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Forbearance Advocacy and Criminal Sanctioning in Iran
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While the discourse of human rights has become a very controversial vehicle for advocacy in Iran in recent years, local activists continue to seek reforms through other avenues, specifically in challenging criminal sanctioning (sentencing) and, rather subtly, in anti-death penalty campaigns. These opportunities for advocacy stem from possibilities found within Iran's own penal code, Islamic values, and Persian cultural identity. As a legal anthropologist, my work on the Iranian system of criminal sanctioning and the codification of forgiveness led me to question what compels some individuals to forgo retribution in the face of the death of a loved-one when the legal system provides them with that 'right'. This essay explores how Iran's criminal laws codify the Islamic mandate to forgive, and how groups and individuals operationalise it by advocating through this system.

The concept of forgiveness has deep roots in Islam. For Muslims, God's most important qualities come from the words *Al-Rahman* and *Al-Rahim*, meaning 'The Most Gracious' and 'The Most Merciful.' These attributes comprise the opening verse of the Qur'an in *Sura al-Fatiha*, (The Key Chapter): 'In the name of God, the Most Gracious, the Most Merciful.' This phrase, repeated at the beginning of 113 Qur'anic chapters, serves as a reminder to Muslims of the obligation to be just and compassionate in their dealings with one another. Muslims will repeat the phrase over 17 times during daily prayers. In addition, there are at least 35 verses in the Qur'an that counsel Muslims to forgive.¹ While mercy and forgiveness are not entirely interchangeable concepts, Islamic mercy encompasses forgiveness and often takes shape through such an act.²

Soon after the 1979 revolution in Iran, the Islamic Republic introduced a criminal code that integrated Islamic principles (*Shari'a*), actually reverting back to the penal code from 1926. Although deemed to be provisional when it was first introduced in the early 1980s, the Iranian penal code has become one of the world's toughest systems of criminal sanctioning, resulting in the most per capita executions per year³. In 1982, the penal code reintroduced a system of retributive justice, which permits the victim's next of kin to seek 'in-kind' punishment (*qesas*) for any intentional tort, including murder. In a case of intentional murder, for example, it is the victim's closest kin who makes the decision to seek retributive death of the perpetrator. In such cases, the next of kin is the plaintiff, thus seeking damages for a kind of tort.

This harsh system of punishment is tempered in a couple of ways. First, in murder cases, in-kind punishment is the exclusive right of the plaintiff and not the state. Under the current penal code, the maximum sentence a defendant can receive is ten years imprisonment for murder *from the state*. Of course the sentence only applies in cases where the family of the victim does not act on its right to retribution. For some victims' families, however, the awareness of this relatively light sentence for murder affects their decision to seek out the death penalty for the murder of their loved-one.

Second, the system of justice also re-introduced the Muslim counter-balance to retribution – forgiveness. The concept of forgiveness is codified in the criminal code as forbearance (*gozasht*) of the right of retribution and applies in intentional torts, not just murder. Lawyers representing offenders, state officials (including judges and magistrates), activists, social workers, and members of the religious community (*ulama*) use this legal provision, drawing from its scriptural sources, to encourage the next of kin to forgo retribution.

The Iranian criminal justice system provides a unique setting in which to consider the mandate of forgiveness. Because Iran is one of the few Muslim-majority countries to have integrated Islamic principles into the state apparatus, tangible qualities of this religious compulsion exist in civil and legal institutions. What this system reveals is that the penal code is a blended system of tort (personal injury laws) and criminal liability; and that the trial (merits) phase⁴ of criminal cases occurs in tandem with the sanctioning phase to uncover what appears to be an extreme form of a 'victim's rights' process. The attention to victims' rights and compensation loss are the key elements in advocacy, both in individual cases and in broad reforms to the penal code. Even while they negotiate forbearance with victims' families, the government officials whom this author has interviewed maintain that the state's preservation of the victim's right to punish is their primary interest. The state's concerns with in-kind retribution as punishment and deterrence are important,

¹ Reza Shah-Kazemi, *My Mercy Encompasses All: The Koran's Teachings on Compassion, Peace and Love*. Berkeley: Counterpoint Press, 2007.

² Khaled Abou El Fadl, Joshua Cohen and Deborah Chasman, *Islam and the Challenge of Democracy*. Princeton: Princeton University Press, 2004.

