

THE LEGISLATIVE- JUDICIAL APPROACH BASED ON TOLERANCE IN RESPONSE TO JUVENILE CRIMES IN IRANIAN CRIMINAL JUSTICE SYSTEM

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Following to approval of Islamic Punishment Act (2013), attitude of Iranian legislator was oriented toward accepting tolerance for juvenile delinquents and this approach has been accepted and also systematized with respect to different age groups and separation of types of responses in terms of tolerance level from zero to perfect tolerance. Legislator's response will be also different according to type of crime and age of perpetrator. In discretionary crimes, security and probative measures and mitigated punishments are enforced to this class of persons according to age of perpetrator (ages 9-15 and older in the ages 15-18). Regarding crimes deserving to punishment and retaliation, these generally unchangeable punishments such as Islamic punishment and retaliation may be waived under some conditions and judges of courts will issue award based on age of perpetrator in making decisions according to security and probative measures and/ or mitigated punishments based on detention in house of correction and by other alternative punishments such as public services for free and payment of fine in cash. This legal and judicial approach, which can be also interpreted in literature of criminology based on tolerance attitude, has practically caused several challenges particularly in breach of retaliatory punishment. Referring to numerous challenges in this essay, some judicial awards are also analyzed in addition to review and evaluation of legal approach

Keywords: Age of criminal liability, Perfect tolerance, Relative tolerance, Zero tolerance, Legislative- judicial approach, Penal maturity

1 Introduction

In order to fight against ever-growing increase of hostility at 1990s, USA has taken zero tolerance penal policy that derived from well-known theory of Broken Windows. This policy was a response to citizens' concern for security of schools, campaign against carriage of weapon and drugs, and antisocial behaviors. This policy is mainly focused on discovery of all and punishing the crimes with sever punishments. In contrast to approach based on lack of tolerance and/ or zero tolerance¹ in criminal laws sometimes delinquents are sentenced in determination of punishment for some tolerances and/ or indulgences such as cases for juvenile delinquents. Therefore, the basic paradigm of zero tolerance policy is that the crime is not created by disorder but crime is generated due to tolerance and indulgence toward small diversions and social impoliteness. If citizens of a community and their authorities ignore mitigated crimes and small mistakes, this may be led to creation of order in the given region and locality so that if it is supposed that locality or group has no owner in opinion of some scholars in order to give response to diversions and misleading. Along with the given tolerance, this attitude which is mainly taken by police and responsible institutes for fighting against disorder, the other type of tolerance may be assumed within responses given to crimes determined by the courts. This type of tolerance about juvenile delinquencies needs to be analyzed per se so that by anticipation of security and probative measures regarding children and adolescents, to what extent the legislator has taken tolerance and approach and how much such tolerance is consistent with juristic attitude of waiving of punishment from children. Accordingly, it is also tried to present analysis within review of range and level responsiveness for children and adolescences conflicting to law in rate of their tolerance to them and criminal liability are integrated in this analysis. Looking at Articles 88-95 of Islamic

Punishment Act (2013), one can draw triple- range relating to level of tolerance: first, *perfect tolerance* denotes lack of criminal liability, second, *relative tolerance* is classified by age so it can be called as tolerance in criminal response or criminal tolerance with respect to medical aspects. Third mode² can be also mentioned within framework of *zero tolerance* and with concept of potential for determination of criminal responses which can deserve to enforcement of Islamic punishment and retaliation in such crimes and this is assumed as a principle if some conditions satisfy these principles may be breached while judge of court shall replace alternative punishment with them, that depend on age of person with more mitigated punishments compared to Islamic punishment (*Had*) and retaliation (*Ghésas*).

2 Zero response and perfect tolerance (100%)

The minimum age of criminal liability is considered as zero in 23 countries of the world. In other words, in some countries no minimum age has been anticipated for criminal liability in these countries and children at any age will be punished in the case of perpetration of crime. In some countries have tried to determine minimum age for criminal liability in their reports proposed to UN Committee of Children's Rights based on some of their domestic laws but this committee has concluded in their accurate investigations that there is also potential for enforcement of punitive reactions to children at ages younger than the given ages in rules of these countries and for this reason that age has not been accepted as the minimum age for criminal liability in those nations. For instance, Bahrain is one of these countries. In their report that had been proposed by Bahrain to Committee of Children's Rights this country declared that by virtue of Article 32 of Punishment Act (1976) of this country, the minimum age was 15 years for criminal liability but the committee concluded in their investigations that the given age of 15 years was in fact age of completion of criminal liability and it was the age after which the person possessed full criminal liability. However, there are some cases in laws of this country that has provided potential for enforcement of punitive reactions to children under age of 15 years as well.³

