HUMAN RIGHTS WATCH

Codifying Repression

An Assessment of Iran's New Penal Code

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Summary

In January 2012 the Guardian Council, an unelected body of 12 religious jurists charged with vetting all legislation to ensure its compatibility with Iran's constitution and shari'a, or Islamic law, approved the final text of an amended penal code. While President Mahmoud Ahmadinejad has not yet promulgated the new bill into law, Iranian officials have described the amendments to the Islamic Penal Code— including more than 737 articles and 204 notes that address various issues ranging from extraterritoriality to the applicability and implementation of punishments—as a new and improved set of laws, and repeatedly cited them as an example of the government's serious attempt to comply with its international human rights obligations.

However, many problematic provisions of the old penal code remain unchanged, and some of the amendments actually represent a weakening of the rights of criminal defendants and convicts. In many cases the new provisions ignore serious concerns about the severity of the penal provisions and their legality under international law. Some provisions touted as marked improvements by Iranian officials would actually allow judges wide discretion to issue punishments that clearly violate the rights of the accused.

In a limited number of areas it is true that Iranian lawmakers have made improvements to the penal code. For example, a new provision abolishes the death penalty for child offenders (defined as anyone accused of committing a crime under 18 years of age) for crimes that do not carry specific or required punishments in shari'a law. The new code also expands correctional and rehabilitation measures in lieu of imprisonment and other harsh penalties for children, and provides more sentencing guidelines than the old code.

However, under the new penal provisions "discretionary crimes," which include punishments for the vast majority of Iran's national security laws under which political dissidents are tried and convicted in revolutionary courts, remain, for the most part, unchanged.

Furthermore, among its many other shortcomings, the new code includes the retention of the death penalty, including for child offenders in certain circumstances. The new penal code also fails to codify laws for which there are serious punishments, including the death

penalty; uses broad or vaguely worded national security laws criminalizing the exercise of fundamental rights; and retains punishments that amount to torture or cruel and degrading treatment, such as stoning, flogging, and amputation. The amendments also retain previously discriminatory provisions against women and religious minorities.

Contrary to repeated assertions by Iranian authorities that the penal code amendments prohibit the execution of children less than 18 years of age, the new law retains the death penalty for children in certain circumstances. Under the new code, children who commit "discretionary crimes" are no longer subject to execution, and courts are instead required to sentence child offenders found guilty of such crimes to correctional and rehabilitation measures. This means there is indeed a strict prohibition on the execution of child offenders convicted, for example, of drug trafficking and possession charges, which can be subject to the death penalty under Iran's draconian anti-narcotics law.

However, the new code also explicitly pegs the age of criminal responsibility to the age of maturity or puberty (*bolugh*) under shari'a law, which in Iranian jurisprudence, is nine years for girls (eight years and nine months per the lunar calendar) and 15 years for boys (14 years and seven months per the lunar calendar). A judge may, therefore, still sentence to death a girl as young as nine or a boy as young as 15 convicted of a "crime against God" or a crime subject to retributive justice, such as sodomy or murder, if the judge determines that the child understood the nature and consequences of the crime he or she committed.

As with the old penal code, the new amendments provide the death penalty for activities that should either not constitute crimes at all or are not considered among "the most serious" crimes (typically resulting in death) under international law. The new provisions continue to criminalize certain types of consensual heterosexual and same-sex sexual relations outside of marriage, such as adultery and sodomy, under penalty of death. Other crimes that carry the death penalty under the new provisions include possession or selling of illicit drugs and insulting the Prophet Mohammad, his daughter Fatima, or any of the twelve Shi'a Imams.

Another serious flaw in the new penal code is that it allows judges to rely on non-codified law to convict and sentence individuals to crimes and punishments. For example, unlike the old code the new amendments *explicitly* allow judges to rely on religious sources, including shari'a and *fatwas* (religious edicts) issued by high-ranking Shia clerics, to

convict an individual of apostasy or to sentence a defendant convicted of adultery to stoning. This is true even though there is no crime of apostasy under the penal code and stoning as a form of punishment for adultery has been removed from the new provisions. Though the numbers of individuals executed by stoning or for apostasy are relatively low in recent years, the new provisions fail to prohibit such practices.

The new provisions also allow judges to rely upon their "knowledge" not only in resolving issues related to applicable laws, but also in determining issues of fact and evidence. Under the old provisions, judges often abused this provision and relied upon evidence that should have been made inadmissible to prove guilt or innocence, including confessions extracted through the use of physical torture and extreme psychological pressure. Moreover, under the old code, judges sometimes relied on this provision as a way to introduce non-codified shari'a evidentiary standards to determine the innocence or guilt of the accused. It is not clear whether new provisions defining "knowledge of the judge" in the new code prohibit the use of non-codified law to determine culpability.

One particularly troubling amendment to the new code concerns article 287, which defines the crime of *efsad-e fel arz* ("sowing corruption on earth"), punishable by death. Legislators have greatly expanded the definition of this crime, which was previously largely limited to prosecuting individuals alleged to be involved in armed resistance or terrorism against the state, to include an even broader set of ill-defined activities, such as "publish[ing] lies," "operat[ing] or manag[ing] centers of corruption or prostitution," or "damag[ing] the economy of the country" if these actions are deemed to "seriously disturb the public order and security of the nation." Furthermore, because this crime is considered a "crime against God" for which shari'a law assigns fixed and specific punishments, judges (and even the Supreme Leader of the Islamic Republic) are, in contravention of international law, generally precluded from granting convicts pardons or commuting their sentences.

Under the current penal code authorities have executed at least 36 people since January 2010 on the charge of "enmity against God" or "sowing corruption on earth" for their alleged ties to armed or terrorist groups. At least 28 Kurdish prisoners are also known to be awaiting execution on various national security charges, including "enmity against God." Human Rights Watch believes that in a number of these cases, Iran's judicial authorities

convicted, sentenced, and executed individuals simply because they were political dissidents, and not because they had committed terrorist acts.

The new penal provisions also fail to amend any of the overly broad or vaguely defined national security laws that severely punish individuals for exercising their right to freedom of expression, association, or assembly. Prosecutors and revolutionary courts systematically use these laws to target, harass, imprison, and silence critics and political dissidents.

Two other serious flaws in the new penal code provisions include the retention of punitive measures that amount to torture and cruel, degrading, or inhuman treatment of individuals convicted of crimes, including flogging, and the inclusion of discriminatory provisions against women and religious minorities related to the implementation of punishments, retribution and compensation, and use of evidence in court. Examples of discriminatory articles include differential treatment accorded to boys and girls in relation to the "age of maturity" and its consequences regarding criminal responsibility, and harsher punishments (including death) for non-Muslim defendants convicted of consensual same-sex relations.

An assessment of the new Iranian penal code provisions clearly suggests that the new penal code provisions approved by Iranian lawmakers fail to address serious human rights concerns regarding the administration of justice in Iran. In light of these failures, Human Rights Watch calls on the Iranian government to immediately suspend key provisions of the country's penal code that violate the rights of criminal defendants, and to introduce new legislation in line with its international legal obligations.

Recommendations

To the Government of Iran

- Remove any and all references to the death penalty in the penal code and abolish its use.
- Abolish the death penalty completely and immediately for child offenders, including those charged with categories of crimes for which death sentences can still be issued by courts (i.e. "crimes against God" or "retribution crimes").
- Abolish the death penalty for all crimes not considered "serious" (typically resulting in death) under international law, including drug possession and trafficking.
- Abolish all provisions that criminalize conduct that involves the exercise of basic rights including the right to privacy, such as consensual adult sex, including outside of marriage.
- Amend the penal code to include a gender-neutral criminal provision on rape, including criminalization of marital rape.
- Ensure that all provisions criminalizing conduct or punishing conduct considered criminal, including the death penalty, are codified (i.e. clearly identified as crimes or punishments with specific reference to the elements that constitute the crime, such that an ordinary citizen could determine if their acts would constitute a criminal offense) in the penal code or other relevant laws.
- Remove or amend articles in the penal code allowing convictions, including those relating to same-sex conduct, based solely on the knowledge of the shari'a judge as "derived through customary methods," which enables judges to rely on tenuous circumstantial evidence to determine whether a crime has occurred and instead require reliance on inculpatory or exculpatory evidence that can be tested and challenged by the defendant and his or her legal representatives.
- Abolish or amend vague or overly broad crimes such as "enmity against God" or "sowing corruption".
    - Narrowly define and identify the elements of conduct under these offenses that constitute a crime, including defining a "center of corruption," so as to ensure

that conduct that is protected under international law, such as the exercise of human rights like freedom of expression or association, is not criminalized under these provisions.
    - Remove the death penalty for these offenses, beginning with crimes not considered "serious" under international law, including "publishing lies," "damaging the economy of the country," and "operat[ing] or managing centers of corruption or prostitution".

- Amend or abolish the vague security laws under the penal code (which have been retained wholesale in the new penal code amendments), entitled "Offenses against the National and International Security of the Country" (the "Security Laws") and other legislation that permits the government to arbitrarily suppress and punish individuals for peaceful political expression, in breach of its international legal obligations, on grounds that "national security" is being endangered, including the following provisions:
    - Article 498 of the Security Laws, which criminalizes the establishment of any group that aims to "disrupt national security";
    - Article 500, which sets a sentence of three months to one year of imprisonment for anyone found guilty of "propaganda against the order of the Islamic Republic of Iran or propaganda for the benefit of groups or institutions against the order";
    - Article 610, which designates "gathering or colluding against the domestic or international security of the nation or commissioning such acts" as a crime punishable from two to five years of imprisonment;
    - Article 618, which criminalizes "disrupting the order and comfort and calm of the general public or preventing people from work" and allows for a sentence of three months to one year, and up to 74 lashes;
    - Article 513 of the penal code, which criminalizes any "insults" to any of the "Islamic sanctities" or holy figures in Islam and carries a punishment of one to five years, and in some instances may carry a death penalty;
    - Article 514, which criminalizes any "insults" directed at the late Supreme Leader of the Islamic Republic of Iran, Ayatollah Khomeini, or the current Leader, Ayatollah Khamanei, and authorizes a sentence of up to six months to two years in prison.

- Define both "national security" and the breaches against it in narrow terms that do not unduly infringe on internationally guaranteed rights of free expression, association, and assembly.
- Remove all provisions that criminalize "insults" against religious figures and government leaders.
- Remove all provisions that allow for punishments that amount to torture or cruel and degrading treatment, including stoning, flogging, blinding, and amputation.
- Amend the penal code by adopting a definition of torture consistent with article 1 of the Convention against Torture to ensure that all acts of torture and cruel, inhuman, or degrading treatment are criminal offenses and that penalties reflect the grave nature of such offenses.
- Remove all discriminatory provisions against women and religious minorities (i.e. non-Muslims) related to the implementation of punishments, retribution and compensation, and the use of evidence in court, including:
    - Differential treatment accorded to men (or boys) and women (or girls) in relation to the age of criminal responsibility;
    - Differential punishment accorded to fathers and grandfathers who murder their children or grandchildren;
    - Differential punishment accorded to men who murder their spouses;
    - Differential compensation accorded to men and women who suffer injuries as a result of criminal or tortious conduct;
    - Differential evidentiary standards valuing the testimony of a woman as equal to half of that of a man.

I. Background

The Islamic Penal Code, which came into effect in 1991, is the codification of several different pieces of legislation that addresses punishment and compensation for criminal (and tortious) conduct. Along with the Code of Criminal Procedure and the Law Establishing General and Revolutionary Courts, the code serves as the primary body of procedural and substantive law related to the administration of justice on all criminal matters.

