



Crisis-Causing Elements in Iran's Judicial System

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(Translated from the Persian original)

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Preface:

Assessment and analysis of Iran’s legal system do not solely lie in the domain of jurists and lawmakers. Understanding and assessing legal systems could serve as requisites for gaining insights into the mechanisms geared to control broader society and understanding the norms and mechanisms that rulers intend to establish. As such, the dimensions of this topic can be vast and manifold, and include the most critical theoretical challenges in reviewing modern political-legal structures—structures that are ostensibly designed in accordance with human rights standards to safeguard, first and foremost, social justice and freedom.

This analysis can also shed light on the degree to which such mechanisms, designed with the aim of appeasing public concern (typically subsequent to the commission of an offence), are successful and work efficiently. The relation between such mechanisms and human rights standards and international conventions is an issue of utmost importance that requires thorough and consistent examination. In this brief commentary, effort is made to examine only a small segment of the theoretical basis on which the Iranian penal system is founded, and determine the extent to which such a theoretical basis contradicts current human rights standards, and how potentially critical they could be.

First:

Typically, in advanced legal systems, penalization and enforcement of the law is carried out with the aim of safeguarding security, preventing the re-commission of an offence, and reintroducing offenders to their community and greater society. It is clear that the definition intended here of ‘penalization or punishment’ does not include harsh penalties, insults and debasement, and/or physical torture. Training and educational provisions, volunteer work in governmental and community-based agencies, participation in special courses and counseling sessions, etc. could all be considered ‘probational-educational measures’ towards rehabilitation of offenders.

However, within the Iranian penal system, clearly this is not the case. Subsequent to the 1979 revolution, efforts were made (according to Article 4 of the new Constitution)¹ to base the Iranian penal system on ‘Islamic’ considerations and precepts. Such precepts fundamentally aim at a different set of goals, and naturally involve a different theoretical base that are, for various reasons, incompatible with modern judicial and human rights theoretical standards.

To begin with, it appears that such Islamic precepts, rather than casting an objective view on ‘greater society’ and the relations involved therein, are more concerned with the actions of the ‘individual,’ i.e., the ‘criminal phenomenon’ in Islamic precepts is usually defined in the context of personal relationships, independent occurrences, and abstract notion.

It is inferred that the ‘offender,’ and the ‘victim of crime,’ which incidentally in many cases can be God himself (such as with a crime against Allah), are considered to be independent of one another, and unrelated to society, in an abstract sense—a relationship with the least connection to objective standards and a vague adherence to it. In other words, in the Islamic penal system, there is minimum interest in social harms and sociological causes of crime; rather it generally regards offenders as ‘sinners’ who commit crimes willfully and by choice.

From a religious perspective, an offender is a ‘sinner’ whose soul and spirit has been stained due to committal of a ‘sin.’ On that basis, therefore, the judicial and penal system devise provisions, first and foremost, to cleanse and purify this stained soul. By enduring pain, the sinner/criminal atones for his sin. This pain and suffering is considered sacred and must be sought after, as it will assist the offender in reducing his pain and suffering on ‘the final day of judgment.’ As such, the sinner/criminal is in fact indebted to this judicial and penal mechanism, since it minimizes, so to speak, his ‘eternal sufferings.’

In a familiar narrative associated with the first Shiite Imam it has been related that a man seeks audience with the Imam and pleads to him, “Cleanse me, my Master!” When Ali-ibn Abi Taleb is about to lash him, the convicted offender lets out a cry of joy and expresses his happiness, since enduring pain in this world is preferred to a punishment faced on the Day of Judgment.²

The above noted parable frames the core of the Islamic penal structure, hence the basis for the judicial system in Iran. Within such structure, the paramount goal of ‘enforcing penalty’ is not to bring about justice, or any motivation of the sort, rather it is to punish the offender so as to: first, have his fate be a lesson to all; and second, have his physical pain and sufferings remedy his

¹ Article 4 of Iran’s Constitution (1979): [Islamic Principle] 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 to all other laws and regulations, and the learned persons of the Guardian Council are judges in such matters.

² For further details refer to *Marefat* quarterly journal, No. 49; “Round Table Discussions on Public Enforcement of *Hudud* and Consequences Thereof.”

ultimate punishment in hell. Punishments that are carried out in the public domain indeed serve to accomplish both these aspects, meaning that it ‘cleanses’ the sins of the wrongdoer while at the same time ostensibly allays public concern and redeems the troubled community.