In Iranian Criminal Acts according Article 147 of the Islamic Punishment Act (2013), the age of maturity is determined nine and fifteen lunar years respectively for girls and boys.⁴ Two different systems have been designated for discretionary punishments (*Tāzir*) and other punishments and the latter one is that the various reactions have been considered according to type of committed crime and age group of perpetrators in the field of discretionary punishments. Two types of crimes deserving to discretionary punishment and *Islamic Punishment (Had)* and *Retaliation (Ghésas)* and should be distinguished from each other based on tolerance and they should be dealt with in this regard since there is not noteworthy change in liability caused by perpetration of crimes deserving for *blood money (Diyéh)* by children in Islamic Punishment Act (2013).⁵

¹ Theory of zero tolerance (which was proposed by Wilson and Kelling) and theory of broken window are complementary to each other.

Zero tolerance

Cunneen, C. (1999) 'Zero tolerance policing: how will it affect indigenous communities?', *Indigenous Law Bulletin* (available online at <http://www.austlii.edu.au/au/cgibin/disp.pl/au/journals/ILB/1999/22.html?query=zero%20or%20tolerance%20or%20policing#fn1>).

Dennis, N. (ed.) (1997) *Zero Tolerance: Policing a Free Society*. London: IEA Health and Welfare Unit.

Muncie, J. (1999) 'Institutionalized intolerance: youth justice and the 1998 Crime and Disorder Act', *Critical Social Policy*, 19: 147-75.

Wilson, J. and Kelling, G. (1982) 'The police and neighborhood safety: broken windows', *Atlantic Monthly*, March: 29-38.

² The first step was taken for determination the lowest age of criminal liability in bill for proceeding of juvenile crimes in which gradual system of criminal liability of children was anticipated as follows: a) up to age of 9 exempted from criminal liability; b) ages of 9-12 with probative- corrective responses; c) 12-15 years by probative-punitive responses; and d) 15-18 years with mitigated punitive responses (Savadkoohifar, 2009: 252).

³ Sabooripour, Mehdi, & Fatemeh Alawi Sadr (2015), Age of criminal liability in children and adolescents in Islamic Punishment Act, *Research Journal of criminal law*, 6th year, vol. 1.

⁴ Fathi, Hojatollah (2009), *Criminal liability of children by an approach toward bill of Islamic Punishment Act*, *Islamic law*, Vol. 21, pp. 81-104.

⁵ It should be noted that by virtue of Clause B of Article 292, like the past time crimes committed by children are assumed as examples of offences of simple faults and the *sponsored relatives* (guardians) should be originally responsible for payment and compensation of blood money to these crimes and also in accordance with articles in fourth chapter of book of *blood monies (Diyéh)* in Islamic Punishment Act (Article 462 and so forth).

In Iranian criminal law, maturity age⁶ deserves for retaliation and Islamic punishment as criterion for distinguishing type of punishments. In Article 147 of Islamic Punishment Act, 'age of maturity has been determined total nine and fifteen lunar years in girls and boys respectively.' Based on calculation of Iranian calendar year, every 9 lunar years are the same as 8 years and 9 months and also every 15 lunar years are equivalent to 14 years and 7 months in Iranian calendar year because any lunar year is ten days shorter than one Iranian calendar year (solar year). Although this age of maturity has been deemed as age of criminal liability in Law, it can be found that Holy Quran has addressed both physical growth and spiritual and rational growth regarding subject of maturity so it has not determined specific age for criminal maturity and as age of liability.⁷ Similarly, it requires nothing this point about subject of criminal tolerance that according to statement of juristic sources, a child is assumed in career of undiscerning child from birthday to age of seven that considered as phase before age of discernment and majority of Islamic jurists and scholars agree in this period and determination of given age and they argue that during this period child has no penal and criminal liability at this period⁸ in whatsoever and s/he may not be punished under title of correction and probation with the specific concept of this term at all and *undiscerning child* lacks competency similar to insane in this period and it has been implied the minority (infancy) is one of consequents and it is not required for human nature while minority is opposed to competency and if a minor perpetrator commits crimes s/he does not deserve to be subject to enforcement of Islamic or discretionary punishments. Of course, s/he is liable for his/her properties in terms of civil case if s/he causes loss to someone else. Thus, although legislator has mentioned absolute order for this age in Provision 2 of Article 88 of Islamic Punishment Act and it covers any age under age of maturity, it seems that one can consider a minimum age to assume relative liability as total 7 years by taking examples from juristic guidelines and the period under this age to be included in total and perfect tolerance.