The code comprises 729 articles and is divided into five "books" or main sections that deal with general penal provisions and four specific categories of punishments referenced in shari'a law. These categories include: a) *hadd* or *hodud* (pl.), defined as "crimes against God," the punishments for which, including degree, type and implementation, are specified in shari'a law ; b) *qesas*, retributive justice reserved for crimes that cause death or injury, such as murder ("retribution crimes"); c) *diyeh*, monetary fine or compensation to victims in the form of "bloody money" for unintentional acts that cause death or injury or for intentional crimes not covered by *qesas* ("compensation crimes"); and d) *ta'zir*, or punishments for criminal acts that do not have specific or fixed sentences or penalties under sharia law but are considered to be in conflict with religious or state interests ("discretionary crimes").[1]

The 1979 Islamic Revolution ushered in a new legal era in Iran that led to a revamping of criminal legislation and the court system. Under the leadership of Ayatollah Ruhollah Khomeini, the founder and first Supreme Leader of the Islamic Republic, lawmakers drafted a constitution that declared the Jafari or Twelver Shia school of jurisprudence the official state religion and shari'a law as a source of applicable law. The revolutionary council abolished most of the country's existing laws, including the penal code, as un-Islamic. In the absence of a codified set of criminal laws, including a new penal code consistent with shari'a law, revolutionary courts meted out justice based on their interpretation of shari'a law. The courts sentenced hundreds of political prisoners and

[1] Sharia law generally means content included in the Quran or the *hadith*, the sayings of the Prophet Mohammad. For *ta'zir* crimes the state is usually free to define the elements of the crime and set the appropriate punishments.

alleged criminals to death for crimes such as *moharebeh* ("enmity against God")[2] and *efsad-e fel arz* ("sowing corruption").

In 1982 lawmakers passed the *Law of Hodud and Qesas*, the country's first major set of penal code provisions since the revolution. A year later they ratified the *Law of Ta'zirat,* or "discretionary punishments", for a trial period. By 1991 lawmakers unified these separate pieces of legislation into the Islamic Penal Code and approved it for a five-year trial period (which was later renewed for five and ten-year periods). In 1996 lawmakers amended some articles of the new code and finalized ratification of Book 5 under the title "Discretionary and Deterrent Punishments," or *Ta'zirat*. Three years later they approved a new Criminal Code of Procedure.

In 2007 the Judiciary submitted draft penal code amendments to finalize ratification of the penal code whose trial period was set to expire in March 2012. In 2008, the legal committee of the parliament approved the general terms of the new legislation and in December 2009 the full parliament approved the text and submitted it to the Guardian Council, an unelected body of 12 religious jurists charged with vetting all legislation to ensure its compatibility with Iran's constitution and shari'a. After two exchanges between parliament and the Guardian Council, the latter announced the ratification and adoption of the final text of the bill on January 28, 2012.

For the new code to take full effect, President Mahmoud Ahmadinejad must sign it into law and it must be published in the country's official journals.[3] However, President Ahmadinejad has not yet signed the bill into law. Once he signs it, it will undergo a three-year trial period. In April 2012 Ayatollah Sadegh Larijani, the head of Iran's Judiciary, announced that in the meantime he had instructed courts to apply the previous code but expressed hope that Ahmadinejad would sign the new provisions into law as soon as possible.

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[2] The crime of "enmity against God" is a *specific crime* within the broader *category* of "crimes against God" for which shari'a law assigns fixed or specific punishments. Prosecutors often use the charge of "enmity against God" against individuals they allege are involved with armed or terrorist groups.

[3] According to officials, the new code will include more than 1200 articles, and integrate several other pieces of legislation, such as the Law on Computer Crimes, which have not yet been integrated into the penal code Iranian Students' News Agency. "An Interview with Qorbani about Amendments to the Islamic Penal Code," February 20, 2012, is available (in Persian) at http://old.isna.ir/ISNA/NewsView.aspx?ID=News-1952901&Lang=P.

In the lead-up to the ratification and adoption of the new code, Iranian authorities constantly referred to its provisions as proof of Iran's serious efforts to comply with international human rights standards. For example, in November 2011, during a two-day review of Iran's rights record before the United Nations Human Rights Committee (Committee) in Geneva, representatives from the Iranian delegation repeatedly referred to the reformed code as a remedy to the Committee's numerous concerns regarding troubling provisions in the old code.

In February 2012 the spokesperson for the Judicial and Legal Committee of the parliament, Amin Hossein Rahimi, told reporters that under the new amendments, the age of criminal responsibility had increased to 18 years and authorities could no longer execute individuals who committed "retribution crimes" prior to age 18. During the next few months, Rahimi and Iranian officials and parliamentarians highlighted the advances of the amended code, citing the elimination of stoning as punishment for the crime of adultery, the absence of any provisions regarding the crime of apostasy (which carries the death penalty under shari'a law),[4] and the establishment of comprehensive corrective and rehabilitative measures for both child offenders (anyone charged and convicted of a crime under the age of 18) and individuals convicted of lighter "discretionary crimes" as examples of substantive and important reforms.[5]

Officials have also pointed to new provisions that establish clearer sentencing categories for discretionary punishments ranging from 25-plus years' imprisonment (the heaviest category of "discretionary crimes" under the new code) to imprisonment of up to three months (the lightest category). The various categories also contain other forms of punishment, including monetary fines, confiscation of property,[6] and flogging.[7]

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[4] During the drafting phase of the new code some officials lobbied hard to include language that specifically criminalized "apostasy" which is considered a crime under shari'a law. In the end, however, the approved draft of the law, like the old code, did not include any references to the crime of "apostasy."

[5] Ibid.

[6] Article 23 identifies a series of other punishments under the title of "additional and incidental punishments" that judges can use to sentence individuals convicted of "crimes against God," "retribution crimes," or "discretionary crimes." They include exile and bans from work, travel, and participation in political or social organizations.

[7] Under both the old and new codes, flogging and lashing (used interchangeably in this report) must be administered to a male detainee while he is standing upright and stripped of his clothes (except for his genitals, which should remain covered). The lashing should not target the man's head, face, or genitals. Women must be lashed while they are seated with their clothes tightly bound to their body. See, e.g. old code, art. 100.

Despite these promised advances, the reformed penal code reaffirms, in many instances, Iran's disregard for the rights of criminal defendants and convicts, while in other important areas it presents a troubling deterioration of the limited rights that existed under the old code. Mr. Rahimi's assertion that the new code's age of criminal responsibility complies with international standards is incorrect, and his claim that it now prohibits "retribution crime" punishment (i.e. execution) for children convicted with murder is also inaccurate. The same applies to other characterizations made by Iranian media outlets regarding the amended criminal code, including blanket declarations that the new provisions prohibit punishments such as stoning.

The most serious problems with the new code include:

1) retention of the death penalty for child offenders;
2) retention of the death penalty for crimes considered not to be "serious" under international law;
3) failure to codify laws related to serious punishments including death;
4) the use of broad or vaguely worded national security laws criminalizing the exercise of fundamental rights;
5) the continued use of punishments that amount to torture or cruel and degrading treatment, such as stoning, flogging, and amputation; and
6) the retention of previously discriminatory provisions against women and religious minorities related to the implementation of punishments, retribution and compensation, and use of evidence in court.

While the amended penal code makes a few important advances, the provisions highlighted above continue to deprive Iranians of their basic rights under international law to fundamental freedoms, freedom from cruel and arbitrary punishment, and freedom from discrimination. The Iranian government should immediately suspend these provisions, and initiate a complete overhaul of the penal code to ensure it complies with its international legal obligations.

II. Iran's International Obligations

The Right to Life

Article 6 of the International Covenant on Civil and Political Rights (ICCPR) states that "In countries which have not abolished the death penalty, a sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime."[8] The Human Rights Committee, which authoritatively interprets the covenant, has said that the death penalty should be a "quite exceptional measure."[9] The ICCPR also provides that "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence."[10]

The juvenile death penalty is prohibited under international law, and the prohibition is absolute. Both the ICCPR and the Convention on the Rights of the Child (CRC) specifically prohibit capital punishment for persons under 18 at the time of the offense.[11] Iran ratified the ICCPR in 1975 and the CRC in 1994. Between 2007 and 2009, the UN General Assembly twice specifically called upon Iran to end the death penalty for children.[12]

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[8] International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976.

[9] UN Human Rights Committee, "General Comment 6," (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994), article 6.

[10] ICCPR, art. 6(4).

[11] International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, art. 6(5); Convention on the Rights of the Child (CRC), Adopted November 20, 1989, 1577 U.N.T.S.3 (entered into force September 2, 1990), art. 37(a).

[12] UN General Assembly, Resolution 62/168, Situation of human rights in the Islamic Republic of Iran, UN Doc. A/RES/62/168, March 20, 2008. This resolution called upon the Government of the Islamic Republic of Iran "to abolish, as called for by the Committee on the Rights of the Child in its report of January 2005, executions of persons who at the time of their offence were under the age of 18"; and "Situation of human rights in the Islamic Republic of Iran" where the AG "deplores the execution of persons who were under the age of 18 at the time their offence was committed, contrary to the obligations of the Islamic Republic of Iran under article 37 of the Convention on the Rights of the Child, and articles 4 and 6 of the International Covenant on Civil and Political Rights and in spite of the announcement of a moratorium on juvenile executions" called upon Iran "to abolish … executions of persons who at the time of their offence were under the age of 18, and to uphold the moratoriums on juvenile executions and executions by stoning and to introduce these moratoriums as law in order to completely abolish this punishment", UN-Doc. A/RES/61/176, 1 March 2007. Annex 1.

In addition, the UN Human Rights Committee has repeatedly found that drug-related offenses do not meet the criterion of "most serious crimes."[13] In 2007 a summary by the UN Special Rapporteur on extrajudicial or arbitrary executions stated:

> The conclusion to be drawn from a thorough and systematic review of the jurisprudence of all of the principal United Nations bodies … is that the death penalty can only be imposed in such a way that it complies with the stricture that it must be limited to the most serious crimes, in cases where it can be shown that there was an intention to kill, which resulted in the loss of life.[14]

In 2009, the Special Rapporteur reminded states that, under international law, death sentences for drug-related crimes should be abolished and those already passed should be commuted to prison terms.[15] Other authorities, including the UN High Commissioner for Human Rights and the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, have also maintained that the imposition of the death penalty for drugs crimes violates international law.[16] The latter has noted that, in his view, "drug offenses do not meet the threshold of most serious crimes. Therefore, the imposition of the death penalty on drug offenders amounts to a violation of the right to life, discriminatory treatment and possibly … their right to human dignity."

The UN Secretary General and the UN Special Rapporteur on the situation of human rights in Iran both expressed concern in 2011 about the high level of executions for drug-related offences. In October 2011, the UN Human Rights Committee recommended that the Iranian

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[13] UN Human Rights Committee (July 8, 2005), Concluding Observations: Thailand, CCPR/CO/84/THA, para. 14; UN Human Rights Committee (August 29, 2007), Concluding Observations: Sudan, CCPR/C/SDN/CO/3, para. 19. For an in-depth analysis of the use of the death penalty for drug-related offenses, see generally Amnesty International, Addicted to Death, December 2011, at 16, available at http://www.amnesty.org.nz/files/Iranreport_Addictedtodeath_AmnestyInternational.pdf.

[14] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, January 29, 2007, UN Doc. A/HRC/4/20, para. 53, http://www.extrajudicialexecutions.org/application/media/A_HRC_4_20.pdf.

[15] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston UN Human Rights Council, May 29, 2009, A/HRC/11/2/Add.1, 188.

