be violated and debased. See Waldron, "Rule of Law," 137–64.

[5] See Duff, *Realm*, 52–101.

[6] Criminal law theorist Tatjana Hörnle's critique of legal moralism is applicable to discussion of the boundary between law and morality: "If a broad, intuitionist understanding of moral wrongfulness seeps into criminal law theory, this means that criminal law theory will not be able to carefully evaluate ill-reflected proposals in the area of criminal policy. Accepting arguments about immorality for the entry decision in criminalisation theory widens the scope for criminal prohibitions considerably"; "'Rights of Others,'" 177.

[7] For instance, "To God belongs everything in the heavens and the earth. Whether you reveal what is within yourselves or conceal it, God will call you to account for it. He forgives whom He wills, and He punishes whom He wills. God is able to do all things" (2:284); "And do not occupy yourself with what you have no knowledge of. The hearing, and the sight, and the brains—all these will be questioned" (17:36).

[8] In German, *Juridisch ist jemand schuldig, so fern er eine Handlung gethan, die dem Recht des andern zuwider ist. Ethisch ist er aber schuldig, wenn er nur den Gedanken gehabt hat, die Handlung zu begehn.*

[9] For instance, "If you avoid the worst of what you are forbidden, We will remit your sins, and admit you by a Gate of Honor" (4:31); "It is He who accepts the repentance of His worshipers, and remits the sins, and knows what you do" (42:25).

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Returning to contemporary Iran, 1979 is remembered as the year that the Western world woke up to the existence of Shiʿi political theology.[10] The Islamic Revolution in Iran introduced the world's Shiʿi constitutional theocracy to the world—the only regime in the Muslim world directly ruled by clerics.[11] The era of Shiʿi jurists' traditional aversion to political activity—the political quietism that also had characterized Salafism in the Sunni world for the last century—came to an end when the Islamic Revolution completely and radically reshaped and restructured the Iranian polity.[12] The charismatic founder of the Islamic Republic, Ayatollah Khomeini, with the help of his disciples, who saw him as a messianic savior and manifestation of divine calling, was able to utilize the sociopolitical dynamics of religion (Shiʿi Islam) to mobilize people toward establishment of a Shiʿi constitutional theocracy. Ayatollah Khomeini, whose role was widely considered—by his followers, at least—to be a response to a divine calling, successfully united disparate sectors of society and convinced his adherents to emerge from their traditional reticence and commit to political action. In response, his faithful devotees rose phoenix-like from the docility to which they had been reduced over the decades and established the Shiʿi theocracy which, for its part, blurred the boundaries between politics and religion.

The success of the revolution led to the politicization of Islam and the formation of a symbiotic relationship between popular religious beliefs and Islamic Shiʿi rule, paving the way for theocratic rulers to translate God's mandates into positive legislation mandating an Islamic, Shiʿi vision of the good. Setting aside the causes of the clergy's ascendancy to power, this epochal occurrence, which most scholars failed to predict, has led many to mock the reports of God's death as greatly exaggerated, especially in the spheres of politics and law.[13] As a result, thinkers have started contemplating the future of religion, in one pertinent instance arguing that "whether religious deprivatization threatens modernity or not depends on how religion becomes public."[14]

Legal Framework

Two months after the victory of the Iranian Revolution, its political arrangement was confirmed and established as the "Islamic Republic" through the 1980 referendum.[15] The next pivotal step of the newly established regime in solidifying its authority was to write the fundamental administrative and normative manifesto of the Islamic state, the constitution of the Islamic Republic of Iran (hereafter the IRI). While the new constitution was being drafted, international organizations turned a spotlight on the Islamic Republic's human rights stance, conscious of the way Iran might treat dissidents and nonconformists who voiced disagreement with Islamic law. Indeed, the biggest international, and particularly Western, concern was whether the hierocratic reading of human rights values would conform to the UN Guiding Principles on states' duty to protect human rights.[16] In particular, one grave concern and the subject of this paper was whether and how the Islamic state would ensure observance of the principle of legality of crime and punishment, according to which an act is not considered a crime and deserves no punishment unless the law explicitly and previously

[10] I use "Shiʿi" to keep faith with a long scholarly tradition.

[11] It is worth mentioning that although some scholars call this a "divine nomocracy," arguing that in such states sovereignty is based on laws derived from God (Allah), other thinkers use the term "theo-democracy" because Muslims, allegedly living under the tutorship of delegates of God, have been given limited sovereignty.

[12] For a discussion of the quietist political attitude of Twelver Shiʿism, see Haider, *Shiʿi Islam*.

[13] For more information, see Abrahamian, *Iran*.

[14] Asad, *Formations*, 182. For more debate on the emergence of other religious movements in the contemporary world, see Hirschl, *Constitutional Theocracy*.

[15] See Amanat, *Iran*, esp. 948–58.

[16] For debate on human rights in Iran and democratic aspects of the Iranian Constitution, see Afshari, "Essay on Scholarship," 544–93.

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determines its criminality and the applicable sanction for it.[17] There was a fear of revival of the historical excessive power of Muslim judges with which, so to speak, not even the Greek gods on Mount Olympus could compete.[18]

Ultimately, the constitution of the Islamic Republic of Iran was adopted by referendum on 2 and 3 December 1979, and immediately went into force, replacing the constitution of 1906. As the regime's sole basis of legitimacy was Islam, it was determined that the supremacy of Islamic law was to be upheld over all man-made laws. The project of "Shariatization" (the Islamization of all laws and regulations through the codification of Shiʿi jurisprudence (*fiqh*) that followed the revolution affected the legal system and the constitutional framework of Iran, as the revolutionary norms were married to the Shiʿi *fiqh.* The main mode of Islamization triggered by Article 4 of the constitution was the direct and blind translation of jurisprudential books, which were sources for the legislation. Given that the majority of Islamic religious texts as well as the main reference to the Islamization of laws (the catechism of Iran's supreme leader) were in Arabic, these texts were translated directly into Farsi and became law through the Parliament. As some legal scholars maintained, "translation was the main method of achieving the Islamization of (criminal) law after 1979."[19]

The constitution, therefore, is steeped in Islamic qualifications that invoke Islamic particularism and make ample reference to Islamic criteria, which override all provisions in the constitution.[20] The prevailing theocratic atmosphere has pushed some jurists to aver as extravagant the claim that virtually no article in the constitution is free of Islam.[21] However, because the constitution does not offer any positive articulation of the content of Islamic law, and therefore what is deemed Islamic, for practical purposes the state is left completely free to determine what the Islamic qualifications imply.[22]

Fortunately, regarding the principle of legality, the wording of the constitution is clear and transparent. Despite the divergence of views among the framers of the constitution on some constitutional elements, they upheld the principle of legality and innocence with one accord and secured its place in Articles 36, 37, 166, and 169 of the constitution.[23] Moreover, the preamble repeatedly emphasizes the rejection of despotism (i.e., arbitrary rule) and the capricious application of the law.[24]

[17] By applying the principle of legality in a criminal system, all citizens are able to avoid legal interference in their affairs by not running afoul of the law. This entails that criminal laws be promulgated in clear terms, in advance, and interpreted and applied with certainty and reliability.

