

ISLAM AND THE DEATH PENALTY

"...[I]f anyone kills a person - unless it be for murder or for spreading mischief in the land - it would be as if he killed all people. And if anyone saves a life, it would be as if he saved the life of all people."¹

Like most other major world religions, human life is sacred in Islam, so the issue of the death penalty is a contentious one in Islamic cultures. The Qur'an further states: "...do not kill the soul which Allah has forbidden except for the requirements of justice; this He has enjoined you with that you may understand."² Using that section of the Qur'an as guidance, generally, the religion of Islam does support the death penalty.³

In order to understand the real-world applications of the death penalty in Islamic countries, several things must be discussed: a discussion of Islam, the history of Islam, the development and sources of Islamic law, a practical look at capital punishment, and finally an evaluation of the death penalty in three countries governed by the two main sects of Islam and a country that is secular is necessary.⁴

ISLAM

¹The Qur'an 5:32 (Abdullah Yusuf Ali trans. 2004).

²The Qur'an supra note 1 at 6.151

³ See Rudolf Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* 1-2, 6-8 (2005).

⁴ By Islamic countries, I refer to countries with a majority Muslim population, and a government that is in part governed by Shar'ia law.

Islam is the second largest religion in the world, with 23.2% of religious people identifying as such.⁵ Islam is a monotheistic religion developing out of the Abrahamic tradition that Judaism and Christianity stem from, as such, all three religions have similar beliefs and narratives.⁶ In fact, Islam believes that Abraham, Moses, and even Jesus Christ are all important prophets whom Allah sent to speak to the people.⁷

Islam has five main pillars that all Muslims are supposed to follow.⁸ These are: *shahadah* (profession of faith), *salat* (ritual daily prayer), *zakat* (charity to the poor), *sawn* (fasting from sun-up to sun-down during the month of *Ramadan*), and *hajj* (Pilgrimage to Mecca).⁹ Each of these pillars are designed to strengthen a Muslims relationship with Allah and further their spiritual life in the following ways:

- *Shahadah*: The central most tenet of Islam. It requires Muslims to believe, “There is no God but Allah, and Muhammad is his prophet.”¹⁰
- *Salat*: The prayer that Muslims say five times a day.¹¹ When Muslims do their daily *Salat*, they must face towards the holiest city in Islam, Mecca.
- *Zakat*: Much like Christianity, charity is important to Islam.¹² Muslims must donate at minimum 2.5% of their gross income yearly, and when asked for donations above and

⁵ The World Factbook, CIA.gov, <https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html> (Last visited Dec. 18, 2013).

⁶ Patheos Library, *Islam Overview*, <http://www.patheos.com/Library/Islam.html> (Last visited Dec. 18, 2013)

⁷ There are several other similarities between Islam, Judaism, and Christianity including their views on human nature, God’s role in salvation, and the means to attain that salvation, more information on the similarities can be found at: http://www.religionfacts.com/islam/comparison_charts/islam_judaism_christianity.htm

⁸ Patheos Library, *Worship and Devotion in Daily Life*, <http://www.patheos.com/Library/Islam/Ritual-Worship-Devotion-Symbolism/Worship-and-Devotion-in-Daily-Life.html>

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² In a 2013 survey by *The Times of London*, they found that British Muslims donate more money to charity than any other group of the British population. The average Muslim donated £371 per person to charitable organizations. http://www.huffingtonpost.co.uk/2013/07/21/muslims-give-most_n_3630830.html

beyond their *zakat* obligations, Muslims are expected to donate to charity.¹³ Islam discourages begging, so *Zakat* is a way to ensure that those who cannot provide for themselves are still taken care of.¹⁴

- *Hajj*: At least once in their life, Muslims must make a pilgrimage to pray in Muhammad's hometown of Mecca.
- *Ramadan*: Muslims must fast from sun up to sun down during the month of Ramadan.

BRIEF HISTORY OF ISLAM

Islam developed in what is now Saudi Arabia in the seventh century C.E.¹⁵ Islam was founded on the teachings of the Prophet Muhammad and is based on the idea of following the will of Allah (in fact, Islam itself means “submission” or “surrender”).¹⁶ On either the 26th or 27th day of Ramadan (The Muslim calendar's ninth month) Muhammad went to a cave near his home city of Mecca.¹⁷ While he was praying in this cave, the Archangel Gabriel appeared and said: “Proclaim in the name of your Lord who created! Created man from a clot of blood. Proclaim: Your Lord is the Most Generous, Who teaches by the pen; Teaches man what he knew not.”¹⁸ After receiving this vision, Muhammad left the cave and returned to Mecca.¹⁹ When Muhammad returned, he began to preach the basic tenets of what would eventually become Islam.²⁰ Unfortunately for Muhammad, the citizens of Mecca were not receptive to his message and banished him.²¹ The elders of the city of Yathrib invited Muhammad to lead their city. His

¹³ Patheos Library, *Worship and Devotion in Daily Life*, <http://www.patheos.com/Library/Islam/Ritual-Worship-Devotion-Symbolism/Worship-and-Devotion-in-Daily-Life?offset=1&max=1>

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Patheos Library, *Origins*, <http://www.patheos.com/Library/Islam/Origins/Beginnings?offset=1&max=1>

¹⁸ The Qur'an supra note 1 at 96: 1-3

¹⁹ Religion Facts, *Life of the Prophet Muhammad*, <http://www.religionfacts.com/islam/history/prophet.htm>

²⁰ *Id.*

²¹ *Id.*

journey, or *Hijrah*, is so important that it marks the beginning of the Muslim calendar.²² Yathrib eventually became known as *Medina al-Nabi* (City of the Prophet).²³

Rather than the traditional tribal culture that permeated the Arabian, Medina was a community, or *ummah*, and open to all who followed the basic belief of Islam: *Allahu Akbar*.^{24,25} Medina thrived under Muhammad's leadership, and eventually, Muhammad raised an army to battle for his hometown Mecca.²⁶ A series of battles occurred between 624 and 630, and finally Muhammad and his followers conquered the city of Mecca.²⁷ Once Muhammad entered Mecca, he rededicated the Ka'ba to Allah.^{28,29} Muhammad's armies continued marching and, in only four years (634), Islam had taken over the whole Arabian Peninsula.³⁰

Muhammad passed away in 632 and after his death a series of *Caliphs* (successors to the prophet) led the newly growing religion from 632-661.³¹ The religion expanded from the Arabian peninsula to central Asia to Northwest Africa.³² Islam continued to grow, and by the mid 700's Muslim forces had conquered the Iberian peninsula in Europe, and the far eastern portions of China.³³

²² John O. Voll, *Islam*, Encyclopedia of Politics and Religion, 383-84 (1998).

