Male Same-sex Sexuality in the Legislation and Jurisdictions of the Islamic Republic

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Hell on Earth

> "If gay people really are going to hell, that hell will probably look something like Iran. In the dark backwaters of the country, gay people are flogged, tortured, abused, and even executed with shocking regularity. Thanks to a 1987 law that legalized sex changes, parents of gay children routinely force them to undergo unwanted hormone treatment, chemical castration, and sexual reassignment surgery to escape being murdered by the regime's thugs. […] In short, it is possibly the bleakest place in the world to be gay, lesbian, bisexual, or transgender."[1]

I found this description of Iran in an article entitled "10 Countries That Completely Hate Gay People" published on a website which produces top-ten "mind-blowing" lists in various categories to entertain or

[1]Morris M., "10 Countries That Completely Hate Gay People," *Listverse*, 30 December 2013, https://listverse.com/2013/12/30/10-countries-that-completely-hate-gay-people/.

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inform its readers. This portrait of Iran as a dangerous place, in which sexual minorities are being oppressed and systematically prosecuted is by no mean an exceptional image but rather the predominant and widely narrated one in various contexts of western societies, be that in travel guides, media reports on LGBT situation or in the scholarly texts.

Of course, there is no question that this portrait is not a product of mere imagination, but the result of actions and legislation of the Islamic Republic. From early months after the revolution, the question of the revival of Islamic sexual morality became one of the signatures of the new elite in power. Islamic sexual morality was not only the characteristic which distinguished the newly installed regime from its predecessor and its "western masters," but also as an instrument to oppress and to intimidate the political rivals as well as the pro-western urban middle class.[2] The agenda of the revival of Islamic sexual morality was demonstrated, for example, through the prosecution and public execution of committers of *livāṭ* and *zinā*, which were intentionally well-covered and highlighted by the national press. With the establishment of the regime in the late 1980s and normalization of the situation, the officials of the Islamic Republic of Iran (IRI) started to pursue a less aggressive sexual policy and thus the rate of execution due to sexual crimes dropped visibly in the 1990s in comparison to the first years of the revolution. The election of the conservative Aḥmadīnizhād in 2005 let the western world once again remember the sexual politics of the early years of the Iranian Revolution. Besides the images of Aḥmadīnizhād's victory in 2005, there were some other images, which were broadcasted from Iran and affected the debates on IRI in the western discourse, namely a series of photographs documenting the execution of two young men who were hanged in the days around the presidential election in Mashhad. Ac-

[2]Concerning the sexual politics of the revolutionary Iran, see Janet Afary, *Sexual Politics in Modern Iran* (Cambridge: Cambridge University Press, 2009), 265-271.

cording to the Farsi sources of the report, namely *Quds* newspaper[3] and *ISNA* (Iranian Students' News Agency),[4] both men were arrested around fourteen months before their execution and sentenced to death due to the charge of abduction and rape of a thirteen-year-old boy. *Outrage!*, an action group with an LGBT cause in Great Britain, seized this news and published the pictures of the execution on its website with the title "Iran Executes Gay Teenagers" a few days later.[5] In the narration of *Outrage!* it was no longer mentioned that both young men were convicted of sexual assault; the headline suggested instead that these men were executed because of homosexuality. Although a few days later other organizations like *Human Rights Watch* and *Amnesty International* released their more accurate reports which pointed to the conviction on the basis of sexual assault, *Outrage!* kept on insisting on its narration that the men were executed just because of having consensual gay sex.[6] *Outrage!*'s version of the story, namely "Iran executing gays," enjoyed somehow more popularity in the public debates of western societies. It fitted better in the understanding of Aḥmadīnizhād's rise as a throwback to the early years of revolution, and the execution of sexual minorities was seen as the ramification of this change. Maḥmūd and ʻAyyāz̲, the executed young men, became figures of a tragic love story of two gay men, who were prosecuted solely because of their forbidden love.[7]

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[3]For the story of *Quds* newspaper, see http://hamjensgera.com/wiki/محمود_عسگری_و_ایاز_مرهونی.

[4]"ḥukm-i i'dām-i dū muttaham-i bih livāṭ-i bih ʿunf ijrā shud," ISNA 19 July 2005, http://www.isna.ir/news/8404-12129/حکم-اعدام-دو-متهم-به-لواط-به-عنف-اجرا-شد.

[5]"Iran Hangings,", *Outrage!*, 23 June 2006, http://outrage.org.uk/2006/06/iran-hangings/.

[6]For the controversies in this case, see Scott Long, "Unbearable Witness: How Western Activists (Mis)recognize Sexuality in Iran," *Contemporary Politics* 15, no. 1 (2009): 119-136.

[7]For example, the play *Haram! Iran!* was brought in 2010 to stage and was based on a "true story of forbidden love" with the words of Huffington Post's contributor Jed Ryan. Ryan saw in the story of Maḥmūd and ʻAyyāz̲, "…an incident [that] opened many people's eyes on the situation for those [LGBT people] who haven't [made some modest gains regarding visibility and rights]." The play made its New York debut in March 2017. See Jed Ryan, "HARAM! IRAN!

