

Toleration-Based Criminal Policy in Case of Murder of a Child by Father under Iran's Criminal Law

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ABSTRACT

After Islamic Revolution of 1988, a new round of revision of existing laws and revival of Islamic laws started, and given Article 4 of the Constitution provided that all legislations must be based on the rules of Islam, criminal law also fundamentally reformed in consistent with Islamic penal law. According to Islamic criminal law, as a rule, the punishment of qisas has been considered for murder; however, such rule has some exceptions, one of which is the case of murder of a child by his father. According to Article 220 of Islamic Penal Code, 1991, and Article 301 of Islamic Penal Code, 2013, following Shiite fiqh, it has been provided that murder of child by father or paternal grandfather is not subject to qisas. The justifications and grounds for such exemption from qisas, and the question if such exemption is a preference of one thing over another with a justified cause or without a justified cause, are important issues that deserve scrutiny. Although legislator has sought to protect children against harm or to establish certain authorities, in Islamic Penal Code, 2013, he has adopted the previous criminal policy based on toleration of murder of a child by father, while legislator could adopt those views of faqihs, which are more consistent with criminal justice, considering the door of ijtihad is open is fiqh.

KEYWORDS: exemption from qisas, father, toleration-based criminal policy, ijtihad, elements of crime, Islamic penal code

INTRODUCTION

Filicide is an obscene and indecent act, which has been practiced since old times based on different motivations. In the Holy Qur'an, filicide is considered as an abominable act. In surah Al-An'am, filicide is considered as a capital sin. Live burial of daughter by Arabs was remonstrated by the Qur'an. Obviously, human life is the biggest gift from the God to human, and intentional murder is punishable by qisas. Given this general rule, how is it possible to exempt father or paternal grandfather from this general rule? This becomes even more complicated when the father has murdered his child due to hostility, personal motives, and his act constitutes the violence known as child abuse, which has many adverse social effects and aspects, and which harms public. Here, criminal policy adopted by legislator is tolerating criminals instead of protecting victims; in fact, both in article 220 of Islamic penal code, 1991, and article 301 of new Islamic penal code, 2013, toleration-based criminal policy has been adopted regarding filicide. This paper tried to discuss the grounds and effects of such discrimination based on new views of faqihs.

Chapter one: Definition of Paternity:

According to article 301 of new Islamic penal code, 2013, "Qisas is imposed as long as the murderer is not the father or paternal grandfather of the murdered". As a general rule, according to rules of Islamic jurisprudence, and Islamic penal code, the primary punishment for murder is qisas, as the legislator has provided in chapter 3, and the Holy Qur'an has provided in verse 140 of surah Al-An'am, "Those will have lost who killed their children in foolishness without knowledge and prohibited what Allah had provided for them, inventing untruth about Allah. They have gone astray and were not [rightly] guided" (Al-An'am: 140).

Discussion of the general preconditions of qisas considers the paternity relation between murdered and murderer as cause of exemption of father who has intentionally killed his child. Paternity means being father, and father refers to a man who has reproduced another human (Loqatnameh Dehkoda, vol. 1, p. 131).

In fiqh, father is the person who has a child from his legitimate marriage with a woman or from his intercourse with women, whom he believed to be his legitimate wife, with date of birth of child not being in less than 6 months or in over one year after intercourse with wife. Majority of Shiite faqihs exempt paternal grandfather from qisas for murder of grandson as well, and accordingly, article 309 of Islamic penal code, 2013 provides, "It must be established for the court that the murderer is the father, or one of paternal grandfathers of the murderer, and if such relation between murderer and murdered is not established, qisas will be imposed upon the oath of heir of the murdered".

To prevent abuse of the title of father, and undue release from punishment impossible on intentional murder, legislator has provided that paternity must be established.

Chapter two: Arguments of advocates of father's exemption from qisas in the event of murder of child by father according to Shiite fiqh

Majority of Shiite faqihs believe that father is exempted from qisas if he kills his child, and most of them believe that qisas can be imposed as long as killer is not father of murdered, and they say that such belief is based on hadiths.

- a) **Hadith:** The most important hadith stating child and father are not on the same footing in case of murder is hadith narrating Prophet Muhammad (PBUH) as saying "Father will not be subject to qisas if he kills his child", and also, "You and your belongings are property of your father" (Kulaini, Furu' Kafi, vol. 5, p. 168).