²³ *Id.*

²⁴ *Id.*

²⁵ *Allahu Akbar* translated literally means "God is the Greatest" or "God is Great."

²⁶ Religion Facts, supra note 19.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Previously the *Ka'ba* had been a temple dedicated to the polytheistic religion that existed in Mecca prior to 630 C.E. Tradition also holds that the Kabbah contains the "Black Stone" which was given to Adam by Allah at the time of creation. See *Classical Islam: A History 600 A.D. to 1258 A.D.* Grunebaum, G. E. von (1970)

³⁰ Religion Facts, supra note 19.

³¹ Voll supra note 22.

³² *Id.*

³³ *Id.*

The middle portion of Islam's history featured massive expansion in two main ways: by the sword and by trade.³⁴ When Muslim armies overtook a new area, the Christians and Jews of the area were allowed to continue practicing their religion, and were afforded all the protections of Muslim citizens.³⁵³⁶

Islam continued to grow throughout the years, and eventually all Muslims became united under a central leader. These empires, or Caliphates, ruled the Muslim world until 1258. After 1258, the empire split into the recognizable countries of today, including the Iranian, Iraqi, and Arabian empires.³⁷

THE SHII'A-SUNNI SCHISM

Islam is divided into two main sects: *Shii'a* and *Sunni*. The division traces its roots to the beginning of Islam.³⁸ After Muhammad's death in 632, a natural debate occurred as to who would now lead the religion.³⁹ A large majority of the tribe felt that Abu Bakr, Muhammad's father-in-law, should be the new leader; and the minority supported Ali, Muhammad's son-in-law.⁴⁰ Supporters of Abu Bakr eventually became known as *Sunnis*, and Ali's supporters became known as *Shiites*.⁴¹

There is not a large difference between the *Sunni* and *Shi'a* sects. Both follow the five pillars of Islam that were mentioned above. However, there are some subtle differences. *Sunni's*

³⁴ Patheos Library, *Mission and Expansion* <http://www.patheos.com/Library/Islam/Historical-Development/Missions-Spread-Changes-Regional-adaptations?offset=1&max=1>

³⁵ *Id.*

³⁶ Christian and Jewish people were however required to pay a special tax called a *zakat*. Those who chose to continue worshipping their local gods were forced to convert or be killed.

³⁷ Patheos Library, *supra* note 34.

³⁸ S.B., *What is the Difference Between Suni and Shia Muslims?*, *The Economist*, May 28, 2013, <http://www.economist.com/blogs/economist-explains/2013/05/economist-explains-19>

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

rely heavily on the *Sunnah*, and *Shiites* follow the direction of their elected leaders, or *Ayatollah*.⁴²⁴³

More relevant to the topic of this paper, both sects support the death penalty as divinely ordained in the *Qur'an*.

SOURCES AND DEVELOPMENT OF ISLAMIC LAW

Like the *Torah* in Judaism and the Bible in Christianity, the *Qur'an* contains the bulk of Islamic Law.⁴⁴ The most noted Islamic scholar on the subject of Islamic law is Risalah al-Shafi'i.⁴⁵ Al-Shafi'i identifies four sources of Islamic law: the *Qur'an*, the *Sunnah* (written statements from the life and teachings of Muhammad), *Ijma* and *Qiyas*.

Qur'an

The *Qur'an* is the most fundamental source of Islamic law.⁴⁶ The most accurate analogy to the United States legal system is that the *Qur'an* is the Constitution.⁴⁷ The analogy to the Constitution is not a perfect one however, because the *Qur'an* is the literal word of Allah, it cannot be amended, or even criticized.⁴⁸ When faced with a question of law, a Muslim first looks to the *Qur'an* for guidance, and if the *Qur'an* is silent then the person can look to another source

⁴² *Id.*

⁴³ Shiites also place a large amount of importance on the belief that a twelfth and final Imam exists, and will one day return to fulfill Allah's will.

⁴⁴ Robert Postwako, *Comment: Toward an Islamic Critique of Capital Punishment*, 1 UCLA J. Islamic & Near E.L. 269, 274-75

⁴⁵ *Id.* at 275

⁴⁶ Susan C. Hascall, *Shari'ah and Choice: What the United States Should Learn From Islamic Law About the Role of Victims' Families in Death Penalty Cases*, 44 J. Marshall L. Rev. 1 at 57-58.

⁴⁷ *Id.*

⁴⁸ *Id.* at 58.

of law. While the legal aspects of the *Qur'an* only take up 140 of the 6235 total verses, the *Qur'an* is still the most important basis of Islamic law.⁴⁹

Sunnah

In his last sermon, Muhammad stated: “O people, bear in mind what I am saying, for I might not see you again. I have left you two things. If you hold fast to them never will you go astray after me. They are: God’s Book and His Prophet’s *Sunnah*.”⁵⁰

In order to properly follow Muhammad, his family and close associates began to write down his sayings and actions, they called this compilation the *Sunnah*.⁵¹ *Sunnah* contains all the cases Muhammad decided, and his reasoning for deciding those cases.⁵² Continuing the analogy to the American legal system, the *Sunnah* is to Islamic law what the Federalist Papers are to American law.

The *Sunnah* also contains the practices of Muhammad, and as such are the “day-to-day guide” of how to live a virtuous Islamic life.⁵³ Combined, the *Qur'an* and the *Sunnah* make the body of Islamic law or *Shari'ah*.⁵⁴ Devout Muslims believe that the *Shari'ah* is a complete body of law; and that it covers “every aspect of life including international, constitutional, administrative, criminal, civil, family, and religion.”⁵⁵

⁴⁹ Angela Tang, *Comparative Analysis of Certain Criminal Procedure Topics in Islamic, Asian and Common Law Systems*, <http://law.wm.edu/academics/intellecualife/researchcenters/postconflictjustice/documents/AnalysisofCertainCriminal.pdf>

⁵⁰ Matthew Lippman, *Islamic Criminal Procedure: Religious Fundamentalism v. Modern Law*, 12 B.C. Int'l & Comp. L. Rev. 29 (1989), <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1374&context=iclr> at 37.