[16] The latter has said that "the imposition of the death penalty on drug offenders amounts to a violation of the right to life, discriminatory treatment and possibly … their right to human dignity." Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 14 January 2009, A/HRC/10/44, para. 66.

authorities consider abolishing the death penalty or at least revise the penal code to restrict the imposition of the death penalty to only the "most serious crimes."[17]

The Right to Liberty and Security

Article 9 of the International Covenant on Civil and Political Rights (ICCPR) affirms that, "Everyone has the right to liberty and security of person." Article 9 also prohibits "arbitrary arrests" and requires that the deprivation of liberty only take place "on such grounds and in accordance with such procedure as are established by law."

Protection against Torture and Cruel, Inhuman, and Degrading Treatment

The ICCPR prohibits any form of torture and cruel, inhuman, and degrading treatment in articles 7 and 10. Although Iran is not a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), the prohibition of torture is consider an absolute rule (*jus cogens*) in customary international law. Torture is also prohibited under Iranian law.[18]

The ICCPR and the Convention Against Torture detail what states must do to enforce the prohibition, including the duty to investigate, prosecute, and provide effective remedies when violations occur.[19] The UN Human Rights Committee has also made clear that the duty to protect people against torture or inhuman treatment not only extends to acts committed by government officials, such as police, but also those inflicted by private individuals.[20]

The Human Rights Committee has noted that the prohibition against torture or cruel, inhuman, and degrading treatment or punishment "relates not only to acts that cause

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[17] Secretary-General, The situation of human rights in the Islamic Republic of Iran: Note by the Secretary-General, A/66/374, 23 September 2011, http://daccess-ddsnyun.org/doc/UNDOC/GEN/N11/512/18/PDF/N1151218.pdf?OpenElement; The situation of human rights in the Islamic Republic of Iran: Report of the Secretary-General, A/66/361, http://daccessddsny.un.org/doc/UNDOC/GEN/N11/499/42/PDF/N1149942.pdf?OpenElement.

[18] Iran Constitution, article 38. Article 578 of the penal code and articles one, six, and nine of the Citizens Rights Law of 2004 also prohibit the use of torture, especially in order to secure confessions.

[19] See for example UN Human Rights Committee Communication no. 322/1988, *Rodriguez v Uruguay*, adopted July 14, 1994; 328/1988, *Blanco v Nicaragua,* adopted July 20, 1994; 1096/2002, *Kurbanov v Tajikistan,* adopted November 6, 2003.

[20] UN Human Rights Committee, "General Comment 20," (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), art. 7.

physical pain, but also to acts that cause mental suffering to the victim."[21] The Committee has noted that the prohibition extends to "corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure."[22] The Special Rapporteur on Torture has specifically addressed the impermissibility of corporal punishment even when laws authorizing it are derived from religion, noting that "those States applying religious law are bound to do so in such a way as to avoid the application of … corporal punishment in practice."[23]

The Right to Privacy

Article 17 of the ICCPR states, "no one shall be subjected to arbitrarily or unlawful interference with his privacy" and that everyone has "the right to the protection of the law against such interference."[24] This right includes "that particular area of individual existence and autonomy that does not touch upon the sphere of liberty and privacy of others."[25]

One protected aspect of the right to privacy and autonomy, confirmed by the Human Rights Committee, is adult consensual sexual activity in private. As the Committee has set out this right, states should protect this right and other aspects of the individual right to autonomy: the right to make decisions freely in accordance with one's values, beliefs, personal circumstances, and needs. States should refrain from imposing illegitimate restrictions and coercion that restricts this right, even where the purpose of such restrictions is to prevent people from adopting a lifestyle that the majority believes is distasteful or harmful to the person who pursues it. Any limitations on the right to autonomy must be directed to a legitimate aim and applied in a nondiscriminatory manner, and the extent and impact of the limitation must be strictly proportionate to meeting that aim.[26]

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21 Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), para. 5.

22 Ibid.

23 Report of the Special Rapporteur, Commission on Human Rights, 53d sess., Item 8(a), U.N. Doc. E/CN.4/1997/7 (1997).

24 ICCPR, art. 17.

25 Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (Kehl am Rhein, Germany: N.P. Engel, 1993), p. 294.

26 UN Human Rights Committee (HRC), General Comment 16 to article 17 of the ICCPR , "Compilation of General Comment and General Recommendations Adopted by Human Rights Treaty Bodies," UN Doc. HRI/GEN/Rev.3, 15 August 1997.

Right to a "Fair Hearing"

Article 14 of the ICCPR guarantees that

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[27]

Article 14 also provides the accused shall "not be compelled to testify against himself or to confess guilt," and shall "have the right to his conviction and sentence being reviewed by a higher tribunal according to law."[28]

Codification of Criminal Laws

According to Article 15(1) of the ICCPR

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

Non-Discrimination and Fundamental Rights

Article 2 of the ICCPR requires a state party to "ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind." It also provides that the state must "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy," and that "competent authorities shall enforce such remedies when granted."[29] The right to a remedy exists regardless of whether the perpetrator is acting in an official

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[27] International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, art. 14(1).

[28] Ibid., arts. 14(3)(g), p. 5.

[29] Ibid.

capacity or a private one. Article 26 guarantees that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law." Unequal protection against violence and unequal access to justice, unless strictly justified, are therefore prohibited under international law.

The ICCPR affirms the right to privacy (article 17), security (article 9), freedom of expression (article 19), and freedom of assembly (article 21). These rights entail the freedom to lead an intimate life peacefully; the freedom to express oneself, including one's gender identity, through clothes or comportment; and the freedom to move and meet in public without fear of harassment or assault. The state must protect people in exercising these rights. Persecuting or harassing people for exercising these freedoms must be prevented where possible and punished where it occurs.

Iranian laws regulating any of these rights and any other government limitation on these rights can only impose such limitations as are consistent with international legal standards—that is, they must be strictly necessary to achieve a legitimate purpose. As the UN Human Rights Committee has advised, "Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected."[30] Any restrictions must also strictly observe the principle of non-discrimination.

Freedom of Expression, Assembly, and Association

The rights to freedom of expression, assembly, and association provided under international human rights law may be limited within narrowly defined boundaries. However, the overly broad exceptions to free expression contained in the Iranian constitution, security laws, and the Iranian penal code more generally allow the government to suppress these rights beyond the limits set by international law.

[30] General Comment 16/32, in ICCPR/C/SR.749, March 23, 1988, para. 4. See *Toonen v. Australia*, para. 8.3.

A party to the ICCPR since 1975, Iran is obligated to abide by this framework. Article 21 of the ICCPR guarantees the right to peaceful assembly.[31] The article specifies that "no restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others."

The right to freedom of association is also well established in international law. The right to freedom of association may be restricted, but only on certain prescribed grounds and only when particular circumstances apply.[32] According to Prof. Manfred Nowak in his authoritative analysis of the ICCPR, the restrictions specified in Article 22(2) should be interpreted narrowly. For example, terms such as "national security" and "public safety" refer to situations involving an immediate and violent threat to the nation. "Necessary" restrictions must be proportionate: that is, carefully balanced against the specific reason for the restriction being put in place.[33]

The UN Human Rights Committee, the international expert body that monitors state compliance with the ICCPR, has repeatedly highlighted the importance of such proportionality. In international law, "necessary" restrictions on freedom of assembly and association must be proportionate: that is, carefully balanced against the specific reason for the restriction being put in place.[34]

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[31] International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, art. 21. Iran ratified the ICCPR in 1975.

[32] ICCPR, art. 22.

[33] Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (Kehl am Rein: N.P. Engel, 1993), pp.386-387.

[34] The UN Human Rights Committee, see for example Vladimir Petrovich Laptesevich v. Belarus. Communication 780/1997 of the Human Rights Committee. See also Richard Fries, "The Legal Environment of Civil Society," The Global Civil Society Yearbook 2003, Chapter 9, Center for the Study of Global Governance, London School of Economics, 2003.

III. Death Penalty for Child Offenders

Government officials have touted Iran's newly amended penal code for its "abolition" of the death penalty for child offenders, defined under international law as anyone convicted for a crime he or she committed while under 18 years of age. An assessment of the new amendments, however, reveals that while lawmakers have abolished the death penalty for "discretionary crimes" such as drug possession or trafficking, judges may still exercise their discretion in sentencing child offenders to death for "crimes against God" or "retribution crimes."

Iran remains the world leader in executing individuals who committed an offense while under the age of 18. During the past three years, Iran is believed to have executed more juvenile offenders than any other country in the world. Authorities executed at least three children in 2011, one in 2010, and five in 2009. In 2011 there were at least 143 child offenders on death row in Iranian prisons for alleged crimes including rape and murder.[35] The figures for 2009 are five children; in 2008 seven, and in 2007 at least eight.[36] Despite all evidence to the contrary, President Mahmoud Ahmadinejad claimed in 2008 that his country does not execute people for crimes committed before they were 18-years-old.[37]

The juvenile death penalty is prohibited in international law, and the prohibition is absolute. Both the Convention on the Rights of the Child (CRC) and the International Covenant on Civil and Political Rights (ICCPR) specifically prohibit capital punishment for persons under 18 at the time of the offense. Iran ratified the ICCPR in 1975 and the CRC in

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[35] Amnesty International, http://www.amnesty.org/en/region/iran/report-2011. See also the Foreign Policy Centre, "From Cradle to Coffin: A Report on Child Executions in Iran," 2009, http://fpc.org.uk/fsblob/1063.pdf (accessed November 26, 2010); "Iran: Execution of juvenile scheduled for Monday," Amnesty International news release, October 1, 2009, http://www.amnesty.org/for-media/press-releases/iran-execution-juvenile-scheduled-monday-20091002 (accessed November 26, 2010).

[36] "Iran hangs seventh juvenile offender this Year," Human Rights Watch news release, November 4, 2008, http://www.hrw.org/ en/news/2008/11/04/iran-hangs-seventh-juvenile-offender-year. It is reported that in 2010 Iran executed at least one juvenile offender. See "Iran, Saudi Arabia, Sudan: End Juvenile Death Penalty," Human Rights Watch news release, October 8, 2010, http://www.hrw.org/en/news/2010/10/09/iran-saudi-arabia-sudan-end-juvenile-death-penalty.

[37] Asked about Iran leading the world in the execution of juvenile offenders in a *New York Times* interview, Iranian President Ahmadinejad said: "In Iran youngsters are not executed. Where have they been executed? Our law actually sets 18 as the criminally liable age for capital punishment. So I don't really know where you brought the number 30 from." See "An Interview with President Mahmoud Ahmadinejad," New York Times, September 26, 2008, http://www.nytimes.com/2008/09/26/world/middleeast/26iran-transcript.html?_r=1&pagewanted=2&ref=middleeast (November 26, 2010).

1994. Between 2007 and 2009, the UN General Assembly twice specifically called upon Iran to end the juvenile death penalty, and member states again raised their concerns regarding this issue during Iran's Universal Periodic Review in February 2010.[38]

The majority of juvenile executions in Iran are for intentional murder.[39] Intentional murder, which under Iranian law includes cases where the murderer intentionally makes an action that is inherently lethal, even if he does not intend to kill the victim, is considered to be a crime punishable by retribution in kind (*qesas-e nafs*). While the judiciary is responsible for carrying out the trial and implementing the sentence in these cases, Iranian law treats them as private disputes between two civil parties, where the state facilitates the resolution of the dispute. The victim's survivors retain the right to claim retribution in kind (that is, demand the defendant's death), to pardon the killer, or to accept compensation in exchange for giving up the right to claim retribution.