By virtue of Articles 88 and 89 of the aforesaid law, the criterion of maturity age is determined according to age in Iranian calendar year (solar year) for crimes deserving for discretionary punishment in which if the perpetrator of a crime is at age of total 18 years (solar years) s/he will be treated as an adult in trial and punishment while at lower ages than 18, type of response depends on this point if his/ her age is 9-12 years, 12-15 years, and/ or older than 15 years before completion of age 18 and also type of response will vary in terms of intensity of discretionary crime.

As a result, if perpetrator of crime is at age lower than total 9 solar years upon commitment of crime deserving for discretionary punishment, no decision may be made regarding him/ her and legislator has determined total 9 solar years as the minimum age needed for response to discretionary crimes. Such an approach toward discretionary crimes (Tāzir) is considered as a type of absolute tolerance and kind of zero response while if the same person⁹ is at age lower than maturity age (15 lunar years for males and 9 lunar years in females) and deserves for Islamic punishment of a crime one can take certain probative measures for him/ her so this will be discussed in the following.

3 Relative tolerance with medical measures

With respect to the same criteria to distinguish age of liability based on type of crimes and dual approach taken by legislator regarding discretionary crimes (Tāzir) on the one hand and the

crimes deserving to Islamic punishment (*Had*) and retaliation (*Ghésas*) on the other hand, relative tolerance can be also distinguished according to type of committed crime.

3.1 Crimes deserving for Islamic punishment and retaliation (*Had*) and (*Ghésas*)

With respect to Provision 2 of Article 88 of Islamic Punishment Act, this relative tolerance may be classified with age levels of immature persons with ages lower than 12 years and also immature ones at ages 12-15 lunar years because by virtue of this provision, 'if an immature person commits one of crimes deserving to Islamic punishment and retaliation and s/he is at ages twelve to fifteen lunar years, s/he will be sentenced to one of the measures stipulated in Clauses (D) and/ or (E) otherwise one of the specified measures will be taken against given person listed in Clauses (A) to (C).'

3.1.1 Immature younger than 12 years: The main regulations of the governing legal system over perpetration of crimes deserving for *Islamic punishment (Had) and Retaliation (Ghésas)* committed by person under age of 18 have been mentioned in Provision 2 of Article 88 and Article 91 of Islamic Punishment Act (2013). Provision 2 of Article 88 of Islamic Punishment Act (2013) held that if an immature person who is at age group (12-15 lunar years) commits crime deserving to Islamic punishment or retaliation, s/he will be sentenced to enforcement of one of the aforesaid measures in Clauses (D) or (E) of Article 88 (i.e. respectively warning and notice or taking written pledge to not to repeat the given crime and attachment in house of correction for 2-5 years). If immature perpetrator of these crimes is at age lower than 12 years, s/he will be sentenced to one of the measures listed in Clauses (A) to (C) of Article 88 (with corrective, probative, and attentive nature) according to the following part of this provision.¹⁰

Primarily, unlike discretionary punishments regarding age group under 9 years for which no reaction has been anticipated as potential for enforcement, at least theoretically there is this possibility about crimes deserving for Islamic punishment and retaliation that the judge may take one of the reactions to them listed in Clauses (A) and (C) of Article 88. This impression is derived from the contents of Provision 2 of Article 88. It is noted that the first part of this provision holds that if immature perpetrator of a crime deserving for Islamic punishment or retaliation is at age of 12-15 years, s/he will be sentenced to the listed responses in Clauses (D) and (E) unless otherwise the given reactions in Clauses (A) to (C) will be enforced. Here term '*otherwise*' refers to an assumption that immature perpetrator of crime is under age of 12 given any minimum age has been designated for this type of reactions. As a result, if a child committed discretionary crime under age of nine, s/he will never be subject to reaction by criminal justice system and even no corrective and attentive measures have been also anticipated for this child. However, in the case of perpetration of crimes deserving for Islamic punishment or retaliation by this child, it is possible to enforce the given corrective and attentive reactions for him/ her listed in Clauses (A) to (C) of Article 88.

