



The Question of “Stoning to Death” in the New Penal Code of the IRI

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Over the last three decades, as Islamic criminal rules have been integrated into the criminal regime of Iran, stoning to death has become one of the most challenging issues for the Islamic Republic of Iran (IRI). The brutality and inhumanity of stoning to death is so grave that even the IRI itself has, to a certain extent, restricted executions and, contrary to the teachings of Islamic jurisprudence (*fiqh*)[1], hidden the practice from the eyes of the public.

During the period that Ayatollah Hashemi Shahroudi presided over the Judiciary, there were some efforts to address domestic and international criticism against cases of human rights abuses in Iran, including stoning to death. Accordingly, in 2002, the Head of the Judiciary issued a directive and asked the judges for a moratorium on stoning. However, since the directive was not binding, it was ignored by some hard-line judges. Therefore, the practice of stoning continued, as highlighted by cases like that of Sakineh Mohammadi Ashtiani, which attracted international attention.

After the new Bill of the Islamic Penal Code was put on the agenda, the question of abolition of stoning in the IRI criminal laws was raised again and in a serious manner. Prepared by the department of Legal Deputy of the Judiciary, the Bill, contrary to expectations, only provided the possibility of replacement of stoning with hanging or flogging in special conditions. Note 4 of article 221-5 of the Bill provided:

“When the execution of stoning would result in mischievousness and cause the degradation of the [IRI] Regime, by the proposal of the Prosecutor in charge of the execution of the sentence, and approval of the Head of Judiciary, if the crime is proved by testimony of witnesses, the stoning shall be replaced with execution; otherwise, [e.g. if it is proved by confession] it shall be replaced with one hundred lashes.”

Finally, the Judicial and Legal Commission of Parliament—which was commissioned to pass the Bill—removed the same article and left no room for predictable disagreement from the Guardian Council. So, the Bill of the new Penal Code was approved by the Guardian Council

without this article and, therefore, many years of debates and struggle for abolishing or replacing [the punishment of] stoning to death in the Penal Code was left frustrated.

The new Code, like the old Code, under the Chapter of *zena* (illicit sexual intercourse) has provided flogging for *zena* committed by an unmarried person: “the *hadd* punishment for *zena* committed by an unmarried person (*zena-ye-qeyre-mohsaneh*) is one hundred lashes”. But, when it comes to adultery of a married man or woman (*zena-ye-mohsaneh*), quite surprisingly, contrary to the old Code, this chapter of the Code is silent and makes no provision in this regard.

The silence of the new Code in not repeating the old article on stoning [2] has caused some people to assume that stoning is abolished. The abolition of stoning has been publicized in Farsi language media [3] leading some to congratulate one another on the abolition of stoning in the new Penal Code! It is predictable for IRI authorities, who have been criticized by international human rights bodies for providing stoning in their laws, to claim that they have abolished this punishment and that the IRI has taken a big step forward toward the implementation of human rights standards!

But, they must answer the question of whether they believe that adultery is no longer a crime and is decriminalized? And, shall we accept that it is not punishable when a married man or woman commits adultery? Or does another punishment, other than stoning, take its place? Moreover, in applying the *ex post facto* law in cases where a lighter penalty is provided by the new law, as expressed in article 10 of the new Code as well, can it be claimed that individuals formerly sentenced to stoning, such as Sakineh Mohammadi Ashtiani, may be released because the punishment for adultery is abolished?

Certainly, the answer to all the questions above is negative. We must not forget that, according to Islamic jurisprudence (*fiqh*), adultery committed by a married man or woman is a *hadd* crime punishable by stoning, one of the most brutal and violent punishments. Moreover, judgment and punishment are the areas that Islamic jurists claim their full authority and tend to apply their own “law”, i.e. *fiqh*, on them. So [despite the silence in the new Code], how on earth can it be claimed that adultery committed by a married person is permissible and no longer punishable under the new Islamic Penal Code?!

It should be noted that, in addition to *zena*, the articles that relate to other Islamic *Hudud*, such as sodomy and homosexual behavior between women, are designated in a summarized and brief way in the new Penal Code and some articles from the old Code have not been retained. Apparently the Members of the Judicial and Legal Commission of Parliament have had a strong expedient will to remove some challenging articles from the Penal Code [4]. However, their silence on adultery committed by a married person in the Chapter of *zena* is the most questionable one and results in ambiguity about the continuation of the punishment of stoning.

On the other hand, according to article 36 of the Constitution, as well as article 2 of the new Penal Code, only those acts will be considered to be crimes for which the law has provided a punishment. Therefore, applying the interpretation methods, and on the basis of the Principle of Legality, one may basically conclude that, under the new Penal Code, adultery of a married person does not form a crime and is not punishable!

Paying attention to other articles of the new Code, [it is evident] that the idea of decriminalization of adultery and abolishing stoning is mere wishful thinking. Articles 172 and 198 of the new Code clearly refer to stoning to death for adultery. Article 172 provides: "Subsequent denial after confession shall not result in removal of punishment, unless in crimes punishable by stoning or execution...". According to article 198 "... *Zena* shall be proved by testimony of two just men and four just women; unless when the *hadd* punishment for *zena* is execution or stoning, in which case, testimony of at least three just men and two just women are required...".

