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# Three Decades of Islamic Criminal Law Legislation in Iran: Legislative History Analysis with Emphasis on the Amendments of the 2013 Islamic Penal Code

*by Mohammad H. Tavana**

## Abstract

*The present paper introduces the traditional perception of Islamic criminal law and studies its status in the Iranian legal system during two eras of legislation; from 1906 to 1979 and since then up to the present day. The paper's main areas of attention are the legislative history analysis of Islamic criminal law during the past three decades and a comparison between the 1991 and 2013 Islamic Penal Codes. It concludes by enumerating the results of the comparison between similar provisions under the two Codes.*

## I. Islamic Criminal Law

The perception of criminal law in the Civil Law system and the Common Law system is relatively different from its understanding in the context of the Islamic legal tradition. This is partly due to the fact that criminal law was not defined as a single and unified branch of law in the sources of Islamic law.[1] In fact, Islamic criminal law has been shaped by the rules mentioned dispersedly in the sources of Islamic law and the later discussions of Muslim jurists on interpreting, justifying and expanding those rules. Various categories of crimes are classified by different criteria[2] in Islamic criminal law but the predominant classification is based on the imposed punishments. The traditional Fiqh[3] textbooks categorize offences into four groups, punishable by Hudud, Qisas, Diyat and Ta'zirat punishments and define special characteristics for each category.

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[1] RUDOLPH PETERS, *Crime and Punishment in Islamic Law – Theory and Practice from the Sixteenth to Twenty-first Century*, 2005, New York, Cambridge University Press, p. 7.

[2] See MOHSEN RAHAMI, 'Development of Criminal Punishment in the Iranian Post-Revolutionary Penal Code', *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 13, Issue 4, 2005, pp. 588-589. The author classifies the crimes based on the Sharia interest and the interests of the society into six groups of crimes against the physical integrity and moral dignity of individuals such as homicide, injury and beating, crimes against property and assets such as theft and robbery, crimes against public security and security of the state, such as *Muharaba* (waging war against God), crimes against the religion, such as apostasy and blasphemy, crimes against reason, such as drinking alcoholic beverages, and crimes against morality and family values, such as sodomy and adultery.

[3] MOOJAN MOMEN, *An Introduction to Shi'i Islam – The Historty and Doctorines of TwelverShi'ism*, 1985, New Haven, Yale University Press, p. xix. *Fiqh* is religious jurisprodance and *Faqih* (pl. *Foqaha*) is an expert in *Fiqh*. *Faqih* is used in Shiite world as equivalent of *Mujtahid*.

The first category consists of the specific offences with fixed and mandatory punishments, as mentioned in the primary sources of Islamic law (i.e. the Quran and the Sunna[4]). It is called Hudud punishments. According to Shiite[5] and Hanafi[6] scholars, these crimes must be entirely or predominantly violation of a Divine claim and therefore they are called "rights of God" or "claims of God".[7] Qisas or retaliation is the second category which concerns the punishment for crimes against the body (bodily injury) and crime against the person (homicide). Under Islamic law, a person who has suffered from intentionally caused injuries resulting in amputation of body organs, infliction of wounds and blinding is entitled to seek retaliation, and death penalty could be imposed by way of retaliation for intentional homicide upon the request of the heirs of the victim – with the exception of the spouse.[8] The third category consists of the crimes that are punishable by Diyat or financial compensation. This category of punishments is applicable when an accidental or semi-intentional act causes bodily harm or death or in cases where they were caused intentionally but a sentence of retaliation could not be pronounced.[9] The last category comprises of all other sinful acts or forbidden conduct under Islamic law which fall outside the scope of other three categories and are punishable by Ta'zirat or discretionary punishment.[10]

# II. Islamic Criminal Law in the Iranian Legal System

In the 20th century, Iran has witnessed different eras of legislation with different approaches due to two revolutions which led to substantial changes in the Iranian political and legal systems. The status of Islamic law and more specifically Islamic criminal law in the Iranian legal system has considerably changed in each era. In order to properly understand the changes in each period it is important to have a general overview of the criminal legislative history with emphasis on the status of Islamic criminal law in each era. Moreover, the survey will help us find the roots of the changes, understand the reasons and rationale behind them and finally analyze the recent changes in light of their historical background.

### 1. Islamic Criminal Law before the 1979 Revolution

It is to be noted that the establishment of legal system in Iran, in its modern conception, dates back to the early days of the 20th century; as an aftermath of the Constitutional Revolution (1905-06). Up until then, at least two parallel types of adjudication on criminal matters had been exercised in the country. The first type was practiced in Sharia courts where the judge – who was an Islamic law scholar as well – dealt with the abovementioned four categories of crimes and made his decision based on the precepts (rules) of Islamic criminal law. The second type of the courts worked directly under the supervision of the central or provincial

[4]*Ibid*., p. 173. *Sunna* consists of the preserved reports from the words and deeds of the Prophet (and the Imams for Shiite).
[5]The primary division between Muslim scholars into the two major sects, Sunni and Shiite, is rooted in the early developments of Islamic law and has continued until the present time. Currently different Shiite branches exist and among them the largest sect is called *Jafari* or Twelver Shiite which is pervasive in Iran, Iraq, Lebanon, and Bahrain.
[6]The four main schools of *Fiqh* within the Sunni Islam are *Hanafi*, *Maliki*, *Shafi'i* and *Hanbali*.
[7] PETERS, *supra* note 1, pp. 53-54. Theft, banditry, unlawful sexual intercourse, the unfounded accusation of unlawful sexual intercourse (slander has a hybrid nature and unlike the other *Hudud* punishments that cannot be waived by men is considered as both a claim of God and a claim of men in this respect), drinking of alcohol and apostasy (according to some schools of law) are *Hudud* crimes.
[8]*Ibid*., pp. 36-37.
[9]*Ibid*., p. 49.
[10]*Ibid*., p. 65.

governments and heard the cases with public or political aspects such as crimes against the government, causing disorder, refusing tax payments and contact with aliens.11 The Constitutional Revolution put an end to this dual system and led to the establishment of the Parliament and a modern semi-secular judicial system in Iran. Although according to Article 1 of the Supplement of the Constitution[12] the Shiite Islam was the official religion of the land and Article 2 stated that the laws should be in conformity with the religion of the land, these provisions did not considerably affect the criminal law legislation.