Based on traditional view, child is property of father, and father owns him/her, because father is the main cause of existence of child. Advocates of father's exemption from qisas follow this view. Another hadith is sahih hadith of hamran and sahih hadith of halabi narrated from Imam Sadiq (PBUH), in which Imam answered the question regarding a father killing his child as follows: "Father doesn't become subject to qisas if he kills his child, however, child will be subject to qisas if he/she murders his/her father" (Wasa'il al-Shiah, vol. 19, p. 56). Hadith Faisal Bin Yasar, narrated from Imam Sadiq (PBUH) also provides the same view. A hadith has been narrated from Imam Baqir (PBUH) regarding the man who has killed his son or his slave, in which Imam provided as follows, "The murderer shall not be killed, but he will be seriously injured and exiled from his homeland" (ibid, p. 58).

b) Consensus

Consensus means agreement between faqihs regarding opinion of infallibles. Therefore, according to Shiite faqihs, consensus certainly represents opinion of infallibles. In case of father's exemption from qisas, there is consensus among faqihs, which has been quoted by Sahib Riad, "If a father kills his child, he will not be killed for doing so, there is no disagreement with such opinion, and there is consensus on this matter". In Sharay' al-Islam wa Mukhtasar al-Nafi', Muhaqiq Hilli, as an early faqih, considered killer father to be exempted from qisas for murder of his child, "If a father kills his child, he will not be killed in retaliation, and is only sentenced to pay atonement and blood money, and to ta'zir". Allamah Hilli also endorsed the same view in Silsilah al-Yanabi' al-Fiqhiyah (Silsilah al-Yanabi' al-Faqhiyah, vol. 24, p. 111). Shahid Awwal said in Luma'ah al-Dimashqiah, "Father will not be killed for killing his child at all, but he will be sentenced to ta'zir, and must pay atonement and blood money" (Luma'ah al-Dimashqiyah, vol. 2)

Sahib Jawahir said in this regard, "The third precondition of qisas is that the murderer must not be father of the murdered. This is not disagreed by anyone, and there is consensus regarding it. Besides, there are texts from both Shiite and Sunni faqih supporting such view (Jawahir al-Kalaam, vol. 42, p. 169). Sheikh Saduq also supported this view. Among later faqihs, Allamah Majlisi, Mula Hassan Faiz, and Imam Khomeini, in Tahrir al-Wasilah, supported the view that father is exempted from qisas for killing his child (Mustand Tahrir al-Wasilah, vol. 2, p. 58). Given the above said, it can be said based on rules of inference that arguments made by Shiite faqihs is based on the fact that majority of hadiths support this view, and majority of Shiite faqihs also supported this view.

Chapter three: View of Sunni faqihs regard murder of child by father:

As with Shiite faqihs, majority of Sunni faqihs also believe that father is exempted from qisas for killing his child. Ibn al-Arabi said regarding imposition of qisas on father who has killed his child, "Father is not killed for killing his child because he is the cause of existence of his child".

Ibn al-Arabi also said that hadith narrated from Prophet Muhammad stating that father is not killed for killing his child is a null hadith, as Umar Bin Khatab rendered judgment regarding the person who had killed his child that he must pay blood money instead of being killed as qisas, which judgment was followed by other companions as well" (Ahkam al-Qur'an al-Qarbaty, vol. 2, p. 251).

Ala' al-Din Bin Mas'ud Kashani Khanafi said, "One of the preconditions of qisas is that murderer must not be part of the murderer, therefore, if a father kills his child, he will not be subject to qisas, and also, if grandfather, whether paternal or maternal, kills his grandchild, he will not be subject to qisas". Ibn Qudamah also said, "One of preconditions of qisas is that murderer must not be part of the murderer, therefore, if a father kills his child, he will not be subject to qisas" (*Al-Qisas fi al-fiqh al-Islamiyah*, p. 61).

Muhammad Bin Idris Shafi'i and Ibn Ishaq, who were Shafi'i faqihs, also believed that father is not subject to qisas for killing his child.

Among Sunni faqihs, Maliki faqihs believe that if it is established beyond reasonable doubt that the father had premeditated killing of his child, he will be subject to qisas, based on the Qur'an, "O you who have believed, prescribed for you is legal retribution for those murdered - the free for the free, the slave for the slave, and the female for the female. But whoever overlooks from his brother anything, then there should be a suitable follow-up and payment to him with good conduct. This is an alleviation from your Lord and a mercy. But whoever transgresses after that will have a painful punishment" (Baqara: 178); and hadith from Prophet Muhammad, "Al-mamnun tankafa wa dama'um". They believe that exemption of father from qisas is based on non-authentic hadiths, and that if it is established beyond reasonable doubt that father had firm will to kill his child, for example, if he make his child lay down on the ground, and then beheads him/her, he must be killed for such act. However, they believe if father beats his child for the purpose of chastisement, even if he hit the child by sword, or the father intends to drive his child away by an iron object, and such act results in murder of the child, father will not be subject to qisas, because he naturally loves his child, and therefore, he may not intend to kill him/her (*Al-qisas fi fiqh al-Islamiyah*, p. 59). According to the doctrine that rules cannot be enforced in presence of doubt, it is seen from study of four Sunni faiths that except for Maliki faqihs, who believed that father who had intention to kill and used killing means must be subject to qisas, others believe other father or grandfather who kills his child or grandchild is exempted from qisas.