The issue of oppression of sexual minorities returned once again to the list of questions Iranian officials were asked about as soon as they were accessible to reporters, students or other politicians[8] and the situation of LGBT community in Iran was more frequently discussed in the western media.[9] Same as the Mashhad case, almost all of the executions monitored by western press as "execution of gays" in the following years, were according to the statements of the Iranian judicial officials as well as national press cases of rape or better said, "forced anal penetration" (*livāṭ-i bih 'unf*). Same as to *Outrage!*'s version, the "rape" accusation was either not mentioned in the western reports or if mentioned was interpreted as a false accusation fabricated by Iranian judiciary to hide the real cause of prosecution, namely punishing those men having consensual sex with each other.[10]

True Story of Forbidden Love in The Middle East Comes To New York Stage," *Huffpost,* 11 March 2017, https://www.huffingtonpost.com/entry/haram-iran-true-story-of-forbidden-love-in-the-middle_us_58c45999e4b070e55af9efb5.

[8]The reformist president Khātamī, who was more than any other Iranian official out and about on the international stage, did not face the question regarding the execution of gays until September 2006. During his speech at Harvard, as the former president, he defended the death penalty as a suitable measure for this "misdeed." Aḥmadīnizhād, on the other hand, faced this question in almost every encounter with a western actor. His response to the student who asked him about penalizing homosexuality in Iran is perhaps one of his most memorable quotes as the President of IRI: "In Iran, we don't have homosexuals. In Iran, we don't have this phenomenon. I don't know who has told you we have it." His audience, the students and staff of Columbia University in 2007 laughed and booed after this remark. For Khātamī's remark, see "Khatami Slams 'Imperial' U.S," *The Harvard Crimson,* 11 September 2006, http://www.thecrimson.com/article/2006/9/11/khatami-slams-imperial-us-encouraging-an/, and for Aḥmadīnizhād's remark see Claudia Parsons, "Iranian President Spars with Academics in NY," *Reuters,* 24 September 2007, http://www.reuters.com/article/us-iran-ahmadinejad/iranian-president-spars-with-academics-in-ny-idUSN2430987520070924.

[9]See for example, "Iran Executes Three Men on Homosexuality Charges," 7 September 2011, https://www.theguardian.com/world/2011/sep/07/iran-executes-men-homosexuality-charges, or Shehab, Khan, "Iran Executes Gay Teenager for Crime Allegedly Committed as a Teenager," 4 August 2016, http://www.independent.co.uk/news/world/asia/iran-gay-teenager-hanged-executed-crime-allegedly-committed-as-juvenile-a7172086.html or Benjamin Weinthal, "Iran Executes Gay Teenager in Violation of International Law," 4 August 2016, http://www.jpost.com/Middle-East/Iran-News/Iran-executes-gay-teenager-in-violation-of-international-law-463234.

[10]I am not claiming at this point, that there is a single narration circulating in the western texts. As mentioned, human rights monitoring organizations like Amnesty International or Human

The idea that the political changes in 2005 started a new wave of prosecution of homosexuals, which is practiced under the semblance of fabricated allegations such as rape, gets support in scholarly texts as well. Janet Afary, for instance, supports the view that the prosecution of the gay men and transgressive women increased in 2005 right after the election of "Basiji Ahmadinejad." The case of Maḥmūd and ʿAyyāẕ serves her as an example of this claim. Relying on the reports of "independent gay sources inside Iran," Afary asserts that the charge of sexual assault was fabricated by the Iranian authorities to cover up the execution of "two lovers who lived together" and were well-known in the city's underground gay community." She explains the compounding of the charges of homosexuality with others such as "rape and pedophilia" as the regime's reaction to the international outrage prompted by execution of men on charges of homosexuality.[11]

These statements raise somehow some questions; principally, one may then ask, even if it might be a tasteless question, why is the rate of executions based on rape allegations so low if the IRI has started to crack down gays under this fabricated accusation? This question especially makes sense in the age of the Internet, in which the gay community has become, on the one hand more visible through the possibility of digital networking, and on the other hand more vulnerable because of its hardly erasable footprint and its traceability in virtual space.[12] There are indeed no signs of an attempt by the "digital army" of the IRI to systematically prosecute numerous individuals frequently using gay dating websites or Apps which are similar to

Rights Watch are documenting the cases more carefully. They are of course condemning the death penalty and juvenile prosecution in general but remain cautious on categorizing the executions as actions against homosexuality. See for example, Human Rights Watch, We Are a Buried Generation: Discrimination and Violence against Sexual Minorities in Iran (New York: Human Rights Watch 2010), 27-32.

[11] Afary, *Sexual Politics*, 358-359.

[12] Concerning the emergence of an LGBT community and a "gay" identity, see Pardis Mahdavi, "Questioning the Global Gays(ze): Constructions of Sexual Identities in Post-revolution Iran," Social Identities 18, no. 2 (2012): 223-237. See also Abouzar Nasirzadeh, "The Role of Social Media in the Lives of Gay Iranians," in *Social Media in Iran: Politics and Society After 2009*, eds. David M. Faris and Babak Rahimi (Albany: Sunny Press 2015), 57-75.

many other filtered websites, however broadly accessed through anti-filtering softwares. Of course, it is very probable that a person using dating Apps or websites gets entrapped by undercover Basīǰīs and faces insult, intimidation, and harassment instead of having a pleasant date. Such incidents seem, however, to be either personally motivated or a part of the State's tightening of moral restrictions, which has occurred time to time since the revolution up to now. These raids are, however, not a part of a determined agenda of gay prosecution since the entrapped persons are not facing more severe punishments than heterosexual persons who could also get arrested for transgressing public virtue. It is as well not convincing to claim that the low rate of executions could be the result of state's successful hush-up of the real number of gay prosecutions, since it is unlikely that the officials could keep every case of disappearing gays away from the eyes of human rights organization as well as the gay community over several years, if they have indeed been doing it systematically.