⁵¹ Hascall, *supra* note 46 at 58

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See J.N.D. Anderson, *Law as a Social Force in Islamic Culture and History*, 20 Bulletin of SOAS 13-40 (1957).

Ijma

When judges have been unable to find a specific directive in the *Shari'ah*, they may look toward the consensus of the community or *ijma*.⁵⁶ While not specifically authorized by Muhammad, the text of the *Qur'an* itself says “Ye are the best of [p]eoples, evolved for mankind, enjoying what is right, forbidding what is wrong, and believing in Allah.”⁵⁷ While not mandatory, *Ijma*'s are very persuasive for Islamic Judges.⁵⁸ In order to find an *Ijma*, there are several steps that are required. They include: 1) participation of a reasonable number of jurists, 2) a unanimous decision, and 3) based on unequivocal statement of agreement by each jurist.⁵⁹

Qiyas

Qiyas, or argument by analogy, is the last and least influential source of Islamic law. In the rare situation where the *Shari'ah* and *Ijma* are silent on the issue, judges are allowed to use analogy to come to the appropriate decision. For example, the Saudi Arabian Permanent Committee of Academic Research and Fatwa recently tackled the issue of whether Muslims should be allowed to smoke.⁶⁰ The *Qur'an* is silent and throughout history, the view on tobacco has evolved and shifted. When faced with the issue the Committee looked at the text of the *Qur'an* and found this passage: “...he [the Prophet] commands them what is just, and forbids them what is evil; he allows them as lawful what is good, and prohibits them from what is

⁵⁶ Haschall *supra* note 46 at 58 n. 327

⁵⁷ *Qur'an* at 3:110 See also Taymour Kamel, *The Principle of Legality and its Application in Islamic Criminal Justice System* 155-56 (M. Cherif Bassiouni ed., 1982).

⁵⁸ Haschall *supra* note 46 at 58.

⁵⁹ Lippman *supra* note 50 at 37.

⁶⁰ http://islam.about.com/od/health/a/smoking_fatwa.htm

bad."⁶¹ The committee, analogized between the last line (“what is bad”) and the medical science indicating tobacco usage was harmful, and came to the following conclusion:

““In view of the harm caused by tobacco, growing, trading in, and smoking of tobacco are judged to be haram (forbidden). The Prophet, peace be upon him, is reported to have said, 'Do not harm yourselves or others.' Furthermore, tobacco is unwholesome, and God says in the Qur'an that the Prophet, peace be upon him, 'enjoins upon them that which is good and pure, and forbids them that which is unwholesome'”⁶²

The use of Qiyas is rare, and most scholars find little validity in decisions reached via this method.⁶³

ISLAMIC CRIMINAL LAW

Islamic criminal law is divided into four classes: *Haad* (or *Houdoud*), *Quissas*, *Diya*, and *Tazir*.⁶⁴

Haad

Haad crimes are crimes that are so offensive to the basic ideas of Islam, that their punishment is set out in the *Qur'an* or the *Sunnah*.⁶⁵ Since these crimes and their respective punishments are directly from Allah, judges have no discretion, and must issue the punishment prescribed.⁶⁶ There are only seven *Haad* crimes in the *Shari'ah*. They are: adultery, defamation, theft,⁶⁷ robbery, rebellion, false accusations of sexual crimes, drunkenness, and apostasy.⁶⁸ A

⁶¹ *Quar'an* at 7:157

⁶² http://islam.about.com/od/health/a/smoking_fatwa.htm

⁶³ Haschall *supra* note 46 a n.328

⁶⁴ William A. Schabas, *Religion's Role in the Administration of the Death Penalty: Islam and the Death Penalty*, 9 Wm. & Mary Bill of Rts. J. 223 at 227

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ An exception exists for persons who are stealing in order to survive. Additionally theft of several items are not included within the *Haad*, they include: Land, items available in large quantities (i.e. fruits or grains), religious icons and texts (A copy of the *Qur'an*), and property deemed to not have value (pork or alcohol). Lippman *Supra* note 50 at 35.

⁶⁸ *Id.*

discussion of which crimes are capital, and thus death eligible, follows in this paper. A majority of *Haad* crimes are subject to corporal punishment, including lashing and amputation.⁶⁹

Ta'azir

Ta'azir crimes are those that are described by the *Shari'ah*, but have no prescribed punishment in the law.⁷⁰ The most common *ta'azir* crimes are embezzlement, perjury, and sodomy.⁷¹ The death penalty is rarely, if ever, applied to *ta'azir* crimes. However, in extraordinary circumstances, it is allowed.⁷² The key distinction is that the victim, or the victim's family can request that the judge forgive the accused, if he so chooses.⁷³

Qisas

Qisas are the intentional torts of the Islamic legal system. Like the other Abrahamic religions, Islam believes in the *lex talionis*, or “eye for an eye, tooth for tooth.”⁷⁴ The *Qur'an* states:

In addition, We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. But whoever gives [up his right as] charity, it is an expiation for him. And whoever does not judge by what Allah has revealed - then it is those who are the wrongdoers.⁷⁵

⁶⁹Haschall, *supra* note 49 n. 341

⁷⁰*Id.* at 61

⁷¹*Id.*

⁷² In the two main schools of Islamic thought there is a disagreement about the applicability of the death penalty to *Ta'azir* crimes. Scholars of the *Hanfi* school argue that “the habitual homosexual, the murderer on whom *qisas* cannot be imposed because of the means used in the crime, and the habitual thief who attacks a man's house and who is not to be prevented from doing harm by means of other punishments.” Conversely, members of the *Maliki* school argue that the death penalty should only be imposed in cases where the defendant has demonstrated that they cannot be reformed.

⁷³ Haschall *supra* note 49, at 61

⁷⁴*Qur'an* at 5:32, 17:33

⁷⁵*Qur'an* at 5:45

In its most basic form, crimes that fall under the umbrella of *Qisas* are punished by doing the same to the accused as had happened to the victim. Historically, *Qisas* crimes and their punishments were designed to prevent blood feuds between rival clans. By limiting punishment to the crime actually committed, Muhammad hoped to prevent the feuds that he saw in the Arabian Peninsula.