[18] See Layish, "Transformation," 85–113.

[19] Gholami and Khodadadi, "Criminal Policy," 616.

[20] The most significant factor ensuring that the Iranian regime constitutes a theocracy is the "religious clause" safeguarded by Article 4 of the constitution. No article is more instrumental than this one in providing a vehicle for the Islamization of all laws and regulations in the constitution. It stipulates that all laws passed must be in accordance with Islamic criteria.

[21] Khodadadi, "Religious-Political Development," 42.

[22] Mayer, "Islamic Rights," 272–73.

[23] For a description of the infighting over the formulation and adoption of the constitution, see Bakhash, *Reign*; Momen, *Introduction*, 289–92; and Arjomand, "Constitution-Making," 118–25. Article 36: The passing and execution of a sentence must be made only by a competent court and in accordance with the law; Article 37: The preamble of the constitution repeatedly emphasizes the rejection of despotism (i.e., arbitrary rule) and grounding the whole system on law; Article 166: The verdicts of courts must be well-reasoned and documented with reference to the articles and principles of the law in accordance with which they are delivered; Article 169: No act or omission may be regarded as a crime with retrospective effect on the basis of a law framed subsequently. In the contemporary world, some prestigious international congresses and instruments such as the Fourth International Congress of Penal Law (Paris, July 1937), the Second International Congress of Comparative Law (The Hague, August, 1937), the International Covenant on Civil and Political Rights (Art. 15, para. 1), and the Universal Declaration of Human Rights, which laid down the principle of legality in Article 11, para. 2, in 1948, took a stand on the necessity of the principle of legality in criminal law and considered it a baseline dogma of criminal justice. For the constitutional articles referenced in this article, please see the Iranian Constitution at https://www.constituteproject.org/constitution/Iran_1989.

[24] In Iranian law, the principle of legality was fixed for the first time in Article 12 of the Supplementary Constitutional Law of 1907 and, later, in Articles 2 and 6 of the Penal Code of 1926.

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This move actually meant taking a fundamental step toward respect for the international human rights instruments that enshrine this principle.[25] Moreover, a few years later, in October 1982, legislators passed "The Law Concerning Islamic Punishment, Containing General Provisions," which guaranteed the principle of legality. Gradually, some other sets of legal provisions (e.g., the Code of Criminal Procedure) were also enacted that ensured the primacy of law in criminal procedure, so that neither state prosecution nor defendants were exposed to arbitrary bias. In the same year, Ayatollah Khomeini declared the Persian New Year to be the 'year of the rule of law' (*sal-e hokumat-e qanun*), maintaining that "all the Prophets since the beginning of the world have come for the establishment of the law (*qanun*) and Islam has come for the establishment of the law."[26]

Therefore, from the first years of the revolution, it was established that a person who was subject to the law of the IRI, be it a state agent or a non-Muslim, could only be punished under the written law, which is intelligible, clear, and predictable. Article 2 of the current Islamic Penal Code (hereafter the IPC) stipulates that "Every act and every omission of an act for which a punishment is foreseen in the law is regarded as a crime."[27] Moreover, Article 10 enshrines the principle of nonretroactivity: "In governmental regulations and arrangements, punishment and security and correction measures must be in accordance with a law adopted prior to commission of the crime; and no one who has committed any conduct including any act or omission is punishable by the law passed subsequently."

Taking these legal developments into account, the theocratic governors as well as some Iranian legal scholars have confidently claimed that the explicitness of constitutional and statutory articles clearly reveal the regime's full commitment to the observance of the legality principle, individuals' rights and freedoms, and the Universal Declaration of Human Rights, which Iran voted in favor of in 1948. At face value, one can join these governors and legal scholars in rejoicing and concluding that the Iranian theocratic state has fully entrenched and guaranteed the given principle in the IPC and constitutional provisions.

Theological Framework

In the aftermath of the Islamic Revolution, sources authenticated by Shiʿi ideology were declared the sole fountainheads of law in the country, and Islamic instructions were held as legal and moral norms and the basis for normative arguments. The principle of legality (*asl-e qānuni boodan-e jorm va mojāzāt)* also was one of the primary dogmas borne in mind by the Islamic jurists. Iranian Shiʿi scholars, however, were not of the opinion that this principle, often considered a Western idea, was imported and adopted by the IRI. Rather, they claimed (and still claim) that the principle had been recognized since the revelation of Islam and had existed before it was conceived of in European countries.[28] This microclaim was in keeping with the long-held macroclaim that revelation was all-inclusive and a ruling existed for everything.[29] Such frames of reference, which can be traced back to the revolutionary discourse of "back to self-identity" (*bāzgasht be khishtan*) and a powerful puritan movement demanding a return to an authentic Islamic identity through the implementation of Sharia, triggered an explosion of research on religious sources and reasonings.[30] This

[25] Examples of such instruments include the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights.

[26] Enayat and Danesh, "Introduction," 3.

[27] However, it is notable that the legality principle is not protected in the same way as it was before; that is, the second part of the sentence—which stated that "only acts or omission of acts for which punishments are foreseen in the law are regarded as crimes" —was eliminated.

[28] Arjmandedanesh, *Asl-e qānuni*, 82–83; Hashemi, "Quran va asl-e qānuni," 192.

[29] Calder, "Accommodation," 10.

[30] *Bāzgasht be khishtan*, as well as "Westoxication" and "spell-bound by the West" (*gharbzadegi*), gained common usage in Iran following the publication of the book *Occidentosis: A Plague from the West*, written by Iranian sociopolitical critic Jalal Al-e Ahmad in 1962. See Axworthy, *Revolutionary Iran*.

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"committed approach" was supposed to provide further, fresh foundations for the given principle.[31] This was, indeed, a prerequisite for the acceptance and legitimation of criminal law in the theocratic state, whose main authority derived from religion.

Islamic jurists and theologians systematically resorted to Islamic sources and doctrines to recognize and acknowledge the principle of legality. The divine sources (the Quran and tradition) and a central juridical rule adopted from these two sources by Islamic jurists have, or so it is argued, provided the religious basis for the principle of legality. Some jurist-theologians go so far as to claim that even if neither the Quranic verses nor tradition provide a rule in Islamic law that corresponds to the principle of legality, its principal concept has long been discussed among Islamic jurists.[32] After all, the "dynamism" of Islamic jurisprudence, it is argued, allows jurists to infer and adopt the principle of legality from the following verses and narratives (*hadith*), which are only a selection of possible examples:

> Whoever is guided is only guided for [the benefit of] his soul. And whoever errs only errs against it. And no bearer of burdens will bear the burden of another. And never would We punish until We sent a messenger.[33]
>
> And We did not destroy any city except that it had warners.[34]
>
> And never would your Lord have destroyed the cities until He had sent to their mother a messenger reciting to them Our verses. And We would not destroy the cities except while their people were wrongdoers.[35]
>
> The burden of nine things were removed from the shoulder of my community: error, forgetfulness, what they are forced to do, what they do not know, what is out of their power.[36]
>
> There is no prohibition for anything until a warning is provided.[37]