While the Code of Criminal Procedure passed in 1911, by the First Parliament, is considered as the first piece of criminal law legislation in the Iranian legal system[13], the Customary Criminal Code – a secular penal code – is the first Iranian penal code which was adopted tentatively by the decree of council of ministers in 1916. This Code was not in force for a long time and was replaced by the General Penal Code just a few days after the transition of monarchy from the Qajar to Pahlavi dynasty in 1925. Both the framework and substance of the General Penal Code of 1925 (hereinafter "the 1925 Code") were inspired, in large measure, by the French system and the Napoleonic Codes[14]; hence offences were recognized and categorized based on secular norms.[15] According to Article 1 of the 1925 Code, the punishments laid down were "to maintain order in the country and be administrated by the courts of justice". In the same Article, the 1925 Code referred to Islamic criminal law punishments in broad terms by stating that the offences "investigated and discovered according to Islamic norms" are to be punishable by Hudud and Ta'zirat according to Islamic criminal law. However, the status of the Sharia courts experienced a state of instability during the decades that followed until their abolition in 1973[16] when the application of Islamic criminal law was removed from the Iranian legal system formally by deletion of the provision related to religious prosecution from the amended form of Article 1.[17]

## 2. Islamic Criminal Law after the 1979 Revolution

The 1979 Revolution changed not only the political system in Iran but also the basis and norms of legislation in the country. In the view of the first leader of the Islamic Republic of Iran, Ayatollah Khomeini, only under a purely Islamic government could "true" justice be administered. As also stated in his book on "Islamic Government" (1971): "The body of Islamic laws that exist in the Quran and the Sunna have been accepted by Muslims and recognized by them as worthy of obedience."[18] Accordingly, the 1979 Constitution [19] (hereinafter "the Constitution") emphasizes that all kinds of legislation must be in conformity with Islamic

[11] RAHAMI, *supra* note 2, p. 585.
[12] The first constitution of Iran was signed by the Qajar King; Mozzafar-al-Din Shah, on December 30, 1906. A few months later the Supplement of the Constitution was signed by another Qajar King; Mohammad Ali Shah, on October 7, 1907.
[13] ZIBA MIR-HOSSEINI, 'Sharia and National Law in Iran', in *Sharia and National Law: Comparing the Legal Systems of Twelve Islamic Countries*, OTTO JAN MICHIEL (ed.), 2010, Cairo, the American University in Cairo Press, p. 357.
[14] GOODARZ EFTEKHAR JAHROMI, 'The Principle of Legality and Its Developments' (in Persian),*Journal of Legal Research*, ShahidBeheshti University, No. 25 & 26, 1999, p. 88.
[15] HAMI R. KUSHA, *The Sacred Law of Islam*, 2002, Aldershot, Ashgate Publishing Limited, p. 135.
[16] In 1973 the General Penal Code was amended and the first 59 articles of the 1925 Code on Generalities were replaced by new provisions.
[17] RAHAMI, *supra* note 2, p. 586.
[18] KUSHA, *supra* note 15, p. 155.
[19] The Constitution of the Islamic Republic of Iran was adopted by a referendum on October 24, 1979, and went into force on December 3 of that year, replacing the Constitution of 1906.

norms.[20] In order to ensure this conformity, the Constitution envisions the establishment of the Guardian Council; a body consisting of Foqaha (Mujtahids) and jurists (lawyers), which is responsible for supervising the conformity of parliamentary enactments with Twelver Shiite Fiqh and the Constitution itself.[21] Contrary to the practice of the Legislature under the Supplement of the Constitution of 1906, the conformity of the laws with Islamic norms became an objective for the Legislature under the post-1979 Constitution and the Guardian Council not only applied these criteria to the legislation passed after 1979 but also tried to revise the previously enacted legislation along the same lines.

As a first step, a series of Islamic criminal law legislations inspired by the Shiite Fiqh were passed in three separate bills in 1982."The Law Concerning Hudud and Qisas and Other Relevant Provisions" was passed in August, "The Law Concerning Islamic Punishment, Containing General Provisions" was passed in October, and finally "The Law Concerning Diyat" was passed in December 1982. The three bills were adopted as tentative laws for an interim period of 5 years. In July 1991 these three laws were combined, with some minor amendments, which constituted the Islamic Penal Code comprising of four books on Generalities, Hudud, Qisas and Diyat. The Judicial and Legal Commission of the Islamic Consultative Assembly (Majlis/Parliament, hereinafter "the Parliament") passed the 1991 Islamic Penal Code (hereinafter "the 1991 Code") according to Article 85 of the Constitution on a tentative basis for an interim period of 5 years.[22]

The Ta'zirat-related legislation has experienced a quite different path and codification in this area was more challenging for the Iranian Legislature due to the lack of clarity in the nature, definition and domain of Ta'zirat crimes in Islamic criminal law. The first Ta'zirat bill, "the Law Concerning Provisions on the Strength of Ta'zirat" was passed in August 1983. The 1983 Ta'zirat Law followed the framework of the 1925 Code in defining the crimes but most of the customary punishments such as fine and imprisonment were replaced by Sharia-oriented punishment of flogging.[23] Moreover, a number of new offences including those related to women's dress and to moral behavior were introduced by The 1983 Ta'zirat Law.[24] In May 1996, a newly drafted bill concerning Ta'zirat punishments was passed by the Parliament. Based on a fatwa (religious decree) by Ayatollah Khomeini, the 1996 Ta'zirat Law reintroduced punishments such as fine and imprisonment for some Ta'zirat crimes while it substituted flogging as punishment for some of the offences.[25] The 1996 Ta'zirat Law was incorporated into the 1991 Code as its fifth book and the interim period of the 1991 Code was prolonged for another ten years until 2006.