The other allegation that the IRI is covering up the prosecution of consensual same-sex sexual activities under the fabricated accusation of rape or pedophilia is based on poorly documented claims or highly problematic subjective sources, which apparently undergo less critical examination, probably because of the general suspicious attitude towards the IRI. Furthermore, one could ask why the IRI would go through the risk of a public execution of gay men falsely accused of rape, although the officials are aware of the possible reaction of the international community. Why should the regime make an exception to its own supposed policy of hidden executions? What if the transgression being punished is the assault, and not the same-sexness of the sexual offence?

By asking these questions, I am neither suggesting here that those men were "properly" convicted of rape nor am I trying to trivialize the high risks the gay community are facing in Iran with respect to severe punishments decreed by law. The intention behind these questions is moreover to criticize the idea that the executions of convicts to *livāṭ* are a manifestation of the escalation of "the war against homosexu-

ality and an openly gay lifestyle."[13] I am somewhat suggesting that the IRI, despite its hostile attitude toward same-sex sexuality, is not considering the elimination of "deviant" subjects involved in same-sex sexual acts as an essential cause and not actively conducting a physical war against "homosexuality." This reserved attitude is in my view inherent to the understanding of *livāṭ* in classical Islamic jurisprudence (*fiqh*), to which the authorities of the IRI seem to be committed. The commitment to the Islamic jurisprudence results into a penal policy, which, I claim, has a behavioristic approach towards sexual offences and is not constructing recognizable types of subjects, which are socially visible and hence prosecutable.

The act-type dichotomy underlying this question goes back to Foucault's perception of modern and premodern sexualities, in which homosexuality as a type of subject is understood as a modern product, while the premodern prosecutions of same-sex offences are considered to be behavioristically motivated. Foucault writes:

> As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage, a past, a case history and a childhood, in addition to being a type of life, a life form, and a morphology with an indiscreet anatomy and a possibly mysterious physiology.[14]

Although I agree with the arguments of those scholars who criticize the universalization of this categorization as the distinguishing feature between modern and premodern sexualities,[15] this dichotomy still im-

[13]Afary, *Sexual Politics*, 398.

[14]Michel Foucault, *The History of Sexuality, vol. 1: An Introduction* (New York: Pantheon Books 1978), 43.

[15]Afsaneh Najmabadi, for instance, questions aptly the applicability of this dichotomy in context of sexualities in pre-modern Iran and argues that although the notion of "homosexual as a type" did not exist in this time, there are still identifications based on desire types, which did not go unnoted by their contemporaries. See Afsaneh Najmabadi, *Women with Mustaches and Men without Beards: Gender and Sexual Anxieties of Iranian Modernity* (Berkeley: University of California Press 2005), 19-23.

plies the distinction between the pre-modern legal approach towards same-sex sexuality from the modern one. Of course, I am also not precluding the possibility of the emergence of a "type of subject" through competitive discourses, such as the medical discourse.[16] I claim, however, that those discourses are not playing a significant role changing the judicial attitude of the IRI towards same-sex sexual offences.

In the first part of this paper, we will discuss the characteristics of *ḥadd* offences in context of classical Islamic jurisprudence to illustrate the main features of a penal policy towards same-sex sexual crimes, which is based on *fiqh*. Subsequently, we will look at the legislation of the IRI concerning the punishment of same-sex sexual conduct and examine the Iranian penal policy concerning its continuities and discontinuities of Islamic jurisprudence. Of course, the theoretical continuity of the Islamic discourse in modern Iranian legislation still does not necessarily mean that these regulations are implemented by law-enforcement authorities as they are intended to be. Thus we will also take a look at some decisions of the Supreme Court concerning *livāṭ* to illustrate the understanding of the judges of this court of the situation. This insight into the legal and judicial approach towards same-sex sexual offences, lead me to conclude that the underlying motive of the actions of the Iranian authorities is the implementation of (their understanding of) Islamic law, which provides the prosecution of *livāṭ* as a particular act under certain circumstances. This study shall also demonstrate that the notion

[16]In fact, the medicalizing of homosexuality is frequently discussed as a process in which the authorities of the IRI are constructing "types of deviant subjects" and at the same time stigmatizing them. A careful examination of the scholarly works on this issue goes far beyond the scope of this study. Briefly summed up, it is frequently argued that the discourse on transsexuality and the encouraging policy of the IRI towards surgical sex-change are at the same time reproducing and reinforcing a heteronormative order and hence constructing and marginalizing homosexuality as a pathological type. For a more comprehensive on transsexuality in the IRI, see Afsaneh Najmabadi, *Professing Selves. Transsexuality and Same-sex Desire in Contemporary Iran* (Durham & London: Duke University Press, 2014) or see Susan Stryker, "Transsexuality and Biopolitics in Iran," in *Journal of Women's History* 28, vol. 4 (2016): 179-182.

of homosexuality as a type of subject within the legal discourse of the IRI is absent. In the final part of the paper I shall use the findings of this paper to criticize the western narratives on the issue of LGBT rights and their possible impacts on the situation of LGBT subjects in Iran.

