

Jurisprudential and Legal Perspectives Regarding the Waiving of Death Penalty for the Parents Who Commit Infanticide

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Abstract: In this study, the jurisprudential and legal principles of Article 220 in the Islamic Penal Code (IPC), which is about the murder of a child by his/her father or father's father are investigated. In that article, the term "father" refers to one's biological father and not his/her stepfather. Even if the father is a Kafir (a person who does not believe in Islam or religions such as Christianity or Judaism) and has murdered his Moslem child, he has to be punished according to the IPC. What the word "child" means in the Code is one's biological child and not his adopted children and there is not any difference between minors and adults, sane children and insane ones and males and females. Since common jurists consider birth as the basis for judgment, they think that regarding the meaning of parent, one's mother, mother's father and father's father should also be judged according to the same article. However, jurists of the Imamyyah sect, believe that it is sufficient to consider what is explicitly stated in the text of the article. It must be stated that according to the customary truth and the jurists consensus, one's father's father is the same as one's father. The only exception that exists is killing one's child in war. However, the father would be sentenced to death according to the laws of Islam regarding armed conflict and not based on the law of vengeance. When someone is murdered and the murderer claims to be his/her father, it is preferred to refer to the rules of vengeance. A second person's cooperation with a father in murdering his child will not prevent the law from sentencing the partner to vengeance. A father's order to murder his own child would not exempt the murderer from vengeance. When a father is addicted to infanticide an uncommon opinion holds that the father must be sentenced to vengeance. Since all the conditions of death retribution are also true about dismembering retribution, disproof of fatherhood is a condition.

Key words: Murder, child, parent, fatherhood, vengeance, father's father

INTRODUCTION

An important issue in Islamic jurisprudence that has long been a topic of discussion and has been considered as statutory laws and Islamic laws in the recent century is murdering children by parents. Since, the sources of jurisprudential opinions of Islamic jurists including Shiite jurists have been the Quran and Prophet Muhammad's traditions, with regard to the religious rule about male or female child murder by one of the parents in Islamic jurisprudence, it must be said that the Quran, the Prophet's traditions and the Innocent Imam's sayings have been taken into consideration. In the Islamic jurisprudence based on religious sayings, a child's murdered by his/her father has been treated differently.

Hor Ameli and many other jurists refer to the inadequacy of children compared to their fathers and mention fathers' honor. They say: "the thing that prevents us from vengeance is a father's superior state and the

reverence we must have for a father's honor." Thus, they generalize the rule to Kafir (pagan) fathers or fathers who are servants (Abd) (Thirir *et al.*, 2010).

Shahid Thani in his book called Masalik tries to explain this rule and states that: "A father is the cause of a child's existence. So, the child cannot be the cause of the father's death. In addition, sentencing a father to death because of murdering his child is against the honor and reverence we must consider for fathers. It is due to this honor, that vengeance does not apply to fathers even if they murder their children. As stated before, the topic of infanticide or murdering one's children has been discussed in Islamic jurisprudence and rules and punishments have been laid down in this respect. According to Article 220 of the Islamic Penal Code (IPC), a father or father's father who murders his child or grandchild will not be sentenced to death and will have to pay blood money to the heirs of the victim and to be chastised (Pourhosseini, 2010).

Literature review

Before islam: In the twelve tables which were the Roman's constitution and it is said to have been the first written statute in history, retribution (retaliation) was the accepted form of punishment for some crimes against people such as amputation of human organs, breaking one's bones and murder. In the Code of Hammurabi, we also see the well-known principle of "an eye for an eye, a tooth for a tooth" has been emphasized. According to that Code, in the case of a murder, when the murderer and the victim belonged to the same social class or when the murderer was from a lower social class than the victim, the retribution law was exercised. In other words, being of the same social class was one of the conditions to retaliate the murder crime. Hurting people's members such as injuries or breaks were also retaliated according to the same code. According to Articles 196 and 197 of the Hammurabi Code, if someone takes out someone else's eye, his/her eye must be taken out in return and if a person breaks another person's bones, judges must break the culprit's bones. Article 200 of the Code, explicitly states about breaking one's teeth that "If a person breaks one of another person's teeth, his/her same tooth must be broken if they are from the same social class."

In the laws of Moses, retribution and retaliation have been emphasized as the base of the penal system in a society. The punishment for murder in the religion of Moses is being sentenced to death. Thus, if someone kills another person intentionally or with the purpose of taking that person's life or using devices that would commonly lead to death, the culprit will be sentenced to retaliation. However, according to that law, the next of kin could kill the murderer without going to the court. In Verse 23, chapter 21 of the Exodus and in Verse 21, chapter 9 of the Deuteronomy, we read that "and if another annoyance takes place, then give a life for a life, an eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot, a burn for a burn, a wound for a wound and a stroke for a stroke." Intentional beating, maiming and mutilation are also punished by retaliation in Judaism. Although Christianity generally confirms the laws of Torah, forgiveness, mercy and tolerance have been emphasized more in this religion (Longeroudi, 1991).