[20] Article 4 of the Constitution: All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the *Foqaha* of the Guardian Council are judges in this matter.

[21] Article 72 of the Constitution: The Islamic Consultative Assembly cannot enact laws contrary to the official religion of the country or the Constitution. It is the duty of the Guardian Council to determine whether a violation has occurred, in accordance with Article 96.

[22] Article 85 of the Constitution: The right of membership is vested with the individual, and is not transferable to others. The Assembly cannot delegate the power of legislation to an individual or committee. But whenever necessary, it can delegate the power of legislating certain laws to its own committees, in accordance with Article 72. In such a case, the laws will be implemented on a tentative basis for a period specified by the Assembly, and their final approval will rest with the Assembly.

[23] RAHAMI, *supra* note 2, pp. 593-594.

[24] MIR-HOSSEINI, *supra* note 13, p. 358.

[25] PETERS, *supra* note 1, p. 163.

### 3. The Reasons for Enactment of a New Islamic Penal Code

Following the 1979 Revolution the National Consultative Assembly was replaced by Islamic Consultative Assembly. The Legislature's lack of experience on the one hand and novelty of codification of Islamic criminal law on the other hand made the task of drafting bills highly challenging. Moreover, the demands for a prompt replacement of the 1925 Code with Sharia-based legislation had put extra pressure on the drafters. Under the circumstances, the bills of 1982 laws – which later became the 1991 Code – were prepared in a short period of time and without adequate care and attention in certain parts. The 1982 General Provisions Law – which later became the first book of the 1991 Code – was a mixture of the Sharia compatible provisions of the first book of the 1925 Code (with 1973 amendments) and the provisions extracted from the Shiite Fiqh sources regarding the general concepts and principles of Islamic criminal law. As a result, the first book of the 1991 Code was a not harmonized, consistent text; rather a combination of provisions inspired by the French general criminal law and Islamic criminal law which were brief and ambiguous in certain parts and silent on some subjects. Lack of consistency, even disorder, in the Generalities becomes more manifest when we observe that some provisions belonging to the Generalities were included the other books of the 1991 Code.[26] This is partly due to the fact that the second book of the 1991 Code – which was originally the 1982 Hudud and Qisas Law – was passed prior to enactment of the basis of the first book – the 1982 General Provisions Law.

In addition to the above-mentioned problems in the drafting process of the 1982 laws which are also reflected in the content of the second, third and fourth books of the 1991 Code on Hudud, Qisas and Diyat punishments, the methodological problem of incompatibility with the standards of penal law codification is observed in different parts of those books. This problem, a matter of case-oriented codification, could be detected in some single articles of the 1991 Code which deal with a very specific case. In fact, a number of articles of the 1982 Hudud and Qisas Law and the 1982 Diyat Law – which later became provisions in the second, third and fourth books – had been extracted (in verbatim form) from Shiite Fiqh books (book of jurisprudence) or fatwas of Shiite scholars.[27] These Fiqh books traditionally discuss each topic by stating the related Hadith[28], the different possible cases under that topic and the ruling on each case. Consequently, in certain cases, a single Hadith became subject of one or two articles of the 1991 Code.[29]

As already noted, following the inclusion of the 1996 Ta'zirat Law as the fifth book of the Islamic Penal Code the interim period of the 1991 Code was prolonged until March 2006 – which was subsequently prolonged on a yearly basis until March 2011 by the Parliament.[30] These periodic prolongations through the past three decades demonstrate that the 1991 Code –

[26] E.g., the provisions related to evidence of crime were discussed under the second book on *Hudud* punishments.
[27] Particularly Ayatollah Khomeini's *fatwas* in his *Fiqh* book '*Tahriral-Vasila*'.
[28] MOMEN, *supra* note 3, p. 173. Written reports from the words and deeds of the Prophet (and the Imams for Shiite) after being transmitted orally for several generations.
[29] Views of Prof. Hossein Mir Mohammad Sadeghi on the 2013 Code (in Persian), available at: http://dadazmoon.ir/?p=2104 [27 December 2013].
[30] Between March 2011 and June 2013 based on the directive of the head of the Judiciary the courts had continued to apply the 1991 Code without the prolongation by the Parliament. This procedure is not unprecedented in the Iranian judicial system. The Criminal Procedure Code was passed in 1999 as a tentative law for ten years. Since March 2010 the courts apply the 1999 Criminal Procedure Code by the directive of the head of the Judiciary regarding this issue until the enactment of the new Criminal Procedure Code which is pending between the Parliament and the Guardian Council.

even with the possibility of minor amendments – was not an appropriate law to be enacted permanently. Therefore, the above-mentioned disorder and flaws in the form and content of the 1991 Code, which had been further exacerbated by the problems and difficulties experienced by the practice of the courts, had practically made a major revision in the Code, in the form of a new bill, all but inevitable.