3.1.2 Immature at age (12-15): The first part of this provision is exclusively enforced for boys because the given subject is immature at ages (12-15 years). Whereas according to Article 147 of this act, a girl at age older than 9 is assumed as mature therefore immature at age (12-15 years) listed in this provision is exclusively immature male, as a result, there is some difference among girls and boys in this regard: the girl at age older than total 9 lunar years will be sentenced to Islamic punishment or retaliation if she has committed crime deserving for Islamic punishment or retaliation as the case requires and provided ascertainment of the stipulated conditions in Article 91 but as long as a boy is under age total 15 lunar years he will be sentenced to one of the given attentive and punitive measures and reaction in Article 88 instead of Islamic punishment or

⁶ Nobahar, Rahim (2012), Age and criminal liability: Revision of well-known theory of Shiite jurists, Research Journal of criminal law, vol. 6

⁷ To confirm this comment, see also Mir Mohammad Sadeghi, Hossein, Crimes against properties and ownership, Mizan Pub, thirty fifth Ed., autumn 2013, pp. 271-272.

⁸ It is because of the fact that the Islamic jurists have only designate this age for children older than 7 years based on some narratives about discretionary punishment. For example, see also Khoei, Seyed Abolghasem, *Fundamental in completion of book of Menhaj*), translated by Alireza Saeed, vol. 2, p. 114. Quoted from Mir Mohammad Sadeghi, Hossein, Ibid, p 271

⁹ Provision of Article 88

¹⁰ - Sabooripour, Mehdi & Fatemeh Alawi Sadr, Op. cit., p 85

retaliation. Thus, the basic defect is in that there is no specific minimum age for the child to determine opposite concept of this article to age before maturity since starting at birth and therefore the immaturity level has not been specified in Islamic punishment and retaliation.

The question that may be raised about Provision 2 of Article 88 of Islamic Punishment Act (2013) is that in comparison with the similar regulations in previous Islamic Punishment Act, if this provision is more favorable in terms of type of response and is it more compatible with scientific objectives of criminal justice for the juveniles? In Islamic Punishment Act (1991), immature boys that committed crime deserving for Islamic punishment or retaliation, were included in general order listed in Article 49 by which they were exempted from punishment and their probation was subject to decision of court for which guardian of children was responsible or duly by house of correction for the juvenile.¹¹ As a result, court might deliver male adolescent under age fifteen years to his family that committed crime deserving for Islamic punishment or retaliation and/ or send him to house of correction for juveniles for some period. According to Islamic Punishment Act (2013) such a person will be sentenced to sending to house of correction based on discerning of judge and with respect to his age and/ or he will be subject to enforcement of more mitigated reactions such as warning and notice by judge for his case.¹² Consequently and unlike what it seems prima facie, Provision 2 of Article 88 has not too changed in criminal reaction to children committed crimes deserving for Islamic punishment or retaliation while former Islamic Punishment Act had approximately anticipated the same reactions to such delinquent children as well.

3.2 Crimes deserving to discretionary punishment (Tāzir)

Depending on age of perpetrator of discretionary crime and type of committed discretionary crime, the degree of tolerance by legislator is reduced by increase in age of perpetrator and intensity of committed discretionary crime in Islamic Punishment Act where distinguishing of this process will be discussed in the following.

3.2.1 Age group (9-12 years): Article 88 of Islamic Punishment Act (2013) has held that children at ages (9-15) will be subject to one of the listed decisions in Clauses (A) to (E) of this article if they commit discretionary crimes. However whereas according to Provision 1 of this article, the given decisions in Clauses (D) and (E) are only enforceable regarding children and adolescents (12-15 years) thus the applicable measures concerning age group (9-12 years), are exclusively specified to the cases listed in Clauses (A) to (C) in this article.

Substantially, reactions legislator has anticipated for this age group include remedial- probative aspect.¹³ Technically, this article denotes that the child at age under 9 may not be subject to any decision made in criminal justice system even probative and attentive decisions. In other words, these children may not be tried criminally and in this regard stance of Islamic Punishment Act (2013) differs from the previous Islamic Punishment Act because according to Article 49 of that act, children were acquitted from criminal liability but according to attitude of the court, their parents were responsible for training of them and duly by house of correction for juveniles. As a result, no

minimum age has been designated in previous law for attendance in criminal court. However in Islamic Punishment Act (2013), no reaction and even correction or probation is anticipated for children under age of 9 years and this means these children may not be criminally tried. Consequently, there is no legal permission for physical punishment of them as well.

3.2.2 Age group (12- 15 years): Concerning to age group (12- 15), legislator has shown stronger measure and provide this potential that rather than aforesaid probative reactions in previous clause to enforce some probative- punitive measures versus them as well. According to Provision 1 of Article 88, in addition to the given measures in previous clause, child or adolescent at age (12-15 years may be also included in anticipated measures in Clauses (D) and (E) in this article. Particularly, the given reaction in Clause (E) comprises of detention in house of correction for three month to one year includes strong punitive aspect.

