6

The Enduring Logic of Mercy

Humanitarianism and the Eclipse of Human Rights

ARZOO OSANLOO

6.1 Introduction

In this chapter I explore the persistence of the logic of mercy as a contemporary global *zeitgeist*. I do so through two seemingly divergent, yet overlapping and co-constituting prisms, criminal sanctioning and humanitarianism, and show how, together, they construe mercy as an enduring ideology of our time. Drawing on research I have conducted in Iran's criminal justice system, I explore the linkages between mercy in criminal justice and the increasingly global turn away from social justice movements based on human rights and toward care-based appeals, such as humanitarianism. The latter is just one major arena of increased reliance on and appeals to care or "care work" over claims to inherent rights; others include charity, aid, and philanthropy.

In Iran's "victim-centered" criminal justice system, in homicide and other major crimes, the victims' families possess a right of "exact" retribution, quite literally (Osanloo 2020: 3). That is, victims' immediate family members may exercise their right to have a perpetrator executed. In these cases, however, victims' family members may also forgo retributive sentencing and forgive the perpetrator. A variety of interests – legal, social, religious, and even economic – shape the concerns of victims' families as they consider whether to exercise the right of retribution by forgoing rather than executing it.

To help to bring about forbearance, Iran's criminal codes compel individuals, especially those working in the judiciary, to pursue reconciliation between parties to the extent possible. However, another dimension of this system is that the entire negotiation or reconciliation process is extrajudicial, ad hoc, unregulated, and therefore, discretionary.

Thus, this legal and moral duty to seek reconciliation, on the one hand, while lacking formal guidelines for how to do that, on the other, has generated a veritable cottage industry of "forgiveness work" throughout Iran. Diverse actors, from actual actors and celebrities to religious scholars, defense lawyers and social workers, to anti-death penalty activists, fill in or populate this cottage industry to promote and persuade victims' families to forgo retribution in favor of some sort of settlement and reconciliation.

This work, while immediate and interpersonal, is also part of a broader attempt, perhaps even a movement, aimed at changing the culture on the ground, endeavoring to do what the activists call the "cultural work," to make people in society at large feel more forgiving, merciful, compassionate, and more caring toward one another. They try to replace the initial emotional and perhaps historically inscribed urge toward revenge, of which retribution is already a diminution, to one of mercy and compassion based on many practices grounded in local traditions and rituals as well as faith.

While being merciful or seeking mercy may possess qualities associated with a "seasoning" of justice (Derrida 2001), the inclination toward mercy and merciful grants, such as granting pardons to persons convicted of crimes, is both a legitimation and entrenchment of the rule of an absolute sovereign over the judiciary or the legislative branch, as in Iran. This normalization of the resort to mercy has its critics, especially among Iranian defense lawyers, who eschew the criminal justice system's capacity to reduce everyone in society to a potential supplicant.

These criticisms echo the concerns of forced migrants, whose own increased reliance on aid, charity, and mercy, including the granting of discretionary relief to refugees, reduces us all to potential supplicants. And today, beyond Iran and refugee camps, the increased recourse to aid, charity, and philanthropy, as with mercy, further entrenches state power through the standardization of states' discretionary powers, such as the granting of pardons by presidents from Iran to the United States. This state of affairs, I argue, is not simply emerging from "pre-modern" laws, as critics of Iran might suggest, nor is it due to the neoliberal maelstrom that Samuel Moyn (2018) offers. Rather, I suggest, the contemporary embrace of "care work," with its increasing recourse to humanitarianism, draws from the same reasoning as that of Iran's victim-centered criminal justice system. To make sense of this claim, I turn to Arendt's critical work on human rights and her finding that the failure of nation-states to

protect minorities would lead to the certain diminution of all rights (the rights of man) (Arendt 1951).

Arendt's findings are reinforced by the more recent work of historian Mark Mazower, who has shown that the ascendance of human rights in the postwar era was a "strange triumph" – having grown from a compromise intended to privilege individual rights over the rights of collectivities, to one aimed at maintaining the status quo, in other words, the authority of the state and its sovereign power (Mazower 2004).

Indeed mercy is always-already tied to much of the presumptive international laws that aim to protect minority groups from the majority, even those in the name of human rights. And this is not by accident. International criminal laws and laws of war are, themselves, derived from domestic criminal legal systems that privilege the state's sovereign powers. Thus, far from being based on democratic principles and the rights of individuals through an inherent personhood, humanitarianism reason takes as its very source the often faith-based foundation of mercy or some other version of it.