Chapter four: Murder of child by mother:

Majority of Shiite faqihs believe that mother who kills her child must be subject to qisas. According to most Shiite faqihs, mother must be killed for killing her child, and such opinion is so popular among faqihs that there is consensus regarding it. Such faqihs as Sheikh Mufid, Sheikh Tusi, Muhaqiq Najafi, Allama Hilli, Shahid Awwal, Shahid Thani, and also late faqihs such as Faiz Kashani, Imam Khomeini, in *Tahrir al-Wasilah*, held that if mother kills her child she must be killed in realization. However, in opposition to this popular view, some Shiite and also Sunni faqihs believe that mother is also exempted from qisas just as do father and paternal grandfather. Such faqihs as Sheikh Hurr Amili, Shahid Thani, Kashani, Hanafi, Ibn Qudamah and Abi Ishaq are among shafi'i faqihs who believe hadith exempting father from qisas for murder of his child cover mother as well (*Al-qisas fi fiqh al-Islamiyah*, p. 61), because the term walid (parent) in "la yaqadu walid bil-walad" covers both male and female as does the term "walad". Another reason is that the cause of creation of a creature cannot be ruined by its effect. Here, father is cause of creation of child, therefore child cannot ruin the cause of his/her creation, namely, father, qisas for murder of child by father is an instance of ruining of the cause by effect. Given mother is also cause of creation of child, she is exempted from qisas based on the prohibition of ruining of cause by the effect (tit for tat in qisas, p. 95). On the other hand, another argument in support of exemption of father from qisas is that father naturally loves his child, and therefore, there is doubt that father absolutely intends to kill his child, which doubt prevents qisas, if this argument is accepted, the same is true of mother as well, because love relation between mother and child is not only less strong than love relation between father and son, but also can be even much stronger than love relation between father and son. Therefore, some believe that mother can also be exempted from qisas in case of killing her child, even though legislator has not accepted such view, and has only exempted father from qisas. Thus, punishment considered for mother by law is like punishment considered for other people, namely, mother is subject to qisas. In terms of comparative law, murder of child by mother is subject to special punishment in penal law of some countries; for instance, in case mothers kill their infant child for the purpose of protecting their honor, or when mothers kill such murder due to postmortem depression, some reduced liability is considered for them, and a less severe punishment is imposed on them, compared with the main punishment for such act.

Therefore, given the provisions of Islamic penal code, and sources of Islamic jurisprudence, at present, if a mother kills her child, he will be subject to qisas; and criminal policy of Iranian legislator is that of zero tolerance regarding mothers who have killed their child. However, a new view has been introduced by some faqihs like Eskafi, Shahid Shahab al-Din Mar'ashi, and Sheikh Yusuf Sana'i in this regard. Ayatollah Yusuf Sana'i said in response to the question if mother who has killed her child must be subject to qisas, "In my opinion, exemption of mother from qisas is relevant as is the case with father, because customary law doesn't exempt father from qisas on the grounds on paternity qua paternity, but based on the fact that father is the cause of creation of child, and that

father loves his child, since the same is true of mother, and it is even more true of mother. Besides, since mother's right with respect to child is more than father's right with respect to child, her exemption from qisas is also more prior than father's exemption from qisas. Above all, forgiveness and preventing qisas is both good, and in case of qisas, mother deserves more pity than father does, so, based on the above said, mother can also be exempted from qisas". So, in legislation of future laws, it would be better to consider the above said, and exempt mothers who kill their child from qisas, given mothers rarely kill their child with premeditated intention, and given the fact that the door of ijthad is open, and fiqh and Islamic penal code are dynamic and Islamic laws can be changed.

Chapter five: Murder of child and toleration-based criminal policy under Islamic penal code

Failing to follow a consistent scientific strategy, and adopting different views, legislative system of Iran has adopted tough substantive and procedural criminal laws and in some case, it has been even retrogressive since Islamic Revolution (*Zero tolerance of criminal policy towards minor crimes*, p. 116).