Ḥadd Offences in fiqh

Livāṭ counts in the Islamic juridical tradition to *ḥadd* offences, which are primarily violations of a claim of God (*ḥaqq al-lāh*) and considered to be explicitly sanctioned by the Qur'an or Sunna. These offences have their specific characteristics: their punishment is fixed and unchangeable; the qualification of their fulfillment is strictly described; they have their own exclusionary rule of evidence and a repentance results in their exemption.[17] The hearing of a *ḥadd* offence is a careful examination of the question if some specific act has occurred under prescribed conditions and if it is proved through its exclusionary prescribed evidence. Any uncertainty (*shubhah*) in any of the constructing elements or any slight deviation from the prescriptions is a reason for hesitation in prosecuting *ḥadd* offences and leads to the acquaintance of the defender.[18] The *fiqh* itself is a source of uncertainty since it is not a uniform legal system but an assemblage of views and debates of the scholars on the divine law, who frequently have different opinions and understandings of the texts.[19] Conflicting rules on a specific subject are not exceptional at all, not only among the schools of law but also among the scholars of the same school. There is also no hierarchal order of these views, in which the position of the majority would automatically discredit the less popular opinions.

[17]There are of course differences among and within Law Schools about the nature and scope of *ḥudūd,* which can not be discussed here. See Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Centur*y (Cambridge: Cambridge University Press 2005), 53-55. See also Wael B. Hallaq, *Sharīʿa, Theory, Practice, Transformations* (Cambridge: Cambridge University Press 2009), 311-312.

[18]This maxim is reflected in a prophetic *ḥadīth.* See Hallaq, *Sharīʿa,* 311.

[19]Rudolph Peters, "From Jurists' Law to Statue Law or What Happens When the Shari'a is Codified," in *Shaping the Current Islamic Reformation*, ed. Barbara A. Roberson (London and Portland: Frank Cass 2003), 84-85.

This variety of views in *fiqh* result in doubt and uncertainty for any authority implementing them.

It is not only difficult to prosecute and punish *ḥadd* offences but also for many reasons it is not seen as a prioritized matter. Firstly, the prosecution of violations against a claim of God is not perceived as an urgent cause since the "damaged" party of this crime, namely God, is not only powerful enough to punish any wrongdoing but also free of needs (*ghanī*) and thus not damaged by the violence.[20] Secondly, the *ḥadd* punishment itself is not considered as a measure which expiates or purifies the committer from his sin and therefore not a necessity, since the perpetrator will still face a punishment in the hereafter regardless of the worldly punishment, although it is common (but uncertain) belief among Muslim jurists that God shall forgive a perpetrator sentenced to a worldly penalty.[21] Furthermore, the implementation of the punishment is not seen as a necessity for protecting the community from God's rage, since the assumption that God would impose collective punishments on the whole community due to its indifference towards sins does not prevail among Muslim scholars. Thirdly, the punishment is not the only way to redeem the evil that occurred since all transgressions of claims of God could also be settled through repentance (*taubah*). The main reason for implementing the penalty, as the Islamic scholars declare themselves, is deterring the public from those wrongdoings considered harmful to society.[22] If the undesirable acts were not severely sanctioned, individuals would not effectively be prevented from committing them, and this would lead to social decay. The fear of the spread of the wrongdoing illustrates, in my opinion, the behavioristic character of *ḥadd* offences. The offence is seen here as a misdeed which could theoretically be imitated by any other member of the community and is not associated with any particular feature inherent to the wrongdoer.

What are the possible features of a penal system which is committed

[20]Ibid., 55.

[21]Ibid., 54-55.

[22]Ibid., 55; also Hallaq, *Sharīʿa,* 311.

to the above understanding of *ḥadd* punishment? The judicial system would probably not take the initiative to prosecute *ḥadd* offences, as they are difficult to prove and furthermore their prosecution could get redundant in most cases through the possibility of the repentance of the sinner. The prosecution is however more likely if the public is affected by the crime or if the rights of a third party are violated through it, as the public deterrence is seen as the raison d'être of the offence. I believe this description applies to the penal policy of the IRI regarding sexual offences. To support this claim, we shall take a look at male same-sex offences in the legislation and jurisprudence of the IRI.

Male Same-sex Sexual Offences in the Legislation and Jurisdictions of the IRI

The Penal Code of 1996,[23] which is the prevailing law of most decisions we discuss later, defined *livāṭ* as anal intercourse as well as intercrural sex (*tafkhīẕ*) between two male persons.[24] The anal intercourse was sanctioned through death penalty, and the intercrural sex was punished by 100 lashes.[25] Whereas insanity and force/duress exempted the accused from punishment, immaturity[26] didn't necessarily lead to an acquittal of the charge. Immature men who got consciously and willingly involved in the act of *livāṭ* could be sentenced to a discretionary punishment (*ta'zīr*) up to 74 lashes. Other activities among men such as passionate kissing or lying nude under the same blanket were penalized through less severe *ta'zīr* punishments.[27]

The new Penal Code, which entered into force in 2009,[28] brought a few changes regarding the definition of *livāṭ* and its punitive measures. According to this Code, *livāṭ* is the act of anal penetration

[23]The Law is available at http://ghavanin.ir/detail.asp?id=1232.