Thus, in the under-examined foundations of humanitarianism – domestic criminal law – through which ordinary appeals for mercy and care for (distant) others emerge, we unwittingly reproduce the very systems that modern human rights were intended to eradicate in favor of approaches to humanity that are, ostensibly, founded on principles of egalitarianism and respect for human dignity. From here we can perceive how we, even in the global North, have never been modern.

6.2 Mercy's Room for Forgiveness

To begin this exploration, I turn to a case that drew me to study Iran's victim-centered approach to criminal justice (Osanloo 2020). I was sitting in on a murder case in Tehran's Provincial Criminal Court. The three-judge panel had just rendered its ruling in a murder case. They held that the prisoners had intentionally killed their victim. The sentence was in-kind retribution and it was up to the victim's family members to decide if they wanted it to be carried out.

In Iran's justice system, in homicide and other major crimes, the family of the victim possesses the right of retribution. That is, victims' family members may exercise the right to have the perpetrator executed. However, they may also forgo retributive sentencing and forgive the perpetrator. In fact, victims' families often enter into negotiations to agree to some punitive measures short of execution.

Another dimension of this system is that the negotiation or reconciliation process, if you will, is extrajudicial, ad hoc, and by and large unregulated – but that does not mean that judiciary officials are not involved. Judicial officials are implicated at every step of the process. In fact, Iran's code of criminal procedure imposes an imperfect duty on all government officials to bring the parties to *solh* (reconciliation).

Moments after the chief judge issued the ruling, he added, "But there is room for forgiveness in this case." With a wave of his hand, he cleared the courtroom, leaving the two sides, several journalists, social workers, and me. To assure the propriety of what was about to take place, the chief judge reiterated the end of the hearing, "Everything is over. This is the start of the reconciliation and settlement meeting."

As though taking those words as a cue to step away from the role of impartial trier of fact to sage adviser, one the associate judges stepped off the judge's dais and walked over to the parties holding his arms out as he reiterated "There is room for forgiveness in this case."

The parties had no dispute over the facts: two daughters and a mother had murdered their father/husband. The defendants while not denying the killing, attempted to mitigate the sentence by revealing their father/husband's years of abuse – verbally, emotionally, and physically.

The judges who spoke about the "room for forgiveness" had been apprised of the abuse in statements the defendants had written and submitted to the court, but as hearsay, the statements carried little weight. There were no witnesses, police reports, or physical evidence to substantiate the claims of abuse. Thus, while judges were aware of the mitigating circumstances, the strict interpretation of intentional murder left them with no possible ruling other than intentional murder, for which there is no other sanction besides *qisas* (retribution-in-kind).

So the judges and social workers all crowded around the victims' family members, who were the plaintiffs, and each in their own way cajoled, persuaded, and chastised the victims' family members to forgo their right of retribution. Some focused on faith-based appeals; some on the essence of justice; some merged the two; others attended to the psychological relief the family members of the victim would feel once they let go of their grief and anger. Still others focused on what the victim would have wanted, while some emphasized the serious mitigating factors in the case.

Upon listening to these mounting entreaties, first the uncle, the victim's brother, cried out, "I am not ready to execute them, but right now I am exploding with grief. So many times, I told them, 'If something

is wrong, come tell me . . .' but they never did. The last time, I said, 'If you don't like my brother, then divorce.' All these people are getting divorced."

Not wanting to retry the facts of case, the chief judge, now as principal mediator, spoke, "We don't want to hear this now." Then more softly, he added, "Our duty in all our cases is to arrive at reconciliation. I want to ask this of you, that you try to come to a solution between you."

One of the aunt's responded, "They don't pray," in an effort to undercut the womens' character and credibility. Looking directly at her two nieces across the aisle, she added, "If my brother was so bad, then why didn't you tell me."

The young women were shepherded by the social workers and prison guards toward their aunts and uncle. The social workers, the guards, and others admonished the young women, "Plead with them. Go!" As the women hesitantly approached, their aunts began castigating them anew. The guards stood closely by to protect them from physical harm, while the journalists hung back, hurriedly documenting the situation on their notepads.

Then girls then fell to their knees and begged for their lives and through their tears repeatedly begged, "Forgive us. Please. Please, forgive us." The aunts looked away, their arms folded at their chests. Instead, they looked up at the crowd of mostly women gathered around them.

"Why should we forgive? Why should we be merciful when they were not?"

As though playing the part of the chorus in a Greek tragedy, the observers, including the prison guards and journalists, were advocating emphatically to spare the lives of the women. Different women spoke with varying degrees of rapidity.

"They did wrong, but you do right!"

"I won't forgo retribution."

"By killing them, you won't receive God's mercy."

From the far end of the room, the chief judge was tidying his desk and packing his briefcase. He spoke over the others in a more authoritative plea, "With your mercy, you will be helping them to become better people."

"They said those things about our brother!