After islam: In the holy religion of Islam, the principle of retribution has been accepted under certain conditions. There are many verses in the holy Quran which implicate the retribution principle. Some verses generally refer to the "retaliation principle" one instance of which is retaliation in penal and criminal affairs. From such verses, it can be inferred that bad (evil) behavior can be responded to with a similar behavior and a victim is

allowed to act in the same way as he/she has been treated and in this case, the victim would not have to bear any responsibility for his/her act of retaliation. One conspicuous example of evil behavior is murdering, beating or maiming other people (Najafi, 1988).

At this point, it seems necessary to review the opinions of Arab jurists who have based their job on the jurisprudential concept (the common jurisprudence). Then, we will examine Iranian jurists' opinions and beliefs in this respect.

Iranian jurists: After reviewing and taking a glance at Arab jurists' opinions and knowing about their intellectual, jurisprudential and legal foundations about atonement (including blood money), we now turn to the contemporary Iranian jurists' definitions of blood money which is a right given to citizens by the Islamic Law and has acquired both statutory and customary status. We pay special attention to Imamiya (Shiite) jurisprudence in this regard. A jurist's definition of the term is as follows: "Atonement (including blood money) is a type of financial compensation which the culprit must pay to the victim or the next of kin in return for his/her soul or members of the body. The murderer must pay 1000 gold dinars or 10000 dirhams and this is called blood money and was something common in the Age of Ignorance (Jahiliyah)." Another jurist believes that "Financial compensations that a person must pay in unintentional crimes are called atonements. In addition, in intentional crimes where the victim or the next of kin agree to take financial compensation instead of death sentence, the amount of the money that must be paid is often specified in the religion of Islam. However, the victim or the next of kin can reach an agreement with the culprit over the amount of financial compensation.

Murder

Definition of murder: Article 204 of the Islamic Penal Code (IPC) divides murder into three categories: murder, semi-murder and absolute error. No specific definition has been provided for murder. And in Article 2 of the atonement rules, act of 1982, August 25, it is stated that: "Murder can be proved when an individual has the intention of taking another person's life by doing anything whether the act would potentially lead to killing or not. Another case is when the murderer does not have the intention to kill but takes the life of another individual with an act which would commonly lead to death; or even when the act would not normally result in death but taking the conditions such as the victim's old age, illness or very young age into consideration, that act will be fatal." Based on the contents of the statements above, we can

infer that murder takes place when the act that is done to the victim is conscious and intended to kill the victim.”

Murder in verses and sayings: Murder which is our main topic of discussion is considered as one of the most serious sins in the customs and religion. It has been blamed on two planes. From the personal aspect, it deprives individuals' of their right to safety and from the social perspective; it might result in social insecurity. Not only in Islam but also in many other schools of thought and cultures such as the ancient Greek, Roman and Egyptian civilizations, a murderer's punishment is that he/she has to be sentenced to death. In Islam, the verdict that relates to the topic is stated in Verse 93 of the Al-Nisa (the women) chapter in the holy Quran: and whoever kills a believer intentionally, his punishment is hell; he shall abide in it and Allah will send his wrath on him and curse him and prepare for him a painful chastisement". According to this verse, a murderer must be sentenced to death. There are other verses in the holy Quran that indicate the prohibition of murder including:

“And do not kill any one whom Allah has forbidden, except for a just cause and whoever is slain unjustly, we have indeed given to his heir authority, so let him not exceed the just limits in slaying; surely he is aided.” “For this reason did we prescribe to the children of Israel that whoever slays a soul, unless it be for manslaughter or for mischief in the land, it is as though he slew all men; and whoever keeps it alive”

Compensation in the Holy Quran: There are two classes of verses in the Quran which refer to the principle of compensation. The first are the verses which generally mention the topic of retaliation one instance of which is retaliation in penal and criminal matters. These verses are: “and the recompense of evil is punishment like it but whoever forgives and amends, he shall have his reward from Allah; surely he does not love the unjust ... and whoever defends himself after his being oppressed, these it is against whom there is no way (to blame).” “And if you take your turn, then retaliate with the like of that with which you were afflicted; but if you are patient, it will certainly be best for those who are patient.” “Whoever then acts aggressively against you, inflict injury on him according to the injury he has inflicted on you.” (Al-Baqara (The Cow), Verse 194) What can be inferred from all these verses and the understanding of jurists and interpreters is that we can react to bad (evil) acts in a similar way and a person who has been a victim of bad (evil) acts is permitted to react in the same way and in

doing so he/she would not have to bear responsibility. One of the most obvious instances of doing others wrong is murdering, beating or maiming them. According to the above verses, it can be stated that compensating these crimes is possible and the next of kin are allowed to do so.

Sheikh-e-Toussi states in his comment on verse 40 of a chapter in the Quran called Ash-shura (Council) (“and the recompense of evil is punishment like it”): It is quite possible that this verse has the same purpose as what is stated in verse 48 of the Al-Maeda (the table) chapter and its aim is to state the compensation verdict. Therefore, a victim can do the same thing to the culprit as the culprit has done to him/her without doing anything more.