The following part of this provision has increased stronger measure versus this age group and it held that if these children and adolescents commit 1-5th order discretionary crime they shall be necessarily sent to house of correction for 3 months to 1 year and the judge may not consider another reaction for them such as delivery of them to competent persons or giving warning and notice and taking pledge for non- repetition of crime.

In Article 88, legislator has employed phrase of 'children and adolescents' at age between 9 and 15 years while only term 'Children' had been used in this article before final approval of this law and in the proposed bill to IRI Parliament. As a result, subject of offered bill in Article 88 was only concerned with boys because a girl at ages between 9 and 15 has passed from the given presumption of maturity in Article 147 and she is no longer assumed as child. However, use of more extensive term of 'children and adolescents' in Article 88 approved in Parliament, this subject includes both of girls and boys. With respect to these issues, a girl who has passed the age of maturity has become fully criminal liable according to well-known comment of Shiite jurists as long as she has not passed total age of 15 years if she commits discretionary crime will be exposed to the mitigated reaction similar to her male cohorts. This important change has removed some part of defect given about the former laws in terms of discrimination between girls and boys in respective of criminal liability.

4 Lack of criminal tolerance (zero tolerance) with potential for determination of mitigated criminal responses in discretionary crimes at age group 15-18

After passing age of 15 until reaching to 18 years old, those girls and boys who commit discretionary crimes will be subject to Article 89 of Islamic Punishment Act (2013). It has been held in this article that the offenders at this age group will be sentenced to one of the punishments listed in that article depending on type of crime in which the most severe case of these punishments is to attachment of criminals in house of correction for five years and also the most mitigated one is to pay fine in cash.

This age group i.e. adolescents at age 15-18 years, are those ones who are placed within in limbo resulting from difference in definition of child in domestic laws and international documents. From perspective of international documents, the foremost one of them discussed in present essay is about convention of children's rights based on which child is someone at age under 18. However, in terms of Iranian domestic laws, the highest age at which one can be called as child is full age of 15 lunar years (fourteen solar years and seven months) which are also specified to the male children.

There was no specific regulation for this age group (15-18 years) in former Islamic Punishment Act and these persons possessed full criminal liability. However, Islamic Punishment Act (2013) has anticipated specific sanctions for the age group and made them to obey a system different from the adults (persons older than age 18). Although legislator has not increase explicitly age of criminal liability, he has extended range of his probative and corrective supports by anticipation of gradual system of criminal

¹¹ Mehra, Nasrin (2006), Iranian criminal rules and regulations versus delinquent juveniles: Present and future, Specialized Journal of Theology and Law, vol. 20

¹² It is surprising that legislator gave right of option about adolescent (12-15 years) perpetrator of crime deserving for Islamic punishment or retaliation so that according his discerning he can sentence perpetrator to detention in house of correction or to give warning and notice to him and to take pledge for non- repetition of given crime. However, by virtue of the following part of Provision 1 of Article 88, if this adolescent commits 1-5th order discretionary crime, s/he shall be necessarily sent to house of correction and no more mitigated reaction may be assumed for this person. Consequently, fast and firm reaction of legislator versus this age group regarding 1-5th order discretionary crimes are higher than Islamic punishment and retaliation. The wise hint of this decision is hidden to the author and it seems that in this regard legislator has tarnished tolerance frameworks and the related systematization.

¹³ Article 1 of convention of child's rights: according to this convention, child is assumed as a human under age of 18 unless age of maturity is deemed as smaller in accordance with applicable law concerning child.

liability and developed these supports up to level of inclusion of person under age eighteen who may not be called as child with any inference from jurisprudential sources. Paying attention accurately to method of choosing equivalents of discretionary punishments for the persons between ages 15 and 18 in Article 89 of Islamic Punishment Act (2013) may indicate this fact better. For example, it has been held in Clause- A of Article 89 that an adolescent perpetrator of 1-3rd order discretionary crime will be sentenced to attachment in house of correction for two to five years. Consequently, detention in house of correction for 2-5 years has been replaced with 1-3rd order discretionary punishments. The least period of discretionary punishment is ten years of confinement for this case and longest period of discretionary imprisonment is life confinement as well. As a result, legislator has replaced attachment in house of correction of age group (12-15) for 2-5 years with confinement for more than 10 years to life confinement so this represents turning around from punishment and punitive- centered approach of legislator and his attention to corrective and probative attitude regarding this age group.

