

Qesas - Whose Justice? For Behnoud and Ehsan

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"...No one can imagine what I feel ...

What it means to have chains around my hands and feet with the hangman's noose in sight...

How can you know what it feels like to witness your friend's painful horrifying death knowing it could have been you? The struggle for life ... the last gasp for air ... body kicking and writhing hanging from the noose...

I've seen it ... experienced it. I've lived it ...

First time there were five of us. I was given time to beg for forgiveness, and while my execution was postponed I watched the other four die in front of me. Next time we were eleven and I witnessed the death of eight friends... another time seven of us were taken - five came back..."¹

Nine times. Behnoud Shojaie² said his goodbyes to the world on nine separate occasions over the last three years – ever since he turned 18. Finally In the early hours of 11 October 2009, 21 year old Behnoud is taken, on his own, to be executed. On his knees, Behnoud begs for mercy, everyone present, including judicial officers, begged for his life, hundreds of people gathered outside Evin's closed doors pray for mercy. However with a blue plastic rope round his neck, his victim's mother kicks the stool from under him ...

Is this justice? If so, whose justice is it?

According to Article 4³ of the Iranian Constitution⁴ all laws must conform to the Islamic criteria. Qesas – the law of retribution which affords individuals the right to avenge the life of one's loved one, is one such enforceable law based on Book III of the still experimental Islamic Penal Code as amended in 2013. Although the death penalty applies for several other offences, in the case of murder, it is the right of the inheritors of the deceased to pardon, or ask for qesas - punishment by death. According to the Islamic justice system, qesas is not the same as the death penalty since it is up to the individual - not the justice system - to demand death. Qesas figures are not calculated into the increasing number of executions annually.

In the 37 years since the Revolution, human rights defenders in and outside of Iran have questioned the compatibility of Iranian Islamic laws (their interpretation and application) with universal standards as enshrined in the International Bill of Human Rights⁵ and consequent treaties and conventions.

In 1990, The Organisation of the Islamic Conference (OIC) issued the Cairo Declaration of Human Rights in Islam⁶. The Declaration - which affirms Islamic Shari'a as its sole inspiration - is widely acknowledged to be a response to the United Nations (UN) Universal Declaration of Human Rights. The Islamic Republic relies on the Cairo Declaration to respond to widespread international recrimination and condemnation regarding its systematic violation of rights.

Quite apart from the adverse psychological impact of individuals having the power to forgive or punish by death, the wider impact of qesas on society must not be ignored. Qesas executions have taken place in public while some members of the public have cheered on the family and others cried out for mercy. Witnessing and participating in such scenes as well as the death by hanging seriously harms the very fabric of society.

There are also additional discriminatory laws governing qesas which undermines due process. For example, if a man kills a woman, her family has the right to demand retribution⁷ but because the value of the life of the

¹ Words spoken by Behnoud Shojaie in an interview with journalist Saba Vasefi after the eighth time he had returned from the execution chamber

² Behnoud Shojaie was convicted and executed on 11 October 2009 for the murder of Ehsan Nasrollahi. Shojaie maintained that he had acted in self-defence and had no intention of killing Ehsan whom he hardly knew. While fighting his case his lawyers repeatedly questioned the flawed process of the case.

³ Article 4: All civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the fuqaha' of the Guardian Council are judges in this matter.

⁴ The Constitution of the Islamic Republic of Iran - Adopted on: 24 Oct 1979, Effective since: 3 Dec 1979, Amended on: 28 July 1989

⁵ The *International Bill of Human Rights* consists of the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *International Covenant on Civil and Political Rights* and its two Optional Protocols. <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>

⁶ Cairo Declaration on Human Rights in Islam <http://hrlibrary.umn.edu/instree/cairodeclaration.html>

⁷ The Holy Qora: Verse 178 Surah Al-Baqara: 'O you who believe! Al-Qisas (the Law of Equality in punishment) is prescribed for you in case of murder: the free for the free, the slave for the slave, and the female for the female. But if the killer is forgiven by the brother (or the relatives, etc.) of the killed against blood money, then adhering to it with fairness and payment of the blood money, to the heir should be made in fairness. This is an alleviation

woman is half of that of the man's, her family must pay the remainder of the blood money to the murderer before 'justice' is carried out⁸. If a Moslem man kills a non-Moslem man⁹, there is no qesas¹⁰ but if a non-Moslem kills a Moslem qesas laws apply. If a father kills his child, there is no qesas¹¹.