Moreover, Iranian jurist-theologians introduce a prominent juridical ruling based on the interpretation of the aforementioned Quranic verses and narratives. This is the rule of "the indecency of punishment prior to the expression of law" (*qubh-e eqā' b-e belā bayān)*, according to which God will never chastise or punish anybody for his or her past sinful deeds unless He has already warned man about his duty by providing him with reasoning, argument, or evidence delivered through a messenger.[38] The illustrious Usuli *mujtahid* Ayatollah Behbahani, for instance, cited several rational arguments as well as Quranic verses and hadiths to justify his thesis that God would not punish a person without first making His intent and injunction clear.[39] The other jurisprudential principle that Shiʿi jurists have advanced is the *bara'a* (exemption of duty) principle, which is based on Quranic injunctions against holding human beings responsible for duties that have not been proclaimed.[40]

From a theological perspective, it would be extremely unfair if God punished individuals without having informed them of the sinfulness of their conduct. Indeed, according to the Islamic perception of God, it is logically flawed to suppose that God could be held guilty of such wrongdoing since He is perfect and faultless. It is also counter to the understanding

[31] This committed approach is one that seeks to give an account of the theoretical problems that arise when Islamic jurists follow traditional Islamic norms from an explicitly Islamic perspective to uncover the inner dynamics and contradictions of religiopolitical ideology at play.

[32] Mohaqqeq Damad, *Qawā'ed-e feqh*, 13–27.

[33] 17:15.

[34] 26:208.

[35] 28:59.

[36] Amili, *Alqāva'ed val favāe'ed*, 195.

[37] Amili, *Qāyat'ol morād*, 115.

[38] Also translated as the "evil of a punishment without informing (of the crime)" and "it is abominable to punish without warning."

[39] Takim, *Shiʿism Revisited*, 85.

[40] 4:165; 20:134; 7:15.

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that God is just, which is one of the major Islamic theological dogmas. This type of argument, supporting the rule of the indecency of punishment prior to the expression of law, also seems to be in harmony with the rationality of the Islamic law of evidence proposed by Rudolph Peters.[41] Stressing the significance of the rule of indecency, a leading Islamic jurist-theologian, Ayatollah Khui, went so far as to state that any state punishment for the violation of an obligation which had not been announced is nothing less than a clear sign of tyranny.[42]

Punishment and Equivocal Criminalization

I have demonstrated that the principle of legality has been distinctly entrenched in Iranian postrevolutionary legislation, and, within the theological framework, I have shown that the theological dogma that nobody, be they Muslim or nonbeliever, should be condemned for something not previously declared forbidden (*harām*) is deeply ingrained in the thinking of Islamic jurist-theologians. The enshrinement of the principle of legality in different sets of regulations and laws, as discussed above, has led some scholars to view it as a fundamental shift from the traditional conception of the Islamic judge (*hākem*) to a constitutionally anchored modern conception of the judge, in which the judge's discretion in assessing cases is constrained by considerable limits.[43] They are bound by law to deliver their judgment on the basis of codified laws that have been passed by the Islamic Consultative Assembly (*majlis*) and promulgated nationwide by the Official Gazette.[44]

The scope of this article forces me to forgo a description of the vicissitudes of this radical shift, but I will mention that in Iran the transition from the traditional to the modern conception of an Islamic judge did not develop smoothly.[45] Indeed, there were, and still are, a group of hardliner or conservative critics who believe that "the features of governance expressed in the republican model, with Islamic laws rationalized in *codified* form, are offensive to the essential values of Islam."[46] All in all, the aforementioned legal provisions might, if read in isolation, strike some readers as profoundly at odds with my initial observation of the uncertain situation and existential insecurity caused by the Iranian legal system. To substantiate my observation requires a technical analysis of conflicting legal materials. The following two subsections serve this purpose.

Equating Sin with Crime

Despite many jurists' adamant support for the principle of legality and the great effort put into this issue by and beyond all the supportive references already cited, I submit that the codification of Article 167 of the constitution should be viewed as the death knell for this principle. In fact, those who deem the principle of legality to be the keystone of criminal justice have bemoaned the decline of the rule of law, found themselves in a hopeless situation, and, as it were, exclaimed "abandon all hope, all ye who enter here" (qua Dante Alighieri). One can read Article 167 as an incongruity that afflicts the constitution with debilitating defects, making it unfit for securing the legitimacy of criminal justice and a significant threat to the self-orientation of individuals. The article reads:

> 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

[41] Peters, *Crime and Punishment*, 12.

[42] Milani, *Negareshi bar asl-e qānuni*, 103.

[43] Osanloo, "Measure," 577. See Layish, "Transformation,".

[44] Article 1 of the Iranian Civil Code reads: "The Islamic Consultative Assembly's enactments and the results of the referendum, having gone through legal procedures, will be presented to the president of the republic. The president shall within five days sign them, present them to executors, and issue instruction to have them published, and the Official Gazette shall be required to publish them within 72 hours after notification thereof."

[45] For more information on the shift at the international level, see Abdillah, "Constitution Building," 51–64.

[46] Osanloo, "Measure," 593 [emphasis added].

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> authoritative Islamic sources and authentic fatwas. He, on the pretext of the silence of or deficiency of law in the matter, or its brevity or contradictory nature, cannot refrain from admitting and examining cases and delivering his judgment.

As the article clearly states, judges enjoy the authority to invoke "authoritative Islamic sources" (e.g., *al-Lum'a al-Dimashqiyyā*, *Sharāyi al-islām*, *Jawāhir al-kalām fī sharḥ sharā'iʿ al-islām*, and *Tahrir al-Wasilāh*) and "authentic fatwas" and may deliver sentences on the basis of these sources in the absence of any law governing an act—that is, when it has not been laid down in a statutory law that an act is deemed illegal.[47] The constitution itself appears to be the source of a violation of the rule of law and a watering-down of the principle of *nulla poene sine lege* (no punishment without law). Indeed, Article 167 empowers judges to refer to outside sources to seek a sentence to impose on an individual whose action is not stipulated in statutory law. The judge, in other words, definitively reaches beyond the previously established penal code. An additional point is that the constitution has yet to limit this judicial authority to the prerogative of judges who specialize in Islamic jurisprudence (*mujtahid*).[48] Therefore, even non-*mujtahid* judges, who constitute the majority of judges in Iran's judicial system, are empowered to invoke Islamic jurisprudence in criminal matters and, therefore, to find sins that carry punishments.