[24]Penal Code 1996, Paragraph 108.

[25]Ibid., Paragraph 121.

[26]Female maturity is reached at the age of nine, and male maturity is reached at the age of fifteen (lunar years).

[27]Penal Code 1996, Paragraph 123 and 124.

[28]The law was finally ratified 2014 after a test phase of five years. The law can be found at http://rc.majlis.ir/fa/law/print_version/845048.

among two men, once the glans is inserted into the anus. The new Code also distinguishes between the punishment of penetrator and penetratee of a *livāṭ* act: the active person in the same-sex anal penetration would only then be sentenced to death if he has forced the sexual act or fulfills the conditions of *iḥṣān*; otherwise, he gets sentenced to 100 lashes. The same paragraph defines *iḥṣān* as the status of being permanently married to a mature woman, with whom the offender has almost had a (vaginal) intercourse and who is "available" to him, as soon as he desires.[29] An adult penetratee is however exempted from the punishment only in the case of force or duress and thus not affected by the *iḥṣān* rule.[30] There are no differences between the active and passive one when it comes to other less severe offences like intercrural sex, which is punished by 100 lashes. Some other forms of sexually motivated activities such as passionate embrace and caresses are sanctioned under the term homosexuality of the male human (*hamjinsgarā'ī-i insān-i muẕakkar*) and punished with a maximum of 74 lashes.[31]

The act of *livāṭ* is proven to the court only either through the testimony of four mature men or a four-time confession of the accused. The new Penal Code removed the ambiguous evidence "knowledge of judge" (*'ilm-i qāẕī*), a controversial proof provided in the previous Code, from the rule of evidence for *livāṭ*.[32] The new Code prohibits as well any form of investigation of private matters concealed from the public eye.[33] This prohibition is also provided by the Penal Procedure Law of 2013, which allows the investigation and prosecution of crimes against Public Virtue (*'iffat-i 'umūmī*), which are sexual offences with *ḥadd* or *ta'zīr* punishments,[34] only if the crime was either visible to the public or committed through force or prosecuted

[29]Penal Code 2009, Paragraph 234.

[30]Ibid., Paragraph 234.

[31]Ibid., Paragraph 237.

[32]Penal Code 1996, Paragraph 120.

[33]Penal Code 2009, Paragraph 241.

[34]Penal Procedure Law 2013, Paragraph 306. The law could be found at http://www.ekhtebar.com/wp-content/uploads/2015/06/1قانون-آیین-دادرسی-کیفری-با-اصلاحات-۱۳۹۴-سایت-حقوقی-اختبار.pdf.

under the account of a private complaint. This Law also rules that in the case of a voluntarily expressed self-denunciation (confession) the judges are recommended to invite the confessing person to keep silence so as not to denounce themselves.[35] The judges are also committed to informing the witnesses about the legal consequences of a false or invalid testimony in such cases,[36] namely the possibility of being charged with sexual defamation (*qazf*), a *ḥadd* offence punished by 80 lashes.[37]

Once accused to or found guilty for *livāṭ*, one could escape capital punishment through repentance (*taubah*), denial after confession (*inkār-i ba'd az iqrār*) or pardon (*'afv*). If the defendant repents before the offence is proven, he would be exempted from the capital punishment, provided the judge is convinced of his repentance and his rehabilitation/correction.[38] This regulation is also applicable for those who committed rape and would reduce their punishment to imprisonment or lashings. In a conviction which results from a confession, the convict can also deny the act and take his confession back, which results in the exposure to the death penalty and its reduction to 100 lashes. All convicts to *livāṭ* are entitled to access to pardon except those whose convictions are based on the testimony of four witnesses.[39]

As I mentioned before, under the traditional understanding of Islamic law there is a reluctance to convict a defendant for *ḥadd* offences. This attitude has been adopted in the Iranian Penal Code as seen in the rules of evidence and punishment prescribed. The reluctance to initiate a prosecution and to implement the punishment, which we find in the classic understanding of a *ḥadd* crime, is reflected in those provisions which order the judges to discourage a defendant from self-incrimina-

[35]Ibid., Paragraph 102-1.

[36]Ibid., Paragraph 102-2.

[37]Penal Code 2009, paragraph 250.

[38]Penal Code 2009, paragraph 114.