### 4. Legislative History of the 2013 Islamic Penal Code

The 2007 Law on the prolongation of the interim period of the 1991 Code contains a provision obliging the Judiciary to submit the new bill of the Islamic Penal Code – which had been prepared by a drafting committee of the Judiciary – to the Parliament within three months. According to the records of the Parliament, the receipt of the bill was announced in June 2008. Between December 2009 and January 2012, the bill was passed several times by the Parliament and forwarded to the Guardian Council for approval, which was sent back to the Parliament for further review and amendment in all instances on the basis of incompatibility with Sharia.[31] Once the bill had been amended in line with the views of the Council, the Code was finally approved in January 2012 and was sent to the President for signature and publication on April 10, 2012.[32] In October 2012, before the Code could be signed by the President, it was recalled by the Guardian Council due to what they considered to be "incompatibility with Sharia in 52 cases" – a very rare and indeed unprecedented action.[33] The Code was last amended by the Parliament in February 2013 and was approved for the second time by the Council on May 1, 2013. Finally, it was signed by the President and published in the official gazette on May 27, 2013 and came into force on June 12, 2013. In addition to the questions raised by the Iranian lawyers regarding constitutional legitimacy of the act of the Guardian Council in recalling the Code, the foregoing summary of the legislative history of the 2013 Islamic Penal Code (hereinafter "the 2013 Code") demonstrates the degree and intensity of supervision of the Guardian Council and its sensitivity in this specific field of law. Moreover, it illustrates the limitations that the Iranian Legislature faces in order to change criminal provisions – whether crucial or otherwise.

## III. Innovations and Reintroductions

The 2013 Code contains 728 articles in four books on Generalities, Hudud, Qisas and Diyat. The 1996 Ta'zirat Law – containing, inter alia, the Computer Crimes Law (passed in July 2009) – is incorporated into the new Islamic Penal Code as its fifth book. Among the four newly enacted books of the 2013 Code, the main changes are to be found in the Generalities – which will be discussed in more detail prior to the review of the changes in the content of the second and fourth books. Finally, it should be added that the book on Qisas has not been considerably

[31] Article 94 of the Constitution: All legislation passed by the Islamic Consultative Assembly must be sent to the Guardian Council. The Guardian Council must review it within a maximum of ten days from its receipt with a view to ensuring its compatibility with the criteria of Islam [Sharia] and the Constitution. If it finds the legislation incompatible, it will return it to the Assembly for review. Otherwise the legislation will be deemed enforceable.

[32] Article 123 of the Constitution: The President is obliged to sign legislation approved by the Assembly or the result of a referendum, after the legal procedures have been completed and it has been communicated to him. After signing, he must forward it to the responsible authorities for implementation.

[33] Report of the spokesman of the Judicial and Legal Commission of the Parliament (in Persian), available at: http://dadazmoon.ir/?p=20 [27 December 2013].

changed, except when compared with the third book of the 1991 Code it appears more classified.

## 1. Generalities

As already noted, the first book of the 1991 Code suffered from serious problems, and not surprisingly, the most substantive changes are to be found in the Generalities of the 2013 Code. A review of the process of the preparation of the Code indicates that the drafters had tried to eliminate the flaws of the first book by taking into consideration of the experience and the lessons learnt from the actual application of the 1991 Code by courts. They have as well tried to compile and consolidate various pieces of criminal law legislations and directives under the heading of Generalities. Furthermore, the provisions related to the Generalities previously dispersed in the other books have been moved to the first book. Generally speaking, the first book of the 2013 Code, when compared with the 1991 Code, could be considered less vague and more objective; the rules have been discussed with more detail, which helps prevent broad interpretations and also meets higher legislative standards. Substantial increased in the number of the articles in the first book (from 62 in 1991 to 216 in 2013) confirms this observation.

In addition to the changes in the form of the first book, the content has also undergone serious revision; some of which could be considered as innovations of the 2013 Code or, at least, reintroduction of the previously eliminated procedures, mechanisms or institutions. One such innovation in the 2013 Code concerns the recognition of the criminal responsibility for juridical persons (Article 143). The issue of separate criminal responsibility of the juridical person from its legal representative had been a matter of controversy in the courts under the 1991 Code. Furthermore, enumeration of punishments for the juridical person (Article 20) has limited the room for long discussions about the possibility of punishment of juridical persons. Nevertheless, changes in Ta'zirat punishments and punishment and correctional measures for minors – to be reviewed in the following section – appear to have more critical impact in practice.

### *a) Ta'zirat Punishments*

Although the 1996 *Ta'zirat* Law was incorporated into the 2013 Code as its fifth book, the first book of the 2013 Code defines specific rules for *Ta'zirat* crimes and punishments. Furthermore, it makes a distinction between these rules and the general rules applicable to all four categories of crimes and punishments. As noted previously, the definition of *Ta'zirat* crimes is relatively broad under Islamic law and their application is under the discretion of the judge. Contrary to the 1991 Code, Article 18 of the 2013 Code provides a definition for *Ta'zirat* crimes. Moreover, it limits *Ta'zirat* punishments to the provisions mentioned by the law. This Article follows the provisions of Article 2 of the 2013 Code and Article 36 of the Constitution,[34] which respectively refer to the principle of legality, a well-recognized principle of international human rights law; as stipulated in Article 11(2) of the Universal Declaration of Human Rights, Article 15 of the

[34] Article 36 of the Constitution: The passing and execution of a sentence must be only by a competent court and in accordance with law.

International Convention on Civil and Political Rights, and Article 7(1) the European Convention on Human Rights.[35]

Classification of *Ta'zirat* punishments could be considered as innovative reintroductions in the 2013 Code. Article 7 of the 1925 Code (with 1973 amendments) categorized crimes into felonies, misdemeanors and minor offences. Since this classification had not been made according to Islamic criminal law, it was not referred to in the 1991 Code. The 2013 Code reintroduces a classification with similar effects to the classification in the 1925 Code but limited to *Ta'zirat* punishments only. Article 19 of the 2013 Code categorizes *Ta'zirat* punishments into 8 degrees based on their severity. Interestingly, capital punishment is not listed by Article 19, whose absence could be assumed to reflect the intention of the Legislature in supporting the interpretation which contends that *Ta'zirat* crimes are not punishable by death penalty.