5 Lack of tolerance and determination of punishment in crimes deserving for Islamic punishment and retaliation

Based on jurisprudential teachings and legal criteria as children go to age of maturity they will be included in Islamic punishments and retaliation with no enforcement of tolerance. Therefore, it is stipulated originally to focus on zero tolerance concerning such committed crimes at age of maturity unless the conditions take place legislator has anticipated in Article 91. Under this condition, perpetrator will be included in policy of relative tolerance listed according his/ her age. It is referred to details of this article to interpret judicial challenges in the following.

5.1 Age of entry in liability based on nature of response

Maturity of perpetrator is deemed as a condition for inclusion of punishment in crimes deserving for Islamic punishment and retaliation and age of extension of Islamic punishment and retaliation for maturity is full age of 9 lunar years for female and full age of 15 lunar years in males while the condition for extension of these punishments in Article of Islamic Punishment Act is to ascertain some preliminary conditions for criminal liability. Unlike Provision 2 of Article 88, Article 99 of Islamic Punishment Act (2013) has seriously transformed criminal reaction to adolescent perpetrators of crimes deserving for Islamic punishments or retaliation. In this article, three statuses have been introduced as factors to waive Islamic punishment or retaliation and it has required the judge to sentence the perpetrator to one of the given discretionary punishments in this chapter based on his/ her age group instead of Islamic punishment or retaliation. These three statuses are as follows: a) non perception of nature of committed crime by perpetrator; b) non- perception of forbidding nature of committed crime by perpetrator; and c) suspicion in growth or rational perfection of perpetrator where by each of these conditions the given adolescent will be included in status of lack of criminal maturity (growth).

As a result, a girl or boy under age of eighteen that committed crime deserving for Islamic punishment or retaliation and one of above-said conditions is applicable to him/her, will be sentenced to the anticipated punishments in this chapter with respect to his/ her age. Unlike Articles 88 and 89, it has not been identified in this case that if age of 18 is in lunar or solar years. However, with respect to governing spirit over this law, legislator has move toward international documents and considered 18 years as criterion age while it seems 18 years is here refers to solar years (18) since on the one hand judicial approaches in different cases result in confirmation of this age and at the same time more development of this age based on accepting solar years than in lunar years is assumed as interpretation in favor of adolescent. Moreover, task of counting level of solar age seems to be as a burdensome duty for judges in judicial approach even though

many judges may calculate age of maturity as 9 and 15 solar years and ignore a few months as difference.

In addition, two points should be noticeable regarding this article: firstly are those considerations which caused waiver of Islamic punishment or retaliation so strong and credible to cause annulment of discretionary punishment stipulated in Article 89 as well? For example, if a person under age eighteen may not be sentenced to *Islamic punishment* (Had) because of suspicion in perfection of his/ her rationality so that is it logical to sentence that person to discretionary punishment (Tazir)? On the other hand, was not Islamic punishment stipulated only for that person while now it has been waived because of exiting suspicion so that based on which logic this punishment has been replaced with discretionary punishment? Basically, is it possible to sentence someone there is suspicion for perfection of his/her rationality out of stipulated types of punishment in Article 89 albeit of discretionary one?

Secondly, type of reaction has been left ambiguous in Article 91 and legislator has sufficed to issuance of a general order without confirmation for waiving of Islamic punishment or retaliation (of course, waiver can be inferred from them of this article) in that perpetrator with respect to his/ her age to be sentenced to anticipated punishments in this chapter. Now this question is raised that as legislator refers the case of given punishment in this chapter at Article 91, which of these three¹⁴ types of measure he has taken into consideration. Two comments may be proposed concerning to these two comments: First is that it depends on this point the perpetrator of crime deserving for Islamic punishment or retaliation is at what age so one type of above-said measures will be applicable to him/ her. Namely, if perpetrator is at age group (9-12 years), the reactions listed in Clauses A to C in Article 88 are applicable and if s/he is at age group (12-15 years), the reactions existing in Clauses D to E of Article 88 are made, and if s/he is at age group (15-18 years), the measures as subjects of Article 89 from Islamic Punishment Act will be enforced to him/ her. Legislator's emphasis in Article 91 about this point that reaction should be proportional to age perpetrator may seem reasonable in this regard. However, according to another attitude, defect of this statement is in that the legislator explicitly explains about punishment of perpetrator in Article 91 while this legislator has deliberative and knowingly avoided from use of term 'punishment' regarding given reactions in Article 88 and employed term 'decisions' about them. Therefore, as a conclusion it can be commented that if the stipulated conditions in Article 91 do not satisfy, the given person will be sentenced based on his/ her age to each of asserted cases in Articles 88 and/ or 89. Thus, this ambiguity of about term of 'punishment' can be answered in this way that according his opinion at time of perpetration of behavior deserving for Islamic punishment or retaliation what is enforced is the punishment and this punishment covers decisions stipulated for adolescent (9-15 years) and punishment held for them at age (15-18 years) per se accordingly and for them. In other words, legislator has intended to show his ambiguity and also difficulty in avoidance from emphasis in punishment as Islamic punishment and retaliation.