[39]The pardon of the convict is practiced in the IRI by the Supreme Leader and regulated through the Guideline of the Commission on Pardon and Reduction of Punishments, an organ of the Judiciary responsible for suggesting the possible candidates for pardon. For the Guideline see http://rc.majlis.ir/fa/law/print_version/135558.

tion, and to deter the witnesses from testifying by reminding them of the severe punishment for false testimony. The death penalty could in most cases be avoided through measures such as repentance or denial, even if the "guilt" of the perpetrator is proved, which demonstrates somehow the secondary importance of the elimination of the perpetrator. If the law-enforcement bodies are committed to the existing laws, it would be quite unlikely that the prosecution of a same-sex sexual offence results in the execution of the perpetrator. Only the penetratee of a consensual sexual act and his married sex-partner, who have been found guilty on the basis of testimony and who have not repented before the hearing of the evidence, have theoretically no chance to escape capital punishment. The certainty of the death penalty in the case of witness testimony illustrates as well another feature of *ḥadd*, namely the decisive role of the public in implementing the penalty. As we observed, one of the primary objectives of the implementation of a *ḥadd* punishment in the Islamic law is to serve as a general deterrent. If an offence has been seen and reported by a member of the public, then it is necessary for the legal system to prosecute and punish the perpetrator. This concern explains to my view the rigorous approach of the Penal Code towards those offenders convicted on the basis of witness testimony in comparison to those whose conviction results from a confession.

If we look at the recent changes of the Penal Code, it is clear that there are no signs of the emergence of a modern notion of homosexuality through these new changes. On the contrary, the major changes regarding *livāṭ* are responses to concerns raised on the compatibility of the former laws with sharia's regulations. All of the major changes of the law, such as the removal of knowledge of the judge (*'ilm-i qāẕī*) as a proof to *livāṭ*, the adoption of the possibility of denial after confession and the introduction of *iḥṣān* as a decisive factor for the degree of punishments are indeed matters which we find in the of classical *fiqh* scholarly discussions.

The only term found in the legislation, which may suggest a shift from a behaviorist understanding of the offence towards the perception of

the wrongdoing as inherent to the wrongdoer is the modern term for homosexuality (*hamjinsgarā'ī*). This word is indeed used in the new Penal Code, which leads some activists and journalists to conclude that the IRI is taking a step towards criminalizing homosexuality as a way of life.[40] The new Penal Code is however not using this expression to refer to a "state of being" or a certain "type of subject." The word is instead functioning as an umbrella term for some behaviors already sanctioned and treated as undesirable in classical works of Islamic legal tradition, such as passionate touching (*mulāmisat az rūyi shahwat*).

The continuity of the Classical Islamic legal discourse in modern Iranian law does not allow us to claim that the authorities of the IRI are following the premodern behavioristic approach towards the offence, and are interpreting the provisions as they are intended to be. Of course, it is imaginable that the interpretation of the law-enforcement bodies deviates from those of the classical law or *fiqh*. As we saw, the scope of action of the judges is defined very broadly in the law. From one side they have measures at their disposal which could stop the trial at a very early stage. They can postpone the hearing of evidence, or accept the repentance of the defendant before the prosecution has begun. At the same time, if they insist on punishment, they have massive influence with respect to the penalty, since they can reject the repentance or refuse to pass the request for pardon to the higher instances. Thus, it is essential to ask whether the presiding judges are interpreting these rules in their classical context or are possibly homophobic agents utilizing these laws to prosecute the accused.

Livāṭ in the Decisions of the Supreme Court

Since the hearings of the offences against public virtue are not held publicly, it is difficult to gain detailed insight into the judicial practice regarding the prosecution of sexual crimes. Still, we can obtain some information on the implementation of the legislation in the Ira-

[40]Ḥamīd Parnīyān, "Vaẓ'īyat-i Hamjinsgarāyan dar Qānūn-i Jadīd-i Mujāzāt-i Islāmī," *Radiozamaneh*, 22 December 2012, https://www.radiozamaneh.com/52003.

nian courts and the judicial interpretation of the situation, if we take a look at the decisions of the Supreme Court and its Chambers. The decisions of the Supreme Court in its function as the final arbiter of a trial are not a binding source of law. But the rulings still reflect the interpretation, understanding, and perceptions of one of the highest judicial authorities of the country which must approve any case of capital punishment before it is carried out.

The first case we discuss was referred to the Penal Chamber of the Supreme Court in 1997, where an eighteen-year-old man was accused of the rape (*livāṭ-i bih ʻunf*) of a ten-year-old boy and was sentenced to death. His guilt was proven through four confessions, all of which were obtained by the judge on the same day where the defendant was asked to leave the court after giving each confession and returning for the next one. The charge was also supported by a forensic medical report which verified injuries and the deformation of the rectum of the victim due to penetration of a "hard object." The judge refused the repentance of the defendant and sentenced him to death. The appeal court objected to this decision and returned the case to another chamber with two arguments: first, the defendant should give four separate confessions, and second, there is no indication which would lead to the assumption that the repentance is not credible. In the new trial, the defendant confessed in three different hearings to *livāṭ* but argued at the same time that he was not aware of the death punishment and repented from his deeds in each hearing. In the fourth day, he confessed to intercrural sex and denied the penetration. The court rejected his repentance due to his criminal record (prior convictions for intercrural sex) and insisted on the decision of the first court and sentenced him to death proven by four confessions. Once again, the appeal court overturned this decision due to lack of required evidence, namely the four required confessions and sent the case to the penal chamber of the Supreme Court for a final decision. The majority of the judges of the court concluded that in this case the required evidence for a conviction to *livāṭ* is not present and acquitted the defendant of the charge. The judges argued that confessions passed in very

first trial had lost their validity due to the overturning of the decision of the first instance by a higher court. Furthermore, the confessions in the second court were considered insufficient for a death penalty, as the defendant had admitted in the last confession only to intercrural sex. Some judges also contended that the repentance in the first court should be regarded as a repentance before confessions in the second court, which exposes the accused to the death penalty. In the discussions on the question whether the confessions are to be given in four hearings, while the judges tended to consider four confessions on the same day as valid, they recommended the distribution of confessions over four days, due to the principle of caution (*iḥtiyāṭ*). The judges of the Supreme Court also objected the decisions of the lower courts for rejecting the repentance of the defendant without any justification and stated that it is to the courts to prove the dishonesty of the defendant.[41]