No, I will not agree."

After some time of this very intense pressure, in the end the victims' family members each signed a document stating that they had forgone their right to retribution "without any doubt or uncertainty." The mood

in the room shifted to a lighter and indeed festive one. The social workers began planning a celebratory party to praise the act of forbearance. The prison guards declined to shackle the defendants, who would return to prison to await formal sentencing, which would include a sentence of between three and ten years for the state harm of public disturbance.

I filed out with the judges and asked about their intensive efforts during the mediation. The chief judge stated that in all of the cases before him, he had both a legal and moral duty to seek a settlement short of death. When I further inquired about their motivations, the judges in these cases frequently responded with some variation of their legal and moral duty to seek forgiveness.

It is this legal and moral duty to seek reconciliation, without any formal guidelines for how to do that, I have argued, has generated a cottage industry of forgiveness work. Throughout Iran, diverse actors, including celebrities, religious scholars, defense lawyers, social workers, and anti-death penalty activists, inhabit and even produce this cottage industry.

In my research for this project which spanned thirteen years (2007–20), I studied the legal, social, religious, and even economic conditions through which families gain this right of retribution and exercise it by forgoing rather than implementing it. In simple terms, I was interested in exploring who forgives in these cases where victims' family members possess an unfettered right, at least legally, to seek retributive sanctioning.

Now, the work of these activists is very delicate as it can, and sometimes does, backfire. While forgiveness work is intensely proximate, the activists I spoke to also intended their efforts to have wider impacts, the culmination of which was a social movement emphasizing compassion and mercy. These strategies, which they referred to as the cultural work, included artistic expression in the form of theater, poetry, and prose, and drew heavily from local traditions, rituals, and faith-based practices. They emphasized the indigenous nature of the values of compassion and mercy over those of revenge and retribution, and they set about to change the values that their society prioritizes.

My interlocutors' engagement with a kind of social work that extends directly from Iran's justice system and, ostensibly, the faith of the vast majority of its people, publicly underscores the state's power. Yet the broader goal of many of these actors is to change the laws on the books. Short of that, because retribution is said to be immutably enshrined in the Qur'an, they seek to change the cultural palate to one in which forbearance is the norm and retribution the exception. And there have

been some slight changes to these laws, substantively and procedurally, that help bring about this "feeling of forgiveness," as my interlocutors refer to it, across broad sectors of society. Their strategies and increasingly their expertise, include their knowledge of the Quran, their eloquence, empathy, and even an embodied performativity, work together to change the possibilities on the ground – that is, to get the family members of the victim to imagine what it means to forgive rather than seek retribution.

In this context, my interlocutors insisted, the victims' families were not simply relinquishing the right of retribution, they were also giving themselves permission to renounce their pain and sorrow. For this reason, some social workers acknowledged, the forgiveness work in which they engaged took years before achieving its goal of forbearance. For in order to forgo retribution, victims' families had to be able to put aside their grief. In this sense, forgiveness work also involves cultivating a new affect and a new way of being. It is slow work that is generously nurtured by numerous social actors.

To be sure, the forgiveness work that I explore takes place through the state's legal apparatus even as it extends to, includes, and implicates its citizens such that we can say that the state corrals, and in some ways even constrains the field of possibility. At the same time, social workers draw from a broad lexicon of cultural resources that include rituals, piety, and reason to appeal to the victim's family members and attempt to cultivate this feeling of forgiveness.

Rather than chiding state agents on rights-based concerns or appealing to human rights discourses that hold little interest to aggrieved families, these activists work through intersubjective ethical dialogues based on mercy and compassion, which, in Shi'ism, are connected to the higher principles (*maqasid*) of justice.

6.3 What Do Appeals to Mercy Conceal about Justice?

My scholarship on Iran's victim-centered criminal justice system by and large explores how these "forgiveness workers" work – labor – to make this room for forgiveness. While many different kinds of actors are engaged in this practice, some, almost exclusively defense lawyers, rebuked and detested it. One lawyer derided the whole system: "Look what they make us do! Do you see how they make people beg? We want law, rights; Why should they have to beg for forgiveness? [My client] doesn't need mercy; she needs justice; she needs law."

Having laid some of the social context for forgiveness work I introduced, I now want to turn to the lawyers and consider the reasoning behind the disdainful attitude that almost every lawyer with whom I spoke had about this forgiveness work. That is, I want to explore just what it is about forgiveness work that the vast majority of rule of law advocates found so troubling. In other words, why do legal actors object to the Iranian state's capture of legal pluralism?