Compensation in jurisprudential terminology: Qisas (compensation) is a jurisprudential term and means punishing a criminal proportional to his/her crime. In old times, mankind did not set a limit to punishments and committing petty crimes could lead to unlimited punishments for the offenders. In divine religions however, the Qisas (compensation) rule was laid down according to which it was required that the punishments must be proportional to the crimes committed.

The compensation rule prevents occurrence of crimes since if one knows that there will be a punishment for every wrongdoing, he/she avoids committing crimes. That is why the holy Quran states: “and there is life for you in (the law of) retaliation, O Men of understanding.”

The meaning of Haq (right): Linguistically, “Haq” has these meanings: right, correct, constant, against evil, certainty, justice, benefit, advantage and proof of the Lord's names. In legal terms, one's right is the ability that the rules of his/her country give him/her to do things like using property, transferring property or other lawful acts either personally or ask other individuals to do them. In Islamic jurisprudence, right is a particular ability given to a person or some people to possess something or have mastery over someone so that he/she can make use of the property or take advantage of the person.

Who has the right to compensate?: In Shiite jurisprudence, there are two viewpoints in this regard. In the first one, the one who can compensate are the persons who inherit the victim's property including male and female immediate relatives and even the ones who are related to the victim through their parents. Although a husband and a wife inherit part of each other's assets, they do not have the right to compensate. This viewpoint is common among Shiite jurisprudents. The second perspective states that the right to compensate only holds

for male relatives of the victim's father and mother's relatives whether male or female do not have any right to compensate.

Common jurists believe that the right to compensate comes to exist due to a crime and since the crime has been committed against the victim, the right to compensate must normally be preserved for the victim himself/herself. However, because the murdered person cannot use this right since he/she is dead; this right is transferred to the inhabitants. It is passed to the heirs and is like a common property among them which must be shared according to the proportion of share they have in the victim's assets. Thus, Shiites believe that each one of the next of kin have the right to compensate and if only one of them wants to compensate, he/she can do it after he/she has paid others their shares of the blood money.

SHIITE JURISPRUDENTS' REASONS FOR NOT SENTENCING A FATHER TO DEATH AFTER HE HAS MURDERED HIS CHILD

Religious sayings: The most important reasons presented by Shiite jurists come from religious sayings that refer to this topic: Quoted by Hemran from either one of the two innocents (peace be upon them): "A father will not be sentenced to death for killing his child but if a child murders his/her father he/she must be sentenced to death." Quoted by Al-Halbi from Abi-Abdellah (peace be upon him): "I asked Imam Sadeq whether a father who has killed his child would be sentenced to death because of his crime and His Excellency said "no". Quoted from Al-Ala bin Al-Fodhayl from Abu-Abdillah: "A man must not be killed for murdering his child but a child must be killed for murdering his/her father. And a man does not inherit the one whom he kills although the act of killing is done unintentionally. Jabir asked Imam Baqir (peace be upon him) about a man who kills his son or his servant. His Excellency says in response: "A man must not be sentenced to death because of killing his son or his servant but must be beat severely and exiled from his native land. In a book called Zarraf, it is quoted from Imam Ali (peace be upon him) that His Excellency said if a man hits his child for something that he/she has done and that thing is the cause of shame for the father and the child suffers from an injury such as mutilation or other deficiency due to that stroke, the child must take an atonement and the father must not be sentenced to death.

Consensus: About this topic, a consensus also exists which is based on narrations and is quoted by the author

of a book called Riadh: "If a father murders his child, he would never be sentenced to death; there is not any. This is a consensus which cannot be breached."

REASONS TO COMPENSATE A MOTHER'S MURDERING OF HER CHILD

Well-known theoretical reasons

Common verses related to compensation : The verses that legislate compensation and stress its necessity such as "and we prescribed to them in it that life is for life and eye for eye and nose for nose and ear for ear and tooth for tooth and (that there is) reprisal in wounds" and "o you who believe! retaliation is prescribed for you in the matter of the slain, the free for the free and the slave for the slave and the female for the female but if any remission is made to any one by his (aggrieved) brother, then prosecution (for the blood wit) should be made according to usage and payment should be made to him in a good manner; this is an alleviation from your lord and a mercy; so whoever exceeds the limit after this he shall have a painful chastisement." and other related verses are general and absolute rules about compensation. Thus, compensation is obligatory in all conditions when murder takes place except in particular cases where the reason does not any more fall under the category of general or absolute reasons. According to the well-known opinion of jurists, there is no any particular reason for which mothers can be excluded from the general and absolute necessity of compensation. So if a mother murders her child, she has to bear compensation (must be sentenced to death).

Generality and absoluteness of narrations (religious sayings): There are not any narrations which explicitly negate the rule stated above. Jurists believe that mothers who commit murder must be sentenced to death based on the many narrations that exist about murder. The content of such narrations is general and states the necessity of murder.