Under article 49 of the old code, lawmakers absolved children of criminal responsibility but defined the term 'child' as one who has not yet reached the age of maturity according to shari'a law.[40] Yet the old code did not define what is meant by the "age of maturity" and there is no unified interpretation of maturity, or *bolugh*, in shari'a law.[41] In determining maturity, judges referred to text in the 1991 Civil Code, which defined the "age of maturity" as nine lunar years (eight years and nine months per the solar calendar) for girls and 15 lunar years (14 years and seven months) for boys.[42]

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[38] UN General Assembly, Resolution 62/168, Situation of human rights in the Islamic Republic of Iran, UN Doc. A/RES/62/168, March 20, 2008. This resolution called upon the Government of the Islamic Republic of Iran "[to] abolish, as called for by the Committee on the Rights of the Child in its report of January 2005, executions of persons who at the time of their offence were under the age of 18"; and "Situation of human rights in the Islamic Republic of Iran" where the AG "deplores the execution of persons who were under the age of 18 at the time their offence was committed, contrary to the obligations of the Islamic Republic of Iran under article 37 of the Convention on the Rights of the Child, and articles 4 and 6 of the International Covenant on Civil and Political Rights and in spite of the announcement of a moratorium on juvenile executions" called upon Iran "to abolish … executions of persons who at the time of their offence were under the age of 18, and to uphold the moratoriums on juvenile executions and executions by stoning and to introduce these moratoriums as law in order to completely abolish this punishment; UN-Doc. A/RES/61/176, March 1, 2007. Annex 1.

[39] Human Rights Watch, The Last Holdouts: Ending the Juvenile Death Penalty in Iran, Saudi Arabia, Sudan, Pakistan, Yemen, September 2008, http://www.hrw.org/sites/default/files/reports/crd0908web_0.pdf.

[40] Islamic Penal Code, art. 49; Civil Code of November 1991, art. 1210. For a discussion of prevailing debates over puberty and criminal responsibility in Iran, see the article by Iranian human rights defender Emad Baghi, "The Issue of Executions of Under-18s in Iran," July 2007, http://www.emadbaghi.com/en/archives/000924.php? (accessed May 21, 2008).

[41] Human Rights Watch, The Last Holdouts: Ending the Juvenile Death Penalty in Iran, Saudi Arabia, Sudan, Pakistan, Yemen, September 2008, http://www.hrw.org/sites/default/files/reports/crd0908web_0.pdf.

[42] Iran generally uses the solar and not the lunar calendar.

Under this legal regime Iran's judiciary has sentenced hundreds of children to death, and prison authorities have carried out dozens of hangings of juvenile offenders. Yet authorities regularly assert that there has always been a prohibition on the execution of children under Iranian law. They justify their position by arguing that children are defined differently under shari'a law, that authorities do not execute anyone until they reach 18 lunar years or that in the case of "retribution crimes," such as murder, it is not the state that carries out executions but family members of the victim, who decide whether the defendant should be put to death, pardoned, or pay compensation in the form of blood money.[43]

In response to mounting international criticism of its practice of execution child offenders, Iranian officials initiated piecemeal measures to address the issue. In 2003 and 2008 the former head of Iran's judiciary, Ayatollah Mahmoud Hashemi Shahroudi, issued circulars instructing judges not to issue death sentences for any person convicted of a crime under 18 years of age. Local judges refused to abide by the circular, arguing that they were in conflict with the provisions of the old penal code.[44] In July 2006 the Iranian parliament gave an initial reading to a draft Juvenile Crimes Investigation Act that officials have said would end executions for juvenile offenders, but which actually allowed judges' discretion to sentence juvenile offenders to death.[45] Lawmakers never adopted the law but at least some of its provisions ultimately found their way into the newly amended penal code.

Age of Criminal Responsibility Still Equals Age of Maturity

Articles 87-94 of the amended code generally address punishments and correctional measures applied to "children and adolescents." Unlike the old code, the new code defines the "age of criminal responsibility" for the first time, but pegs it to the age of

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[43] After the execution of 17 year old Alireza Molla Soltani in September 21, 2011, a spokesperson for the prosecution justified the public hanging by claiming that Molla Soltani was 18 years under the lunar calendar. The judiciary had sentenced Molla Soltani to death for the murder of a well-known champion of Iran's "strongest man" competition. UN: Expose Iran's Appalling Rights Record, Human Rights Watch news release, September 21, 2011, http://www.hrw.org/news/2011/09/21/un-expose-iran-s-appalling-rights-record.

[44] International Campaign for Human Rights in Iran, "Half Measures: Juvenile Executions under Iran's New Penal Code," February 27, 2012, http://www.iranhumanrights.org/2012/02/new-penal-code-commentary/ .

[45] Article 31(3) of the new code would allow but not require judges to reduce a sentence of death or life imprisonment against juvenile defendants ages 15 to 18 to a term of imprisonment ranging from two to eight years in a juvenile correctional facility. In addition, article 33 of the new code makes clear that reduction of sentences in "retribution crimes" and "crimes against God" shall be applied only when the judge determines that "the complete mental maturity of the defendant is in doubt." Human Rights Watch, The Last Holdouts: Ending the Juvenile Death Penalty in Iran, Saudi Arabia, Sudan, Pakistan, Yemen, September 2008, http://www.hrw.org/sites/default/files/reports/crd0908web_0.pdf.

maturity under shari'a law.[46] Accordingly, judges may not hold girls under nine lunar years and boys under 15 lunar years criminally responsible for their actions or omissions.[47] This was already the practice under the old code, but the amended code includes a specific provision codifying the age requirement.

Death Penalty Abolished for "Discretionary Crimes"

A particularly noteworthy area of improvement in the new code is for children who commit "discretionary crimes." Under the new amendments, they are no longer subject to execution. Judges are instead required to sentence child offenders found guilty of "discretionary crimes" to a variety of correctional and rehabilitation measures depending on the nature of their crime and age range.[48] This is a somewhat positive step given that the vast majority of all the executions carried out by authorities over the past few years have involved drug possession and trafficking crimes which are considered "discretionary crimes."

Death Penalty Retained for Other Crimes

No such prohibition exists, however, for children convicted of "crimes against God" (which include death sentences for crimes such as consensual sex outside of marriage and apostasy) and "retribution crimes" such as intentional murder. (As previously mentioned these crimes account for the majority of death sentences passed by the judiciary against child offenders.) Under article 90 of the amended code, a judge may sentence a boy who is 15 (lunar) years and older or a girl who is nine (lunar) years and older to death for these two categories of crimes if he determines that the child understood the nature and consequences of the crime he or she committed.[49] The article allows the court to rely on

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[46] New code, art. 146.

[47] New code, art. 145. Nonetheless judges may sentence individuals younger than the age of maturity to a series of correctional and rehabilitation measures. In addition to maturity, judges must determine whether the accused was "of sound mind" and whether he or she willingly committed the criminal act or omission in question. New code, art. 139.

[48] "Discretionary crimes" include drug trafficking and possession, which carry very heavy punishments under Iran's draconian anti-narcotics law and have accounted for the vast majority of executions during the past few years. Article 87 of the new code provides that children who are between the ages of nine and 15 when they commit "discretionary crimes" or *ta'zir* crimes may be subject to a series of minor correctional and rehabilitation measures, including strict supervision by parents or other legal guardians, referral to social workers, limitations on their freedom of movement, or transfer to a correctional facility between three months to one year. Article 88 provides harsher penalties for children who are between 15 to 18 years when they commit a "discretionary crime," including monetary fines and transfer to a correctional facility up to five years (depending on the severity of the "discretionary crime"). Indeed, the new code does not seem to apply "age of maturity" requirements to *ta'zir* crimes at all.

[49] New code, art. 90. There is a danger that this standard will be applied arbitrarily since the new code does not specify how a judge is to determine whether a child understood the nature or consequences their actions.

"the opinion of a forensic doctor or other means it deems appropriate" to establish whether a defendant understood the consequences of his or her actions.[50]

For children convicted of these categories of crimes who are under the age of maturity (and therefore criminal responsibility under Iranian law), the amended penal code requires a series of correctional and rehabilitation measures.[51] Nonetheless, it does not meet the absolute prohibition on child executions required by international law.

Under international law, anyone under the age of 18 is considered a child and there is a strict prohibition on execution of child offenders. The new code provisions therefore clearly violate international law because they fail to abolish the death penalty for children, specifically boys who are 15 (lunar) years and girls who are nine (lunar) years and older.

[50] Ibid., note.

[51] Pursuant to article 87 of the new code judges may sentence offenders who have not yet reached the "age of maturity" and are convicted of "crimes against God" or "retribution crimes" while they were between the ages of 12 to 15 lunar years a warning or transfer them to a correctional facility from three months to one year. New code, Article 87, note 2. Technically this provision only applies to immature boys since girls over 9 lunar years are considered mature and criminally responsible. In all other cases (i.e. "immature" offenders under 12 lunar years) judges may sentence the offender to series of minor correctional and rehabilitation measures including strict supervision by parents or other legal guardians. Ibid.

IV. Death Penalty for Protected Conduct or Non-Serious Crimes

The amendments to the penal code retain the death penalty for activities that should either not constitute crimes at all, or for which the death penalty is strictly prohibited under international law, given they are not considered among "the most serious" crimes. Crimes for which the death penalty is mandatory under the new node generally fall under the category of "crimes against God." Contrary to international law, under both the old and new codes individuals convicted and sentenced to certain punishment for "crimes against God" (including the death penalty) cannot receive pardons or commutations of their sentence. These crimes include but are not limited to adultery, sodomy, and same-sex relations, and insulting the Prophet Mohammad. Other charges that qualify individuals for the death penalty are related to harsh anti-narcotics laws that criminalize the possession and sale of even modest amounts of drugs.

Adultery

Articles 222-231 of the new code address the crime of *zena* ("adultery" or "fornication," depending on the marital status of the individuals involved), generally defined as consensual or forced penetrative sex between a man and a woman outside of marriage. The new code removes, but does not specifically prohibit the imposition of the punishment of stoning, which is explicitly reserved for adulterers in the old code. However, in this area the amendments largely leave intact the provisions of the old code which make the death penalty mandatory for all individuals who willingly engage in sex with someone other than their married spouse (i.e. adultery), those who engage in incest, men who have sex with their stepmothers, and non-Muslim men who have sex with a Muslim woman regardless of his marital status.[52] Judges can sentence offenders who have not reached the "age of maturity" only to correctional and rehabilitation measures.[53]

[52] New code, art. 225. For a discussion of the removal of key provisions related to stoning as a punishment for adultery, see infra section V.

[53] Ibid., art. 22, note 2. In cases of incest, if the victim has not reached the "age of maturity," a judge may sentence the offending party only to 100 lashes.

The new code still considers rape to be forced adultery or fornication—thereby excluding marital rape—and makes the death penalty mandatory for the offender.[54] Victims of rape are not considered criminals and are, therefore, not punished. No separate provision for rape exists, however, in either the old or the new code, including for marital rape, which is not recognized under Iranian law.

In cases where the offending party accused of extramarital sex is not married, the punishment is 100 lashes.[55] Similarly, if a man is married but has not yet had penetrative sex with his wife and commits adultery, a judge must sentence him to 100 lashes, a shaved head, and one (lunar) year of internal exile.[56]

The crime of *zena* violates international law by criminalizing consensual sexual relations between adults. International human rights law requires decriminalization of consensual adult sexual relationships to protect a variety of human rights, including the rights to nondiscrimination, physical autonomy, health, privacy, and liberty.[57]

Sodomy and Lesbianism

Like the old code the new code also requires the death penalty for an individual engaged in *lavat* (sodomy), defined as consensual or forced penetrative sex between two men in articles 232-233, but unlike the old code, the amendments limit application of the death penalty depending on whether the man was "active" or "passive." It requires 100 lashes but not death for the "active" participant of consensual same-sex relations, provided he is not married and has not engaged in rape.[58] But it requires the death penalty for the

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[54] Ibid., art. 225(d). The New code also maintains that the crime of forced extramarital sex is committed when a man tricks, scares or threatens a woman into having penetrative sex with him. Ibid., art. 225, note 2.