³ Dr Majid Rafizadeh, *Iran Is Leader of Executions 2016: At Least One Execution A Day*, 10 August 2016, http://www.huffingtonpost.com/majid-rafizadeh/iran-is-leader-of-executi_b_11410368.html

⁴ A 'trial on the merits' means that the court has rendered its judgment, holding or ruling after all the facts and evidence in a court have been presented to the judge. In other words, a trial has been held at which each side has been given an opportunity to present opening and closing arguments, the legal issues in controversy, witnesses and evidence in accordance with trial rules. See here from Robyn Lynne Schechter http://www.ehow.com/info_8657550_trial-merits-mean.html

if secondary, to maintaining its monopoly on violence, which it does by demonstrating it can carry out swift justice on behalf of victims.

Activists and legal practitioners increasingly use the Islamic mandate of forgiveness in their advocacy, especially in light of the politicisation of the language of human rights in Iran today. Having conducted interviews with many defence lawyers, it has become clear that they recognize the shortcomings of forbearance advocacy, but also value its efficacy in the immediate contexts of their clients who have been sentenced to *qesas*. Activists and state officials alike make reference to Iran's restorative justice traditions, such as the 'blood stop' (*khoon bas*), as part of a wider trend to reduce over-criminalization and work towards reconciliation (*solh*).⁵ Scholars and social workers have told me that Iranian restorative traditions also offer routes to internal reform and alternative sanctioning. Such alternatives include the use of informal mediation between parties and the offer of substitute remedies, such as financial reparations, that aim to be compensatory and restorative. These practices are bound up with sacred Islamic texts as well as local customs that sometimes even pre-date Islam in Iran.

For some Iranian legal scholars and activists, forbearance – not to be confused with a state pardon – is indicative of the most important values in Islam: compassion and the restoration of justice. It is to exactly those values that a veritable cottage industry of activists, whether they are neighbours, family-members, members of the religious establishment, government officials, or social workers, appeal to when trying to persuade the victim's next of kin to forego their right of retribution. While acknowledging the sensitivity of such work, individuals and groups begin to meet with the victim's family members from the start of the criminal process. In seeking a resolution that avoids retribution, they often appeal to the family's faith, citing verses from the Qur'an that counsel forgiveness over retribution. They recount stories of forgiveness from the Prophet Mohammad and Imam Ali. In other cases, individuals and groups may appeal to emotion, noting that the loss of a loved one can never be replaced or remedied by putting another person to death or being an agent in the death of another. Some of the most persuasive activists are those individuals who, themselves, forgave the murder of a loved one. In these cases, individuals recount their own emotional state before and after forgoing their right to seek retributive punishment. These include the sense of feeling liberated, joyful, at peace, and closer to God.

Gender is also an important analytical component in studying forgiveness in criminal sanctioning. In the context of trials, negotiations and retribution, women are often portrayed as bereaved victims or non-actors. In practice, however, family matriarchs play key roles in the decisions made around criminal sanctioning in criminal cases. Women are also active as judicial advisors, prosecutors, defence attorneys, and social workers. Because of their positions in the family, as mothers, wives, sisters, they are often considered the primary agents in the act of forgiveness, and thus much of the activism surrounding forbearance focuses on the women in affected families.

In the context of the state, actors at each stage of the legal process, including judges, often counsel victims' families to seek reconciliation and forego the right for retribution. Before the death sentence will be carried out, lawyers appeal the cases to two levels of higher courts. A procedural mechanism put in place in 2007 requires the head of the judiciary to review each case and individually sign each death sentence, issuing his permission (*estizan*) for every sentence. When the offender reaches the implementation phase, a magistrate whose office is in charge of carrying out the sentence, meets with the victim's family to pursue reconciliation. State officials regularly participate in settlement negotiations and even organize so-called, 'reconciliation and settlement meetings' between the plaintiff-victims and the defendant's family, but they do so unofficially. The meetings are not based on legal regulations, but, as one judge told me, by their faith, they are called upon to counsel against retribution. Negotiations may proceed even at the final step of carrying out the sentence, when the next of kin, who are required to be in attendance during an execution, are exhorted to forgo retribution at the last instance.