As a general rule, each society adopts a different view to control and prevention of crimes as well as correction and rehabilitation of criminals, and the way it responds to criminal conduct. However, in recent decades, a new aspect has been added to it according to criminologists, which is protective victimology. Protective victimology is in fact aimed at helping and immunization of individuals and groups that are susceptible to danger and violence. Children are obviously among the susceptible groups, and, therefore, most countries adopt criminal policies to protect children's body and mind from harms. Given such view, it can be said that policy of toleration with regard to fathers who have killed their children in article 220 of Islamic penal code, 1991, and article 301 of new Islamic penal code, 2013, are not free from defect rationally, even though they have not been adopted irrationally. Therefore, study of the controversial procedure of adoption of criminal policies in different systems, including liberal democrat, socialist, democrat, Marxist system, is ambiguous (*Criminal policy*, p. 25). Given legislator has adopted laws based on principles of Islamic jurisprudence, in case of murder of child, it has adopted policy of toleration instead of adopting policy of zero tolerance or stringent policy. In article 220 of Islamic penal code, 1991, it has been explicitly stated that the father or paternal grandfather who has killed his child or grandchild will not be subject to qisas, and is only sentenced to pay blood money to the heirs and ta'zir. The text of the said article expressly promotes filicide, and from criminological view, it is a cause of crime, because it fails to prevent crime, as the preventive aspect of the said article in article 612 is not so strong that it could prevent filicide. Increased fatal violence against defenseless children demonstrates inefficiency of the criminal policy regarding this phenomenon, which has social and psychological effects in society. If father is legal have the right to chastise his child according to principles of Islamic jurisprudence, such right has a limited scope, as paragraph 1 of article 59 of Islamic penal code, 1991, and paragraph d of article 158 of Islamic penal code, 2013, stating the right to chastise his child, explicitly subjects such chastisement to conditions, for instance, such chastisement must be reasonable, and do not exceed the limits provided for chastisement by shariah. Therefore, if a conduct is merely criminal, and falls outside the reasonable limits, it will be considered as crime, and will be punishable. On this basis, shariah and law has only allowed chastisement rather than murder and crime, especially when such murder occurs due to personal motives. Thus, although the working of article 301 of Islamic penal code, 2012, has been smoothed a little, compared with wording of article 220 of old Islamic penal code, it can be said that absolute exemption of father from qisas is unreasonable. Accordingly, some contemporary faqihs consider the view that father must be exempted from qisas in all cases of murder of child by father is an extremist view; at same time, they believe that holding that father must be subject to qisas in all cases of murder of child by father is also extremist, and so, they have tried to reach a compromise between these two extremes. According to them, there are a limited number of hadiths exempt father from qisas, and such exemption is limited to cases where two elements are present: first, the father must have killed his child unintentionally, and second, the father must have had a justified reason to kill his child, for instance, when well-wishing advices of father to his child turns out to be futile, and father is done advising his child, and therefore, murders his child, he is not subject to qisas, but when he kills his child while he has other choice and has no justified excuse to kill his child, he will be subject to qisas. Thus, when father kills his child for reasons involved in other murders as well, such as personal motives, hostility, for seeking wealth, position, or for prevention disclosure of secrets, *etc.*, the general rule of father's exemption from qisas can be violated. Ayatollah Sheikh Yusuf Sanei argued, "Because paternity, which is included in the argument in support of exemption, has no role in such murders (murders with brute and hostile motives, *etc.*), father is subject to qisas, father is exempted from qisas only in case murder has been committed with well-wishing motives and unintentionally. Anyway, whether or not father is exempted from qisas is subject to the two above said elements. In case murder has been committed with non-human motives, father is subject to murder, and exemption only holds as long as father has had a human motive. Therefore, given the grounds provided for such exemption, it can be said that such exemption holds only as long as the elements resulting in exemption are present".

It seems that interpretation provided by the said faqih for article 220 of Islamic penal code causes exemption of father from qisas to become rational and reasonable (Fiqh al-thaqalayn fi sharh tahrir al-wasilah, the book of qisas), and enforcement of such exemption to become limited to limited cases, in which the murderer has committed murder unintentionally. However, it should be noted that enforcement of such interpretation is faced by serious challenges in the courts of law, because:

First, although it may be said that arguments of such faqihs are consistent with wording of hadiths, because the courts are bound by the rule of legality to judge based on the law, they may not interpret article 301 of Islamic penal law in the way said faqih did, because article 220 of Islamic penal code, 1991, and article 301 of new Islamic penal code, 2013, have provided that father and paternal grandfather are exempted from qisas for killing child or grandchild, and have not distinguished between killer who has killed with well-wishing intent, and one with hostile intent.