Narrations (religious sayings)

- Imam Sadeq (peace be upon him) said: "when a woman murders a man, she must be killed in return"
- Imam Sadeq said elsewhere: "If a woman murders a man, the woman must be killed in return and the murdered man will not have any other right besides compensation (death sentence)"

Consensus: Another oft-quoted reason referred to by Shiite jurists is the consensus that exists about this issue. In providing documents for the well-known opinion,

Sheikh-e-Toussi states that our reason is jurists' consensus and the valid narrations that are about the topic.

Definition of murder according to jurists: Most jurists including late Mohaqiq Helli have stated about murder that must be compensated: "Taking out the esteemed spirit from one's body intentionally and in unrighteous manner, when the murderer and the victim are equals, is forbidden." "Mokafia" is the term used by Mohaqiq Helli and means the equality of the murderer and the victim (in their being Moslems or not, in their being free or slaves, etc.). "Odvan" is another key term used by him and means something that is forbidden and unlawful. One other condition that can be seen in some definitions is when a murderer commits the crime without legal permission.

Shahid-e-thani says: murder is confirmed when an adult and wise person commits the crime with something that is commonly considered as a murder weapon. When the murderer has the intention to kill someone and kills that person even if with something that is scarcely considered as a murder weapon, the act of murder must be compensated with death sentence. Imam Khomeini also defines murder as "taking away the esteemed soul from a human body under the following conditions: Absolute intention to murder a human being with something that can kill though it is rarely considered as a murder weapon; an act that would normally lead to murder even when the intention is not to commit murder both confirm murder in a case. Intentionality sometimes takes the form of being an accomplice and sometimes refers to causing murder.

After stating the conditions for murder that must be punished through compensation, the author of Jawahir says: "Murder is realized when a wise adult human being's intention is to murder someone because of cruelty (in an unrighteous manner) with something that is normally considered as a murder weapon. It is also confirmed with the intention of beating someone consciously with something that is commonly considered as a murder weapon (even without having the intention to murder). This is so because having the intention to do the act (with a tool usually considered a murder weapon) is the same as having the intention to murder."

Definition of child-murder: Murdering one's own child entails taking away his/her life by a wise adult parent intentionally and illegally.

Shiite jurists' fatwas (judicial decrees)

Allame Helli: About this topic, Allame Helli says: "If a father murders his son, he will not be sentenced to death although the father is at a lower social status than the

child. However, if a child murders his/her father, he/she will bear death sentence. Also if a mother murders her child, she will be condemned to death. All the other relatives of a person including his/her grandparents, brothers and sisters and uncles and aunts will be sentenced to death if they murder the person." Mullah Mohsen Faidh also says: "a father's act of murder must not be compensated with death sentence and the reasons for it are the text of the holy Quran and the consensus of the jurists.

Imam khomeini: In his book called Tahir-al-wasilah, in a chapter on the minutiae of compensation, Imam Khomeini explains about one of the conditions under which death sentence must be exercised "the third condition is nullifying the state of fatherhood. Therefore, a father must not be condemned to death for murdering his child and it is apparently the case for the father's father and so on.

Shahid-e-awal: He refers to a saying quoted from Imam Sadeq (peace be upon him) which states that a father must not be sentenced to death for murdering his child.

Ayatollah makarem shirazi's opinion about a father's murdering of his child: There are many narrations which state that there is difference between a mother and a father in this issue. In many of the related narrations we see the word "Rajol" (man) or "Abb" (father). Interestingly, these terms do not only occur in the narrator's words to conclude that the narrator's case cannot be generalized to other cases but also we see them in the Imam's (peace be upon him) saying and this is itself a reason to state that there is difference between a father's verdict and that of a mother. Obviously, taking the general meanings of the words "Rajol" (man) and 'Abb" (father) into account (to say that they mean both men and women and fathers and mothers in general) is not possible if we consider the semantic aspect of the words in the Arabic language since another word has been used in the narrations which can only refer to a male parent ("walid" which means father). So it is very difficult to generalize the rule to both genders and doing so is in contrast with the principles of jurisprudence. In addition, this issue is almost a topic over which a consensus exists and going against it, with so many sayings and narrations that we have on the topic is not jurisprudentially appropriate. Adherence to the rule of "dir'a" (Arabic "İñĀ") in this issue is very difficult since the generality of compensation rule is inferred from numerous verses and sayings and laying down exceptions to the rule requires firm evidence which does not exist in the case of a mother who murders her child.

Anyway, a father will not bear the compensation rule if he murders her child but he has to pay the blood money and the reason are valid narrations which negate a father's death sentence for murdering his child. However, it must be taken into consideration that no father would normally murder his child while he is mentally healthy and sober.