With this constitutional license, the Islamic jurisprudential rule of *ta'zīr* also gives judges justification for punishments for actions described as sinful in authoritative Islamic sources and authentic fatwas. This creates an overlap between, and confuses, the spheres of crime and sin. A wide range of books written on Islamic jurisprudence have incorporated the *ta'zīrta* rule under slightly different terms, including: every forbidden act is to be punished by *ta'zīr* (*at-ta'zīr li-kull 'amal muharram)*; the *ta'zīr* punishment is in the hands of the judge (*at-ta'zīr bi yad al-hākim*); and the *ta'zīr* punishment is delivered for the commission of sin (*at'-ta'zīr li-kull ma'siya*).[49] These legal maxims, together, comprise the rule of *ta'zīr*, according to which *ta'zīr* is a punishment delivered for the commission of sin (*ma'siya*) whose punishment has not been fixed by Sharia.[50] The determination of the punishment is left to the judge, and it shall not exceed the amount of punishment decreed by fixed punishment that has been prescribed under Sharia (*ḥudūd*). According to this understanding, nongrievance evils—that is, acts which are viewed as sins or moral failings—can be punished by the courts even if they had no injurious effect on another individual or on society as a whole. Essentially, according to *ta'zīr*, private sins do not lie beyond the reach of earthly judges.

The problematic nature of Article 167 has sparked many vibrant debates and legal controversies among Iranian legal scholars. Authors who have commented on this controversial article are divided into two camps. First are those who are comfortable with it, believing it an essential provision that guarantees the Islamicness of Shiʿi theocracy. Some scholars do not seem to have taken notice of Article 167; indeed, they have contented themselves with referring to some articles of the constitution, such as Articles 36, 37, 166, and 169, averring that "the Constitution embraces the rule of law *in a full-fledged manner*."[51] Moreover, a number of commentators have attempted to argue that observance of the principle of legality is

[47] The same provision is included in laws of other Muslim countries, such as Afghanistan (Article 13 of the constitution), Egypt (Article 32 of the civil code), and Qatar (Article 1 of the civil code). See Abdullah, "Influence," 78, 84.

[48] A *mujtahid* enjoys the exclusive competence to issue legal decisions by employing independent juristic reasoning (*ijtihad*). The term *ijtihad* has also been translated as the "exercise of judgment in legislation."

[49] Gholami, "Sāzo karha-e ejrā-e qāaede-e 'al'ta'zīr," 175.

[50] Although the majority of Islamic jurists confirm that *ta'zīr* is an unspecified penal function that covers all types of punishments, some jurists hold that punishment under the *ta'zīr* is limited to flogging, and further that the number of lashes should be less than the number prescribed by the *ḥadd* punishment. *Ḥudūd* [sing. *ḥadd*] literally means "limits" but in the legal jargon *ḥudūd* are Islamic corporal penalties and crimes which have been specified in the Quran or authentic hadith. They include flagellation, contralateral amputation of a leg and hand, crucifixion, hanging, and stoningSee Hedayati-Kakhki and Bohlander, "Criminal Justice," 429–30.

[51] Emphasis added. See Habibzadeh, "Legality Principle," 108–14; Rasekh, "Traditional Secularism," 8.

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accepted in the Iranian legal system. Some of them have even gone so far as to claim that Article 167 is in line with, and could be very well justified by, an interpretation of the rule of law suggested in Herbert Hart's theory of law.[52]

On the other side, and of more significance here, are those scholars who seek to present a modest and right-protective reading of Article 167. Viewing this article as a potential threat to the legality principle and uniformity in criminal justice, this camp of scholars has contrived to develop a series of stratagems to soften the edges of this problematic article. These efforts have initiated a vibrant legal, political discourse on the limits of this article. For instance, some scholars have argued that, because some of the terms in various articles of statutory law would be misunderstood if judges failed to invoke authoritative Islamic sources, it is reasonable and technically necessary in some cases that the judges refer to religious sources to develop an accurate understanding of the statutory law.[53] For these scholars, judges may only fill a lacuna by interpreting certain notions of Islamic law that have not been explained in the positive law. Other scholars put forward a solution that mitigates the detrimental effects of Article 167. An article written in 2021 purports to provide instruction on how to apply Article 167 in criminal matters; the article suggests that in cases of silence, brevity, deficiency, or the contradictory nature of a codified law, judges must deliver their judgments on the basis of an authoritative Islamic source or authentic fatwa that prescribes the most lenient punishment.[54] Yet others have maintained that the legislation process for nonstipulated *ta'zīr* laws and Ayatollah Khomeini's view as well as his practice reveal that judges are not permitted to invoke Islamic jurisprudence in criminal matters.[55]

The other progressive attempt to protect of the principle of legality was directed to revisiting Article 167. To extricate the Iranian legal system from the morass of the unfettered judicial discretion authorized by the constitution and improve its image in the area of human rights, some commentators have attempted to soften Article 167 and tame unbridled theocratic criminal law by proposing moderate theocracy. A well-known criminal law professor, Mahmoud Akhondi, for instance, argued that Article 167 only included procedural criminal law but not substantive criminal law.[56] But the most serious argument of these commentators is that this article only relates to civil cases and that the framers of the constitution did not intend to expose the rights and freedoms of individuals to danger by giving judges this sword and the freedom to wield it by extending this article to the scope of criminal law.[57]

This interpretation is, however, just window dressing and too ipse dixit to be convincing. I have two specific quarrels with it. First, these jurists have failed to offer any explanation of the legislator's specific original intention. What if, conversely, they believed that giving judges a free hand—the power to pass sentences based on authoritative Islamic sources and authentic fatwas—did not weaken the rights and freedoms of individuals but rather consolidated the Islamic norms and values of Iran's Muslim society? Pushing further, would it not be more sensible to suspect that Article 167, written and supervised primarily, if not entirely, by revolutionary and religiously devout (Islamic) jurists, was based on a conviction in precise opposition to the given interpretation?

The second, more serious flaw in this interpretation is that there are some articles in other laws that explicitly acknowledge that Article 167 covers criminal cases.[58] A quick glance at these articles demonstrates that the Islamic Consultative Assembly's intention

[52] Rahdar and Nikbin, "Movajjah sāziy-e asl-e 167," 174–75.

[53] Eftekharjahromi, "Asl-e qānuni budan-e jarāyem," 95–96; Milani, *Negareshi bar asl-e qānuni*, 131.

[54] Mohamadian, "Asl-e 167 qānun-e asāsi," 224.

[55] Jafari and Amirian, "Nāravāyi-e tamassok," 333–34.

[56] Akhondi, *Āyin-e dādrasiy-e keyfari*, 94.

[57] Habibzadeh, "Legality Principle," 108–14; Mohaqqeq Damad, *Qawā'ed-e feqh*, 23; Golduziyan, *Hoquq-e jazā-ye omumi-ye Iran*, 213.

[58] For instance, Article 289 of the Correction of the Articles of the Criminal Procedure Code Act (1982); Article 29 of the Establishment of Criminal Courts 1 and 2 and Divisions of Country Court Act (1989); and Article 214 of the Criminal Procedure Act (1999).

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did not align with the interpretation offered by those who believe that Article 167 governs only civil actions. A prime example is Article 220 of the IPC, which states explicitly, "As regards *ḥudūd* punishments (fixed punishments, prescribed by Sharia) not mentioned in the present law, action shall be taken in accordance with Article 167 of the Constitution."[59] This is the constitutional obliteration of the line that is supposed to exist between wrongdoing that is punishable under the law (a crime) and an offense against a religious or moral law (a sin), because it empowers judges to inflict punishments not stipulated in the IPC, such as punishments for apostasy (*ertedād*), claiming the power of prophecy (*edde'āy-e nabovvat*), performing magic (*sehr*), and pernicious innovations (*bed'at*) [60].