Studies in the field of criminology and sociology of crime have shown, however, that harsh physical punishments (specifically the type recommended in Islamic teachings to be carried out in public) are the least effective and beneficial to the general public. Enforcing punishments in this manner has no merit, unless we believe that the offender’s physical pain and sufferings, such as lashing, hanging, the mutilation of body parts³ and so on are of benefit above and beyond the contingent realm.

Second:

Another notion that emerges as we explore further the penal system of the Islamic Republic of Iran is that Islamist lawmakers ascribe to every offence a ‘divine’ aspect. This indicates not only that there are crimes that *Sharia* law regards as ‘sin,’ and the commission of which is *Haram* [forbidden], but other offences as well are given a ‘divine’ aspect, and in some form or fashion infringe upon the ‘right of Allah.’ This notion is clearly outlined in Article 2 of the Code of Criminal Procedure.

According to Article 2 of the Code of Criminal Procedure (1999), all crimes contain a ‘divine’ aspect. Note 2 of Article 2 provides:

Any crime that entails two aspects can be prosecuted on two grounds:

- a) General ground: to protect divine *Hudud* and rights, and to safeguard public rights and order;
- b) Private ground: to claim [one’s] right through the provision of *Qisas* [retribution], or for slander and/or damages and costs to real persons or legal entities.

The ultimate chaos and confusion in a judicial system that makes every effort to somehow entangle itself with *Sharia* or divine provisions can be found in its determination to establish such incongruent and disjointed terms as norms. On this basis, even minor offences such as traffic violations, referred to in the Islamic Penal Code, can potentially carry a ‘divine’ aspect, let alone crimes such as ‘extortion,’ ‘embezzlement,’ and ‘fraud!’ In this vein, it should be further noted that all of Iran’s trial judges are considered inherent ‘representatives and deputies of the religious magistrate!’ Irrespective of what type of cases these judges review and manage during the day, they are considered designates of the religious magistrate, and issuers of divine judgment.

³ Re. Islamic *Hudud* and provisions concerning *Qisas* [retribution] involving body organs (subject of Books II and III of the Islamic Penal Code.)

The inherent danger of such an approach by Iran’s judiciary is that the one who has committed an offence is no longer confronted by a judicial authority or the direct victim(s) of the incident, rather it is ‘God’ himself Who has been victimized and Whose right has been violated! It is evident then, how precarious, critical and vague it can be to face God in violation, i.e., to couple a criminal phenomenon with a divine precept. In the 1980s, at the height of the repression of alternative socio-political movements, many religious provisions and teachings became the basis of political persecutions.⁴

One of the basic principles that are officially recognized in modern judicial systems—at least in the age of enlightenment, from mid-18th century onwards—is the principle of ‘punishment of crimes based on codified law.’⁵ Other than one or two exceptions, namely the German penal system under the Nazi regime [National Socialist Party], this basic principle is reflected in all modern legal structures.⁶

Based on this legal principle, no person can be prosecuted for an act which by law is not considered a ‘crime.’ Even if the person is prosecuted for such an act, s/he cannot be tried or penalized. In other words, in addition to crimes, penalties must be codified and specifically defined in law.

This legal principle and standard has been noted in both the ‘Constitution of the Islamic Republic of Iran,’ as well as in the ‘Islamic Penal Code.’⁷ Furthermore, prior to the 1979 revolution, the lawmakers in the Pahlavi regime included this principle in the amendment of Article 12 of the Constitution, and in Article 2 of the General Criminal Code (1925 & 1975 [1973]).⁸ On the other hand, some Muslim legal scholars have tried to explain this legal principle in the context of *Sharia* law, with reference to ‘*Qubh-e Aqab Belabayan*’ [vileness of indescribable punishment], or in light of Verse 15 of *Surah Al-Isra* in the Quran.⁹

However, it appears that in spite of considerable support and effort to instill this principle [in Iran’s judiciary system], indeed, as a result of the inter-mingling of the judicial system with religious precepts, the Islamic lawmakers have reached a state of confusion and desperation, i.e., Muslim lawmakers do know how they should manage acts that are considered ‘sinful’ under

⁴ Also see sections of memoirs of Iraj Mesdaghi—one of the political prisoners of the 1980s.