Ayatollah sanei's opinion about child-murder: Ayatollah Sanei was asked whether he thought that Article 220 of the Islamic Penal Code (IPC) which is about child-murder requires revision according to the circumstances of our time (our context of time) or not? Exception to the general rule of compensation in a case of child-murder by a father, as is quoted in narrations, applies when murder has taken place due to emotional states of being or a child's violation of his/her father's good advice. Exceptions do not hold when murder occurs because of other reasons that are present in other cases of murder as well. The general principle of compensation usually holds true and avoiding death-sentence for a father is for a time when a father unintentionally commits the crime and the act of murder takes place most probably if not definitely due to the child's violation and ignoring of the father's commands and pieces of advice. Exceptions can be applied only when the father has had enough of the child's bother and when he is out of his senses because of the annoyance he suffers from his child's part. Here, it is certain that the intention for murder is different from the intentions in other cases such as personal motives, nemesis, greed for one's property, post or presidency or anonymity of disloyalties or the like. In the latter cases, fatherhood and childhood as stated in the language of the reasons, do not interfere and are not parts of the picture. Therefore, the reasons for exceptions in compensation must either relate to the abnormal state of the father while committing the act of murder or to the inhuman nature of motives and intentions in most cases of murder. Our rational understanding of the laws would also tell us that the law-maker does not intend to leave child-murder unpunished

Even if we assume that the reasons provided are absolute and apply to all cases of child-murder by fathers, we must consider some particular cases because belief in the absolute exemption of any father who murders his child is against that verse of the holy Quran which states: "and there is life for you in (the law of) retaliation, o men of understanding, that you may guard yourselves". Exempting fathers from this rule and removing the fear of compensation from them might endanger the lives of children and bring about an unsafe situation in the society. The text of the verse mentioned here tells us that

the rule stated is a general one and must apply in all cases. This verse does not refer to any exceptions to the rule. So, care must be taken in thinking of exceptions. However, in the case of a father who murders his child after giving him good advice and after being annoyed and embarrassed to an extreme degree by the child, we can exempt the father since this kind of murder is totally different from the types we normally encounter in other murder cases. Having said this, there must not be any difference between a mother and a father regarding their death sentence when they commit the crime of child-murder.

Child-murder committed by a mother

Shiite jurists' opinions: There is almost a consensus among Shiite jurisprudence that states if a child's father or father's father murder a child, they would not be sentenced to death. However, such a consensus does not exist about a victim's mother or other relatives. Some Fatwas (religious decrees) are mentioned as follows: Late Mohaqiq Najafi states about this topic: "If a mother murders her child, she must be condemned to death and we have not yet seen any cons for this rule except the ones that are in line with the Sunni jurists. They compare mothers to fathers and thus they exempt mothers from the rule as well.

In the same manner, if one's other relatives such as grandparents (mother's parents), brothers and sisters, uncles and aunts murder them, they must be condemned to death. I did not see any opposition to this rule except Abu-Ali and Sunni jurists who exempt grandparents from punishment. Late Mullah Mohsen Faidh states in this regard: "A father would not have to bear death sentence because of murdering his child and the reason for this rule comes from the text of the Holy Quran and the consensus of the jurists. A father is the cause of a child's existence and thus it is not right that a child become the cause of his/her father's death. In addition, according to some decrees grandparents would not be sentenced to death because of murdering their grandchildren but a mother's act of murdering her child must be compensated based on a consensus reached by Shiite jurists.

Sunni jurists: Unlike Shiite jurists, most Sunni jurists exempt mothers as well as fathers from punishment in case they murder their children. They state that just as the way a father is the cause of a child's existence, mother is the cause of his/her existence, too. Therefore, we cannot prefer one over the other in establishing the rules for the crime of child-murder. Just like when someone donates something to someone else,

he/she would not have the right to take it back or destroy it, supposing a child's life is donated to him/her by parents, it cannot be taken away by them. However, if we consider the dignity of parents, both mothers and fathers can be exempted from death sentence.

Reasons for sentencing a mother to death because of murdering her child: The most important reasons for not exempting a mother from death sentence in case she murders her child are the following: The punishment for murder is death and the exceptions to the rule are explained in the jurisprudential and legal sources. Therefore, if there is not a particular reason to exempt a person from punishment in a particular case, we have to stick to the general rule. In the case of a mother who commits the crime, there would not be any particular reasons and the general rule of compensation must be applied. The religious sayings that have exempted fathers cannot be extended to mothers because some of them have used the term “Walid” (Arabic for male parent) and this term refers to fathers. For example, Imam Sadeq (peace be upon him) said: “If a father kills his child, he will not bear compensation but if a child kills his/her father, he/she will be sentenced to death.

Some narrations have used the term “Rajol” (man), which undoubtedly refers to a father who commits murder. For instance, there is a saying quoted from Imam Sadeq (peace be upon him), which states that if a man kills his child he must not be sentenced to death. However, referring to the term “Rajol” (man) to allocate the narration to fathers is not very justifiable since this term is usually used in narrations without being solely about man. For instance, there is a saying that states “a man’s prayers must be halved”. But it does not mean that a woman’s prayers must not be halved. So, the term “man” can refer to both genders in this case. Late Sheikh Toussi refers to the Shiite jurists’ consensus as a proof of his opinion besides the two reasons mentioned above.