Worse still, as authoritative Islamic sources and authentic fatwas espouse different precepts apropos the sinfulness and punishability of actions on the one hand, and judges have different legal styles or predilections on the other, it is quite conceivable that the judicial outcomes of two cases involving the same charges and facts but heard in different courts may be totally dissimilar. Indeed, a defendant who was sentenced to punishment in Court A might have been acquitted if her or his case had been heard in Court B. This discordant judicial situation in practice triggers waves of ambiguity that sweep across criminal procedure, destroy uniform application of the law, and replace uniform national criminal law with ad hoc pronouncements of local courts. The consequence of this is the uncertainty of punishment, which is directly opposed to a key principle in rational criminal justice.

The legal mechanism of Article 167 also suggests that the religious sources that were supposed to merely be the origin and source of criminal law (Art. 4) have turned into the criminal law themselves in cases of silence, brevity, deficiency, and the contradictory nature of the law. Some pro–Article 167 jurists have pointed to the double-edged function of Article 167, arguing that authoritative Islamic sources and authentic fatwas do not always function as punitive sources in criminal matters.[61] The given sources can lead to decriminalization and depenalization. They argue that referring to Islamic jurisprudence may prepare the way for judges to acquit an accused. This is well illustrated by the concept of repentance: under Islamic jurisprudence, true repentance coming from the belligerent's heart (before his or her arrest) allows criminals to escape *ḥudūd* punishment for their acts.[62]

This argument may encourage us to take an optimistic view and believe that, in allowing for some acquittals, referring to Islamic jurisprudence may give rise to less punitive and more tolerant criminal justice. If we accept this approach, we may view Article 167 as an opening for legal mediation. However, this is not the reality. The acceptability of referring to Islamic jurisprudential sources to find a criminal sentence cannot be evaluated by its degree of punitiveness or nonpunitiveness. That is, being more or less punitive does not ameliorate the problems with the permissibility and legitimacy of a systematic penal policy. Rather, all the theoretical and practical challenges already described and currently observable in criminal courts should be taken into account.

[59] For a critical discussion on *ḥudūd* punishments in the Islamic Penal Code, see Khodadadi, *On Theocratic Criminal Law*, Chapter 4.

[60] This situation might strike some US legal historians as somewhat similar to the common law of crimes that, once upon a time, served as a reservoir of substantive law to fill the gaps left by legislatures, empowering judges to utilize their judicial discretion to fill any lacunae in existing or forthcoming specific legislation that might constitute a threat to public security. This judicial discretion, however, is not comparable to the carte blanche granted to Iranian judges by the constitution, because the operation of common law in the United States was strictly restricted to the field of petty offenses that were not sufficiently important to merit legislative treatment. Therefore, US judicial discretion, unlike that in Iran, was confined to the petty field (i.e., the field of misdemeanors). See Hessick, "Myth," 965–1024.

[61] Ahmadzadeh and Elham, "Ghabz va bast-e asl-e 167," 249.

[62] Under Article 279 of the IPC, belligerent]*muharib*], which has been translated by English-language Iranian media as "enemy of God," refers to someone who draws a weapon to threaten someone's life or property, puts their family in danger, or threatens them in a way that causes insecurity in the environment.

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By and large, based on the challenges linked to the principle of legality in the criminal system, our study reveals that the rule of law has been undermined by the Iranian constitution itself, to the extent that individuals can be punished based on esoteric punitive resources or behind-the-scenes penal laws that are not made public. As legal scholar Silvia Tellenbach states,

> It can also be deduced from the Constitution that religious (*shari'a*) law has the priority over the Constitution in the hierarchy of sources of law in Iran, and that for this reason, even if the principle of legality is laid down in some articles of [the] Constitution, it should not be credited with too much influence in view of its secondary nature.[63]

Deliberate Equivocal Wording

There is a rich body of scholarship on the significant nexus between human rights and the state's penal power. At the heart of this, certainty and clarity are two basic traits of fair law and an essential part of an accessible justice system. The law ought to be precise and understandable to the general public. Crucial prerequisites for clear law are neatness, precision, and appropriate language in the text of legal acts. This applies to both the vocabulary and syntax of articles that are incorporated into the penal code. The legal system needs to protect those who are subject to the law from arbitrary use of state power and permit them to regulate their conduct with certainty.

Certainty, as legal scholar Brian Tamanaha has pointed out, requires that "those who are subject to the law be able to predict reliably what legal rules will be found to govern their conduct and how those rules will be interpreted and applied. Predictability is a necessary aspect of the foreknowledge that enables freedom of action."[64] Legal certainty requires maximizing the transparency of law, particularly when it comes to penal codes containing severe and corporal punishments. Otherwise, it causes civil perplexity and individual disorientation, with citizens easily becoming entangled in an inextricable and menacing prosecutorial process.

I now want to draw attention to further problematic legal provisions—namely, Articles 637 and 638 of the IPC, which constitute a threat to individual freedom and the principle of legality.[65] The articles are as follows:

> If a woman and a man who are not married are involved in illicit affairs or an indecent act excluding *zina* [sexual intercourse], they should be sentenced to 99 lashes. If one of them did not consent to the crime, then only the one who initiated the crime should be punished.
>
> Anyone who publicly perpetrates a religiously forbidden act in public view in places or passageways, besides being punished for the committed act, she or he should also be imprisoned from ten days to two months, or should be flogged (74 lashes), and if she or he commits an act which per se is not punishable but violates public decency, she or he should merely be imprisoned from ten days to two months, or should be flogged (74 lashes).

For the purposes of this research, I set aside discussion of the disproportionality of punishment in these articles. The constituent elements (*actus reus*) of the above crimes are "illicit affairs," "indecent act," and "religiously forbidden act"—but what are they, exactly? Different answers to this vexing question are possible, and it is clear that the equivocation of these

[63] Tellenbach, "Principle of Legality," 25–26.

[64] Tamanaha, *Rule of Law*, 66.

[65] For the articles of the Islamic Penal Code referenced in this article, please see the Iranian Penal Code at https://sherloc.unodc.org/cld/uploads/res/islamic-penal-code_html/Islamic_Penal_Code.pdf

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puzzling phrases poses a threat to freedom of action and the principle of legality. This method of criminalization, behind its obfuscatory language, blurs the boundaries of the state's jurisdiction and complicates the scope of civil liberties. This is a blurriness akin to that attributed to metaphysics, which according to Kant is "a dark ocean without coasts and without lighthouses."