The lawyers I interviewed were critical of the fact that in Iran, murder is treated as a private tort versus a criminal case prosecuted by the state. And of course, looking at the case of Iran, a rogue state often in the crosshairs of Western rule of law standards, facilitates a critical assessment that reveals the faults and flaws of a logic of mercy that requires one party to become a supplicant to a party who has the power over the life and death of another.

Criminal laws are adjudicated by state actors and institutions and the measure of mercy requires sovereign state power, which can take many forms – pardons, reprieves, or clemency, to name a few. That mercy allows for a curbing of a due punishment is significant given that it may also comprise a justice response to structural inequality (Meyer 2010).[1]

At its core, this description is a humane response in the face of very real mitigating circumstances, but it is one that is weighed and carried out by those in positions of power, through their broad discretionary authority. Pardons are subject to unequal application, subject to the whims of the sovereign or, in contemporary times, well-resourced public campaigns, often requiring entrenched support or at times, celebrities shining a light on injustice. In most jurisdictions, state officials make the determination that the person who caused the harm is deserving of this lessening of a due punishment.

Mercy in such contexts may also possess the quality of translocal justice that is the subject of this volume. Yet, even as a translocal corrective to injustice, mercy is inimical to a modern understanding of human rights, another translocal signifier of justice, precisely because mercy hangs on the sole discretion of a ruling authority – a higher power (Osanloo 2006). The sovereign confers mercy, while through a human rights approach to justice, the question of the *deservingness* of the lessening of a punishment is connected to a human's inherent worth

[1] Derrida (2001) refers to this as "mercy seasoning justice," an approach that suggests mercy enhances the very "taste" of justice.

and dignity and is never envisioned to be at the mercy of another's whims and caprices, politics, or vengefulness.

Human rights organizations and Iranian human rights lawyers have said as much about Iran's system. And even when Iran's judiciary announced changes to the penal codes, such organizations and lawyers still roundly criticized Iran's practices, particularly with respect to human rights, dignity, and the right to life, and urged Iran to change its laws even further. To be sure, international human rights organizations, alongside Iranian human rights lawyers, have objected to the Iranian justice system, particularly with respect to human rights, dignity, and the right to life. They have diligently urged Iran to further amend and revise its laws to bring them into conformity with international human rights conventions which the country has ratified.

Yet many human rights groups and individuals who support these conventions in the global North applaud, seek, and encourage mercy, compassion, and other "humane" responses to tragic circumstances, even as they are critical of how Iran's victim-centered justice system mobilizes mercy. In what follows, I seek to tease out this tension surrounding mercy and unpack what I observe as its enduring logic in our contemporary times. In so doing, I consider the relationship that contemporary "justice" responses to other kinds of tragic events have to theories of criminal justice like that of Iran's, which is premised on extending mercy. I suggest that in contemporary and even aspirational appeals to human rights, this logic of mercy persists, albeit unwittingly. The impulsive or unconsidered intrusion of mercy in ostensible human rights concerns inadvertently upends the very core values and considerations of justice upon which human rights are premised.

6.3.1 Juristocracy's Hidden Peculiarities

In 1941 legal anthropologist Robert Redfield gave an address in which he distinguished state law in contemporary societies from what he referred to as "primitive law" (Redfield 1964). This use of the term "primitive" was both a common term for the times and also the very thing Redfield was arguing against. That is, Redfield's address was responding to Bronislaw Malinowski's contention that law can be found in all societies as rules that individuals follow for "personal and social reasons" (Redfield 1964: 2). Redfield considered this definition of law to be overly broad and argued that it failed to capture the "special peculiarities of law" in state-centric legal systems. Redfield began by noting that:

> to us, who live under a developed system of law, law appears as something very different from the personal and cultural considerations which motivate our day-to-day choices of action. It appears as a system of principles and restraints of action with the accompanying paraphernalia of enforcement. The law is felt to be outside, independent, and coercive of us. Within its labyrinths we find our way as best we can. (Redfield 1964: 2–3)

Thus, Redfield points to a critical feature of statist legal systems: that courts "are powerless to recognize obligations" that societies based on custom were able to account for (Redfield 1964: 3). Redfield's understanding of what we might refer to as "prejuristocratic" societies found that such obligations derive from social relations and socially diffuse but commonly held beliefs about compensation for loss and conflict avoidance, which are structured through moral codes of honor.

Of course, today in many contexts that draw from multiple temporalities of justice and possess nostalgic investments about them, ideas about such obligations remain, but they are often beyond the capacities of juristocratic institutions to address. Thus, in contemporary societies, actions that are based on social duties often appear anomalous and are unaccounted for by legal institutions. As Redfield notes, "The highly developed state with its powerful law looms so large that perhaps we do not always see that within it are many little societies, each in some ways a little primitive society, enforcing its own special regulations with a little primitive law of its own" (Redfield 1964: 4).