In another case which was heard by the General Assembly of the Supreme Court in 2010, three young men were sentenced to death for to the rape of a thirteen-year-old boy in 2005. In the first day of the hearing all three defendants had confessed four times to the assault yet on the second day denied their statements. The judge had found them guilty due to their confessions on the first day and sentenced them to death. The revision court had objected to this decision due to a procedural error since the legal representatives of the defendants were not present on the first day of the hearing and thus rendered the confessions invalid. The case was once again heard in another trial court, which insisted on the death penalty due to the confessions in the first instance, the forensic reports and the negative reputation of the defendants. Once again, the case was reviewed in the revision court, which subsequently overturned the decision. This court accepted the claim of the defendants that they confessed under pressure from the investigating officials and raised severe doubts about the validity of this evidence. The court also considered the fo-

[41]Daftar-i Muṭāli'āt va Taḥqīqāt-i Dīvān-i 'Ālī-i Kishvar, *Muẕākirāt va Ārā-i Hay'at-i ,umūmī-i Dīvān-i 'Ālī-i Kishvar* (Tehrān: Idārah-yi vaḥdat-i rayīyah va nashr-i muẕakirāat-i Dīvān-i 'Ālī-i Kishvar 1378sh), 471-490.

rensic report not to be reliable enough to ascertain that this particular act of *livāṭ* happened since in the report it is only mentioned that the injury had occurred through penetration of a "hard object," which could have been anything. The court stated as well that the negative reputation of the defendants did not count as evidence for this particular accusation. As the third trial court insisted on the death penalty, the matter was discussed in the General Assembly of the Supreme Court. The Court supported the arguments of the last Revision Court and approved it and acquitted the defendants of the charge.[42]

We also find cases of convictions based on consensual same-sex sexual conduct which were examined by the Supreme Court. A Chamber of Supreme Court heard in 1990 the case of two young men who were found guilty on the basis of their confession during the initial investigation. This decision was also supported by a report of forensic medicine which testified to the permanent deformation of the rectum of one of the defendants (the penetratee), which was seen as a result of repeated penetrations over an extended period of time. The Supreme Court overturned the decision of the first instance with the reasoning that there were doubts about the validity of evidence since the confessions were made in the investigative phase and not during the official hearing. Furthermore, they objected that the forensic medical report could not concretely confirm that this specific act of *livāṭ* between the defendants had happened and discharged both men.[43]

The role of the the judges in these cases is consistent with the expectation of Islamic law in dealing with a *ḥadd* offence. As we mentioned, the elements of these crimes, as well as the rules of evidence concerning the exclusion of certain confessions and their punishments are all prescribed in Islamic law and the judges had to carefully examine if all those provisions were fulfilled. The judges of the Supreme Court

[42]Summary of the decision available on: Paygāh-i Iṭṭilā'-risānī-i Ḥuqūqī-i Iran, "Ra'y-i Iṣrārī-i Kayfarī-i Dīvān-i 'Ālī-i Kishvar: Istinād bih Qā'idah-yi Dar' Mawjib-i Muntafī Shudan-i Ḥukm-i I'dām Shud," 25 September 2018, http://lawyernews.ir/?p=1325.

[43]Yadullāh Bāzgīr, *Qānūn-i Mujāzāt-i Islāmī dar A'īnah-i Arā'-i Dīvān-i 'Ālī-i Kishvar: Ḥudūd, Jarā'im-i Khalāf-i Akhlāq-i Ḥasanah* (Tehrān: Nashr-i Hastān, 1378sh.), 125.

seemed to be committed to this maxim. They examined the validity of the decisions of the lower courts in respect to Islamic law and then the codified law. The *fiqh* texts served as a source for the interpretation of the codified law and for responding to the ambiguities which occurred during the hearing. The judges, who were mostly clergy, frequently crossed the boundaries of codified law and took into account scholarly debates on *livāṭ* which are not in codified law. We find in their discussions, for example, notions such as the role of *iḥṣān* or insufficiency of the knowledge of the judge as evidence to *livāṭ* long before they were adopted by the Penal Code of 2009. It is also notable that the forensic findings played an insignificant role in the decisions of the court, which indicated the adherence of the judges to the strict and non-negotiable evidence rule of this *ḥadd* offence.[44] Furthermore, the judges seemed to have the same behavioristic approach towards the offence, which we find in the classical understanding of *livāṭ*. The personality or the psyche of the wrongdoer appeared irrelevant to the Supreme Court judges in their decisions and discussions. As we observed, neither the criminal record of convictions to same-sex sexual offences nor the findings of forensic medicine, which attested to regular anal intercourse, served as indicators to the judges, which would let them find the defendant guilty in the case they were hearing. None of those circumstances led the judges to conclude that the behavior was an expression of some continuous quality inherent to the personality of the defendant, which would have made the judges more biased towards him.