[55] Ibid., art. 228.

[56] Ibid., art. 227. The adultery or fornication provisions do not provide a precise definition regarding marriage, but article 233 under the sodomy (penetrative sex between two men) heading of the new code maintains that marriage for a man means that he has a permanent wife who has reached the "age of maturity," that they have already consummated their marriage while she was of age, and that he can still have sex with her anytime he pleases.

[57] United Nations expert bodies and special rapporteurs have called for the repeal of *zena* laws in various countries. For example, the UN special rapporteur on violence against women has called on Afghanistan to "abolish laws, including those related to *zena,* that discriminate against women and girls and lead to their imprisonment and cruel, inhuman and degrading punishment" (see the Report of the Special Rapporteur of the Commission on Human Rights on violence against women, its causes and consequences, and the situation of women and girls in Afghanistan, UN Doc. A/58/421, October 6, 2003 at para. 31.

[58] Ibid., art. 233. The old code required judges to sentence both partners to death. The term "active" partner refers to the individual whose penis has penetrated the anus of his male partner. "Passive" partner generally refers to the latter individual. For in-depth analysis of penal code provisions related to same-sex conduct and its effects on Iran's lesbian, gay,

"passive" partner, except in cases of forced sodomy or rape. As with the crime of adultery or fornication, the new code discriminates between Muslims and non-Muslims: it stipulates that if the "active" male engaged in consensual penetrative sex act is non-Muslim and the "passive" male is Muslim, a judge must sentence the former to death regardless of his role as the "active" partner.[59]

The new code provides a slightly modified definition of *mosaheqeh* (lesbianism), which is also considered a "crime against God." It defines lesbianism as an act where a "woman places her sexual organs on the sexual organs of [another woman]."[60] The punishment for lesbianism is 100 lashes. The New Code also defines non-penetrative sexual relations between two men that involve sexual organs as *tafkhiz* (foreplay between men).[61] The mandatory "crime against God" punishment for foreplay between men is 100 lashes.[62] However, the new code discriminates against non-Muslims by requiring judges to issue a death sentence for the "active" partner accused of unlawful foreplay if he is non-Muslim and the "passive" partner is Muslim.[63]

The new code also subjects other same-sex conduct between men and women not involving sexual organs, such as passionate kissing and hugging or "laying naked under the same cover without necessity and out of passion," to flogging.[64]

Drinking Alcohol

Under Iran's old code, consumption of alcohol is a "crime against God" for which the punishment is 80 lashes.[65] Article 179 of the old code provides that individuals with two

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bisexual and transgender community, see generally, Human Rights Watch, "We are a Buried Generation," December 2010, http://www.hrw.org/sites/default/files/reports/iran1210webwcover_1.pdf.

[59] Ibid., art. 233, note 1.

[60] Ibid., art. 238. Article 127 of the old code defined lesbianism as "same-sex relations between women by way of their genitals." According to some Iranian legal scholars, such as Shadi Sadr, the more exact definition of lesbianism in the new code makes it more difficult for authorities to convict women of lesbianism. Maryam Hosseinkhah, The Execution of Women in Iranian Criminal Law: an Examination of the Impact of Gender on Laws Concerning Capital Punishment in the New Islamic Penal Code, May 7, 2012, available at http://www.iranhrdc.org/english/publications/legal-commentary/1000000102-the-execution-of-women-in-iranian-criminal-law.html.

[61] New code, art. 234. *Tafkhiz* is defined as "placing one's male sexual organs between the thighs or buttocks of another man."

[62] Ibid., art. 235.

[63] Ibid., art. 235, note.

[64] See, e.g., Ibid., arts. 236-37.

[65] Old code, art. 174.

prior alcohol convictions will receive the death penalty upon their third conviction.[66] The law allows a court to ask the Supreme Leader or his representative, usually the head of the judiciary, for clemency if defendants repent after being convicted of the crime based on their own confession.[67] Clemency is not an option, though, if the conviction was based on witness testimony.[68]

The new code retains the punishments of flogging and death for people convicted of consuming alcohol but is silent on the issue of recidivism.[69] Article 135 of the new code, however (see below), mandates the death penalty for all "crimes against God," including consumption of alcohol, upon the fourth conviction.

Insulting the Prophet

The third category of "crimes against God" that requires a death sentence is *sabb-i nabi* (insulting the prophet). According to article 263 "anyone who insults … [the Prophet Mohammad] is considered a *sabb al-nabi* and shall be sentenced to death."[70] The death sentence also applies to individuals who insult the twelve Shi'a Imams or Fatemeh, the Prophet Mohammad's daughter.[71] The code does not provide a definition for what constitutes an insult in such cases.

As with the old code, the new code's criminalization of insulting the prophet, under penalty of death, violates international law because it is vague, overly broad, and infringes on the right to freedom of expression under Article 19 of the ICCPR.

Other "Crimes Against God" Provisions

Both the old and new codes contain other "crimes against God" that do not generally require a death sentence upon the first conviction. Examples of these crimes include *qavadi* (pimping), *qazaf* (falsely accusing an individual, dead or alive, of having committed

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[66] Ibid., art. 179.

[67] Ibid., art. 182.

[68] Ibid., art. 181.

[69] New code, art. 266. As with the old code consumption of alcohol by non-Muslims is not considered a crime unless they do so in public view. Ibid., art. 267.

[70] Ibid., art. 236. Insulting the Prophet Mohammad also includes the crime of *qazaf*, or falsely accusing the Prophet Mohammad of having committed adultery or sodomy. See discussion below regarding the crime of *qazaf*.

[71] Ibid., art. 263, note.

adultery, fornication, or sodomy), and *serqat* (theft).[72] Despite this, article 135 of the new code stipulates that "anytime an individual commits a similar 'crime against God' three times and the punishment is administered, punishment upon the fourth conviction is execution."[73] This article would seem to apply, at the very least, to the crimes of pimping and giving false testimony of a prohibited sex act, even though they would not be considered serious crimes under international law.[74]

It is also interesting to note that although the new code removes the death penalty for a fourth conviction for foreplay between men, or for lesbianism, the catch-all language in article 135, still requires such a sentence upon a fourth conviction for these crimes.

Draconian Drug-Related Punishments

The amendments to the penal code leave intact provisions that address "discretionary crimes," including most drug-related offenses and national security crimes that carry the death penalty, other than to establish sentencing categories ranging from 25-30 years imprisonment (the heaviest category of "discretionary crime" punishments under the new code) to imprisonment of up to three months (the lightest category). As previously mentioned, the new code abolishes the death penalty for individuals under 18 years of age who commit "discretionary crimes," including drug offenses.

Nonetheless, judges can still sentence drug offenders to death under Iran's draconian anti-narcotics law. This law, which was initially passed by Iran's Expediency Council in 1988 and then amended in 1997 and again in December 2010, imposes the death penalty for crimes including trafficking, possession or trade of more than 5kg of opium and other specified drugs; producing, trafficking, possession or trade of 30g of heroin or morphine (and repeated offences involving smaller amounts); and the manufacture, trafficking, and possession of specified synthetic and non-medical psychotropic drugs.[75] The law also provides a mandatory death sentence for the "heads of the gangs or networks," in addition to armed smuggling.

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[72] The punishments for "crimes against God," which generally include flogging, are addressed in articles 242-244, 245-262, and 268-79 accordingly.

[73] New code, art. 135.

[74] The punishment for theft is death upon the fourth conviction. New code, art. 279(d).

[75] See generally Amended Drug Control Laws (amended 2010).

On October 11, 2010, Iran's Prosecutor General Gholam Hossein Mohseni-Ejei announced that to speed up the prosecution of drug offenses, certain trafficking cases would be referred to his office. After this announcement Amnesty International said it had received information that those convicted under the law are not permitted to lodge appeals despite requirements in the anti-narcotics law, Iranian criminal procedure, and international law that all death sentences should be subject to appeal.[76]

The number and percentage of individuals executed by authorities for drug-related offenses has sharply risen over the last few years. According to research carried out by Amnesty International, in 2009, of the 389 executions recorded, 166 of them – or almost 43 percent – were drug-related. In 2010 about 68 percent of all executions recorded by the organization (or 172 of the 253 known executions) were for drug-related offenses.[77] For 2011, 488 of the at least 600 executions recorded by Amnesty International, or 81 percent, were for drug-related offenses.[78]

In 2009, the Special Rapporteur on extrajudicial, summary, or arbitrary executions reminded states that, under international law, death sentences for drug-related crimes should be abolished and those already passed should be commuted to prison terms.[79] Other authorities, including the UN High Commissioner for Human Rights and the UN Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, have also maintained that the imposition of the death penalty for drugs crimes violates international law.[80] The latter has noted that, in his view, "drug offenses do not meet the threshold of most serious crimes. Therefore, the imposition of the death penalty on drug offenders amounts to a violation of the right to life, discriminatory treatment and possibly … their right to human dignity."

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[76] Amnesty International, *Addicted to Death*, December 2011, at 16, available at http://www.amnesty.org.nz/files/Iranreport_Addictedtodeath_AmnestyInternational.pdf. Under article 32 of the Anti-Narcotics Law death sentences passed under the law must be affirmed by either the Supreme Court or the Prosecutor General.

[77] Amnesty says, however, that it received credible reports of over 300 further executions, the vast majority believed to be for drug-related offenses (bringing the percentage of drug-related executes to 80 percent).

[78] Amnesty International, *Addicted to Death*, December 2011, at 19-20, available at http://www.amnesty.org.nz/files/Iranreport_Addictedtodeath_AmnestyInternational.pdf.

[79] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN Human Rights Council, May 29, 2009, A/HRC/11/2/Add.1, p. 188.

[80] The latter has said that "the imposition of the death penalty on drug offenders amounts to a violation of the right to life, discriminatory treatment and possibly … their right to human dignity." Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 14 January 2009, A/HRC/10/44, para. 66.

The UN Secretary General and the UN Special Rapporteur on the situation of human rights in Iran have both expressed concern in 2011 about the high level of executions for drug-related offences. In October 2011, the UN Human Rights Committee recommended that the Iranian authorities should consider abolishing the death penalty or at least revise the penal code to restrict the imposition of the death penalty to only the "most serious crimes."[81]

[81] Secretary-General, The situation of human rights in the Islamic Republic of Iran: Note by the Secretary-General, A/66/374, September 23, 2011, http://daccess-ddsnyun.org/doc/UNDOC/GEN/N11/512/18/PDF/N1151218.pdf?OpenElement; The situation of human rights in the Islamic Republic of Iran: Report of the Secretary-General, A/66/361, http://daccessddsny.un.org/doc/UNDOC/GEN/N11/499/42/PDF/N1149942.pdf?OpenElement.

V. Failure to Specify Laws Related to Serious Punishments Including Death

There is an inherent tension in Iranian law between the concept of codified law and a judge's ability to rely on religious sources (shari'a) and/or reliable *fatwa* or religious decrees issued by high-ranking Shia clerics. The principle of *nulla poena sine lege*, or no punishment without [clear] law, is a well-established one in Iranian law.[82] According to article 36 of the Iranian Constitution, "the passing and execution of a sentence must be done by a competent court and in accordance with the law."[83] Article 166 of the constitution provides that "verdicts of courts must be well reasoned and documented with reference to articles and principles of the law."[84]

However, Article 167 of the constitution says that "in case of the absence of any [codified] law, [a judge] must deliver his judgment on the basis of authoritative Islamic sources and authentic *fatwa*." The inclusion of Islamic law as a source of non-codified civil or criminal law is also affirmed in article 214 of the Criminal Code of Procedure.[85]

For the first time, the new penal code includes a specific provision that explicitly empowers judges to rely on religious sources where crimes or punishments are not specified in the penal code. Article 220 of the new code provides that in cases where "crimes against God" are specified in the code, judges must issue sentences in accordance with Article 167 of the Iranian Constitution.[86] According to some Iranian legal scholars, however, this article conflicts with article 2 of the new code, which states that

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[82] See, e.g., Behnam Daraeizadeh, Crisis-Causing Elements in Iran's Judicial System, December 2011, at 5, available at http://www.iranhrdc.org/english/publications/legal-commentary/1000000039-crisis-causing-elements-in-iran%E2%80%99s-judicial-system.html.