One of the salient problems under the 1991 Code concerned the heavy caseload of courts. In practice, only a relatively limited number of offences in the Iranian judiciary system are punishable by *Hudud*, *Qisas* and *Diyat*; the vast majority of the cases are related to *Ta'zirat* crimes. Furthermore, the rules of Islamic criminal law related to *Ta'zirat* punishments – in comparison with the provisions on *Hudud*, *Qisas* and *Diyat* punishments – are more flexible and the Legislature enjoys a wider discretion in terms of defining the rules in this area of Islamic criminal law. The 2013 Code attempts to solve this problem by applying lenient institutions such as "impunity" and "probation before judgment" in cases of minor *Ta'zirat* punishments. Previously, Article 22 of the 1991 Code gave the judges the power to reduce or substitute *Ta'zirat* punishments, but impunity was not included among the available options. On the contrary, Article 39 of the 2013 Code allows for resort to impunity in case of minor *Ta'zirat* punishments (categories 7 and 8) under special circumstances. Another innovation of the 2013 Code relates to the question of probation before judgment. Article 40 stipulates that when a minor *Ta'zirat* crime (punishable by categories 6 to 8) is proved, the judge can, under special circumstances, place the offender on probation from 6 months to 2 years. Based on the behavior of the offender during probation, Article 45 of the Code provides the judge with two options upon the expiration of probation; a verdict of sentence or impunity should be pronounced.

Substantial increase in the number of prisoners – not to mention the heavy and varied social costs involved – were also considered as the major problems under the 1991 Code. With a view to reducing the negative effects of this problem, the 2013 Code enhances alternative regimes that confine imprisonment, including "conditional sentence", "alternative sentence" and "intermittent sentence". Articles 38 to 40 of the 1991 Code dealt with conditional sentence and the related conditions which are discussed with more detail by Articles 58 to 63 of the 2013 Code. Alternative sentence is another regime in this context which is comprehensively covered by Articles 64 to 87 of the 2013 Code. As noted before, under Article 22 of the 1991 Code the judge had the power to reduce or replace *Ta'zirat* punishments in special circumstances. Based on this article, the Head of the Judiciary issued a directive in 2005 concerning alternative sentence[36]. Chapter 9 of the Generalities of punishments, on alternative sentence, incorporates

[35] See EFTEKHAR JAHROMI, *supra* note 14, p. 87.

[36] The directive obliged the judges to replace *Ta'zirat* imprisonment with other *Ta'zirat* punishments such as fine especially when the punishment was less than 6 months. The directive (in Persian) is available at: http://www.tebyan.net/newindex.aspx?pid=252565 [27 December, 2013]

the directive into the 2013 Code with more detail. Unlike the other two regimes, intermittent sentence (Article 56) is an unprecedented regime in the Iranian legal system. The conditions for applying this particular regime in cases that the offenders are in prison for minor *Ta'zirat* punishments (categories 5 to 7) are set by Article 57 of the 2013 Code.

As pointed earlier, the second part of book one is on the Generalities of punishments, in which Chapter 11 enumerates the grounds for nullification of punishments. In addition to the recognition of the principle of *Dara'*[37], the institutions of "prescription" and "repentance" have witnessed more changes under the 2013 Code. Contrary to the general acceptance of prescription under the 1925 Code,[38] the post-revolutionary criminal law legislations had not recognized this institution until 1999 when Article 173 of the Criminal Procedure Code (hereinafter "the 1999 Criminal Procedure Code") reintroduced prescription – even though limited to *Ta'zirat* crimes only. Article 105 of the 2013 Code follows the 1999 Criminal Procedure Code in this respect and sets the periods of prescription for the eight categories of *Ta'zirat* punishments. Repentance, as covered in Article 115, is another ground for nullification of minor *Ta'zirat* punishment (categories 6 to 8). Moreover, the Article allows the judge to reduce the punishment in case of the offender's repentance where other categories of *Ta'zirat* punishments are involved. It is noteworthy that repentance was recognized as a ground for nullification of punishments limited to *Hudud* punishments under the 1991 Code.[39] The 2013 Code stipulates the principle of *Dara'* as a general principle of Islamic criminal law and underscores its applicability in the process of nullification of punishments. According to Article 120, the applicability of this principle is not limited to nullification of punishments.[40] In fact, the principle of *Dara'* in Islamic criminal law is very close to the principle of presumption of innocence, as recognized by Article 37 of the Constitution[41], Article 11 of the Universal Declaration of Human Rights and Article 48 of the Charter of Fundamental Rights of the European Union.

### *b) Punishments and Correctional Measures for Minors*

Aside from the negligible difference between the 1991 Code and the 2013 Code in respect of the age of criminal responsibility, the difference between the two Codes with regard to the punishment of children and juveniles is substantial. The 1925 Code (with 1973 amendments) considered offenders under the age of 18 as minors. Article 33 of the 1925 Code categorized minors into two groups of offenders; 6-12 and 12-18, and defined special rules applicable to the punishment of each group. Once customary law criterion had been substituted with those of Islamic law, Article 49 of the 1991 Code set the age of maturity as the age of criminal responsibility, but was silent on the exact age of maturity. According to the predominant view

[37]The principle of *Dara'*, as a precept in Islamic criminal law, is widely recognized by the Shiite *Foqaha.* The application of this principle was primarily limited to *Hudud* punishments but was later extended to the other three categories of punishments, including *Ta'zirat*. According to the principle of *Dara'*, the punishment could not be executed when there is a doubt about the occurrence of the crime or its commission by the accused. See MOSTAFA MOHAGHEGH DAMAD, *Rules of Fiqh – Penal Rules* (in Persian), 2000, Tehran, Center for Islamic Publications, p. 42.

[38] The related limitations were stated by Article 49 of the 1925 Code (with 1973 amendments).

[39] According to Article 116 of the 2013 Code repentance is not applicable to *Qisas* and *Diyat* punishments.

[40] Article 120 of the 2013 Code: when there is no reason to overcome the doubt about the occurrence of the crime, the conditions of the crime or one of the conditions of the criminal responsibility, the crime or the mentioned conditions are not proved.