We observe that the legal approach of the Islamic Republic towards same-sex sexual offences is a continuity of the Islamic legal tradition, not only on the point of the adoption of harsh measures but also in the conception, perception, interpretation of this offence. This tradition

[44]It is frequently said, that the IRI is using forensic medicine to intensify and optimize the prosecution of the male homosexuals. The influence of forensic reports in the discussed cases, however, qualifies this allegation. See Afary, *Sexual Politics*, 359 or K. Korycki and A. Nasirzadeh, "Homophobia as a tool of Statecraft: Iran and its Queers," in *Global Homophobias: States, Movements, and the Politics of Oppression*, ed. Meredith L. Weiss and Michael J. Bosia (Champaign, ILL: University of Illinois Press, 2013), 174-196.

is characterized by the absence of active prosecution of wrongdoers and the reluctance of implementing capital punishment as long as the public is not affected by the crime. In this traditional understanding the crime is treated as a singular act of violation and thus the personality of the offender and his character traits do not play a role on the prosecution and the trial. The more committed the law-enforcing bodies remain to this traditional understanding of the offence, the more unlikely it is that this penal policy leads to a systematic prosecution of people conducting it and I believe this commitment to the tradition is by and large present in the penal policy of the IRI.

Some Final Remarks

It is difficult to imagine that the authorities of the Islamic Republic of Iran are unaware of the existence of Iranians who identify themselves as gay. Of course, they are well-equipped enough to be able to increase pressure on the gay community and intensify the prosecution of sexual offences. Nevertheless, they seem to lack the will to actively fight against same-sex sexual conduct or to eliminate this community altogether. The regulations regarding military service offer a perfect example for the awareness of the IRI about the existence of gay citizens and the absence of any intention to punish them. For more than a decade it is possible to be exempted from the military service for homosexuality.[45] "Disorders (*kazhkhū'ī*) which are against military or social norms (*shu'ūnāt-e ijtimāʿi wa nizāmī*) such as sexual deviances (*inḥirāfāt-i jinsī*) and homosexuality" may exempt one permanently from military service, as per paragraph 7 of Chapter 5 of the current *Regulation of Medical Exemption of Military Service*.[46] One may be skeptical of this provision and assume it is designed to keep a register of gays for possible future prosecution. But this regulation seems to be ineffective as a register as not many gay Iranians are making use

[45]HRW wrongly claims that these regulations are prohibiting gay men from service and categories these measures as discriminatory, although these rules are optional and do not hinder gay men from the service. See *Human Rights Watch*, "We are Buried," 23-27.

[46]The regulation could be downloaded from the website of *Tabnak Professional News Site* under: http://cdn.tabnak.ir/files/fa/news/1393/4/18/395987_387.pdf.

of this possibility to get exempted from military service, since the bureaucratic process they have to go through is not only utterly humiliating, but also often ends in an unwanted "coming-out" of the applicants in front of their parents. The regulation seems to be a response to the problem overt homosexuality in public spaces and is fueled by the fear of spreading the undesired behavior among the others in society. Apart from the intentions of the regulation, its existence *per se* shows that the IRI is aware of the presence of subjects who get involved in same-sex sexual conducts yet is still not showing any intention to prosecute them.

I am of course not claiming that there aren't any risks of being prosecuted and punished for same-sex sexual conduct in Iran and that the gay Iranians or those having same-sex sex are having a life free from the fear of facing prosecution and harassment. I am, however, suggesting that the judicial authorities of the IRI seem to be committed to a traditional understanding of same-sex sexual offences, which is characterized by the reluctance to prosecute sexual offences. As long as this perception prevails among the judicial authorities, it is less likely that they will initiate a systematical prosecution of same-sex sexual offences. Once the view of the judicial officials is "modernized" and they start to conceive gays as a social group, which is more suspected for practicing *livāṭ*, then we need to be alert to potential worsening of the situation of gays in Iran.

In this respect, the reports in the western medias regarding "Prosecution of Gays in Iran" could have a negative impact on the lives of the gay Iranians and increase their vulnerability. Those reports are not only objectively inaccurate and fail to provide their readers with differentiated information on the situation of gays in Iran, as I tried to demonstrate in this paper, but also exploit the LGBT issues for the "othering" of non-western (Muslim) societies and as a demarcation line between those societies and the liberal western world.[47] This pro-

[47]For the role of (homo)sexuality in self-identification of western societies see Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham, N.C.: Duke University Press, 2007), 3-24. For a critical view on the "othering" of muslim societies on the basis of their sexualities

cess makes at the same time the anti-LGBT positions to serve as the marker of being Islamic or anti-western in the Muslim societies. As soon as taking an anti-Western course or showing dedication to Islam gets politically relevant for the actors in power, then the members of LGBT community are probably at the top of the list for suppression and harassment, as we have observed by the increase of anti-gay crack-downs in many parts of the Muslim world such as in Egypt, Chechnya, Azerbaijan or Indonesia in the last two decades.

see Joseph A. Massad, *Desiring Arabs* (Chicago, London: The University of Chicago Press 2007), 160-190.