[83] Iranian Const., art. 36. Article 32 of the Iranian Constitution also says that "no one may be arrested except by the order and in accordance with the procedure laid down by law." Iranian Cons., art. 32.

[84] Ibid., art. 166. Article 169 of the constitution also provides that "no act or omission may be regarded as a crime on the basis of a law established subsequent to it."

[85] Code of the Criminal Procedure for the Courts of General Jurisdiction and Revolutionary Courts, Approved by the Islamic Consultative Assembly September 19, 1999, art. 214. The article states: "Where there is no corresponding law against the issue at hand, [the court] must proceed to issue a verdict substantiated on reliable religious sources and/or reliable *fatwa*. The court cannot refrain from issuing a verdict under the pretext of absence, discrepancies, imprecision or vagueness, and/or conflict in codified law."

[86] New code, art. 220.

"crimes are acts or omissions for which the law has assigned a punishment, and no act or omission can be considered a crime unless a punishment exists for it in the law."[87]

Article 15(1) of the ICCPR states

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

Stoning

The tension between codified law and shari'a law (as a source of non-codified law) took center stage in the debate regarding whether the amendments to the penal code abolished punishment of stoning. In the old code, the punishment for adultery was stoning.[88] According to rights groups Iran has carried out the punishment of stoning against both men and women several dozen times since 1979.[89]

Most recently, the issue received a great deal of international attention when rights groups focused on the case of Sakineh Mohammadi Ashtiani, a 43-year-old woman sentenced to stoning for adultery.[90] After the international outcry, Iranian judiciary officials declared that

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[87] See, e.g., Mohammad Hossein Nayyeri, The Question of "Stoning to Death" in the New Penal Code of the IRI, February 2012, at 4, available at http://www.iranhrdc.org/english/publications/legal-commentary/1000000059-the-question-of-stoning-to-death-in-the-new-penal-code-of-the-iri.html.

[88] See generally old code, arts. 89-107. According to the old code, both men and women condemned to stoning must be placed in a hole in the ground, but a man must be covered with dirt up to his waist while a woman must be covered up to her breasts. Ibid. art. 102. The size of the rock used to stone the condemned must be small enough not to cause death upon one or two blows, and large enough not to be considered a pebble. Ibid. art. 104. In the case of adultery proven by confession (and not testimony), if the detainee is able to escape, he or she may not be returned to the hole and stoned again. Ibid. art. 103.

[89] According to Amnesty International, authorities have stoned at least 77 men and women to death since 1979. Amnesty International, Iran: Executions by Stoning, December 2010, http://www.amnesty.org/en/library/asset/MDE13/095/2010/en/968814e1-f48e-43ea-bee3-462d153fb5af/mde13095 2010en.pdf (cited in Maryam Hosseinkhah, The Execution of Women in Iranian Criminal Law: an Examination of the Impact of Gender on Laws Concerning Capital Punishment in the New Islamic Penal Code, May 7, 2012, at 17-18, available at http://www.iranhrdc.org/english/publications/legal-commentary/1000000102-the-execution-of-women-in-iranian-criminal-law.html).

[90] "Iran: Prevent Woman's Execution for Adultery," Human Rights Watch news release, July 8, 2010, http://www.hrw.org/news/2010/07/07/iran-prevent-woman-s-execution-adultery. See also "Iran: 'Confession,' Stoning Sentence a Mockery of Justice," August 13, 2010, http://www.hrw.org/news/2010/08/13/iran-confession-stoning-sentence-mockery-justice.

her stoning sentence would be suspended, but she remains on death row, and there is legitimate fear that authorities may execute her by hanging instead.[91]

Apparently in response to international pressures and sustained criticism from rights and women's groups inside Iran, the former head of the Judiciary, Ayatollah Mahmoud Hashemi Shahroudi, issued a circular in 2002 that called for a moratorium on the practice of stoning. Despite the circular, authorities have executed at least five men and one woman by stoning since then, according to Amnesty International.[92] In 2008, judiciary officials revoked the circular, noting that it was never legally binding and contravened provisions in the penal code. Lawmakers and judiciary officials addressed the controversial issue of stoning again in 2008, when a draft penal code bill noted that the punishment of stoning may "result in mischief and cause the degradation of the regime" and recommended execution by hanging or other methods instead.[93]

Ultimately, however, lawmakers removed stoning as a punishment for adultery in the amendments to the penal code, which is now silent on the method of punishment for such a crime.[94]

Notwithstanding the removal of these provisions, Iranian legal analysts believe that article 220 of the new code empowers judges to rely on the constitution and sentence individuals convicted of adultery to stoning.[95] They also refer to debates surrounding the ratification of the new code and language in articles 172 and 198 of the code (which discusses confessions and testimony of witnesses for certain "crimes against God" such as adultery

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[91] Saeed Kamali Dehghan, "Sakineh Mohammadi Ashtiani could be hanged in Iran", Guardian News, December 26, 2011 http://www.guardian.co.uk/world/2011/dec/26/sakineh-mohammadi-ashtiani-hang-iran.

[92] Authorities also reportedly executed another two men and one woman originally sentenced to stoning by hanging since Shahroudi issued the circular. Amnesty International, Iran: Executions by Stoning, December 2010, http://www.amnesty.org/en/library/asset/MDE13/095/2010/en/968814e1-f48e-43ea-bee3-462d153fb5af/mde130952010en.pdf (cited in Maryam Hosseinkhah, The Execution of Women in Iranian Criminal Law: an Examination of the Impact of Gender on Laws Concerning Capital Punishment in the New Islamic Penal Code, May 7, 2012, at 17, available at http://www.iranhrdc.org/english/publications/legal-commentary/1000000102-the-execution-of-women-in-iranian-criminal-law.html).

[93] See generally Mohammad Hossein Nayyeri, The Question of "Stoning to Death" in the New Penal Code of the IRI, February 2012, at 2-3, available at http://www.iranhrdc.org/english/publications/legal-commentary/1000000059-the-question-of-stoning-to-death-in-the-new-penal-code-of-the-iri.html.

[94] See old code, arts. 98-107.

[95] Shadi Sadr, Radical or Cosmetic; How Would Be Khamenei's Fatwa about Stoning [Sic]?, April 11, 2012, available at http://justiceforiran.org/articles/english-radical-or-cosmetic-what-would-be-khameneis-fatwa-about-stoning-shadi-sadr/?lang=en. See also Justice for Iran news release, Ratification of the Islamic Penal Code: Iran to Continue Passage of Laws to Violate Human Rights, January 30, 2012, available at http://justiceforiran.org/news/ipc/?lang=en.

and includes explicit references to stoning) as further proof that lawmakers did not intend to abolish stoning as a form of punishment.[96]

Apostasy

The applicability of article 220 of the new code and the use of non-codified religious law is also relevant with respect to the crime of *ertedad* (apostasy), which also carries the death penalty. The recent case of Yousef Nadarkhani illustrates the issues surrounding enforcement of the crime of apostasy in Iran. In September 2010 a lower court convicted Nadarkhani, a 33-year-old pastor of an evangelical church in Iran, of apostasy and sentenced him to death. The judge in the case ruled that Nadarkhani was an apostate because he was born to a Muslim family and adopted Christianity at age 19. In 2011, however, Iran's Supreme Court overturned the earlier death sentence and remanded the case to the lower court. It instructed the lower court to conduct additional investigations to determine if Nadarkhani was a Muslim after the "age of maturity"—15 years for boys according to Iranian law—and if he repented.[97]

Mohammad Ali Dadkhah, Nadarkhani's lawyer, argued in part that his client's conviction was unlawful because the crime of apostasy did not exist in the old code. The Supreme Court rejected his argument that the crime did not exist simply because it was not codified in Iran's penal code, and noted that apostasy is recognized as a crime in shari'a law and by the founder of the Islamic Republic, Ayatollah Ruhollah Khomeini.[98] Although this ruling was issued prior to the ratification of the new code (and article 220), it is likely that this new provision will lead to more courts relying on shari'a law to issue death sentences for crimes such as apostasy.

Nadarkhan's case remains under review and his death sentence has not yet been quashed by Iran's judiciary.[99]

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[96] See generally Mohammad Hossein Nayyeri, The Question of "Stoning to Death" in the New Penal Code of the IRI, February 2012, available at http://www.iranhrdc.org/english/publications/legal-commentary/1000000059-the-question-of-stoning-to-death-in-the-new-penal-code-of-the-iri.html.

[97] Human Rights Watch news release, "Iran: Christian Pastor Faces Execution for 'Apostasy'", September 30, 2011, http://www.hrw.org/news/2011/09/30/iran-christian-pastor-faces-execution-apostasy.

[98] Ibid.

[99] In August 2012 Nadarkhani learned that authorities planned to retry him on new charges that include "banditry and extortion." International Campaign for Human Rights in Iran, "'Banditry and Extortion' Replace 'Apostasy' Charges for Christian Pastor!", August 17, 2012, http://www.iranhumanrights.org/2012/08/nadarkhani/ (accessed August 21, 2012).

"Knowledge of the Judge"

Like the old code the amended code also allows judges to rely upon their "knowledge," not only in resolving issues related to applicable laws, but also in determining issues of fact and evidence.[100] Article 210 of the new code states that "knowledge of the judge comprises certainty derived from presentable evidence in connection with an issue before the judge."[101] In the absence of confessions or other available testimony by eyewitnesses, a judge may enter a conviction for certain crimes based on his "knowledge." The law requires, however, that rulings based on a judge's "knowledge" derive from evidence, including circumstantial evidence, and not merely personal belief that the defendant is guilty of the crime.[102]

Human Rights Watch has documented instances where defendants have received summary trials in which judges ignored the strict evidentiary guidelines that the penal code stipulated for such cases. Instead, the judges have used this apparently unrestricted power to include or exclude evidence to rely on evidence that should have been inadmissible as evidence of guilt, including confessions where there was very strong evidence that they were extracted through the use of physical torture and extreme psychological pressure. In some cases, for example, courts have convicted defendants of sodomy charges solely on the basis of "the knowledge of the judge," even in the absence of other inculpatory evidence or in the presence of exculpatory evidence. This provision also makes it easy for a judge's individual prejudices toward a defendant's appearance or demeanor to sway his or her rulings.[103] It in effect makes the judge a key witness against the defendant, but the defendant is not able to examine and test the judge's evidence.

The existence and practice of this provision appears to violate the right to a fair trial under ICCPR article 14, by in effect making the judge a witness for the prosecution and therefore able to introduce evidence against the defendant. This violates the rights of every

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Human Rights Watch could not independently confirm whether these new charges replace the apostasy charges, and continues to believe that the death sentence against Nadarkhani has not yet been quashed by the judiciary.

[100] See, e.g., old code, Iran, arts. 120. Article 120 of the of the old code allows a *shari'a* judge to reach a verdict on sodomy based on his knowledge as "derived through customary methods," which in practice enables judges to rely on tenuous circumstantial evidence to determine whether a crime has occurred.

[101] New code, art. 210.

[102] New code, art. 210, note and 211.