For example, in 2011, a woman in Iran had acid thrown in her face leaving her blind after refusing a marriage proposal. Ameneh Bahrami requested that the Iranian court use *qisas* and allow her to throw acid in her attacker, Majid Movahedi's, face. However, at the last possible moment she requested that rather than blinding, Majid pay for her medical bills, which amounted to an estimated \$216,000.⁷⁶

DEATH-ELIGIBLE CRIMES

As discussed above, Islam classifies crimes into four categories. The death penalty may be an appropriate punishment for a crime in all four categories, although it is generally accepted that few crimes are so heinous that they deserve the death penalty.⁷⁷

The Death Penalty and *Haad* Crimes

Of the seven *Haad* crimes, it is generally accepted that four are death eligible.⁷⁸ These are adultery (or unlawful intercourse), apostasy, armed robbery and rebellion. Since *Haad* crimes leave the judge with no discretion, the punishment prescribed in the *Qur'an* or a *Hadith* is binding.

⁷⁶ BBC, *Iranian Sentenced to Blinding for Acid Attack Pardoned*. (July 31, 2011), <http://www.bbc.co.uk/news/world-middle-east-14356886>

⁷⁷ Postwako *supra* note 43, at 286

⁷⁸ *Id.*

Crime	Authorization	Number of witnesses required ⁷⁹	Punishment
<i>Zina</i> (unlawful intercourse)	<i>Hadith</i> of the Prophet ⁸⁰	Four ⁸¹ (Must be men) Or Four separate confessions by the accused	Married persons: 100 lashes, then stoning. ⁸² Unmarried persons: 100 lashes and exile from the community for a year
<i>Al-Riddah</i> (apostasy) ⁸³	<i>Qur'an</i> 16:106-109 ⁸⁴	Two	Muslims view the only true punishment for apostates to be eternal damnation, so some debate exists about the applicability of the death penalty, but the consensus is that death is the only earthly punishment for apostasy. ⁸⁵⁸⁶
<i>Al-Hirabah</i> (Armed	<i>Qur'an</i> 5:33-34 ⁸⁷	Four	If the victim of the

⁷⁹Witnesses must broadly meet these requirements: sanity, maturity, adulthood (at least 18 years old), a person of “good character.”

⁸⁰ Verily God has ordained a way for them (the woman who commits fornication); (When) a married man (commits adultery)with a married woman, and an unmarried male with an unmarried woman, then in the case of married (persons) there is (a punishment) of one hundred lashes and then stoning (to death). And in the case of unmarried persons, (the punishment) is one hundred lashes and exile for one year.

⁸² “The Woman and the man, guilty of adultery or fornication—flog each of them with a hundred stripes.” Qur’an at 24:2

⁸³ According to the noted scholar Shaf’I Nawai, “[a]postasy consists in the abjuration of Islam, either mentally, or by words, or by acts incompatible with faith... But before such words can be considered as a sign of apostasy[,] they must contain a precise declaration: (1) That one does not believe in the existence of the Creator, or of His apostles; or (2) That Mohammed, or one of the other apostles, is an impostor; or (3) That one considers lawful what is strictly forbidden by the ijma, e.g., the crime of fornication; or (4) That one considers to be forbidden what is lawful according to the ijma[; or] (5) That one is not obliged to follow the precepts of the ijma, as well positive as negative; or (6) That one intends shortly to change one's religion; or that one has doubts upon the subject of the truth of Islam, etc.” Samuel M. Zwemer, *The Law of Apostasy*, 14 *Moslem World* 373, 387-88 (1924)

⁸⁴ “Whoever disbelieves in Allah after his belief... except for one who is forced [to renounce his religion] while his heart is secure in faith. But those who [willingly] open their breasts to disbelief, upon them is wrath from Allah, and for them is a great punishment; That is because they preferred the worldly life over the Hereafter and that Allah does not guide the disbelieving people. Those are the ones over whose hearts and hearing and vision Allah has sealed, and it is those who are the heedless. Assuredly, it is they, in the Hereafter, who will be the losers.”

⁸⁵ Postawako, *supra* note 43, at 291

⁸⁶ Since apostasy is the most serious crime in Islam, numerous opportunities are afforded to the accused to assure he (women are incapable of committing apostasy) is sure of his statements, these include a three day waiting period between sentencing and execution, and intensive meeting with religious leaders. See Postawako at 292

⁸⁷ “Indeed, the penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption is none but that they be killed or crucified or that their hands and feet be cut off from opposite sides or

Robbery)			robbery dies: Death If the victim does not die: cutting off hands and exile from the community.
<i>Al-Baghy</i> (Revolution or Rebellion)	<i>Qur'an</i> at 49:9 ⁸⁸	Four	Death, however once the rebellion is quashed; those who rebelled are forgiven and welcomed back to the community. ⁸⁹

Murder and Capital punishment

As discussed earlier, intentional murder would fall into the *Qisas* class of crimes. After convicting someone of murder, execution is not the automatic punishment. Since these are crimes against a person rather than the community, a large amount of discretion lies with the victim or the victim's family.⁹⁰ Historical Islamic law disfavored the death penalty for murder and utilized three main methods to limit the application. They are: 1) requiring specific intent on the part of the murderer, 2) granting family members the right to override the punishment and accept monetary damages rather than executing the accused, and 3) looking at the social status of both the victim and the accused.⁹¹ The punishment for the varying levels of murder is found below:

"Level" of Murder	Description	Punishment
<i>Qatl al-Amd</i> (willful murder)	Deliberate killing of another	Death, and compensation to

that they be exiled from the land. That is for them a disgrace in this world; and for them in the Hereafter is a great punishment, Except for those who return [repenting] before you apprehend them. And know that Allah is Forgiving and Merciful."

⁸⁸ "And if two factions among the believers should fight, then make settlement between the two. But if one of them oppresses the other, then fight against the one that oppresses until it returns to the ordinance of Allah . And if it returns, then make settlement between them in justice and act justly. Indeed, Allah loves those who act justly."