Reasons for prohibiting a mother’s death sentence in case she murders her child: The most important reasons for prohibiting compensation of child-murder committed by a mother are the following: A narrative (religious saying) that exempts fathers from compensation when they kill a child can be extended to mothers as well, since in this narrative the word “Abb” (Arabic word whose first meaning is “father”) is used and this word can refer to both parents. What is the cause of something else’s existence cannot be destroyed by that thing and compensating child-murder by sentencing a father to death is an instance of destroying the cause by the effect. This reason is also absolutely true about mothers

because mothers are causes of children’s existence just the way the fathers are. One justification that is often made for avoiding compensation in a case when a father murders his child is that every father loves his children and considers them as parts of his own being. Therefore, a father cannot commit child-murder and destroy part of his life when he is in a normal state. Doing such a cruel act could be due to the father’s passivity and lack of psychological balance while doing the act. If we accept this reason about a father, we can say that it also holds true about a mother. In fact, the emotional relationship between a mother and her child is not only not less than that between a father and his child but also much more than that. Thus, just the way a father is exempt from compensation, a mother would not have to bear death sentence.

Narrow interpretation of law to benefit the accused person entails that a mother must also be exempt from punishment because both Shiite and Sunni jurisprudences, exempt fathers from capital punishment. However, in the case of mothers, there is some discrepancy and even some Shiite jurists, as we saw before, are of the same opinion as the Sunni jurists. Therefore, we could at least consider compensation of a mother’s crime of child-murder as an instance of doubt and such a punishment cannot be exercised due to the existence of a rule called “der’a”.

COMMITTING CHILD-MURDER BY A FATHER FROM THE PERSPECTIVES OF THE IRANIAN CRIMINAL LAW, JURISPRUDENCE AND CRIMINOLOGY

Negation of fatherhood condition and its origin: Following the opinions of the Shiite jurists, the Islamic Penal Code (IPC) explicitly states that negation of fatherhood is necessary to prove the right for compensation. The meaning of fatherhood negation condition is given in Article 220 of the Islamic Penal Code. According to that Article, a father or a father’s father who murders his child or grandchild will not be sentenced to death....” The meaning of this statement is that for the right of compensation to realize for the next of kin, the murderer must not be the victim’s father. Thus, the father-child relationship prevents compensation. It must be mentioned that according to Islamic narratives, fatherhood which prevents compensation includes the victim’s father, father’s father and father’s forefathers. Therefore, if someone’s father’s father or forefather kills him/her, the father or forefather would not be sentenced to death.

It is also worthy of attention that religious narratives only refer to the father-child relationship as the factor that

prevents compensation and any other relationship except that is bound to the general rules. For example, if a child murders either one of his/her parents or a mother murders her child or any of the relatives murders any other, the narratives mentioned are not relevant and the general rules hold true. Therefore, if it is proved that the act of killing is an act of murder, the murderer is sentenced to death. This conclusion can be seen in almost all the jurisprudences that agree with the fatherhood negation condition in matters of compensation. Mohaqiq Helli says: "If a child murders his/her father or mother, he/she will be sentenced to death. This is also true about other relatives such as one's mother's parents and grandparents, brothers and sisters and uncles and aunts.

The Islamic Penal Code (IPC) states in Article 220 that only the father-child relationship prevents us from compensation and any other family relationship cannot be a reason for not sentencing the murderer to death. The origin of this verdict which is in contrast with the general rules of compensation is a set of narratives that have been quoted from the innocent Imams (peace be upon them); narratives which state exceptions to the general rule stated in the Holy Quran. It has been said that the valid narratives that exist on the topic are eleven legal narrations. In the following lines, we mention some examples of such narratives and avoid referring to all of them since all the eleven narrations have similar content.

The Holy Prophet (peace be upon him) said: "A father will not be sentenced to death for killing his child." Imam Sadeq (peace be upon him) said: "A father will not be condemned to death for killing his child." Based on the same narratives, the lawmaker has laid down this condition in Article 220 of the Islamic Penal Code (IPC). By reading the narratives and Article 220 of the Islamic Penal Code, some questions come to the reader's mind including the following: "What is the philosophy behind this rule? Why is a father exempt from compensation if he kills his child? Is there any instance of suspension of this rule in the words of the innocent Imams? Why is this rule only true about one's father and father's father and not about one's mother? Can we extend the rule to mothers as well through analogy? And there are tens of other questions which we try to discuss in this research.

Quality of a father's behavior in child-murder: What must be taken into account regarding this issue is how the act of murder typically takes place. Acts of murder sometimes occur instantaneously at a single time and sometimes continuously, repeatedly or frequently. In the former, a father might intentionally and purposefully do the act of murder without paying precise attention to the consequences of his fatal behavior. For instance, when a

father intentionally throws an object at his child in a state of fury and causes him/her to die, the case must be considered totally different from the time a father injures his child and mutilates his body when he is in a normal state. In the latter case, we can easily infer from the behavior of the father that he had the intention to murder his child. Denial of the purpose to murder is not justifiable in the second case. However, claiming that the act of killing has not been carried out on purpose in the former case is justifiable since the father committed the crime instantaneously without any previous intention for murder. The doubt that exists in this case can suspend compensation for murder. What can be the reason for the decline of compensation in this case is not the father's anger but the instability of his intention to kill because anger cannot interfere with the mental dimension of the crime. There are many cases where the individuals who commit crimes have the will and choice in doing their acts although they are angry at the time.