[103] See generally Human Rights Watch, "We are a Buried Generation," December 2010, http://www.hrw.org/sites/default/files/reports/iran1210webwcover_1.pdf.

defendant to a "competent, independent and impartial tribunal' and to be able to "examine, or have examine, the witnesses against him."[104]

[104] International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, art. 14.

VI. Overly Broad or Vaguely Worded Provisions Criminalizing the Exercise of Fundamental Rights

The amended code fully retains Iran's overly broad and vaguely worded national security laws under which authorities can prosecute, convict, and sentence political dissidents and others exercising their basic rights to freedom of speech, assembly, association, and religion. The new code also disturbingly expands the definition of another vaguely worded crime, *efsad-e fel arz*, or "sowing corruption on earth", which authorities have often used to sentence political dissidents and anti-government critics to death.

Iran currently detains several hundred political detainees, broadly defined as individuals charged and sentenced to long prison terms, for exercising their right to freedom of speech, association, or assembly. Prosecutors charged many of these detainees under Iran's overly broad and vaguely defined national security or "anti-terrorism" laws, some of which carry the death penalty. Authorities try those charged with national security laws in revolutionary courts; subject them to long periods of pretrial detention and solitary confinement; prevent them from having regular access to their lawyers; and subject them to torture and mistreatment.

Under articles 186 and 190-91 of the old code, which effectively amounted to anti-terrorism laws, anyone found responsible for taking up arms against the state, or belonging to an organization taking up arms against the state, was considered guilty of "enmity against God" and sentenced to death. The crime of *efsad-e fel arz*, or "sowing corruption on earth" had been used almost interchangeably with "enmity against God," and the definitions were one and the same. In addition, one of the most serious criticisms of the old code is that it fails to differentiate between individuals of a group who actually use violence or take up arms, and those who are merely members (or supporters) of organizations that have announced their willingness to engage in armed struggle to reach their objectives, but have never resorted to violence.[105] Both are subject to the death penalty (or other cruel punishments such as amputation, crucifixion, or internal exile).

[105] See, e.g., old code, art. 186. Article 186 says: "All members and supporters of any group or organized body that initiates armed rebellion against the Islamic government and retains its central structure during such rebellion are considered *moharebs* so long as they are aware of the group's, body's or organization's beliefs and have, in an effective way, contributed to the advancement of its goals and objectives , even if they have not participated in the group's armed branch.

Human Rights Watch has documented numerous cases where revolutionary courts sentenced individuals to death for "enmity against God" where no evidence existed that the defendant had resorted to violence, or based on extremely tenuous links with the alleged terrorist groups (including fondness or admiration for their ideals). Human Rights Watch has also documented cases where security forces used physical and psychological coercion including torture to secure false confessions in security-related cases, and courts have convicted defendants of "enmity against God" in trials where prosecutors relied primarily if not solely on confessions and failed to provide any other convincing evidence establishing the defendant's guilt.

On January 15, 2011, for example, Iranian rights groups reported that authorities had executed Hossein Khezri following a revolutionary court conviction for enmity against God. State-controlled media announced that day that prison authorities in West Azerbaijan province had hanged a member of the Party for Free Life of Kurdistan (PJAK), an armed Iranian Kurdish group, but did not reveal the person's identity. Mohammad Olyaeifard, Khezri's lawyer, earlier said that Khezri had joined PJAK militants in Iraq when he was younger, but that he had never participated in the group's military wing and that his interrogators tortured him to falsely confess to taking part in a violent attack that happened in 2008.[106]

On May 9, 2010, authorities executed five prisoners, four of them ethnic Kurds charged with having ties to an armed Kurdish group. Authorities failed to notify their lawyers in advance and prevented delivery of the bodies to the families for burial. Human Rights Watch documented numerous trial irregularities in these cases, including credible allegations of torture, forced confessions, and lack of adequate access to a lawyer.[107]

Authorities have executed at least 36 people since January 2010 on the charge of enmity against God, for alleged ties to armed or terrorist groups. At least 28 Kurdish prisoners are known to be on death row awaiting execution on various national security charges including enmity against God.[108]

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[106] Human Rights Watch, "Iran: Halt Execution of Kurdish Activist," April 30, 2011, http://www.hrw.org/news/2011/04/30/iran-halt-execution-kurdish-activist.

[107] Human Rights Watch, "Iran: Executed Dissidents 'Tortured' to Confess," May 11, 2010, http://www.hrw.org/en/news/2010/05/11/iran-executed-dissidents-tortured-confess.

[108] International Campaign for Human Rights in Iran, "Twenty Eight Kurdish Prisoners Sentenced to Death," August 10, 2012, http://www.iranhumanrights.org/2012/08/execution-list/ (accessed August 28, 2012). See also Human Rights Watch, "Iran:

The New "Enmity against God" Provisions

The new code retains the crime of enmity against God used by authorities against political dissidents and described by officials as "anti-terrorism" measures. Article 280-86 define "enmity against God", while articles 287-89 address *baghi* (armed rebellion).[109] But the new code limits the definition of the crime of "enmity against God" to anyone who threatens public security by "drawing arms" with the intent to kill, injure, steal, or frighten others.[110] This definition is dramatically different from the definition in the old code, which allowed for the death penalty for individuals who were members of any group (including political opposition groups) that engaged in armed resistance or terrorism against the state. The crime of enmity against God in the new code also covers robbery and trafficking involving in armed activities.[111] As in the old code, the penalty for this offense may be death, amputation, crucifixion (not entailing death), or internal exile, and lies at the discretion of the judge.[112]

The New "Armed Rebellion" Provisions

The new code creates a wholly new crime of "armed rebellion" targeting individuals engaged in armed resistance against the state.[113] It provides that the members of any group that opposes the ideals of the Islamic Republic and use arms to further their goals will be sentenced to death, and effectively considers the group to be a terrorist organization.[114] In instances where authorities arrest members of an armed or terrorist group that have not used weapons or resorted to violence, courts will sentence the members to imprisonment not exceeding 15 years.[115] This second provision is an improvement over article 186 of the old code in that it distinguishes between members of armed or "terrorist groups" that use or carry arms, and those who do not.

Authorities Defiant on Rights Record," January 11, 2012, http://www.hrw.org/news/2012/01/22/iran-authorities-defiant-rights-record.

[109] New code, arts. 280-86; 287-89. The crimes of *efsad-e fel arz* and *baghi* are grouped and defined together in the new code (similar to the way *efsad-e fel arz* and *moharebeh* were grouped together under the old code), but they are different offenses with different elements.

[110] Ibid., art. 280. In the old code the definition of "Enmity against God" also covered anyone found responsible for taking up arms against the state, or belonging to an organization taking up arms against the government. Old code, arts. 183-88.

[111] New code, art. 282.

[112] Ibid., art. 283.

[113] In the old code "Armed Rebellion" was part of the definition of "Enmity against God," while in the new code it has been separated out and contains its own stand-alone provisions.

[114] Ibid., art. 288.

[115] Ibid., art. 289.

The new more restricted definitions of "enmity against God" and "armed rebellion" do not necessarily infringe on the exercise of fundamental rights that are protected under international law, but the punishments available for these crimes (death, amputation, and crucifixion) violate the right to life (especially in cases where the crime did not lead to the death of other individuals) and the prohibition against torture or cruel, inhuman, or degrading treatment.

The New "Sowing Corruption" Provisions

The New Code greatly expands the crime of "sowing corruption" for which the penalty is death, and arguably offsets any improvements made under the new enmity against God provisions. As previously mentioned, pursuant to the old code, prosecutors for the most part limited the charges of enmity against God and sowing corruption to individuals suspected of engaging in terrorist-related activities (or being "affiliated with" terrorist organizations). Under the new definition, however, a court also may convict someone of sowing corruption if he is found to have "seriously committed crimes against the physical well-being of the public, internal or external security, published lies, damaged the economy of the country, engaged in destruction and sabotage … or operated or managed centers of corruption or prostitution in a way that seriously disturbs the public order and security of the nation …"[116]

This new definition covers serious national security crimes and other organized criminal activities, such as operating prostitution and racketeering rings or engaging in corruption and embezzlement, but provides no criteria to determine when and how the listed offenses "seriously disturb[] the public order and security of the nation." This is a serious deficiency given that anyone convicted of sowing corruption is automatically sentenced to death for a "crime against God." Rights groups are also concerned that the new code provisions may criminalize, under penalty of death, activities (such as the publication of "lies") that should be freely permitted under the right to freedom of expression.

In regard to the new definition of sowing corruption, Shadi Sadr, an Iranian lawyer and rights defender who left Iran after the disputed 2009 presidential election because authorities increasingly harassed her and her family, told Human Rights Watch:

[116] Ibid., art. 287.

> The most dangerous change in the new law that has received little attention is the expansion of the definition of [sowing corruption]. … Before [enmity against God] and [sowing corruption] applied to individuals who used arms or were members of armed groups. But according to the new law [cowing corruption]… has a very expansive and vague definition that could even include acts like sending emails opposing the state. And the punishment is death. It is no longer necessary to link political activists to groups like the Mojahedin-e Khalq, PJAK or other armed groups in order to convict them.[117]

This new expanded definition of sowing corruption is so overly broad and, in some cases, vaguely defined that it infringes on fundamental rights protected under international law, including the right to freedom of expression, assembly, and association. It also violates the right to life because it requires the death penalty for a whole host of offenses that would not be considered "most serious" under international law.

Troubling National Security laws Remain Untouched

The new provisions do not alter other crimes defined under the broadly or vaguely worded "Offenses against the National and International Security of the Country" (national security laws), many of which criminalize the exercise of fundamental rights. Examples of these patently political crimes include "collusion and gathering against the national security," "propaganda against the regime," "disturbing the public order," "membership in illegal groups," "participating in unlawful gatherings," "insulting the Supreme Leader," and "publication of lies." Courts generally hand down sentences on these charges that include heavy prison terms of up to 25 years, flogging, internal exile, and work bans.

In fact, the penal code's sections on security laws, which remain untouched by the amendments incorporated in the new code, constitute the government's primary legal tool for stifling dissent.[118] These laws are so broadly articulated that the government is able to punish a range of peaceful activities and free expression with the legal cover that it is protecting national security. The provisions governing security offenses have been in place since 1996, and the government has frequently relied on them to arrest and harass perceived critics.

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[117] Human Rights Watch email correspondence with Shadi Sadr, May 23, 2012.

[118] Islamic Penal Code, Book Five, State Administered Punishments and Deterrents, ratified May 9, 1996.

The provisions of the security laws prohibit various forms of speech, assembly, and expression, allowing the state to arbitrarily and subjectively judge them as being "against" the nation or its security. Article 498 of the security laws criminalizes the establishment of any groups that aim to "disrupt national security."[119] Article 500 sets a sentence of three months to one year of imprisonment for anyone found guilty of "in any way propaganda against the order of the Islamic Republic of Iran or propaganda for the benefit of groups or institutions against the order." Article 610 designates "gathering or colluding against the domestic or international security of the nation or commissioning such acts" as a crime punishable by two to five years of imprisonment.[120] Article 618 criminalizes "disrupting the order and comfort and calm of the general public or preventing people from work."[121]

The government relied on other provisions in the old code such as Articles 513 and 514, to silence perceived critics. Article 513 of the old code criminalized any "insults" to any of the "Islamic sanctities" or holy figures in Islam, while Article 514 criminalized any "insults" directed at the first leader of the Islamic Republic of Iran, Ayatollah Khomeini, or at the current leader, Ayatollah Khamenei. Neither article defines what constitutes "insults."[122]

Similarly, the Iranian government uses its security laws and other sections in the old code to restrict speech beyond the narrow exceptions allowed in international law; these laws remain unchanged in the new code. For example, forbidding "insults" to the Supreme Leader and setting heavy punishments for so doing effectively prohibit any critical assessment of the Supreme Leader, the single most important and powerful position in the Iranian government.[123] In the absence of a definition of what constitutes "insults," both this article and the article criminalizing "insults" to the "Islamic sanctities" can be broadly applied to expressions of criticism about current Iranian policies.[124]

Iran's constitution provides little effective protection from such ambiguous and overbroad criminal laws. While the constitution sets out basic rights to expression, assembly and association, these are invariably weakened by broadly defined exceptions. Article 24 of the

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[119] Islamic Penal Code, Book Five, State Administered Punishments and Deterrents, ratified May 9, 1996, art. 498.