Qur'an at 49:9

⁸⁹ Postwako *supra* note 43 at 299

⁹⁰ *Id* at 301

⁹¹ *Id*

	with a lethal weapon.	the family of the victim.
<i>Qata Shibu'l-Amd</i> (Voluntary Maslaughter)	The killing of an individual with an instrument not recognized as a lethal weapon.	Atonement for their crime, and payment of blood money to the victim's family.
<i>Qatl al-Khata</i> (Homicide by misadventure or mistake)	Misadventure: A man is target shooting and accidentally hits a bystander. Mistake: A person shoots what they believe to be an animal and it turns out it was a person.	Two month's fast, and blood money
<i>Qatl bi-Sabab</i> (Homicide by intermediate cause)	Some form of negligence by the owner of a building that results in death.	Pay a fine

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As discussed below, the victim's family plays a large role in Islamic criminal procedure. In fact, the state may not initiate proceedings and the case must be brought by the closest male relative of the victim.⁹³ While executions for murder do occur, the Qur'an explicitly states that Muslims who chose *Diyya*, or blood money, will be rewarded by Allah in heaven.^{94,95}

ISLAMIC CRIMINAL PROCEDURE

The basic precepts of the Islamic court system are not entirely different from our own. The key features are a presumption of innocence, rule against self-incrimination, a right to counsel, and a great amount of discretion and deference given to the judge. The *Qur'an* states: "Why did not the believers – men and women – when ye heard of the affair – put the best construction on it in their own minds and say, 'This (charge) is an obvious lie?' Why did they

⁹² Lippman *supra* note 50 at 44

⁹³ Elizabeth Peiffer, *The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria*, 11 *Wm. & Mary J. Women & L.* 507 (2005),

<http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1132&context=wmjowl>

⁹⁴ *Id.*

⁹⁵ So by mercy from Allah, [O Muhammad], you were lenient with them. And if you had been rude [in speech] and harsh in heart, they would have disbanded from about you. So pardon them and ask forgiveness for them and consult them in the matter. And when you have decided, then rely upon Allah. Indeed, Allah loves those who rely [upon Him]. *Qur'an* at 3:159

not bring four witnesses to prove it? When they have not brought the witnesses, such men, in the sight of Allah, (stand forth) themselves as liars.”⁹⁶

Interestingly, hearsay evidence is inadmissible and no exceptions or exemptions exist. In order to convict a defendant of a severe *haad* crime the defendant must either confess voluntarily, or independent non-hearsay proof must be offered by no fewer than four witnesses.⁹⁷ The *Qur’an* views false accusations as a crime equally as serious as the underlying offense. “...those who accuse chaste women and then do not produce four witnesses - lash them with eighty lashes and do not accept from them testimony ever after. And those are the defiantly disobedient, except for those who repent thereafter and reform, for indeed, Allah is Forgiving and Merciful.”⁹⁸

Rights of the Accused

Much like the American justice system, the *Qur’an* demands that judges and police must be neutral and impartial.⁹⁹ *Shari’ah* law also guarantees several features familiar to Western courts: a right against self-incrimination, right to counsel, an exclusionary rule for illegally obtained evidence, a right to cross-examine accusers, a guarantee that the defendant can inspect evidence against themselves before trial, and the right to cross-examine the prosecution’s witnesses.¹⁰⁰

Right against Self-Incrimination

⁹⁶ *Qur’an* at 24:12-13

⁹⁷ Angela Tang, *supra* note 49. at p. 10

⁹⁸ *Qur’an* at 24:4-5

⁹⁹ Tang *Supra* note 49 at p. 13

¹⁰⁰ *Id.*

Since confessions serve such a vital role in the criminal justice system, numerous rules exist to protect the accused. In any criminal trial, the accused has the following rights: the right to remain silent, a right not to have a coerced confession used against him, the ability that at any time a confession may be recanted and completely forgotten by the judge.¹⁰¹ Additionally, in order to confess, the judge must make sure of several things, including: that the accused was in full possession of his faculties when he confessed, that the accused is not confessing to protect another, and a confession must include sufficient relevant details of the crime.¹⁰²

The *Qur'an* sections regarding confessions operate under the assumption that there is a more permanent and higher power that judges all people.¹⁰³ The influential scholar Hashim Kamali argues that: “[i]f the defendant is truly guilty, but his guilt may not be fairly proven in court, the defendant will still have to answer to God.”¹⁰⁴

Right to counsel

Until now, the Islamic legal system has closely mirrored our American system. However there is one key difference, while the US operates under an adversarial system, in Islam the courts operate under an inquisitorial system. There is no prosecution; rather the judge is the one who conducts an investigation.¹⁰⁵ There is no explicit right to counsel, because the judge has a professional and a religious duty to be fair, and investigate the case in an unbiased manner.¹⁰⁶

The *Qur'an* states:

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

“So if they come to you, [O Muhammad], judge between them or turn away from them. And if you turn away from them - never will they harm you at all. And if you judge, judge between them with justice. Indeed, Allah loves those who act justly.”¹⁰⁷

While not required, the accused is entitled to have some form of legal representation. That representative, however, may not distort the truth or waste time. The *Qur'an*'s only guideline for lawyers is: “And be thou not a pleader for the treacherous...”¹⁰⁸ Additionally, the accused is allowed to have his attorney present at all proceedings of the trial and be allowed to introduce exculpatory evidence.¹⁰⁹

Judicial Discretion

Since they are the fact-finder in Islamic courts the Judge, or *Qadi*, has a vital role. As such, there are strict requirements as to who can become a *Qadi*.¹¹⁰ It is generally accepted that there are seven conditions one must meet to become a *Qadi*. They are: 1) the candidate must be Muslim 2) they must be a free person 3) they must be mature 4) they must be sane 5) they must be just 6) they must be a learned scholar and 7) they must be knowledgeable about how to apply the law to the individual facts.¹¹¹ While the *Qadi* is given wide discretion, he (or she) is still governed by the *Qur'an*.¹¹² The *Qur'an* offers the following guidance:

The Messenger of Allah (saw) said: “Whoever Allah tests by letting him become a judge, should not let one party of a dispute sit near him without bringing the other party to sit near him. And he should fear Allah by his sitting, his looking to both of them and his judging to them. He should be careful not to look down to one as if the other was higher,

¹⁰⁷ *Qur'an* at 5:42

¹⁰⁸ *Qur'an* at 4:15

¹⁰⁹ Matthew Lippman, *supra* note 50 at 49.