In addition, article 220 of the new Code refers the punishment of the *hadd* crimes that are not provided in the Code to Article 167 of the Constitution. Article 167 again refers such cases to valid Islamic sources and valid *fatwas* and therefore opens the door of references to *fiqh* books and *fatwas* of Islamic jurists.^[5] According to the Islamic sources endorsed by the IRI, the punishment of adultery committed by a married person, as stipulated in the old Code as well, is stoning to death. Moreover, because it is a *hadd* crime, when awarded, there is no possibility of mitigation or replacement of the punishment.

So, article 220 of the new Penal Code must be regarded as a clear violation of the Constitution and the Principle of Legality. Before the new code was approved, almost all lawyers believed that Article 167 of the Constitution may only govern civil cases and strongly refused the reference to *fiqh* books and *fatwas* in criminal cases. Even still, article 214 of the Criminal Procedure Code, by violating the Principle of Legality, had already opened the door to *fiqh* sources in criminal cases.

The passage of the new Penal Code and its article 220 has been carried out, too, in the same direction and has expressly announced the rule of *fiqh* over all criminal cases. However, in order to downplay the sensitivity around the issue, it has been carried out by keeping this fact under wraps with a single reference to the figure of the relevant Article of the Constitution (Article 167). In addition, although the further step of asking for a *fatwa* from the Leader, or his delegate, is needed and has been added to the process of issuing the decision on stoning to death, it does not mean that stoning to death is abolished.

Thus, although not directly referred to in the new Code, adultery committed by a married person and the punishment of stoning to death are still very much part of the IRI's criminal framework. Instead, these provisions have merely been moved to a more obscure position so as

not to attract the attention of critics; and in fact, they play their old role, though indirectly, in *fiqh* sources as the new parts of the new Penal Code.

In conclusion, let me review an interview given on 24/6/2009 by Mohammad Dehqan, a Member of the Judicial and Legal Commission of Parliament, in which he expressly—and without hiding the facts—confirms the abovementioned conclusions. In this interview, he rejects the possibility that the “divine punishment of stoning” will be replaced and instead stresses that: “abolishing stoning is not rational”. Then in response to the question of the reporter that “you mean there is neither abolition nor any alleviation?” he declares:

“Yes. None are the case; because stoning is a divine had punishment. Who can, and has the right to, manipulate the divine hudud punishments? ... In the new Bill of Penal Code prepared by the Judiciary, through the discussions in the Judicial and Legal Commission of Parliament, such hadd punishments have been assigned to Islamic Shari’a and they do not fit in the Code”.

The reporter then asks shrewdly: “so, you have not solved the question, but only relocated it?” and [Dehqan] confirms:

“Yes, we do not have right to do this; because Shari’a does not allow us ... Stoning to death, instead of law, is relegated to Shari’a. There is no disagreement in Shari’a about such hadd punishments. In fact, it has been relegated from the [Penal] Code to the mother law which is Shari’a. The judges will issue their decisions [in such cases] in accordance with Shari’a ... All of us know that there are not good reactions to this issue around the world; but they do not know that our holy book has so ordered. One of the reasons that the members of Judicial Commission had some meeting with legal experts was that, this punishment [i.e. stoning] was not to be mentioned in the Code and must be relegated to Shari’a. There have always been, and still are, some misunderstandings about our country, but they forget that we apply divine commands of God.”[6]

[1] According to article 101 of the old Penal Code: “It is appropriate that the judge informs the public of the time of execution of the *hadd* punishment ...”.

[2] Many articles in the old Code have dealt with stoning. For example, article 83 of the old Code provided:

“In the following cases, the hadd punishment for zina is stoning to death:

- (a) *Zina of a mohsan man, that is a man who is married to a permanent wife and has had sexual intercourse with her whilst he has been sane and can have sexual intercourse with her whenever he so wishes.*

(b) *Zina of a mosaneh woman with an adult man; a mohsaneh woman is a woman who is married to her permanent husband and the husband has had sexual intercourse with her whilst she was sane and she is able to have sexual intercourse with her husband.*"

[3] For example see this news with the title of "stoning to death and juvenile execution is abolished in the new Penal Code"; Link: <http://www.khabaronline.ir/detail/198520>

[4] Ayatollah *Shahrokhi*, the Chief of Judicial and Legal Commission of Parliament, in an interview declared: "The Judicial Commission, when discussing the new Bill [of Penal Code], came to the conclusion that it is expedient for the Regime that some of the *hadd* punishments, including stoning, are not mentioned in the Code ... The Members of the Commission concluded that there is no need to deal with such *hadd* punishments in the [Penal] Code". He also added "according to the new Bill, in the case of any *hadd* punishments which are not dealt with [in the Code], it shall be referred to reliable Islamic Sources." (*Etemad* newspaper, 24/7/2009, p 1)

[5] It must also be noted that according to article 221 of the new Code "When the reference to article 167 of Constitution is required, the judicial authority shall ask for a fatwa from the Leader. The Leader may delegate this issue to other person(s)."

[6] Link: <http://www.khabaronline.ir/news-11356.aspx>