Financial transactions are often the key elements in preventing death sentences from being carried out. Such transactions, however, are extra-judicial. When families of victims forego the right of retribution, they present a notarized written statement to the criminal court attesting to their unconditional forbearance. Critics of the financial deals claim that the defendant is forced to buy his or her life. Others find that financial transactions provide necessary compensation for the loss of a bread-winner and are just and equitable propositions, similar to damages paid for tort liability in some western contexts. At the moment, there is no state regulation of the financial transactions that lead to forbearance. They often serve to punish the

⁵ *Khoon bas* is attributed to the Lor, an indigenous group from Lorestan, a province in western Iran. After a murder, the perpetrator's family would place a rope around the perpetrator's neck, take him to the victim's family, and allow the victim's family to choose retaliation or an offer of goods.

family of the victim by forcing them to raise sometimes exorbitant funds demanded by families of victims. Others argue that this lack of regulation provides the wealthy with 'an out', but affords little relief to families without such financial means.

Some observers have suggested that the state should provide limits on compensation and aid in its implementation. In my research, I have found that the state's disinclination to regulate this matter lies in its concern with affirming the victim's rights above all and avoiding the appearance of partiality towards the defendant. The crucial issue in criminal cases is that the law affords victims' families the right to seek retributive sanctioning. Activists, even at the state level, often aim publicity campaigns at the virtues of forgiveness. So the emphasis of local activism is not only on state-level legal reforms, but also on changing the social culture of retribution to one that celebrates forgiveness.

Despite the government's sensitivity to human rights activism, one international human rights treaty that is still very relevant, particularly to death penalty cases, is the United Nations Convention on the Rights of the Child (CRC), which Iran ratified in 1994. Much local and international activism against the death penalty is based on Iran's legal obligations under this convention. Through incremental and sustained cooperative practices, some significant changes to the laws are being made. This includes the procedural mechanism mentioned above, which requires the head of the judiciary to review and sign each order of execution. Activists also prevailed upon the judiciary to refrain from signing these orders, especially in the case of defendants under the age of 18, as a way to halt executions. Executions, however, may be carried out once the defendant reaches the age of majority.

In 2013, Iran's Council of Guardians the vetting body that verifies the conformity of laws with Islamic principles - approved an amended criminal code, which had been provisional until then. The new criminal code, with 738 articles, almost doubles the size of the current criminal code and thus cannot be adequately discussed in this article. The code expands the repertoire of state sentencing for homicide, including measures such as banishment, probation, suspended sentencing, and others, and may prove influential to victims' families in their decisions to forgo retributive sanctioning.⁶ A development significant for perpetrators under the age of 18 is that judges may now consider their mental state, whereas before they could only base their sentences on the actual age of the defendant. Article 91 of the new criminal code permits defence lawyers to argue that their clients lacked the mental maturity to understand their crime and thus should not be punished with death. While this provision does not abolish the death penalty for perpetrators under the age of 18, and thus still leaves Iran outside of full conformity with the CRC, it offers a legal solution on the merits of the case – as opposed to leaving perpetrators solely at the mercy of the victims' families.⁷

My research on the place of forbearance in the Iranian criminal justice system seeks to open up a different vantage point from which to observe social advocacy and legal reform strategies. The possibility of forbearance in criminal sanctioning, albeit controversial and imperfect, serves as a site for engaged activism amidst calls for reform.⁸ This activism aims not only to change laws, but also to emphasize a culture of forgiveness from the ground up, one in which an anti-death penalty culture can slowly take root in an environment that is hostile to advocacy through appeals to human rights but amenable to local calls for humanity (*ensaniyat*), characterized by compassion, empathy, magnanimity, and an appreciation of the suffering of others.

⁶ In 2014, a new code of criminal procedure was also approved. Courts began implementing it in June 2015.

⁷ For a deeper discussion, see, Arzoo Osanloo, 'Gender and Criminal Status in the New Iranian Criminal Code,' in *Social Change in Post Khomeini Iran*. Mahmood Monshipouri, ed., Cambridge: Cambridge University Press, 2016. Pp. 91-112.

⁸ For problems with mercy, see, Arzoo Osanloo, 'The Measure of Mercy: Islamic Justice, Sovereign Power, and Human Rights in Iran.' *Cultural Anthropology*, 21(4): 570-602, November 2006.