¹¹⁰ Khilafah, *An Introduction to the Islamic Judiciary*, <http://www.khilafah.com/index.php/the-khilafah/judiciary/466-an-introduction-to-the-islamic-judiciary>

¹¹¹ *Id.*

¹¹² *Id.*

he should be careful not to shout to one and not the other, and he should be careful of both of them.”¹¹³

No direct appeals of a *Qadi*'s ruling are allowed. However, if a death sentence is handed down, the defendant can appeal to the ruler of the community after the sentence is handed down.¹¹⁴ If the ruler determines that the *Qadi* acted improperly, then he will be removed from his post. Whatever sentence the *Qadi* prescribed to the accused will be given to him.¹¹⁵¹¹⁶ Lastly, when a *Qadi*, is replaced, his successor is permitted to review the sentences given by his predecessor and vacate them if he so desires.¹¹⁷

Role of Victims and Victim's families

As discussed earlier, victims have a large role in the criminal justice system. Victims are afforded three choices when they accuse someone of a crime. They can seek retribution, compensation, or outright forgiveness.¹¹⁸ Victims' families are prohibited from asking for “more” than was done to them.¹¹⁹ The important thing to remember is that rather than promoting retaliation or vindictiveness, the purpose of victim input is to redress and equalize the harm suffered.¹²⁰

PROHIBITIONS AGAINST THE DEATH PENALTY

Much like the American system of capital punishment, there are broad prohibitions on who may be executed. These include prohibitions based on the status of the accused i.e. gender,

¹¹³ *Id.*

¹¹⁴ Lippman *supra* note 50 at 24.

¹¹⁵ *Id.*

¹¹⁶ In addition to the punishment to *Qadi*, the defendant will be compensated for the anguish he suffered as a result of the inappropriate sentence

¹¹⁷ *Id.* at 25

¹¹⁸ H. Ibrahim Hatip, *Victim Rights in Islam and Western Legal Systems: A Comparative Analysis*, The Fountain (January-March 1999), <http://www.fountainmagazine.com/Issue/detail/Victim-Rights-in-Islam-and-Western-Legal-Systems-A-Comparative-Anlysis>

¹¹⁹ *Id.*

¹²⁰ *Id.*

age, family status.¹²¹ Generally, the death penalty is not allowed for those under the age of 18, women who are pregnant, or women with children under the age of two.¹²² Additionally, there are several affirmative defenses that the accused are allowed to argue.¹²³ These include: intoxication¹²⁴, self-defense, mistake, duress, necessity, or forgetfulness.¹²⁵

Additionally, as discussed earlier, the death penalty is only authorized when authorized by the *Qur'an*, or when the imposition of the death penalty is consistent with the crime committed. If those two criterion are not met, death cannot be imposed.

MODERN CASE STUDIES

Until now, I have presented the “view from 30,000 feet.” This portion will analyze practical applications of the death penalty in three Islamic countries, one with a *Shi'a* majority (Iran), one with a *Sunni* majority (Saudi Arabia), and one that is almost entirely secular (Turkey).

Saudi Arabia

Saudi Arabia, the homeland of Islam itself, is one of the most prominent Muslim countries in the world today. Saudi Arabia is ruled by a dynastic theocracy, where the law of the state is *Shari'ah*.¹²⁶ As discussed earlier, there are two main sects of Islam, and a Sunni majority governs Saudi Arabia. The death penalty is allowed in Saudi Arabia, and is practiced with some

¹²¹ Schabas *Supra* note 62 at 227.

¹²² *Id.*

¹²³ *Postwao supra* note 43 at 285

¹²⁴ Wide debate exists about the validity of intoxication as a defense, the *Maliki and Hanafi* schools argue that voluntary intoxication is not a defense; on the other end of the spectrum, the *Zahiri* school argues that intoxication is a complete defense to the underlying crime and absolves the defendant of all responsibility. Masoodi at 8-9

¹²⁵ *Id.*

¹²⁶ The Saudi Constitution states: “The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God’s book and the Sunnah of His Prophet, God’s prayers and peace be upon him, are its constitution, Arabic is its language and Riyadh is its capital.” SAUDI ARABIAN CONST., art. 1.

fervor. According to Amnesty International, so far in 2013, 79 people have been executed, and in 2012, the per capita execution rate was one execution per 341,463 persons.¹²⁷

The Saudi Constitution lays out the criminal law and what the prescribed punishments are allowed in Article 38. It states: “There shall be no crime or penalty except in accordance with Shari’ah or organizational law. There shall be no punishment except for acts committed subsequent to the coming into force of the organizational law.”¹²⁸ Some of those crimes include:

- Aggravated murder
- Murder
- Other offenses resulting in death
- Rape of an adult
- Rape of a child
- Drug trafficking
- Adultery
- Highway Robbery¹²⁹
- Homosexual intercourse
- Treason¹³⁰

Since most of these crimes are either *Haad* or *Qisas*, the method of execution is prescribed and judges have no discretion. Beheading is the preferred method of execution, stoning still occurs and recently one person was crucified for armed robbery on the highway.¹³¹

¹²⁷ Northwestern Law Center for International Human Rights, *The Death Penalty in Saudi Arabia*, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Saudi+Arabia#f5-2>

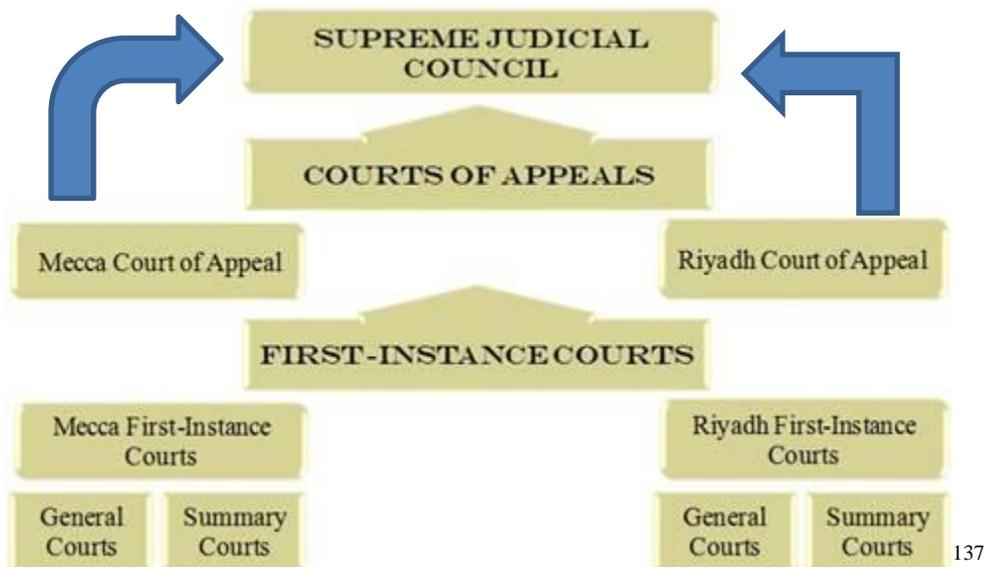
¹²⁸ SAUDI ARABIAN CONST. art. 38.