⁵ *Nulla poena sine lege* [Latin]

⁶ According to the German Nazi penal laws, any act contrary to “healthy consciousness and spirit of German people.” could be considered a crime. Morteza Mohseni, *Public Penalization Laws (Tehran, Ganje Danesh Publication, 1996)* Vol. I, P.335.

⁷ Articles 32, 36, 166, and 169 of Iran’s Constitution, and Article 2 of the Islamic Penal Code.

⁸ According to Article 2 of the General Criminal Code (1973): “Crime is any act or omission that is punishable by codified law or that which would necessitate disciplinary and/or correctional measures. An act cannot be considered a crime if there is no punishment, disciplinary and/or correctional measures determined for it in law.”

⁹ Quran: Surah Al-Isra (17:15) And never would We punish until We sent a messenger.

Sharia law, but that are not considered ‘criminal’ under the judicial law, in a manner that is appropriate to and befitting of an Islamic government.

For instance, suicide is a ‘sin,’ but attempt at suicide, based on current laws, is not considered a ‘crime.’ As such, the law cannot prosecute a person who has attempted suicide (provided the attempt was not successful!), or one who has made suicide possible for another (auxiliary in crime).

There are many such examples. ‘*Ruzeh Khari*’ [public display of non-fasting] for instance is also considered a ‘sin.’ Even though from the early days of coming to power, the core Islamists in Iran displayed harsh disciplinary or even judicial reprimand against those who openly ate, or even smoked, in public during the month of *Ramadan*, the truth remains that eating in public during *Ramadan* still is not a ‘crime,’ and nowhere in Iran’s judiciary is there an indication that this act is criminal. In relation to this inherent concept, more serious examples can be pointed out that bear graver consequences. For example, based on Islamic laws, ‘apostasy’ or turning away from Islam is punishable by hanging. However, to date, apostasy or turning away from religion has not been stated as a criminal act in the law. Nonetheless, and owing to the same confusion and ambiguity suffered by the Islamic judges, some courts in Iran, by virtue of Islamic sources (especially referencing Ayatollah Khomeini’s *Tahrir-al Wasileh*)¹⁰ have issued execution orders against those whom the Islamic judges regard as ‘apostate,’ those who have been attracted to home-churches for instance. The case of Pastor Yousef Nadarkhani in Gilan’s judiciary is the latest of such instances.

Reflection of such inconsistencies can also be found, more systematically and structurally, in the text of bylaws pertaining to the Prosecutor’s Office and the Special Clerical Court. Based on these laws, behaviours that are considered ‘contrary to the dignity of religious men’ could also bear judicial consequences—behaviour that may or may not be considered an offence under the law. According to Article 18 of the said bylaw, “Any act or omission that according to codified law or *Sharia* law is punishable and requires correctional and/or rehabilitative measures is considered a crime.” Therefore, ‘crime’ is not necessarily an act or omission that is defined by the Criminal Code; rather *Sharia* provisions and instructions, which are incidentally open to wide interpretation, can become the basis for judicial orders.

In conclusion, as noted earlier, the essence of this inadequacy goes back to the fact that the judicial authorities in the Islamic Republic clearly do not know what to do with ‘sins’ that are not yet considered ‘crimes,’ or for that matter ‘crimes’ that are not considered ‘sins’ (the buying and selling of weapons for instance), so that punishment of such acts could concurrently be justified under both judicial and *Sharia* laws.

¹⁰ Ruhollah Khomeini, *Tahrir-al Wasilah (Qom, Islamic Publication Inc.)* Vol. II, P. 329.

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It is clear that the derivations arising from Iran's judicial system are not limited to what has hitherto been discussed. Each of these issues potentially demonstrates the extent to which a religious-based judicial system can be problematic and dangerous. Also it can violate the most basic principles of human rights. Such anomalies become more apparent in light of special judicial cases, for instance that of *Qisas* in the case of Ameneh Bahraminava, or the [public] hanging of the killer of Ruhollah Dadashi.¹¹ It is in light of such cases that superior moral standards and norms demonstrate their inherent contrast with the current practices of Iran's judicial system—practices that thus far, due to various crises, have managed to somehow be viewed as 'normal or rational.'¹²

The demand to replace a judicial system with one that is based on common modern principles (where at least a single fair trial is conducted) is a basic socio-political expectation of a 'first generation.' It implies that the expectation of the current uprisings and movement of the people of Iran towards general reform in the legal system is that traditional-religious provisions should be practiced—provisions that have historical roots within the Iranian judicial system.