The authors of this article believe that the discrepancy that exists about this topic is not substantive but totally judicial. Discussing whether the act of murder has been instantaneous or frequent can be useful in recognizing if the crime has a mental element or not. In proving the mental dimension, discussion can always help us and it is not exclusive to cases where a father commits child-murder. However, as it integrates with the father-child relationship, it can assert father's exemption from compensation. If the act of the subject whether a father or another person is frequent, this indicates that he has had the intention to commit murder and the claim of non-intentionality cannot be accepted from the claimant. In such a situation where there is an assumption that a mental element exists, compensating the father's crime is not far from reality. A contemporary jurisprudent also considers the topic a judicial matter and states that "to solve the discrepancy that exists on the topic we must have a judicial perspective towards the issue rather than a substantive one". According to him, in compensation, there is not any difference between murder by a father or any other person. According to Malik, the main point in this issue is that what is necessary in permitting the issuance of death sentence is the judge's certainty that the act of murder has taken place purposefully and intentionally. Thus, a father-child relationship can play the role of a judicial evidence of non-intentionality or create doubt in judgment. In common instances, i.e. when such a family relationship is not present, the judicial assumption is that the crime has taken place intentionally and lack of intentionality must be proved.

But according to Malik, such an assumption does not apply where the father-child relationship does not exist.

Lack of intentionality and purposefulness is assumed unless otherwise is proved. Therefore, even when the act of killing takes place by a sword, a cane or a rock which are commonly as tools for committing murder, the right to compensate does not hold unless the father's intention to commit murder is determined. When the judicial documents verify that the father has had the intention to murder his child, the right to compensate holds." As it is evident, the root of discrepancy is related to the perspective towards the behavior that is commonly considered as murder which is described in paragraph "B" of Article 206 in the Islamic Penal Code, following the well-known Shiite jurisprudence. Most of the Shiite and Sunni jurisprudents believe that in such a situation, murder takes place but there are some scholars who think otherwise and consider murder as a possibility that must be taken into consideration during judicial procedures. The principle that necessitates compensation after the act of killing has occurred is only one thing and that is the intention to murder another human being. The narratives that consider performing an act that is typically fatal as murder are in fact judicial narratives. It means that basically whoever carries out a typically fatal act has the intention to kill another individual and this act is an instance of murder. Based on this viewpoint it can be stated that we cannot make sure that murder has occurred in all the instances that the act is typically fatal but the typically fatal act is a strong indication that intention existed. So, whenever the act is typically fatal we can assume intentionality of the act and suppose murder has been the case. If we want to accept the opposite of this statutory principle, it is the offender's responsibility to prove that while his act has been typically fatal, he had not actually had the intention to commit murder. Therefore, it cannot be said that whenever an act is typically fatal, compensation is definite and if the offender proves that he had not have the intention to murder the victim, compensation would not be exercised.

Shiite jurisprudents' opinions: One certain rule among Shiite jurisprudents is that a father or father's father will not be sentenced to death for killing his child or grandchild. Thus, all Shiite jurists have considered valid the negation of fatherhood as the main condition for compensation. Now, we mention some examples: Sheikh-e-Mofid: "If a father unintentionally kills his child, he is responsible to pay blood money and the money must be paid from his assets...and if a father kills his child intentionally (commits child-murder), the judge must severely punish him and bind him to pay the whole blood money to the victim's heirs except his/her father". Abu-Salah Halabi: "Relatives will be sentenced to death

if they commit murder and kill their other relatives, except a father who kills his son." Sheikh Hassan Najafi: "the third condition for compensation is that the murderer must not be the victim's father. Thus, if a father kills his child, he must not be condemned to death. There is not any discrepancy about this topic and consensus exists among jurisprudents. In addition, there are narratives quoted by both Shiite and Sunni scholars which verify this opinion..." Imam Khomeini: "The third condition for compensating murder, is the lack of father-child relationship between the murderer and the victim. Therefore, a father must not be condemned to death sentence if he kills his child and apparently one's father's father and forefathers are exempt from the rule of compensation." Investigating the jurisprudential and legal bases of Article 220 in the Islamic Penal Code (related to murder committed by one's father or father's father)

Father in this rule refers to one's biological father even if he is a kafir (a pagan or non-Moslem) when he kills his Moslem child. Child also refers to one's biological child and there is not any difference between minors and adults, sane and insane, male and female. Stepchildren and foster children are not included in the rule but a child whose father is not definitely known is considered as the father's biological child. Illegitimate children are also attached to biological children due to a rule called "der'a".