Redfield goes on to point out that a key feature that distinguishes statist legal systems is that they treat harmful actions, such as murder or theft, as violations of impersonal law – as crimes – rather than as first and foremost harms to specific persons or groups. This contrasts with their treatment in nonstate societies as harms that are suffered by the victim's family. While poring over a number of ethnographic examples, Redfield shows that legal institutions and proceedings in nonstate societies are concerned with mediating the quest for redress by the victim's next of kin, whether by facilitating compensation or regulating retaliation. They thereby address the concern with social obligations, which in these cases amounts to the victims acquiring some kind of settlement or retribution.

In contemporary legal systems, however, the state, in a sense, assumes the victim's right to attain redress: it seizes the harmful action as an injury to the whole of society, treating it primarily as a violation of state-enacted criminal law, and only secondarily as a harm to the victim or the victim's family. That the legal system attributes greater importance to the

crime against the state than the harm to the victim is reflected in the harsher punishment it metes out, as severe as incarceration and death, while victims, if they choose to pursue redress at all, may seek only monetary damages. Thus, what such societies often leave unaddressed is the damage to the underlying relationship between the victim and perpetrator and the need for repair.

As Redfield, among others, points out, the shift in murder from a tort (private action) to a state prosecution is a defining moment for the modern state and its legal institutions because it is at this point in which the state takes the reins of determining who lives and who dies and it is further a defining moment of sovereign power.[2] And yet, a continued element of the state's calculus in deciding who lives and who dies is its pardon power.

From a human rights standpoint, it is possible to discern how the logic of mercy, embedded in the pardon power, is troubling. Appeals to compassion, such as those in the case I describe above, are pleas to powerful authorities to grant mercy; they are based on the potential of benevolence as opposed to the necessity of equality. They rely on and reentrench social, class, race, and gender hierarchies – rather than egalitarianism, a cornerstone of human rights. And while mercy or the power of pardon can be used as a corrective in justice-seeking, those decisions are often emotional, sometimes irrational, and the resulting system is deeply unequal and arbitrary.

To shed light on some of the concealed effects of the state's continued authority in pardon power, I return to Redfield, who suggested that "modern" law emerges when the state distinguishes criminal law from tort (or personal injury) law, with the former addressing harms to state and society and the latter concerned with harms to individuals. Thus, as disputing became more juristocratic, states privileged punishment for transgressions against society over the restorative aim of mediating between two sides of a conflict (Braithwaite 2002: 7).

That is to say, our contemporary understanding of law emerged from "the development of systems of compensation or of forms of socially approved retaliation in ... what might be called a rudimentary law of torts" (Redfield 1964: 12). This rudimentary tort law included formal (legal) process and specific sanctions. The overall goal of this incipient

[2] See also, Foucault 1996.

law, Redfield found, was to contain "unlimited revenge" between families or tribes. He saw this process of standardization and systematization of retaliative sanctions as developing into a "modern" justice system at the point when the laws of a society began to be more concerned with punishing the harm committed against society as a whole, rather than just the injury to victims and their next of kin. "The beginning of law may . . . be sought," Redfield wrote, both "in the extent to which there is formal process" and in the extent to which offenses are "thought to be also, or only, wrongful acts committed against the society," but it is only with this last transformation that formally imposed sanctions become "the impersonal application of force – that we are likely to think of as criminal law" (Redfield 1964: 12).

While Redfield examines the missing social elements of harm, I turn to what persists after the juristocratic takeover of states adjudicating personal harms. The transformation elides the residue and remainder of what is an affective appeal to power, not in the name of or for the purposes of effectuating justice, but rather for seeking that authority's benevolence.

And here is where I want to draw attention to the logic of mercy as one that is not simply evident in prejuristocratic, so to speak, disputing processes. Rather, the pardon power with its attendant logic is present in contemporary justice systems throughout the global North. Indeed, humanitarian laws, otherwise known as the laws of war, that have emerged over the last four hundred years to protect civilians during times of conflict derive from these very processes.

I suggest that the same logic guides much of the humanitarian approaches to major social problems in our world today, with special consideration for the current refugee crisis. The refugee crisis exceeds the conditions of possibility of statist, juristocratic problem-solving, not only due to its vastly larger scale, but also because of the inability of its analytic to address the idea of social obligations, to which Redfield was attuned. And yet, as we live through an era of myriad, protracted humanitarian crises: multiple war zones, as well as climate, economic, and global health disaster zones, hundreds of millions of people have fallen into need – of aid, charity, or relief, and have been relegated to performing the role of supplicants in order to obtain such services. The bottom line is that "modern" lawfare seeks responses to these problems in juristocratic remedies, when, in fact, these are better thought of as social problems in need of remedies that are attuned to the wider moral obligations that underlie the substantive laws.