[41] Article 37 of the Constitution: Innocence is to be presumed, and no one is to be held guilty of a charge unless his or her guilt has been established by a competent court.

in the Shiite *Fiqh* – also reflected in Article 1210 of the Iranian Civil Code[42] – the age of maturity is 9 lunar years (8 years and 9 months) for girls and 15 lunar years (14 years and 7 months) for boys. Although the Note of Article 220 of the 1999 Criminal Procedure Code considers the juvenile court as the competent court to hear claims against mature offenders of less than 18 years of age, there was no distinction between the minor offenders based on their age, and mature offenders had full criminal responsibility – exactly the same as adults – under the 1991 Code. The 2013 Code follows the framework of the 1991 Code and states in Article 146 that immature persons do not have criminal responsibility, but contrary to the 1991 Code, Article 147 of the 2013 Code sets the exact ages of 9 lunar years for girls and 15 lunar years for boys as the age of maturity.

One of the main innovations of the 2013 Code – which can also be considered as a reintroduction in some respects – concerns the establishment of a regime for punishments and correctional measures for children and juveniles. Chapter 10 of the Generalities of punishments is devoted to this issue. Article 88 categorizes the minors who committed *Ta'zirat* crimes into two groups of offenders; 9-15 and 15-18 years of age.[43] Moreover, the approach of the Legislature to the punishment of minor offenders who commit *Hudud* or *Qisas* crimes has also changed considerably under the 2013 Code. Article 91 states that one of the alternative punishments enumerated in Chapter 10[44] should be applied instead of *Hudud* or *Qisas* punishments when a minor who has reached the age of maturity does not understand the nature of the committed *Hadd* or *Qisas* crime or its prohibition, or if there is a doubt about his or her mental development and perfection. In respect of *Diyat* crimes committed by minors, the provisions of the 2013 Code are not different from those under the 1991 Code due to the compensatory aspect of *Diyat* punishments. Article 92 stipulates that when a minor who has reached the age of maturity is involved in *Diyat* and other compensations, the court will apply the general rules as stipulated in the book on *Diyat*.

Although Article 147 of the 2013 Code sets different ages as the age of criminal responsibility for different sexes, this difference is not completely reflected in their punishments. In fact, in so far as the relation between the sex of a minor offender and his or her punishment is concerned, there is no difference between boys and girls in *Ta'zirat* punishments and there exists absolute difference with respect to *Diyat* punishments. The approach to *Hudud* and *Qisas* punishments is somewhat different; a middle way is pursued. In case of the application of Article 91 to *Hudud* and *Qisas* punishments, again, there is no difference between boys and girls. But when none of the requirements of Article 91 are met, the general rule on the age of criminal responsibility is applied, hence reflecting the effect of sex on punishment of minor offenders.

[42] Article 1210 of the Civil Code: No one, when reaching the age of majority, can be treated as incapable of insanity or immaturity unless his immaturity or insanity is proved.
Note - The age of majority for boys is fifteen lunar years and for girls nine lunar years.

[43] According to Article 88 of the 2013 Code, the judge has five options to make a decision about an offender between 9 and 15 years of age who commits a *Ta'zir* crime and none of the options are considered as punishment. Moreover, under the 2013 Code, the punishments for the juveniles between 15 and 18 years of age who commit *Ta'zirat* crimes are different from *Ta'zirat* punishments for adults. According to Article 89, the judge can send the juveniles who commit *Ta'zirat* crimes to correctional and rehabilitation centers instead of jail in major crimes or sentence them to limited public working without payment or paying fine in the case of delinquency.

[44] The correctional measures and the punishments which are enumerated by Articles 88 and 89 of the 2013 Code; see note 43.

Besides the effort of the Legislature to reduce the effects of the difference between the sexes on their punishment, the criteria applied for defining minors merit scrutiny. It has already been discussed that the definition of minors based on customary criterion of 18 years of age in the 1925 Code was totally replaced by the Sharia definition of minors based on the criterion of age of maturity in the 1991 Code. The 2013 Code, however, has adopted a dual approach in this respect. The 2013 Code follows the framework of the 1991 Code for definition of minors in the Article related to criminal responsibility; it applies the criterion of age of maturity. Simultaneously, it has tried to reduce the negative effects and consequences by defining 'minor' in respect of punishments and applying the criterion of 18 years of age – as had been the case under the 1925 Code and is used by Article 1 of the 1989 Convention on the Rights of the Child.[45] Moreover, the 2013 Code follows the 1925 Code by categorizing minors into two groups in cases of *Ta'zirat* punishments.

## 2. Hudud

The 2013 Code second book contains 73 articles on *Hudud*; a substantial decrease from 141 articles in the 1991 Code. As noted in the preceding pages, one of the reasons for the reduction is that the provisions related to the Generalities which were included in the second book of the 1991 Code were moved to the first book in the 2013 Code. However, a more important reason for the 'minimalist' approach of the Legislature could be attributed to its view on the applicability of the principle of legality to *Hudud* punishments. Article 15 of the 2013 Code states *Hadd* as a punishment whose cause, type, amount and way of execution are determined by Sharia. Contrary to Articles 16, 17 and 18 of the 2013 Code which emphasize the applicability of the principle of legality in *Qisas*, *Diyat* and *Ta'zirat* punishments, Article 15 does not limit *Hudud* punishments to the law but to Sharia. Furthermore, Article 220 stipulates that in cases of *Hudud* crimes not mentioned in the 2013 Code, Article 167 of the Constitution[46] applies. According to Article 167 of the Constitution, it is the duty of the judge to render the judgment, and in the absence of law, the judge has to deliver his judgment on the basis of authoritative Islamic sources and authentic *fatwas*. The text of Article 220 leaves no room for any doubt about the intention of the Legislature in non-applicability of the principle of legality to *Hudud* punishments or about any interpretation limiting the application of the provisions in Article 167 of the Constitution to civil cases.[47]