Second, in penal code of Islam and Iran, if material element of crime, that is, physical conduct, which has resulted in murder of another person, and also, the mental element, that is, intent and knowledge of committing murder, are established, the murderer can be sentenced to qisas for the crime of intentional murder. Therefore, there would not be required to establish other elements than the three legal, material, and mental elements in case of intentional murder. Then, "motive" has no effect on the type of murder, and it doesn't make any difference what the intention of murderer has been in doing murder, because he will be charged with murder and sentenced to punishment upon establishment of the three elements of crime. Therefore, argument of the said faqih, and the distinction made between well-wishing human intent and non-human intention cannot have any effect on punishment of murderer because they have no place in Islamic penal fiqh.

Thus it can be said that the basis on which father is exempted from murder is merely based on the divine command, and the rational arguments provided in support of such exemption are not that firm. In Islamic law, the ground of such rule is not known by humans; and only the God knows it, just as the God required us to say prayer in a certain way without us knowing the true reason behind it. Currently, as rules of fiqh are governing our society, the effect of some properties of Islamic penal code have become clear, one of which is that some rules are merely based on the divine command. However, in addition to article 220 of the old, and article 301 of the new Islamic penal code, there are many other rules that are merely based on the divine command.

Presence of the rules that are merely based on the divine command create ambiguity and doubt regarding the scope of law, and the law must be freed from ambiguous rules as much as possible, because when a father intentionally kills his child, all material and mental elements of intentional murder are present, and only legal element of crime is undermined by a rule that is merely based on the divine commandment, leading to possibility of exempting father from qisas, which exemption, and criminal policy of toleration in some cases results in abuse of the law.

The issue of qisas of father must be viewed from perspective of the victimology, and in terms of the unjust done to the victim and the heirs of victim. The question rises here why the heirs of victim shouldn't be able to punish the father for the bad deed he did. If the father sees his child as one whom he created, why should the father kill his child instead of protecting him/her? Why should the father be exempted from qisas, while the divine teachings provide that the father is bound to protect his child? Shouldn't such crime be even subject to a more serious punishment because it promotes violence and insecurity in families and society? It seems that in presence of material and mental elements of intentional murder, the father should at least not be less punished than others at least, if he is not punished more severely than others.

Conclusion

From perspective of criminology, it is clear that sometimes the law itself is the cause of crime, preparing ground for violence, disorder, and commitment of crime. In fact, toleration-based criminal policy in case of fathers who kill their children with any motive itself provides incentive for filicide and causes insecurity and violence among people in society, while a consistent preventive criminal policy requires foreseeing of the harmful effects of the crime, and strong and sufficient response from society to really criminal fathers who are everything but fathers can ensure public peace and security. Accordingly, given the door of ijtihad is open, the legislator can accept the non-majority view of faqihs if it ensures criminal justice better and more conveniently, and such act of legislator would not undermine principles of fiqh at all. Rational interpretation of texts of shariah is based on the fact that rules of shariah are consistent with realities of human life. Besides, some rules of shariah are fixed and may not change according to requirements of time and place such as prohibition of murder, or necessity of worship of the God, while others can be changed according to requirements of time and place. Accordingly, reform of the rules of shariah is breach of shariah, but insisting on keeping one rule of shariah irrespective of the conditions of the time and the reforms occurred in the subject-matter of the rule, or in circumstances of enforcement of the rule, and irrespective of the scientific achievement is against the will of the God, and also against the objectives the God

seeks by sending shariah. Flexibility of rules of shariah may limit or expand the scope of applicability of a law (Criminal policy in Islam and I.R. Iran, pp. 101 & 102).

In interpreting the religion, one must consider the intellectual and social reforms of human community, and humans' new needs, new sciences must be used as much as possible to obtain a better understanding of the matter in question, and to better obtain the rule of shariah regarding the matter in question, so that answers to new questions regarding ethical, cultural, political, and social life can be obtained from religion (New Kalaam and Islamic law: dynamic fiqh knowledge, Quarterly of Legal views, University of judicial sciences, No. 49, p. 14).

It seems that legislator must distinguish fathers who have killed their children with motives other than chastisement and protection and without considering limits imposed by shariah. Enforcement of toleration-based criminal policy covering all fathers must be stopped, and a real and more concrete criminal justice taking into account principles of fiqh and Islam must be achieved.

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