In fact, from the early years of the Pahlavi regime, a modern judicial system was formed where legal principles interacted with religious provisions and standards (this was especially so in areas of individual rights and civil laws). However, changes were directionally towards common judicial principles, moving away from religious precepts. These developments were not only in the realm of criminal law, but also in family law and women's rights, to which we witnessed ratification of advanced laws during that era.¹³

After the revolution [of 1979], however, the successful religious government managed to exploit certain strata of society—engulfed in economic crisis, to advance its own agenda through propaganda and use of certain training schemes—schemes that were indeed pre-conceived and are justified only within the framework of government propaganda.

¹¹ In 2001, Ameneh Bahraminava initially opted for *Qisas* and requested blinding of convicted Majid Movahedi, but ultimately pardoned him; and Alireza Mulla Soltani, a 17 year old killer of Ruhollah Dadashi (a.k.a. the strongest man in Iran), was publicly hanged in Karaj before thousand onlookers causing serious concerns for human rights and social activists in Iran.

¹² It appears that the effects of an eight-year war, the oppression and repression of political forces, gaps in social classes, a widespread socio-economic crisis, exile and migration of thinkers and intellectuals, lack of proper educational programs, coupled with a religious-based government have managed to support, and entrench [into Iran's judicial system], some of the harshest Islamic *Sharia* precepts, such as *Qisas* and capital punishment—to the extent that the concept of 'criminal justice,' has been diminished considerably to that of *Qisas* and/or a sense of personal vengeance.

¹³ According to 'family support' laws (1974), Iranian women were able to gain some of their rights as human beings within the framework of marriage and divorce. Providing access to these rights was not possible without elimination of some religious provisions instilled in the law in 1967.

Facing the current situation, what is most urgent, is to identify and expose crisis-causing religious elements in Iran's judicial system, and make utmost efforts to widely instill the notion that without seriously demanding a 'secular judicial system'—one that is based on common humanistic and compassionate principles, establishment of a free society that respects human rights and considers its citizens equal is not possible.

Some related legal references:

Article 32 of IRI's Constitution: "No one may be arrested except by an order and in accordance with the procedure laid down by law."

Article 36 of IRI's Constitution: "The passing and execution of a sentence must be done only by a competent court and in accordance with the law."

Article 166 of IRI's Constitution: "The verdicts of courts must be well reasoned and documented with reference to the articles and principles of the law in accordance with which they are delivered."

Article 169 of IRI's Constitution: "No act or omission may be regarded as a crime on the basis of a law established subsequent to it."

Article 2 of the Code of Criminal Procedure of Iran: All offences contain a 'divine' aspect, and they are categorized as follows:

- 1) Offences for which penalties have been defined by *Sharia* law, such as in *Hudud* and *Ta`zir*;
- 2) Offences that encroach upon society and public places or public order;
- 3) Offences that infringe upon real person(s) or legal entities.

Note 1- *Ta`zirat* under *Sharia* are a set of laws which prescribe penalties in accordance with the blessed Islamic precepts at the discretion of the judge for any act that is *Haram* [forbidden] or the omission of what is prescribed, the details of which are expounded in the Islamic Penal Code.

Note 2- Any crime that entails two aspects can be prosecuted on two grounds:

- a) General ground: to protect divine *Hudud* and rights, and to safeguard public rights and order;
- b) Private ground: to claim [one's] right through the provision of *Qisas* [retribution], or for slander and/or damages and costs to real persons or legal entities.

Article 214 of the Code of Criminal Procedure (1999): “Any judgment issued by the court must be justified and substantiated by law. Verdicts must contain clear references to articles of the law and issued based on legal principles. Every court is bound to issue its verdict based on codified law. 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* [religious decrees]. The court cannot refrain from issuing a verdict under the pretext of absence, discrepancies, imprecision or vagueness, and/or conflict in codified law.”

Article 18 of the by-laws pertaining to the Prosecutor's Office and the Special Clerical Court: “Any act or omission that according to codified law or *Sharia* law is punishable and requires correctional and/or rehabilitative measures is considered a crime.”

The amendment of Article 12 of the Constitution [under the Pahlavi regime]: “No punishment or court order can be enforced, unless it is according to the law.”