These umbrella articles have been formulated so broadly and ambiguously that they cover a broad range of activities that may be considered offenses in the eyes of even a lenient judge. What if a female artist is arrested for singing on the sidewalk? What if a man intimately kisses his spouse in public view? It is not extravagant to say that both cases are punishable under Article 638 to a judge who believes that women's voices and intimate kisses (even in the case of married spouses) have the potential to trigger immoral sensual or kinetic arousal, and therefore are religiously forbidden.[66] The same holds true for indecent acts and illicit affairs, which may include a wide range of social relations between male and female citizens. The failure of this description, which is supposed to define what kind of conduct leads to criminal liability, has been utterly ignored by the legislature.

The deliberately poor articulation of these descriptions has added fuel to the fire of some conservative commentators in Iran, leading them to hold that all kinds of romantic correspondence (e.g., chatting through mobile apps, video calls, emails, letter writing) between a woman and a man who are not married to one another (*nā'mahram*) are punishable pursuant to Article 637.[67] An advisory opinion of the General Legal Department of the Judiciary holds that a private gathering of a woman and a man (tête-à-tête) who are not married to each other, if there is no essential reason for it, can also constitute a crime punishable by the article in question.[68]

Furthermore, Article 637 does not specify a person's intention to commit this crime (*mens rea*), meaning that the *actus reus* is not dependent on an intention to act. Therefore, touching someone jokingly or patronizingly, shaking someone's hand out of courtesy, or kissing somebody's hand (e.g., a professor's) out of respect and modesty—a common and polite action in Iranian culture—may carry severe corporal punishment in accordance with the article, even though all of these acts are devoid of any sexual connotation.

The situation becomes more complex and problematic with "a religiously forbidden act," which broadly covers any sinful behavior that breaks a religious taboo. Because "religiously forbidden act" has not been specifically introduced by any law, it is by no means clear how broadly or narrowly criminal court judges should interpret this term. Committing a sin that is foisted on the attention of others by virtue of taking place in public may carry severe corporal punishment under Article 638, without any description provided of where the boundaries (of sinfulness or religious disobedience) lie. The punishment for the religiously forbidden act also remains undefined. Are judges to resort to unwritten laws (Art. 167 of the constitution) to punish the sinners? The question cannot be answered.

The broad interpretability of the given terms in these two articles is especially problematic when the perpetration of acts carries severe corporal punishments. The situation is exacerbated when judges serve in an ideology-steeped judicial system and are selected and appointed by conservative examiners.

Beyond Objective: The Agency of the Judge

The two previous sections suggest that the Iranian legal system is entangled in a web of contradictions, leaving both renowned scholars and lay people in a quandary. How can we synthesize the contradictory legal materials? At least one or two constitutional and statutory articles guarantee the principle of legality supported by theological justifications and

[66] Since the Islamic Revolution, restrictions have been placed on women singing.
[67] Zera'at, *Sharh-e mokhtasar-e qānoun-e mojāzāt-e eslāmi*, 201.
[68] Ibid., 202.

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religious scriptures. Yet Article 167 of the constitution as well as two articles of the Iranian Penal Code violate the principle of legality—a basic requirement of the rule of law—by overlapping the spheres of sin and crime and jeopardizing the certainty and clarity of the law. This is the nowhere-but-everywhere situation. A reasonable appraisal of the Iranian legal system is that there is always a possibility that perpetration of a religiously sinful act will result in a severe punishment.

When elaborating on the contradictory authoritarian and democratic features of Iran and the conflicting elements of repression and tolerance, political scientist Sussan Siavoshi holds that one should go beyond the structural and objective factors and consider the dynamic of factionalism and the behavior of the political elite the most immediate and important factors affecting the direction of change.[69] I think this approach is also well-suited for our line of inquiry because it is a situation in which, in the presence of conflicting legal elements, the judges are entrusted with considerable latitude in their discretionary authority, and therefore subjective factors play a weighty role. The final question to tackle is which of these potential factors may affect a person charged for allegedly violating a religious norm.

Unlike the Pahlavi regime's judicial recruitment policy that was geared toward recruiting judges from university graduates, the IRI has been far more hospitable to Shiʿi seminaries (known as the *howzeh-ye ʿelmiyyeh*—the prescience of knowledge) because of the ideological predilections of Iran's ruling clerics.[70] The Shiʿi theocracy has been inclined to select judges from Shiʿi seminaries in which the educational system offers Islamic courses—such as the principles of jurisprudence (*uṣūl al-fiqh*), the sciences of the Quran (*ʿulūm al-Quran*), hadith, Islamic history (*tārīkh*), theology (*aqāʿid*), the science of hadith authentication (*elm-e rejāl*), and the interpretation of the Quran (*tafsir*)—with the aim of making students capable of deriving religious law from its foundations. Seminaries in postrevolutionary Iran, administered by senior grand Ayatollahs, started functioning as law schools for those wanting to preside over the court.[71] However, about a decade ago, the state's exclusivist policy that favored seminaries was partly revised. For various reasons, including a growing need to employ more judges because of an increase in crime, the state opened the doors of the courts to the university, so that law school graduates were qualified to apply for judicial services and to hold judicial office.[72] The increase in the number of university-educated judges has somewhat altered the atmosphere of the seminary-controlled courts.[73]

Although today seminaries are inclined toward internationalization and integration with the university world, there is still a major difference, if not a tension, between the two educational institutions when it comes to their religiopolitical atmosphere and

[69] Siavoshi, "Authoritarian or Democratic," 313–31.

[70] Banani and Floor, *Nezam-e qāzai-e asr-r qājār va pahlavi*, 116–20. This trend also gained momentum in other countries, such as Turkey and Egypt, over the course of the nineteenth century. See Opwis, "Maṣlaḥa," 184–86. See Cotler, "Foreword"; and Enayat and Danesh, "Introduction," esp. 3–4. I thank a reviewer for drawing my attention to these two pieces.

[71] For details on the development of Shiʿi seminaries in contemporary Iran, see Zekavat, "Howze-e elmi-e dar jedāl-e ghadim va jaded."

[72] According to the study *Criminal Law Overview of Iran: Penal Policy Effects* conducted by the Iranian legal scholar Esmaeel Haditabar in 2015, the rate at which prisoners entered prisons in Iran between 1979 and 2014 increased dramatically. The statistical findings of his research suggest that although the total population of Iran has increased less than twofold in the last three decades, the prison population of Iran increased tenfold between 1966 and 2013. His research finds that the current total capacity of prisons in Iran is only about 650,000 individuals. This means that today there are about 100,000 extra prisoners in Iranian prisons. The number of arrested people in Iranian jails is four to six times the actual capacity of the jails, and the number of female prisoners in Iran is increasing as well. See Haditabar, *Criminal Law*.

[73] I intentionally use the word "somewhat" because, although state favoritism of the seminary has been modified in judicial recruitment, the universities from which judges are selected are affiliated with the government, such as Razavi University, Imam Sadegh University, and the University of Judicial Sciences. Only a very small percentage are selected from law graduates of ordinary universities (with even higher rankings than the aforementioned universities).