¹²⁹ A defendant charged with highway robbery cannot be given the death penalty if he repents and turns himself in, then returns the stolen property, and lastly pays *diya* to the victim’s family. Peiffer *Supra* note 98 at 524.

¹³⁰ Northwestern Law Center *Supra* note 122.

Capital Appeals in Saudi Arabia

There are three levels of courts in Saudi Arabia, *Musta'jalah*, *Kubra*, and the Court of Cassation. *Musta'jalah* courts are ineligible to hear cases that could result in a death sentence.¹³² *Kubra* courts consist of three *Qadi*'s who do all of the investigation, witness questioning, guilt determination and issuing punishment.¹³³ If a death sentence is given to the accused, he may appeal to the Court of Cassation.¹³⁴ This court, much like the United States Supreme Court, does not entertain issues of guilt or innocence; rather their only basis of appeal is whether the *Qadi* "paid sufficient attention to the point of objection."¹³⁵ After that, the King is allowed final review to determine if a death sentence should be applied.¹³⁶



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As discussed above Death eligible cases either start in the Mecca or Riyadh *Kubra* courts and can be appealed to the Court of Cassation (The Supreme Judicial Council). Not pictured here is the King who has the final decision regarding execution.

<http://blog.amnestyusa.org/deathpenalty/an-execution-and-crucifixion-in-saudi-arabia>, Jan. 2, 2007, Amnesty Int.,

Affront to Justice: The Death Penalty in Saudi Arabia

¹³²Peiffer *supra* note 98 at at 519.

¹³³*Id.* at 519

¹³⁴*Id.*

¹³⁵*Id.* at 519-20

¹³⁶*Id.* at 520

¹³⁷Dr. Abdullah F. Ansary, *A Brief Overview of the Saudi Arabian Legal System*

http://www.nyulawglobal.org/globalex/saudi_arabia.htm

Iran

Iran is the largest Shi'a Muslim country in the world. Much like Saudi Arabia, a small council of religious leaders led by an Ayatollah lead the country. The *Shari'ah* is the unquestioned law of the land. Unfortunately, due to geo-political issues, data about the death penalty is difficult to obtain, so the following information is the experts' best guess.

Iran is one of the most prolific death penalty countries in the world. So far in 2013, an estimated 600 executions have occurred.¹³⁸ The actual number is estimated to be exponentially higher.¹³⁹ Like Saudi Arabia, the method of execution are limited to those authorized by *Shari'ah*. However, Iran has a wider variety of execution methods. These include: hanging, shooting, stoning, beheading, and falling (more accurately, being thrown) from a height. Iran has many of the same death-eligible crimes as Saudi Arabia, with a few more added:

- Murder
- Other offenses resulting in death
- Rape of an adult
- Rape of a child
- Robbery
- Burglary

¹³⁸ Northwestern Law Center *Supra* note 122. Iran

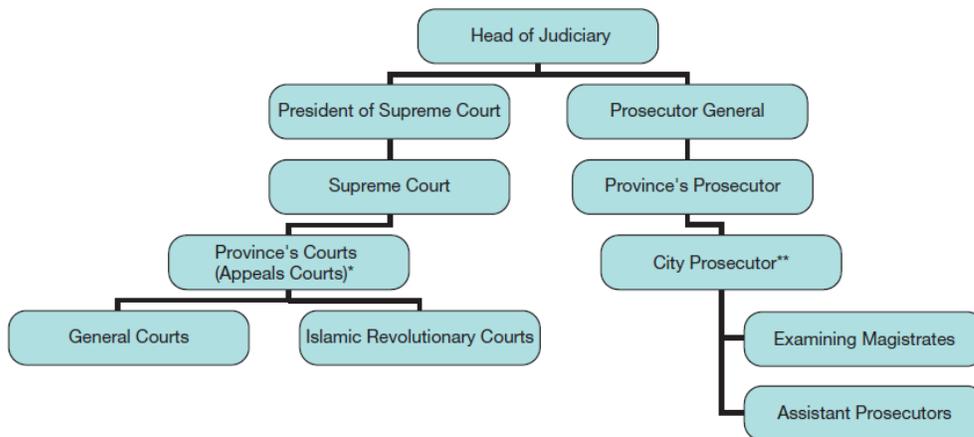
¹³⁹ *Id.*

- Drug trafficking
- Drug possession
- Economic crimes (counterfeiting, smuggling)
- Adultery
- Homosexual intercourse
- Terrorism
- Espionage
- Apostasy¹⁴⁰

Iranian Criminal and Trial Procedure

This section should come with a caveat. There is an enormous difference between what is set out in the law of Iran, and what occurs in reality. The general structure of the Iranian Judiciary is shown below:

Structure of the Iranian judiciary



* Appeals against sentences of death, amputation, expropriation and confiscation of property and imprisonment over 10 years are referred to the Supreme Court, not to appeals courts.

** The prosecutor may decide to refer investigation of a case to an examining magistrate or to one of his assistants.

¹⁴⁰ *Id.*

Despite the *Qur'an*'s guarantee of an attorney, often times capital defendants in Iran are denied an attorney.¹⁴² Additionally, Judges are far from impartial, and it is often the duty of the defendant to prove his innocence rather, than the Islamic presumption of innocence.¹⁴³

Appeals in Iran are also a completely different animal than they are in the rest of the world. If defendants appeal their sentence, a strong possibility exists that the sentence could be increased.¹⁴⁴ This certainly decreases the likelihood of a defendant appealing his or her sentence, and flies in the face of all established protocols in Islamic law.

Turkey

Turkey represents a fascinating case study. While the country is 99% Muslim, it is the most politically secular country in the Middle East.¹⁴⁵ While it is the most secular, it is not purely secular, the state teaches Islam in schools to Turkish youths regardless of their religion. Geographically, as well as politically, Turkey is torn between Europe and the Middle East. Turkey's leaders have actively sought to join the European Union. However, thus far they have not been successful.¹⁴⁶ The EU has a ban on the death penalty, so as a condition of their application to the EU, in 2004, Turkey banned the death penalty¹⁴⁷. However, a moratorium had

¹⁴¹ International Federation for Human Rights, *Iran/Death Penalty: A State Terror Policy* http://www.fidh.org/IMG/pdf/Rapport_Iran_final.pdf at 25

¹⁴² *Id.*

¹⁴³ In 2007, a group of suspected terrorists were put on trial for a bombing in Northern Iran. Their lawyers wrote a letter concerning unfair treatment from the judge in charge of the case, and were subsequently all arrested for "acting against national security."