6.4 The Cruel Logic of Mercy

The cruel logic of mercy or its cruel irony is evident in its contemporary codified forms starting with the Universal Declaration of Human Rights (UDHR), Article 14, that provides that those fleeing their places of residence owing to a well-founded fear of persecution have a right to seek asylum. This language is reminiscent of a criminal seeking a federal pardon. They have the right to ask – to beg.

And as with the pardon, the grant of relief to a person with a well-founded fear of persecution, a refugee by definition, is considered humanitarian and thus also a discretionary grant. Legal scholars, jurists, and political leaders made this deliberate decision in the wake of the horrors of World War II. With the rise of nation-states and their greater affinities for imagined homogenous communities, the rights-claims of individuals who fell outside of the states' normative Constitution would be cast aside and left to the mercy of those states. Writing in the wake of the postwar international system, Hannah Arendt saw the effects on refugees clearly and noted, "the prolongation of their lives is due to charity and not rights" (Arendt 1951: 296).

As many are aware, we are currently seeing the worst refugee crisis since World War II. This is an interesting correlation because our laws protecting refugees derive from the crisis in World War II. The *1951 Convention Relating to the Status of Refugees* is the primary legal treaty that guides nation-states' approaches to refugees and asylum seekers who reach their borders.

There is no right to asylum. There is only the right to seek asylum, just as a person indicted of legal transgressions has a right to procedure in the form of a fair trial. Technically, asylum seekers do not even have that, a point which Arendt also noted (Arendt 1951). Only once the refugees reach the borders or specific zones for processing them into such nation-states, can refugees or stateless persons seek legal relief. In point of fact, these remedies are increasingly diminishing as a result of constraints that the states themselves create.

The refugee must ask the sovereign for asylum, often as a supplicant, and the more supplicating the better for their cases. These are people who have committed no crime, particularly as asylum seekers with criminal convictions are ineligible under the Convention (as are persons convicted of war crimes, crimes against humanity, serious nonpolitical crimes, and other politically inscribed views, such as, in the US, being a member of the Communist Party). Nation-states adopting the Convention,

moreover, often define criminal activity even more broadly for purposes of evaluating applications for asylum.

The 1951 Convention placed specific temporal and geographic parameters on refugees seeking relief. Only refugees from postwar Europe were eligible to apply for asylum. And even then, asylum was a discretionary grant – from the sovereign. While the 1967 Protocol Relating to the Status of Refugees removed the temporal and geographic constraints on asylum applicants, the entire international system for refugee protection emerged to protect European refugees during and after World War II.

The raced/ist legacy of this system is still intact in important ways. This is evident in the treatment of refugees from the global South, to whom these treaties, arguably, were never intended to apply. Palestinians, many of whom were made refugees after the British mandate over Palestine ended, and the conflict began, were specifically excluded from both treaties and these exclusions continue until today. For Palestinians, a separate but unequal system of temporary aid exists through the creation of a United Nations agency, the United Nations Relief and Works Agency (UNRWA). After more than seventy years of UNRWA activities, it beggars belief that the humanitarian crisis to which it is responding is provisional. UNRWA, nonetheless, is funded at a small fraction of the UN's other relief agency, the United Nations High Commissioner for Refugees.[3] It is significant that UNRWA's mandate is to "manage" rather than solely to provide temporary relief, as humanitarian aid is otherwise intended.

Overall, this refugee relief system is not one based on the inherent dignity of the human. Rather, it is intended as temporary and discretionary humanitarian aid by a conglomeration of sovereigns, while the ultimate grant of asylum, which can be both temporary and revocable, is conferred by the sovereign authority who has the power to decide who

[3] UNRWA, created in December 1949, is a relief and development agency originally intended to provide jobs for public works projects and direct relief to Arab Palestinians who fled or were expelled from their homes during the fighting that followed the end of the British mandate over the region of Palestine, managing 5 million refugees from the 1948 and 1967 wars. UNRWA is the only agency dedicated to helping refugees from a specific region or conflict and is separate from UNHCR. UNHCR was formed in 1950 and is the main refugee agency and helps refugees from all over the world with the exception of Palestinian refugees. It has a specific mandate to aid refugees by eliminating their refugee status through three durable solutions: local integration, resettlement, or repatriation whenever possible. In contrast, UNRWA does not try to eliminate the problem. It manages it.

lives and who dies. Refugees' claims of their suffering are often denuded of politics in order to trade on the compassion of those with power.