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curriculum.[74] Law school students, while taking some Islamic courses like jurisprudential texts (*motun-e fiqh*), also learn modern sciences, methods of interpretation, and principles. Criminologists and professors in Iranian universities inculcate students with criminological theories that conceive of criminality as anomie. They advocate for rehabilitative measures rather than harsh punitive treatments. Moreover, criminal law professors often emphasize modern and liberal legal principles and theories of rights, such as the principles of "criminal law as last and least resort" (*ultima ratio*); "when in doubt, rule for the accused" (*in dubio pro reo*); strict construction interpretation; and the right not to be punished. In postgraduate study programs, law students are encouraged to carry out research in Western philosophy and theories and write articles and theses in these fields.

This academic approach does not apply to the seminary. For seminarians steeped in Shiʿi juristic orthodox tradition, the traditional Islamic disciplines occupy a central position in educational materials, and the normative directives of Islam embodied in jurisprudential sources and fatwas are regarded as the primary and secondary sources of law and ethical or moral standards, ensuring the worldly and otherworldly prosperity of mankind. Politically, seminarians are primarily opposed to Western liberal values. Indeed, since seminaries are closely aligned with the IRI and serve as strongholds for state supporters, those who prefer to maintain a distance from politics often find themselves dissatisfied with contemporary seminary education".[75]

Because of the great differences between these two educational institutions and the change in seminary requirement policy, the Iranian court system now constitutes a mix of clerical (*ruhāni*) and university-educated jurists. The religiopolitical background of a judge who hears a case concerning the perpetration of sin (e.g., apostasy or blasphemy) or a crime against the ideological values and ethical standards of the Iranian theocratic system (e.g., an illicit affair or indecent act) will influence his verdict.[76] The pithy words of Jeffrie Murphy, a philosopher, fit here well:

> When a person brought up a Christian becomes an atheist, he tends to become a Christian atheist. The questions he chooses to make central and many of the answers that tempt him are often framed, even if he does not realize it, by the very set of beliefs he claims to reject. I suspect that this is true for other religions as well.[77]

One can infer that a university-educated judge, influenced by the modern criminal law and criminology theories and principles taught in law school, is more likely to rely on strict construction, the principles of *in dubio pro reo*, and *ultima ratio*. If this is the case, he will most likely find that Article 167 of the constitution only relates to civil cases, and illicit affairs, indecent acts, and religiously forbidden acts are limited to a few particular behaviors. In these behaviors, such as exhibitionism (indecent exposure) or drinking or eating in public during Ramadan (the month of fasting), religious sinfulness is embedded in a moral common sense. On the other hand, it is not implausible to expect a seminary-educated cleric—insulated from above mentioned theories and principles and trained in an ideological environment of traditional Islamic authoritative texts, government-endorsed interpretations of moral values, and a scripturalist approach —to be strict with those seen as sinners and rule on sins that are vaguely stipulated or not mentioned in the IPC but described in authoritative Islamic sources.[78]

Let us assume that an ex-Muslim who has come to believe that he should embrace another religion, or a woman of letters who was engaged in critical scholarship and poses

[74] See Soroush, "What University Expects," 171–83; and Takim, *Shiʿism Revisited*, 32, 34, 49, 112.

[75] Sakurai, "Shi'ite Women's Seminaries," 733. See also Ghobadzadeh and Akbarzadeh, "Religionization," 570–84.

[76] Historically, the great majority of Muslim judges have been men, therefore I refer to them with male gender pronouns.

[77] Murphy, *Punishment*, 44.

[78] For more on the scripturalist approach, see Wood, "Legislation," 568–73.

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a theological challenge in a somewhat skeptical way, is arrested by police forces and charged with apostasy or blasphemy. They would far more likely be acquitted if brought before a court presided over by a university-educated judge than one led by a seminary-educated judge. Because apostasy is not explicitly criminalized in the IPC, there is a fair chance and reasonable probability that a university-educated judge, strongly influenced by his academic education, would resort to principles such as strict interpretation, construing an ambiguous statute in favor of the defendant, or criminal law as a last resort, and therefore exonerate the accused from criminal liability.

However, it is unlikely that this scenario would take place at a cleric-run court. Let us look at three causative factors: (a) seminarians are taught that jurisprudential sources (*manābe-e feqhi*) are authoritative and reliable; (b) the majority of Shiʿi jurists (*fuqahā*) maintain that apostasy should be punished by death; and (c) it is technically lawful for a jurist to base his judgment on an authentic fatwa or authoritative Islamic source, as stipulated in Article 167.[79] Resorting to any authoritative source on Shiʿi jurisprudence, such as *al-Lum'a al-Dimashqiyyā, sharāyi al-islām* or *Jawāhir al-kalām fī sharḥ sharāʾiʿ al-islām*, would suffice to convince a seminary-educated judge to enforce capital punishment for apostasy.[80] In addition, if he views the apostasy as a political threat, the seminary-educated judge's typical commitment to the theocratic state may lead him to charge the apostasy as a political action against state security.[81]

Almost all Shiʿi clerics consider it their religious obligation to choose a source of emulation (*marja-e taqlid*)—a Grand Ayatollah with the authority given by a seminary to make legal decisions within the confines of Islamic law for followers and lower-ranking clerics—and to follow his dictates in matters of belief and utilize his personal opinions (*ra'y*) or fatwas in matters of law.[82] An authentic fatwa stating that an apostate's blood is worthless or wasted (*mahdur'a dam*) is enough for a seminary-educated judge to base his judgment on it. The judge may view enforcement of the fatwa a compulsory religious obligation, and that this will enhance the spiritual merit (*savāb*) he obtains in the afterlife. By and large, the judge identifies himself as an agent who is constitutionally and religiously authorized, or even mandated, to sentence the apostate to death.

These conflicting scenarios hold true for cases in which defendants are charged with illicit affairs, indecent acts, and religiously forbidden acts. Recall Fardad's case: if he and his girlfriend are arrested by the morality police for an alleged illicit affair while traveling, the outcome of their trial will be contingent on whether the judge is a cleric or a university graduate.[83] Their chances of being acquitted will be much lower if a cleric presides over the court. It can be realistically expected that the journey of a boy and a girl together out-of-wedlock would be treated as sinful and obscene in the eyes of a seminary-educated judge who was trained in a single-sex institution at which mixed-gender environments like coed universities are looked upon with distrust and criticism.[84] The fact that numerous authoritative Islamic sources studied by students at seminaries include the Islamic precept

[79] Saeed, "Limitations," 370.

[80] See Amini and Ayati, *Feq-he estedlāli*, 628–29.

[81] Saeed, "Limitations," 372; Mayer, "Islamic Rights," 280. For further scholarly discussion on the quiddity of apostasy, see Peters and De Vries, "Apostasy," 1–25.

[82] See Zonis, "Rule," 85–108; Clarke, "Shiʿi Construction," 40–64; and Takim, *Shiʿism Revisited*, 77, 85.

[83] The morality police, also known as guidance patrols (*gasht-e ershād*), are a unit of Iran's Islamic religious police force tasked with enforcing the dress code based on Islamic values.