Another general observation about the second book of the 2013 Code relates to the increase in the number of *Hudud* crimes in comparison with the 1991 Code. Blasphemy (*Sab al-Nabi*) is considered as a *Hadd* crime punishable by death penalty under the Shiite *Fiqh*. Although it was not stated in the second book of the 1991 Code, Article 513 of the 1996 *Ta'zirat* Law defines the penalty for insulting the Islamic values or holy persons in the Shiite Islam and implicitly

[45] Islamic Republic of Iran signed the Convention on the Rights of the Child (1989) in 1991, which was ratified by the Parliament in 1994. Article 1: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

[46] Article 167 of the Constitution: The judge is bound to endeavor in order to adjudicate each case on the basis of the codified law. In case of the absence of any such law, he has to deliver his judgment on the basis of authoritative Islamic sources and authentic *fatwas*. He cannot refrain from admitting and examining cases and delivering his judgment on the pretext of the silence or deficiency of law in the matter, or its brevity or contradictory nature.

[47] EFTEKHAR JAHROMI, *supra* note 14, p. 97.

referred to the *Hadd* punishment for blasphemy.[48] The second book of the 2013 Code contains a chapter (Chapter 5) on blasphemy and Article 262 explicitly defines the *Hadd* crime and its relevant punishment.

Chapter 7 of the second book of the 1991 Code dealt with "*Muharaba* and Corruption on Earth" and their relevant punishment. Articles 183 to 188 covered a number of offences considered as "*Muharaba* and Corruption on Earth", the *Hadd* punishment for which is defined in Articles 190 and 191. Instead of using the general term "*Muharaba* and Corruption on Earth", the 2013 Code defines "*Muharaba*", "Corruption on Earth" and "*Baqy*" (rebellion) as three separate categories of offence and sets the specific *Hadd* punishment for each one. Roughly speaking, the offences mentioned under Articles 183 to 185 of the 1991 Code are classified as "*Muharaba*" under the 2013 Code and Articles 279 to 285 deal with their definition and punishment. Even if the term "*Baqy*" was not used in the 1991 Code, the related offences mentioned in Articles 186 to 188 of the 1991 Code have been classified as "*Baqy*" in the Articles 287 and 288 of the 2013 Code. Despite these changes in the format and separation between these three categories of offences, the main change in this respect concerns the definition of "Corruption on Earth" in Article 286 of the 2013. This article provides a broad definition for "Corruption on Earth" which introduces new offences that were not previously mentioned under the second book of the 1991 Code.[49] Moreover, Article 286 limits the punishment for "Corruption on Earth" to death penalty[50], which is different from the provisions of Articles 190 and 191 of the 1991 Code under which the judge had four options to choose as the punishment for "*Muharaba* and Corruption on Earth".

### 3. Diyat

Inequality between the amount of *Diya* for a Muslim and a non-Muslim, a long-established rule under the Sharia, and for that matter, the Shiite *Fiqh*, was considered as one of the main challenging points in the practice of courts under the fourth book of the 1991 Code. Until 2003, the 1991 Code had no provision regarding the amount of *Diya* for non-Muslims; Article 297 only referred to the amount of *Diya* for a Muslim man. In the absence of statutory provisions on the amount of *Diya* for non-Muslims, judges applied the rule of the Shiite *Fiqh* on this matter. Article 297 of the 1991 Code was amended in 2003 on the basis of a *fatwa* of the current leader of the Islamic Republic of Iran, Ayatollah Khamenei, on equality between the amount of *Diya* for Muslims and the religious minorities. On the basis of the same *Fatwa*, Article 554 of the

[48] Article 513 of the 1996 *Ta'zirat* Law: Anyone who insults the sacred values of Islam or any of the Great Prophets or [Twelve] Shiite Imams or the Holy Fatima, if considered as *Saab al-Nabi*, shall be executed; otherwise, they shall be sentenced to one to five years' imprisonment.

[49] Although the author has tried to translate the articles of the 2013 Code from the text in Persian (available on the official website of the Guardian Council), the following translation (with minor changes) is quoted from another source; MOHAMMAD HOSSEIN NAYYERI, 'New Islamic Penal Code of the Islamic Republic of Iran: An Overview', University of Essex, March 2012. Article 286 of the 2013 Code: "Any person, who extensively, commits: felony against the bodily entity of people, crimes against national and international security of the state, spreading lies, disruption in economic system of the state, arson and destruction of properties, distribution of poisonous and bacterial and dangerous materials, and establishment of, or aiding and abetting in, places for corruption and prostitution, as it causes severe disruption in the public order of the state and insecurity, or causes harsh damages to the bodily entity of people or public or private property, or causes distribution of corruption and prostitution on a large scale, shall be considered as corrupt on earth and shall be sentenced to death."

[50] Articles 282 and 283 still allow the judge the same four options for the punishment of *Muharaba*.

2013 Code recognized equal amount of *Diya* for Muslims and non-Muslims; that is, the religious minorities recognized by the Constitution.[51]

Inequality between the amount of *Diya* for a man and a woman – also reflecting the long-established rule under the Sharia and the Shiite *Fiqh* – was another challenging point in the practice of courts under the 1991 Code. With a wording similar to Article 300 of the 1991 Code, Article 550 of the 2013 Code states the general rule of the Shiite *Fiqh* that the amount of *Diya* for a murdered Muslim woman is half the amount of *Diya* for a murdered Muslim man. Also similar to Article 301 of the 1991 Code, Article 560 of the 2013 Code lays out the general rule on the amount of *Diya* for a woman in cases of bodily injury that does not cause death. According to Article 560, the amount of *Diya* for a woman in cases of bodily injury is equal to the amount of *Diya* for a man up to the point that it is one third of the full amount of *Diya* for a man, and once beyond that point, the amount of *Diya* for a woman reduces to half the amount of *Diya* for a man.