Thus, the rights-based critique of the Iranian criminal justice system, particularly the condemnation that relief is bestowed through the discretionary grant from a merciful sovereign, is also one that applies to the international system to protect refugees and other forced migrants. And, to be honest, beyond the humanitarian approach to the treatment of refugees and stateless populations, we can today observe numerous other social issues whose recourse to redress are to avail themselves of the "care economies" that are emerging and flooding our contemporary moment. This is evident not only with the elderly or the sick (consider the now ubiquitous GoFundMe crowdfunding campaigns) but also the calls for governments to "forgive" student debt. Now, with the overturning of *Roe* v. *Wade* in the United States, even reproductive rights are being contained through prohibitions that increasingly require women to supplicate for care, aid, and even worse, for permission, rather than to exercise their inherent right to bodily autonomy.

These are grave and seemingly intractable problems, to be sure. Right now, it seems that compassion is the key driver for relief, humanitarian forms of relief, but we might ask what it would look like to have compassion and human dignity be the drivers of justice, of an egalitarian and secular system of rights based on the rule of law.

To be clear, law and politics have always been co-constituting. For this issue with regard to human rights, Mark Mazower made that clear when arguing that the individuated nature of the claims alongside of their unenforceability was always intended as a political compromise to give some features of rights-claims to individuals as opposed to presenting minority populations with group rights (Mazower 2004). Indeed, as Mazower shows, judicialization was never the intention of the UDHR. What it was, however, was a means of strengthening the sovereignty of new post–World War II nation-states from precisely those minority groups.

Similarly, the humanitarian laws that undergird much of the activities around the suffering of distant others are born of law – laws of war. Their intent was always to provide temporary relief in much the same way as the 1951 Convention. This, I suggest, is the discontent of our contemporary (and widening) humanitarian world system. It is not just a way to make war more humane, as Samuel Moyn (2021) has claimed: it is more than that. If the camp is the biopolitical nomos of our time, as philosopher Giorgio Agamben has noted (Agamben 1998), then humanitarianism, I contend, has become our *zeitgeist,* our very way of

life,[4] the moral, intellectual, and cultural climate of our current era. Charity, mercy, pardon, relief, aid, and benevolence have become powerful signifiers of life and life-giving today. And as such, they are slowly undermining rights-claims, exactly as the Iranian cause lawyer put it to me, and precisely what Arendt wrote about some seventy years ago.

To use the term of salience to this volume, this juristocratic reckoning that we are seeing today in outsized humanitarianism is what Arendt presaged long ago when she wrote:

> insofar as the establishment of nation-states coincided with the establishment of constitutional government, they always had represented and been based upon the rule of law as against the rule of arbitrary administration and despotism. So when the precarious balance between nation and state, between national interest and legal institutions broke down, the disintegration of this form of government and of organization of peoples came about with terrifying swiftness. (Arendt 1951: 275)

Notably, Arendt aligns this fallout with "precisely the moment when the right to national self-determination was recognized for all of Europe and when its essential conviction, the supremacy of the will of the nation over all legal and 'abstract' institutions, was universally accepted" (Arendt 1951: 275).

For Arendt, the breakdown of interests and institutions was more than merely administrative. It also laid bare the contingent nature of the core principle of human rights: their inalienability. As it turns out, those rights are only enjoyed by citizens (Arendt 1951: 284).[5] The stateless are left to the "mercy" of the state (Arendt 1951: 283).

[4] In Part III, section 7, "The Camp as the 'Nomos' of the Modern," Agamben (1998) evokes the concentration camps of World War II: "The camp is the space that is opened when the state of exception begins to become the rule." Agamben continues, "What happened in the camps so exceeds (is outside of) the juridical concept of crime that the specific juridico-political structure in which those events took place is often simply omitted from consideration." The conditions in the camps were "conditio inhumana," and the incarcerated somehow defined outside the boundaries of humanity, under the exception laws of Schutzhaft. Where law is based on vague, unspecific concepts such as "race" or "good morals," law and the personal subjectivity of the judicial agent are no longer distinct.

[5] Later, Arendt continues, "The Rights of Man, after all, had been defined as 'inalienable' because they were supposed to be independent of all governments; but it turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them" (Arendt 1951: 292).

Thus, the international laws that aim to protect minority groups including refugees and stateless persons provide no recourse but to mercy. And this is not by accident. International criminal laws and laws of war are themselves derived from theories of crime and punishment that aim to preserve the power of the sovereign. Far from being based on democratic principles and the rights of individuals through inherent personhood, humanitarian logics have as their very source the faith-based foundations of mercy, often reprocessed through the contemporary frames of law, including the laws of war.