[84] This pessimistic, negative attitude toward mixed-gender environments, and especially the coeducational schools and universities run by the government, adopted by the state authorities in the aftermath of the Islamic Revolution of Iran, reached its apogee in the Iranian educational system in 2011 after an unexpected announcement by the president of the largest, leading specialized public university in the humanities, Allameh Tabatabai University. Hardline cleric Seyed Sadredin Shariati announced that the separation of men and women would be required for classes with large numbers of students. Following his order, gender segregation was quickly implemented in university classes, including graduate classes with only a handful of participants.

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that a romantic tête-à-tête is religiously forbidden heightens the risk that this conduct will be deemed a punishable crime by a seminary-educated judge.[85]

The final point related to a judge's agency is the knowledge of the judge (*elm-e qazi*). Implementation of *ḥudūd* requires that a series of regulations and formalities set out by the Sharia be followed.[86] In classical criminal law, the general rule is that a confession or the testimony of witnesses is valid evidence when it comes to *ḥudūd* punishments. A long-standing subject of controversy among Shiʿi jurists is the probativity of a judge's knowledge (*hujjiyate-e elm-e qāzi*). Shiʿi jurists address the question of whether a judge can, based on his own knowledge, apply *ḥudūd* in the absence of these two forms of proof. Their theories on the probativity of a judge's knowledge are divided into four categories: (a) the nonprobativity of a judge's knowledge; (b) the probativity of a judge's knowledge only in the rights of people (*haqq al-nās*); (c) the probativity of a judge's knowledge only in the rights of God (*haqq Allah*); and (d) the absolute probative force of a judge's knowledge.[87] The founder of the IRI, whose opinion on jurisprudential matters had a dramatic impact on legislation in postrevolutionary Iran, joined the fourth group; for Ayatollah Khomeini, a judge's knowledge had probative force in cases relating to both the rights of God and the rights of —in both criminal matters such as *ḥudūd* and civil matters like blood money— provided that there was no proof against his knowledge.[88]

The judge's knowledge was not stipulated as proof in the penal code before the Islamic Revolution. In the previous penal code of 1991, under Article 5, the judge's knowledge was allowed as proof in *ḥudūd*, although this was explicit only in the *adultery*, sodomy, lesbianism, and theft sections.[89] It was not clear whether the judge's knowledge would apply only to the explicit crimes or to all *ḥudūd* crimes.[90] However, the new IPC embraced a clear-cut penal policy with a view toward treating those accused of *ḥudūd* crimes more harshly. Pursuant to Article 160 of the current IPC, "evidence [admissible] for proof of crimes includes confession, testimony, *qasaameh*,[91] and oath in the cases specified by law and also knowledge of the judge." Furthermore, the legislation articulated in Article 212 that "if the knowledge of the judge is contradictory to other legal evidence, if the knowledge remains manifest [untouched], such evidence shall not be admissible for the judge, and the judge, explaining the reasons for his knowledge and the grounds for rejecting other evidence, shall deliver the judgment."

The fact that the judge's knowledge was embedded in the IPC as proof in *ḥudūd* along with traditional Islamic forms of proof (confession and testimony), reveals adoption of the most expansive probativity theory—category (d)—and therefore, enhanced and strengthened the agency of the judge considerably. This has led some scholars to suggest that the knowledge of the judge "allows the judge to use 'his' (for at least two decades or more there have not been any women judges in the criminal courts) 'insight', or personal intuition not clearly based on objectively verifiable evidence."[92] This further exposes the defendant's fate to the religiopolitical predilections of the judge and his punitive attitude to crime as a destabilizing threat to Islam.

[85] See Markaz-e Tahqiqāt-e feqhi, *Majmu-e ārā-e feqhi-e qazā'i*, 159.

[86] See Peters, *Crime and Punishment*, 12–20.

[87] Mousavian, "Ghalamro-e elm-e ghāzi dar feghh," 94; Heydari, "Etebār-e elm-e ghāzi," 103–5.

[88] Biglari and Soltani, "Siāsat va ghezāvat," 1310, 1318.

[89] Article 105 reads: "Although required to state the evidence that his knowledge relies on, the judge may make a judgment of both God's claims [*haqq-ol-lāh*] and people's claims [*haqq-on-nās*], according to his knowledge, and execute the *ḥadd* punishment. Execution of *ḥadd* punishment in the cases in which God's claims are violated shall not be subject to any personal request; however, when people's claims [private rights] are violated, the execution of the *ḥadd* punishment shall be subject to the request of the plaintiff." See https://www.refworld.org/legal/legislation/natlegbod/1991/en/115464

[90] For further discussion of the judge's knowledge in the previous penal code (1991), see the doctoral thesis of Fujinaga, "Life and Limb," esp. 54–58.

[91] *Qasaameh* refers to a form of oath or sworn testimony used in cases of homicide or bodily harm. In situations where there is a lack of clear evidence or witnesses, the accused may be required to swear an oath to establish their innocence or to cast doubt on the claims against them.

[92] Dyke, "'Islamic Penal Code,'" 33–34.

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Conclusion

This article presents the complex issues raised by certain constitutional articles and penal provisions that infringe on the legality principle and the principle of nonretroactivity, the very rule of law in the sphere of criminal law. I have attempted to demonstrate that, although constitutionalization and codification were formally carried out in Iran after the Islamic Revolution, the substantive normative requirements of these modern projects—to ensure that nothing proceeds beyond the reach of a formal written enactment of legislative authority, and clarity and certainty in criminal legislation—were not met with flying colors. As the constitution obliterates the border that should exist between wrongdoing punishable under the law (crime) and offenses against religious or moral law (sin), it is fair to conclude that the principle of legality is forsaken. The punitiviness is greatly increased due to the blurring of the boundary between crime and sin.

In addition, employing the IPC, the Iranian theocratic state has preserved space for its judicial authority to impose unwritten Sharia-oriented penal sanctions for religious conduct that is vaguely stipulated in two articles. This legislative strategy, allowing judges unfettered discretion to pass punishment on those they deem to be sinners, creates a situation in which citizens cannot orient their behavior due to legal uncertainty and equivocation. This has a detrimental chilling effect, making Iranians hesitant to exercise legitimate rights for fear of legal repercussions. Even if cigarette smoking by women in public is neither a crime nor a sin, a large number of women may avoid smoking for fear of being arrested and punished.

Finally, I can imagine a theocracy-minded critic countering the premise of this paper by asking why the Iranian criminal justice system, formulated and constructed based on Sharia values and tradition, should be evaluated based on legal norms (e.g., no punishment without law) that originate in a Western sociopolitical context? This critic may argue that an Islamic theocracy cannot be expected to absorb a Western legal norm based on Western sociopolitical and cultural experiences and vested interests. In my view, this criticism has two important shortcomings. First, the legality principle, ensuring the legitimacy and fairness of the judicial system, is a universal norm. Even if we consider *nulla poene sine lege* to be a Western principle rather than a universal one, this legal norm has been introduced and recognized by Shiʿi jurists and theologians as a principle rooted in scriptural revelation and Islamic jurisprudence. Second, the principle is entrenched in international human rights instruments that Iran itself has voted in favor of or ratified, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and the Convention on the Rights of the Child.

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