[120] Ibid. Islamic Penal Code, Book Five, State Administered Punishments and Deterrents, ratified May 9, 1996, art. 610.

[121] Ibid. Islamic Penal Code, Book Five, State Administered Punishments and Deterrents, ratified May 9, 1996, art. 618.

[122] Ibid. Islamic Penal Code, Book Five, State Administered Punishments and Deterrents, ratified May 9, 1996, arts. 513 and 514.

[123] Old code, Book Five, State Administered Punishments and Deterrents, Ratified May 9, 1996, art. 514.

[124] Ibid. old code, Book Five, State Administered Punishments and Deterrents, Ratified May 9, 1996, arts. 513 and 514.

constitution grants freedom of the press and publication "except when it is detrimental to the fundamental principles of Islam or the rights of the public. The details of this exception will be specified by law."[125] Article 26 states that freedom of association is granted except in cases that "violate the principles of independence, freedom, national unity, the criteria of Islam, or the basis of the Islamic Republic."[126] Article 27 guarantees the right to peaceful assembly again with the exception of cases deemed to be "detrimental to the fundamental principles of Islam."[127]

[125] Constitution of the Islamic Republic of Iran, adopted October 24, 1979, amended July 28, 1989, art. 24.

[126] Ibid. Constitution of the Islamic Republic of Iran, adopted October 24, 1979, amended July 28, 1989, art. 26.

[127] Ibid. Constitution of the Islamic Republic of Iran, adopted October 24, 1979, amended July 28, 1989, art. 27.

VII. Punishments that Amount to Torture

The amended penal code retains punitive measures that amount to torture and cruel, degrading, or inhuman treatment of individuals convicted of crimes. Most "crimes against God" in the new code, as in the old code, provide death or flogging for crimes such as adultery, sodomy, consuming alcohol, and pimping. Non-penetrative same-sex conduct between men and same-sex relations between women (including lying together naked or kissing) carry mandatory flogging sentences.[128]

According to article 283 of the new code, a judge who convicts an individual of the crime of "enmity against God" may sentence the offender to amputation of the right hand and left leg or crucifixion (not entailing death).[129] Iran's "retribution crimes," premised upon the idea of an "eye for an eye," allow victims of serious injuries resulting from criminal acts to seek retribution against the offender by amputation of various body parts arms, legs, and blinding of eyes. Cases of punishments for "retribution crimes" such as amputation or blinding are rare, but the authorities have carried them out on occasion in the past 31 years. In the past few years Iranian courts have issued a handful of "retribution crime" sentences authorizing the blinding of individuals who blinded their victims (usually as a result of acid attacks), but Human Rights Watch is not aware of any cases where authorities actually carried out the punishment.[130]

As previously mentioned, although lawmakers have removed the punishment of stoning from the new code provisions related to adultery,[131] article 220 of the new code allows judges to sentence adulterers to stoning by relying on shari'a law or *fatwas* issued by high ranking Shia clerics. Moreover, articles 172 and 198 of the new code, which discuss confessions and testimony of witnesses for certain "crimes against God," such as adultery, still contain references to stoning.

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[128] See, e.g., art. 228, less than 4 times confess to *zena*,

[129] New code, art.283. The judge is allowed to choose the form of punishment. Ibid., art. 284. Amputation is mandatory for other "crimes against God" such as certain types of theft. See, e.g., new code, art. 279.

[130] In May 2011 Ameneh Bahrami, the victim of an acid attack by a jilted lover, pardoned her attacker whose blinding was scheduled to be carried out in days. She instead asked for "blood money" compensation. The Telegraph, "Iranian Man who Blinded Student Saved from "Eye for an Eye" Justice", July, 31, 2011, http://www.telegraph.co.uk/news/worldnews/middleeast/iran/8789456/Eye-for-an-eye-Iran-court-orders-waiter-blinded.html.

[131] See generally old code, arts. 89-107. For a description of how stoning is administered, see supra note 88.

Under international law corporal punishment including flogging, stoning, and amputation amount to torture or cruel, degrading, or inhuman treatment. The Human Rights Committee has noted that the prohibition against torture or cruel, inhuman, and degrading treatment or punishment "relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim."[132] The Committee has noted that the prohibition extends to "corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure."[133] The Special Rapporteur on Torture has specifically addressed the impermissibility of corporal punishment even when laws authorizing it are derived from religion, noting that "those States applying religious law are bound to do so in such a way as to avoid the application of … corporal punishment in practice."[134]

It should be noted that under the new code, as in the Old Code, punishments such as flogging, amputation, and stoning also apply to child offenders or individuals under the age of 18 when they allegedly committed the crime.

132 Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), para. 5.

133 Ibid.

134 Report of the Special Rapporteur, Commission on Human Rights, 53d sess., Item 8(a), U.N. Doc. E/CN.4/1997/7 (1997).

VIII. Discriminatory Provisions

The amendments to the penal code reinforce previously discriminatory provisions against women and religious minorities related to the implementation of punishments, retribution and compensation, and use of evidence in court. Examples of discriminatory articles include harsher punishments (including death) for non-Muslim defendants convicted of consensual same-sex relations, lower compensation paid to women and non-Muslims (and their families) who are victims of crimes or tortious acts, and evidentiary provisions that value the testimony of a woman in court as equal to half that of a man.[135]

Perhaps the starkest example of discrimination under both the old and the new code, as previously discussed, is the differential treatment accorded to boys and girls in relation to the "age of maturity" and its consequences regarding criminal responsibility. The new code explicitly pegs the age of criminal responsibility to the age of maturity or puberty under shari'a law, which is nine years for girls (eight years and nine months per the lunar calendar) and 15 years for boys (14 years and seven months per the lunar calendar).

Under the new node (as in the old code) the definition of what constitutes a "married" man (for the purposes of "crime against God" punishments for sex outside of marriage) is slightly different than the one for women. Under article 227, for example, a man who commits adultery but has not yet had penetrative sex with his wife will not be sentenced to death and will instead receive 100 lashes.[136] The same provision does not exist for women who commit adultery (who will receive a death sentence regardless of whether or not they had already engaged in sexual intercourse with their husbands). Moreover, this provision specifically limits the issuing of "crime against God" punishments for adultery in cases where the man has a permanent, not a temporary wife.[137]

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[135] For a general discussion of discriminatory provisions in the new node against women within the context of capital punishment, see Maryam Hosseinkhah, The Execution of Women in Iranian Criminal Law: an Examination of the Impact of Gender on Laws Concerning Capital Punishment in the New Islamic Penal Code, May 7, 2012, available at http://www.iranhrdc.org/english/publications/legal-commentary/1000000102-the-execution-of-women-in-iranian-criminal-law.html.

[136] New code, art. 227.

[137] Under Iranian law, men are allowed to have up to four permanent wives, but Iranian law also allows the practice of *sigheh*, or temporary marriages. The law only allows men to have temporary wives, and women are not accorded the same privileges.

Another provision in the new code, article 233, further defines "marriage" within the context of the sodomy law. It maintains that marriage for a man means that he has a permanent wife who has reached the "age of maturity," that they have already consummated their marriage while she was of age, and that he can still have sex with her anytime he pleases.[138] Again, these provisions do not apply to women.

Pursuant to article 303 of the new code, judges cannot issue a "retribution crime" punishment against fathers or grandfathers who kill their children.[139] Additionally, article 303 of the new code provides exemptions for "retribution crime" punishments, one of which includes "crimes of passion" or situations where a man walks in on his wife as she is engaged in the act of adultery. Under these circumstances, the law allows the man to kill both his wife and the male adulterer without being subjected to the "retribution crime" laws.[140]

None of the above bars or exemptions to the laws of "retribution crime" applies to women.

Under article 383 of the new code, where the victim of a murder is female and the perpetrator male, the victim's next of kin must pay half of the full blood money prior to exercising their right to retribution. If a non-Muslim man kills a Muslim woman, however, he will not be entitled to blood money compensation prior to his execution.[141]

The new code also retains discriminatory provisions found in the old code regarding the value of testimony offered by women as evidence. The testimony provided by a woman in court is, generally, equal to half that of a man. For example, Article 198 of the new code provides that in general, the testimony of at least two male witnesses is required for most crimes, but that in the case of adultery or fornication, the testimony of two men and four

[138] New code, art. 233.

[139] New code, art. 303. Some legal analysts have noted that this article is particularly discriminatory against women because the majority of killings perpetrated by parents against their children involve violence against girls/women, often within the context of "honor killings." See, e.g., Maryam Hosseinkhah, The Execution of Women in Iranian Criminal Law: an Examination of the Impact of Gender on Laws Concerning Capital Punishment in the New Islamic Penal Code, May 7, 2012, at , 29, available at http://www.iranhrdc.org/english/publications/legal-commentary/1000000102-the-execution-of-women-in-iranian-criminal-law.html.

[140] In such situations the murder will receive imprisonment.

[141] New code, art. 383.

women (who have witnessed the act taking place) is required. In cases where the punishment is death, the testimony of three men and two women is required.[142]

Where criminal penalties are disproportionately applied against women, it constitutes a form of discrimination. International law guarantees equality before the law and prohibit all forms of discrimination. Direct and blatant differential treatment, enshrined in law and having a detrimental effect on many women will be considered discriminatory (and therefore a violation of international law) unless the authorities could show it was done for a legitimate purpose, and is a proportional means to meet that purpose. The Iranian authorities have not made any such justification.

[142] New code, art. 198. The article also says that when two men and four women provide witness testimony regarding adultery (which carries the death sentence), the punishment is only flogging. With regard to "compensation crimes," the testimony of one man and two women is sufficient.

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Codifying Repression

An Assessment of Iran's New Penal Code

In January 2012 the Guardian Council, an unelected body of 12 religious jurists charged with vetting all legislation to ensure its compatibility with Iran's constitution and shari'a, or Islamic law, approved the final text of an amended penal code. While President Mahmoud Ahmadinejad has not yet promulgated the new bill into law, Iranian officials have described the amendments to the Islamic Penal Code as a new and improved set of laws, and repeatedly cited them as an example of the government's serious attempt to comply with its international human rights obligations.

Codifying Repression, an assessment of the new Iranian penal code provisions shows on the contrary that the new penal code provisions approved by Iranian lawmakers fail to address serious human rights concerns regarding the administration of justice in Iran. The report underlines that many problematic provisions of the old penal code remain unchanged, and some of the amendments actually represent a weakening of the rights of criminal defendants and convicts. Some provisions touted as marked improvements by Iranian officials would actually allow judges wide discretion to issue punishments that clearly violate the rights of the accused.

The report shows that, among its many other shortcomings, the new code retains the death penalty, including for child offenders in certain circumstances; fails to codify laws for which there are serious punishments, including the death penalty; uses broad or vaguely worded national security laws criminalizing the exercise of fundamental rights; retains punishments that amount to torture or cruel and degrading treatment, such as stoning, flogging, and amputation; and retains discriminatory provisions against women and religious minorities. Codifying Repression urges the Iranian government to address these shortcomings before promulgating the new amendments into law.

A masked Iranian policeman preparing for the public hanging of a convicted criminal in Tehran on August 2, 2007.

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