If a murder is committed and the perpetrator can prove that, the victim deserved to die there is no right to retribution. According to Islamic teachings, any person can unilaterally decide that another human being has forfeited the right to life (*mahduroldam*) and kill them in the name of performing one's religious duty to rid society of vice¹². This is in direct violation of Article 11 of the Universal Declaration of Human Rights and Article 37¹³ of the Islamic Constitution itself concerning the concept of innocent until proven guilty - a dead person cannot defend him/herself. This clause is used in defence of those who have for example killed religious converts (apostates) or individuals claiming to be enemies of the State and/or Islam.

The Constitution allows for judges to use their personal interpretations in their work¹⁴, making the application of justice arbitrary at best.

In the last few years, arguably perhaps since the death of Behnoud, a growing movement has seen the involvement of popular public figures advocating the culture of forgiveness and raising funds to compensate the victim's family. They make personal visits to victims' families, plays have been performed and special screenings have taken place with proceedings donated to save the lives of those sentenced to qesas. Unfortunately, in some instances unscrupulous individuals have taken advantage of the good will of the public for personal gain. On the other hand, asking for large sums of money as the price of mercy has resulted in a desperate tragic barter for life. The question remains, is this justice? If so, whose justice?

The proponents of qesas argue that it is a preventative punishment; that if the public understood the consequence of taking a life, murder rates would fall¹⁵. However this is not proven. They argue that although the right to retribution is given in Islam, the words of God encourage mercy and values it above all else. The problem with this argument is that the present qesas legal system expects justice, decisions around life and death to fall on the shoulders of the grieving families of the victims.

Some religious scholars argue that the application of Islamic justice is a question of interpretation¹⁶. In the same manner as defenders of qesas, using the very same verse they too argue that in so far as the Quran gives the right to retribution it favours forgiveness and mercy more. They argue in favour of revision of the laws, as stipulated in Article 9 of the Civil Code of Iran. 's that states that national laws must be brought in line with its international obligations.

Behnoud and hundreds of other Behnouds caught up in the legal system at present were minors at the time of committing their crimes, but have been tried as adults. According to the Convention on the Rights of the Child to which the Islamic Republic is signatory they should not have been tried as adults where the punishment is the death penalty¹⁷. However, the the existing legislation recognises a young boy of 14 years 7 months (15 lunar years) and a girl of 8 years 9 months (9 lunar years) to be criminally responsible. Although efforts were made in the 2015 amendments to the Criminal Procedural Code¹⁸, much of the contradictions and confusions remain allowing the judges to rule as they see fit in each case, resulting in serious failures of justice.

It is not fair or just to allow a grieving family to make life and death decisions about the perpetrator of the crime they are effected by. It is not fair or just to expect a person to beg for his/her life with a noose round

and a mercy from your Lord. So after this whoever transgresses the limits (i.e. kills the killer after taking the blood money), he shall have a painful torment.'

⁸ Islamic Penal Code Book III 382

⁹ The Holy Qoran: Verse 93 Surah Al-Nisa: 'And whoever kills a believer intentionally, his recompense is Hell to abide therein, and the Wrath and the Curse of Allah are upon him, and a great punishment is prepared for him.'

¹⁰ Islamic Penal Code Book III 310

¹¹ Islamic Penal Code Book III 301

¹² Islamic Penal Code Book III 302 (a)

¹³ Article 37: 'Innocence is to be presumed, and no one is to be held guilty of a charge unless his or her guilt has been established by a competent court.'

¹⁴ Article 167: 'The judge is bound to endeavour to judge each case on the basis of the codified law. In case of the absence of any such law, he has to deliver his judgement on the basis of authoritative Islamic sources and authentic fatawa. He, on the pretext of the silence of or deficiency of law in the matter, or its brevity or contradictory nature, cannot refrain from admitting and examining cases and delivering his judgement.'

¹⁵ The Holy Qoran: Verse 179 Surah Al-Baqarah, O men of understanding! There is security of life for you in the law of retaliation, so that you may learn self-restraint.

¹⁶ ACI 3rd conference in the Death Penalty and the Right to Life series, last panel day two UCLA, May 2014, https://youtu.be/xx45V_zD2GQ?list=PL7Vnh45Dgvh1dRdX_rSgq2NX_1hsEE3f6

¹⁷ Article 37 (a) Convention on the Rights of the Child

¹⁸ The amended Criminal Procedural Code came into effect on June 2015.

his/her neck – it is inhumane. It is not fair or just to set a price and barter for life. It is not fair or just to have discriminatory laws that adversely affect the fundamental right to life. Without a doubt, a modern progressive society such as the one aspired to by the overwhelmingly young population of Iran should be progressive and forward thinking in its laws. The existing legal system – I hesitate to call it a justice system - not only fails due process but it undermines what it means to be a free and equal human being with all the inherent rights and dignity that goes with it.

The unanswered question remains ‘whose justice?’