The provisions of Article 551 of the 2013 Code has somewhat changed the partial inequality between the *Diya* of man and a woman. As stated in the Note of Article 551: "In all cases of *Jenayat* where the victim is not a man, the difference between the amount of *Diya* and the amount of *Diya* for a man shall be paid from the Fund for Compensation of Bodily Harm."[52] Given this provision, the amount of *Diya* for a woman in case of homicide is practically equal to the amount of *Diya* for a man under the 2013 Code, but the applicability of Article 551 to cases of bodily injury is a matter of question. Use of the term *Jenayat* in Article 551 deserves some scrutiny; the term had been used by the Legislature in other parts of the fourth book for both the actions that result in death and the actions that cause bodily injury but do not cause death. Therefore, the rule of Article 551 could be applicable to both cases and consequently the answer to question on the equality of *Diya* for both men and women in cases of bodily injury is positive. The very fact that Article 551 is under the first chapter of the second part of the fourth book on the *Diya* for homicide which immediately follows Article 550 on the amount of *Diya* for a woman in homicide cases undermines the validity of this interpretation. However, Article 560 on the amount of *Diya* for a woman in cases of bodily injury is included in the next chapter on the Generalities of the amount of *Diya* for bodily injury. Therefore, it is not easy to give an accurate answer to the questions on the equality of *Diya* for both men and women in cases of bodily injury and the actual practice of courts under the 2013 Code will provide a more precise answer.

# IV. Conclusion

The present paper has discussed the legislative history analysis of Islamic criminal law in Iran during the past three decades. The legislative history of criminal law in Iran could be divided into two eras; the first era dates back to the Constitutional Revolution and the establishment of Parliament in 1906 – which came to an end in 1979. The 1925 General Penal Code, the second penal code enacted in this era, which had been inspired in large measure by the French system

[51] Article 13 of the Constitution: Zoroastrian, Jewish, and Christian Iranians are the only recognized religious minorities, who, within the limits of the law, are free to perform their religious rites and ceremonies, and to act according to their own canon in matters of personal affairs and religious education.

[52] NAYYERI, *supra* note 49, translation of Article 551 of the 2013 Code (with a minor change).

and the Napoleonic Codes, was in force for more than half a century. This Code recognized and categorized offences on the basis of secular norms. Following the 1979 Revolution and replacement of the 1906 Constitution with the Constitution of the Islamic Republic (1979), the overall approach of the legislature underwent fundamental change; conformity of the laws with Islamic rules and norms became the overriding objective. Therefore, Islamic criminal law became the basis for definition of crimes and their classification in the new era – starting from 1979 onwards. Contrary to the predominantly secular 1925 Code, Islamic law came to shape the framework and substance of the Islamic Penal Codes of 1991 and 2013. As discussed in the earlier part of the paper, a review of the history of the post-1979 criminal law legislation clearly indicates that the Guardian Council, the highest body for monitoring and supervision of all legislation in the land, has exercised its authority over the laws passed by the Legislature (Majlis/Parliament) in order to ensure strict compatibility with the rules and norms of the Sharia.

The comparison between the respective provisions in the 1991 and 2013 Islamic Penal Codes – in the third part of the paper – shows that the main distinction between the two Codes is to be found in the organization of the latter, especially as relates to the Generalities. The organization of the first book of the 2013 Code shows an improvement; the Generalities have been enhanced in terms of general criminal law. On the contrary, the organization of the 2013 Code in the related part to special criminal law and the classification of crimes which is based on Islamic criminal law – in books on *Hudud*, *Qisas* and *Diyat* punishments – have not changed considerably. In addition to certain changes in the format, the content of the 2013 Code has undergone partial change in the first, second and fourth books. The most substantial changes in the content of the first book could be summarized under two topics; the provisions related to the Generalities of *Ta'zirat* punishments and the new regime in respect of Correctional Measures for Minors. Stipulation of the provision on non-applicability of the principle of legality in *Hudud* punishments, introducing Blasphemy as a *Hadd* crime and re-classification of *Hudud* crimes of *Muharaba*, Corruption on Earth and *Baqy* can be considered as the main changes in content of the second book. Finally, the most important changes in the content of the fourth book are to be found in the provisions on equality between the amount of *Diya* for a Muslim and a non-Muslim and the provision related to equality between the amount of *Diya* for a man and a woman. The analysis of these changes and their rationale leads us to a similar conclusion in all the instances; the 2013 Code has tried to address and solve – at least – some of the problems that had arisen during the practice of the 1991 Code through designing a number of innovative and practical mechanisms without crossing the boundaries of Sharia or changing the basis, framework, characteristics and features of the 1991 Code.

Reintroduction of Islamic criminal law – after the experience of a secular penal code – as reviewed in this paper in the case of Iran, has not been a unique experience in the Muslim world. The first such experience occurred in Libya during the early years of the rule of Colonel Qaddafi (1972-1974). Since then Islamic criminal law has been enacted in a number of Muslim countries including Pakistan, Sudan, and also in Northern Nigeria. From the beginning of this process, a wide range of questions, including with respect to the rationale for the recourse to Sharia, efficacy of the new type of legislation in modern, complex societies, and also with regard to human right considerations, have been raised at the public level and extensively discussed in the relevant literature. Following three decades of actual practice, it is now quite evident that the Iranian experience with the Islamic criminal law legislation, which could be

considered the most articulated and comprehensive Sharia-based body of legislation in the entire Muslim world, has encountered a range of difficulties, uncertainties and controversies. The very fact that the 2013 Code was adopted on a tentative basis for an interim period of 5 years confirms this point. Finally, the practice of courts during the next 5 years will probably provide us with a clearer picture and possibly better answers to the outstanding questions in this area: Will the interim period of the 2013 Code be further prolonged on interim basis – similar to the 1991 Code? Will the Legislature (and the Guardian Council) succeed in articulating a permanent Islamic Penal Code? And will the enacted changes adequately respond to the actual needs of the judiciary system in order to administer justice?