5.2 Penal - judicial policy based on new approach of legislator in determination or waiving Islamic punishment and retaliation

Concerning determination of punishments based on Islamic punishments and retaliation in mature persons under age of 18 solar years, legislator has anticipated some conditions for stipulation of criminal liability to these persons. At this part of

¹⁴ Three classes of reactions have been designated for juvenile perpetrators of crime in this chapter: first includes children and adolescents at ages (9-12 years) as perpetrators of discretionary crimes that are exposed to the reactions given in Clauses A to C in Article 88. Secondly, those children and adolescents at age of (12-15) that committed discretionary crimes or ones deserving for Islamic punishment or retaliation that encountered given reactions in Clauses D and E in Article 88. Thirdly, the group of adolescents at ages of (15-18) that committed discretionary crimes that are exposed to the listed punishments in Article 89 and these punishments have been also classified according to degree of committed crime.

given conditions which are discussed under title of basics of criminal liability for crimes deserving to Islamic punishment and retaliation in order to identify for which conditions the adolescent perpetrator may be qualified for punishments and how one can determine and enforce criminal liability to the juvenile perpetrator caused by committing crimes that deserved for Islamic punishment and retaliation. It is crucially important to interpret judicial- penal policy in this regard because juvenile courts are practically exposed to many challenges in relation to enforcement of Article 91 of Islamic Punishment Act.

Before detailed interpretation of these topics in the following, it should be noted that legislator has referred to condition for inclusion of deserving for Islamic punishment in Article 217. By virtue of this article, 'in crimes for which Islamic punishments are applicable, perpetrator will be liable if rather than knowledge and intention for crime, has known the conditions for criminal liability toward legal prohibition of the committed practice as well.¹⁵ Maturity of perpetrator is one of the conditions of criminal liability in crime deserving for Islamic punishment; therefore, according to this article if the person is mature s/he is liable if s/he has committed a crime both knowingly and deliberately and despite of knowing legal prohibition of the aforesaid offence. Accordingly, presentation of full criminal liability for this person requires primary ascertainment for recognition of individual liability in which these basic conditions have been predicted both for crime deserving to retaliation and one deserving for retaliation in Article 91.

Here, rational growth means criminal maturity that to reach to the age given person possesses faculty of full recognition and discerning of goodness and evil of actions and perceiving legal and legitimate commands and prohibitions. It can be implied in criminal rules of our country that it has been for the first time this issue has been addressed in Article 91 of Islamic Punishment Act and mainly this subject has been discussed in juristic and legal books typically as 'civil maturity' i.e. faculty of recognition of benefit and loss and wisdom for sustenance and addressed by lawyers and jurists. Following to approval of Islamic Punishment Act 2013 and enforcement of this law regarding Islamic punishments and retaliation for persons under age 18 this subject was one of the equivocal topics in judicial field during recent years although it is stipulated perfection of rational growth for the children after reaching to age of religious maturity, by virtue of given article if there is suspicion about rational perfection and growth of persons under age 18, Islamic punishments and relation will not be enforced to them. Similarly, based on this law, discretionary punishments differ for person under age 18 compared to ones older than age 18. Likewise, the subjects under age 18 have not been sentenced to imprisonment and they are transferred to probative centers such as house of correction.

6 Discussion and conclusion

In Islamic Punishment Act 2013, in crimes deserving for discretionary punishment (Tāzīr) as well as Islamic punishment and retaliation ((*Had*) and (*Ghēsas*)) committed by children and adolescents, level of tolerance varies separately in recognition of liability and responsiveness. If crime is of discretionary type, tolerance is either perfect and full or relative tolerance. In Full and perfect tolerance, as a person is under age 9 when committing a crime according to legislator's statement and practical procedure of courts, no measure can be taken versus the perpetrator in such a way that basically court may not enter into the justice cycle. Relative tolerance also begins when a person is at age 9 years (in solar calendar) and it is continued before the

end of full age of 18 solar years and by virtue of Article 89, security measures are taken for the given subject at age (9-15 years) and responses given to that subject based on mitigated punishments after age 15 and before the end of age 18 totally whether the perpetrator is male and/or female.