Since common jurisprudents consider birth as the criterion for exercising the rule, taking the meaning of "Walid" (parent) into consideration, they have included the child's mother, mother's parents and grandparents and father's parents and grandparents in the rule but the Shiites have only relied upon the text of the holy Quran. However, it must be said that according to the customary truth and the consensus among jurisprudents, father's father and forefathers are also the same as father. New jurisprudents talk with care when giving opinions about mothers. The real reason for this rule is not known to us and we do not have any other choice but to accept the truthful sayings. The only exception to the rule is murdering one's child during war and of course the guilty father will be sentenced to death according to the laws of war and not according to the law of compensation. In murdering someone whom the murderer claims to be his son, the preferred pinion is non-compensation. Assisting a father commit child-murder does not exempt the accomplice from compensation. A father's order to someone to kill his child will also not prevent the judge to punish the accomplice according to the rule of compensation. In case of a father's addiction to child-murder, there is a non-common opinion which states that the father must be punished by death sentence.

If a man kills his wife, the well-known Shiite and Sunni jurisprudents believe that a child does not have the

right to compensate his/her mother's death against his/her father. However, Imam Khomeini gives this right to children. Since all the conditions of compensation for life exist in compensation for a body member, negating fatherhood is also essential here.

In the laws of other countries there is also an institution called infanticide in which some reductions have been taken into account for a mother who commits child-murder. This is while in the Islamic laws and jurisprudence, no reductions have been established for mothers in case of child-murder at all and some jurists say the reason is that a child is related to (usually known by) its father and not its mother.

CONCLUSION

It is conspicuous to everyone that observing a balance between crime and punishment and realization of the idea that penal exercise must be individualized are closely related to the authorities given to a judge as well as a judicial authority's precision of opinion. Lawmakers' interference at the stage of determining punishment is sometime in such a way that limits the role of the judge in the criminal legal procedure only to the task of determining if the accused person has committed the crime or not. It is evident that in cases where the lawmaker determines constant punishments or obligatory minimums and maximums, the ability to create any change or transformation is taken away from the judicial authority and his authorities are perceptibly reduced, individualizing judicial punishment will be faced with serious obstacles. Since according to the fourth and fifth principles of the Islamic Republic of Iran's constitution, the official religion of the country is Islam and the jurisprudential criteria are the basis for laying down laws, the lawmakers are bound to follow the Islamic criminal regulations in determining punishments and giving legal authorities to judges. Thus, the Iranian criminal system follows the decrees of the sacred religion and often takes into account the well-known perspective of the Shiite jurists in determining the system of fixed and changing penalties. By studying the process of determining and exercising punishments in Iran, we can draw a two-dimensional system in each dimension of which the realm of judicial authorities is very different from the other. On the one hand, defining some pre-determined punishments, a system of fixed and specific punishments is created and the judicial authorities reach a minimum level. On the other hand, a system of changing and unspecific penalties is made in which the authorities of judges are significantly expanded. Hodood (some form of punishment in Islamic Laws), compensation and fines, are fixed penalties for which not only the type and the

amount has been determined in law but also sometimes the conditions for their exercise and their drop are specified in law. Thus, except in cases that are explicitly stated in law, determining the type and the amount of punishment falls outside the authorities of the judge.

Unfixed penalties form a considerable part of the Iranian law as preventive types of punishment. A judge's authorities in unfixed punishments are not limited to the stage at which the verdict is issued and in some cases extend to the stage after the verdict is determined or to the procedure during which the verdict is being decided upon. The decisive stage of determining the type and the amount of the minimum punishment in Iranian judicial courts has not yet found its proper status. Since at the procedure stage, the source of determining conviction and punishment is the same, the judge has been assigned to issue the verdict immediately after the end of investigations and if not possible, within a maximum period of one week. So, from the Iranian law-maker's viewpoint, nothing would be left to do after finishing investigations and announcing the end of procedure except making the final decision and the judge must issue the verdict on the same session. In other words, the judge must take up the eventual investigation of the evidences right after the end of the legal procedure and if he believes the accused person is guilty, he must immediately determine the punishment. The one-week time that can be given to judges is usually spent on reflecting deeply upon the discussions and evidences of the case rather than on selection of an appropriate reaction. Therefore, preparing evidence for proving one's conviction or innocence, are the main concerns for legal authorities such as magistrates, attorneys and judges; activities which take the highest amount of their time and ability.

It is necessary for judges to base their verdicts on evidences and the laws related to punishment. Thus, in most verdicts, the main section states the reasons of accusation and legal evidence and the necessity of selecting a particular punishment for a specific crime is scarcely mentioned. So, lack of regulations in the stage of determining punishment can be considered as one of the chronic and basic shortcomings in the judicial system which is caused by disharmony between the legislative and judiciary branches of the Iranian government. The lawmaker's share of this disharmony is related to his non-prediction of a particular stage or opportunity to contemplate and consult over the effective and proportional punishment and the judges' share is related to their non-commitment to mention the bases and reasons on which and for which particular penalties are determined.

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