¹⁴⁴ Behnam Daraeizadeh, an Iranian attorney cites the example of two women charged with homosexual relations: For example, if two homosexual women have a relationship that, in the opinion of the court of first instance, did not qualify for the designated punishment of "musahiqih (lesbianism)," they will each receive less than 100 lashes, as prescribed by law. However, if one of the two women appeals this sentence, the possibility exists that the appellate court will determine that the action warrants the designated punishment for "musahiqih."

¹⁴⁵ <https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html>

¹⁴⁶ Ministry of Foreign Affairs, *Turkey-EU Relationship*. <http://www.mfa.gov.tr/reasons-between-turkey-and-the-european-union.en.mfa>

¹⁴⁷ *Id.*

been in place since 1984, prior to the ban.¹⁴⁸ However, recently Turkey's Prime Minister, Recep Tayyip Erdogan, has argued that the death penalty should be reinstated specifically for cases of terrorism.¹⁴⁹ This plan does not seem to have wide support, because the already-tenuous relationship with the EU would be all but eliminated if Turkey introduced the death penalty again.

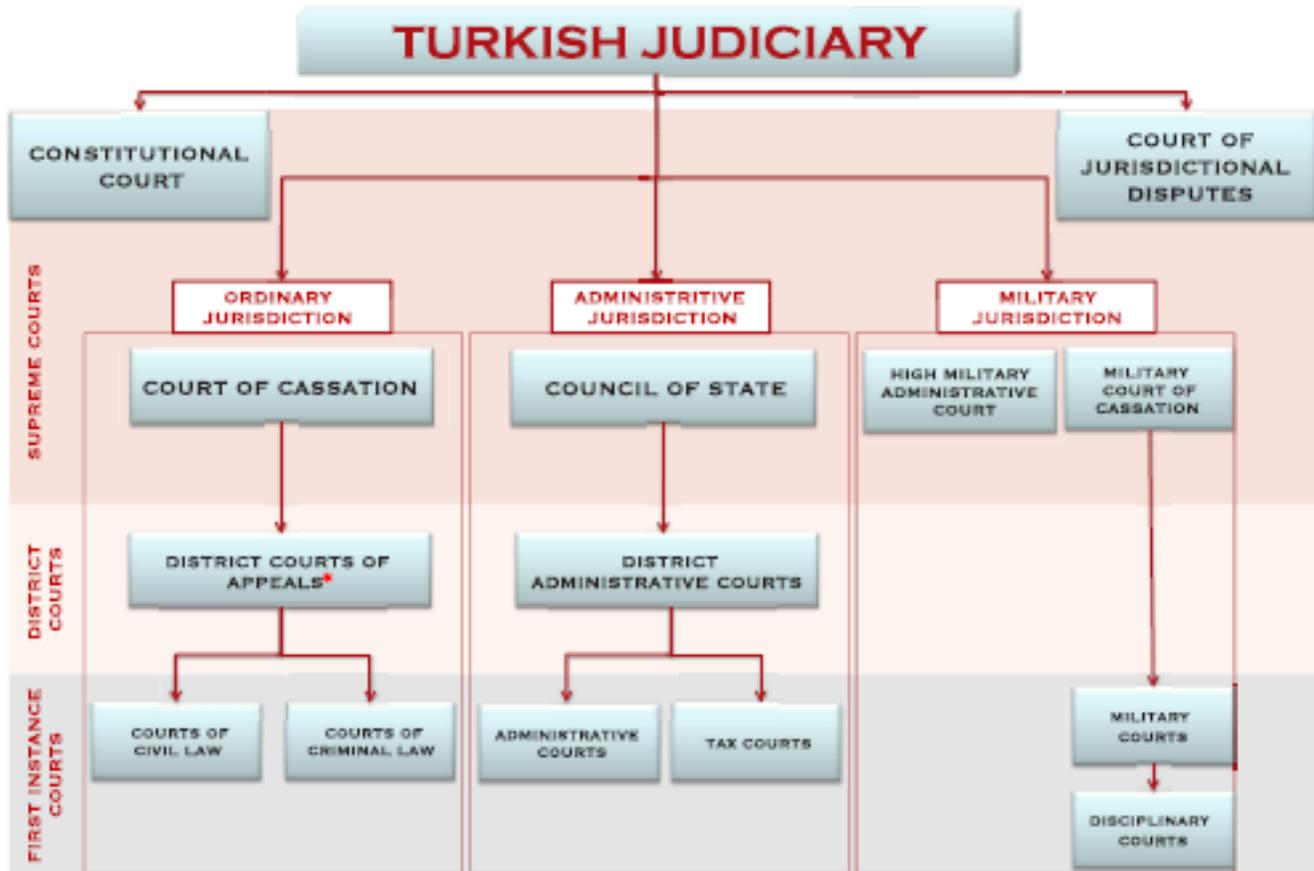
Turkish Judiciary

While there is no death penalty in Turkey, the current political winds in Turkey indicate that it could make a return appearance. A discussion of how the court system works in Turkey is necessary. The Turkish Ministry of Justice gives the following graph to describe how their judicial system is structured¹⁵⁰:

¹⁴⁸ *Id.*

¹⁴⁹ <http://www.voanews.com/content/turkey-to-consider-return-of-capital-punishment/1550752.html>

¹⁵⁰ Ismail Aksel, *Turkish Judicial System: Bodies, Duties and Officials*, <http://www.justice.gov.tr/judicialsystem.pdf> at 10



CONCLUSIONS

“...do not kill the soul which Allah has forbidden except for the requirements of justice; this He has enjoined you with that you may understand.”¹⁵¹

Like most other world religions, Islam’s views on the death penalty have evolved greatly over time. While the *Qur’an* and *Shari’ah* have explicit authorizations of the death penalty for most levels of crime, and a prescribed method to execute based on the offense, most Muslim clerics, judges, and scholars advocate the accused pay blood money to the victim’s family rather

¹⁵¹ The Qur’an supra note 1 at 6.151

than an execution of the offender. While in theory and theology, Islam is weakly pro-death penalty, in practice Muslim countries are among the most active death penalty jurisdictions in the world. For example, Saudi Arabia, Iran, Iraq and Yemen are some of the most frequent death penalty countries in the world.

With the current worldwide trend against the death penalty, it appears as those Islam's views would continue to evolve and further the trend against the death penalty.