Again, to draw from Arendt, the consequences for the deprivation of rights is the denial of a political community. This loss of a polity, Arendt argues, is akin to being expelled from all of humanity – to being "nothing but human" (Arendt 1951: 297). Despite the contemporary resort to relief in the form of charity and aid, the loss of a political community for hundreds of millions of people who are today subjects of aid is a subtle if glaring residue of the failure of rights and of the judicialization of wider social and political problems. This includes the judicialization of the plight of refugees (Behrman 2014). Here, we are reminded of Redfield's concern with wider social obligations which are denied to persons lacking political community. This lack of political community is further observable in the rise of neoliberalism, which is also attributed to destroying the polity – or *demos* – for other populations (Brown 2015).

As with other reactionary backlashes, the hostility to refugee rights today is a form of neoconservatism that manifests from the same kind of power as neoliberalism (Farvardin 2020: 28). As state authorities render forced migrants to zones outside of the polity, they prefigure refugees and others who are similarly situated as subjects-in-need rather than as subject of rights (or as rights-bearing subjects).

Thus, a reckoning with juristocracy requires us to address key problems that arise from the judicialization of social and political crises – from the underlying conditions that lead to social injury to those of forced migration. These problems have their roots in the political exclusion and subjugation of large swaths of humanity, whom the laws render lawless and without legal redress, and hence only as subjects of aid.

6.5 Conclusion

I have drawn from research on the Iranian criminal justice system as well as international laws of war to explore the tension between humanitarianism and human rights, examining how discourses of care

mask, seep into, and overtake endeavors that seek justice through human rights. In doing so, I have sought to demonstrate that logics of mercy pervade and cross nations, cultures, and legal systems even as they offer wholly different notions of citizenship, belonging, and democracy. Ultimately, I have sought to draw attention to the effects of logics of mercy, care, aid, and relief on the meanings and qualities of justice.

And this is the contradictory logic of espousing human rights through humanitarian care: the latter are based on benevolence and while they can be used for good deeds, they are also arbitrary, discretionary, and of course, unequal. Human rights, however, call for exactly the opposite. This is how humanitarianism comes to eclipse human rights. For, as long as humanitarian care is our *zeitgeist*, or the lens through which we make sense of and address persisting social and global problems, inequalities will persist and even be exacerbated.

How could we start to rethink refugee rights given the contemporary political conditions? Drawing from the works discussed here, we might start by taking into account the conditions that have fostered the refugee crisis. We might, moreover, consider that where or with which nation-states or political entities, social obligations should lie. Perhaps countries that invade or support invasions, even or especially if they do so on humanitarian grounds, should have the responsibility of taking in refugee populations that their incursions create.

References

Agamben, Giorgio. 1998. *Homo Sacer: Sovereign Power and Bare Life*. Trans. Daniel Heller-Roazen. Stanford: Stanford University Press.

Arendt, Hannah. 1951. The Decline of the Nation-State and the End of the Rights of Man. In *The Origins of Totalitarianism*. New York: Schocken, 267–302.

Behrman, Simon. 2014. Legal Subjectivity and the Refugee. *International Journal of Refugee Law* 26 (1): 1–21.

Braithwaite, John. 2002. *Restorative Justice and Responsive Regulation*. New York: Oxford University Press.

Brown, Wendy. 2015. *Undoing the Demos: Neoliberalism's Stealth Revolution*. London: Zone.

Derrida, Jacques. 2001. What Is a "Relevant" Translation? Trans. Lawrence Venuti. *Critical Inquiry* 27 (2): 174–200.

Farvardin, Firoozeh. 2020. Reproductive Politics in Iran: State, Family, and Women's Practices in Postrevolutionary Iran. *Frontiers: A Journal of Women Studies* 41 (2): 26–56.

Foucault, Michel. 1996. Truth and Juridical Forms. Trans. L. Williams with C. Merlen. *Social Identities* 2 (3): 327–341.

Mazower, Mark. 2004. The Strange Triumph of Human Rights, 1933–1950. *Historical Journal* 47 (2): 379–398.

Meyer, Linda Ross. 2010. *The Justice of Mercy*. Ann Arbor: University of Michigan Press.

Moyn, Samuel. 2018. *Not Enough: Human Rights in an Unequal World*. Cambridge, MA: Harvard University Press.

2021. *Humane: How the United States Abandoned Peace and Reinvented War*. New York: Farrer, Strauss, & Giroux.

Osanloo, Arzoo. 2020. *Forgiveness Work: Mercy, Law, and Victims' Rights in Iran*. Princeton: Princeton University Press.

2006. The Measure of Mercy: Islamic Justice, Sovereign Power, and Human Rights in Iran. *Cultural Anthropology* 21 (4): 570–602.

Redfield, Robert. 1964. Primitive Law. *University of Cincinnati Law Review* 33 (1): 1–22.