Similarly, tolerance is capable in crimes deserving for Islamic punishments and retaliation or in the case of relative tolerance and/ or zero tolerance and the legislator has anticipated solution to escape from zero tolerance for punishment in Article 91 of Islamic Punishment Act in such a way that 'regarding crimes deserving for Islamic punishment and retaliation, if essence of crime has been committed by persons under age 18 and/ or they do not perceive prohibition of that crime and/ or there is suspicion about growth and full wisdom in them as it requires and with respect to their age they are sentenced to the punishments anticipated in this chapter¹⁶.' Thus, there is still potential for enforcement of retaliation on persons under age 18 in Islamic Punishment Act and given that Iran has signed international convention of children's rights on 05/09/1991 and it has been ratified by IRI Parliament on 20/02/1992 and according to Article 37 of this convention, it is forbidden to enforce death punishments long- term imprisonments and life confinement without potential for freedom for children under age 18, it seems this process is defective especially it is inferred from body of Article 91 that it principally based on presence of faculty of perception and discerning while the reverse fact should be proved; namely, adolescent should be responsible for proving this cause. Thus, in this regard as level of tolerance approaches to zero, it may deal irrecoverable blow to the adolescent. Nonetheless, number of execution awards is practically very few in terms of retaliation and forensic center usually issue award in favor of adolescents and assumes them as qualified for terms of suspicion and lack of penal maturity and consequently makes them exempted from Islamic punishment or retaliation.

The other point that is duly implied concerning tolerance is the orientation of tolerance. At present, it is not obvious in judicial approach that if the judge intends to sentence perpetrator to the given discretionary crimes in Article 89 after waiver of Islamic punishment and retaliation, which discretionary punishment should be assumed as criteria by him. Has the judge absolute freedom of action and can he enforce each of discretionary punishments as he likes? It does not seem the positive answer to this question can put forth a favorable solution for us because under this condition, a lot of disorder will take place in judicial procedure. On the other hand, how can one accept the legislator to determine exactly type of criminal reaction to the children in discretionary punishments as it already mentioned while such a freedom of action is given to the judge in Islamic punishment and retaliation? These are some ambiguous cases derived from Article 91 of Islamic Punishment Act and legislator has issued general award of Article 91 regardless of them. In fact, legislator's focus on justification of implicit tolerance of Islamic punishment or retaliation in this article has caused the judge to fail in paying due attention adequately to the punishment that will be replaced with Islamic punishment or retaliation and he could not anticipate proper order for the substituted assumption. The relevant challenges of criminal-judicial policy to non-issuance of retaliation award are much numerous. Noting that right of retaliation has been deemed as public right and retaliation right has been assumed for owner of retaliation right from the very beginning while by legislation of Article 91 about adolescents, legislator has anticipated some conditions that has led judicial approach toward waiver of retaliation punishment. Looking at judicial approach, one can find that many judges will encounter a lot of problems if they do not issue decision for retaliation including protests of owners and avengers of blood. For this reason either the judges surrender to view of owners of blood and declare typically ascertainment of conditions for enforcement of retaliation award or by unequivocal acceptance of comment of forensics regarding lack of rational maturity of

¹⁵ Then Article 218 holds that in crimes deserving for Islamic punishment, if culprit claims for lack of knowledge or intention or presence of one barriers of criminal liability upon perpetration of crime, provided the truth of his/ her statement is possible and if s/he claims that s/he has committed crime by threat and intimidation or torture by confession then the given claim will be accepted without need to evidence and oath.

N. B.1: Regarding crimes such fighting against God and corruption on earth and crimes causes indecency by force, duress, abduction or beguilement, only claim may not waive enforcement of punishment and court shall investigate about reality of case.

¹⁶ This article has been enacted according to fatwas from Ayatollahs Noori Hamedani and Makarem Shirazi.

perpetrator they cancel retaliation and overlook such protests. Procedure of National Supreme Court has been formed accordingly to refuse awards of execution. The problem is not only limited to this point in judicial approach about retaliation punishment since judicial precedent encounters problem to determine which type of punishment and at what level should be stipulated instead of retaliation. Retaliation punishment is placed at one side and under the most aggregated condition there is attachment in house of correction by virtue of Article 89 on the other side. Looking at this condition here, one can find judicial challenges against enforcement of legislator's approach in taking appropriate reaction by the judge because it has not been yet accepted customarily to imprison someone instead of retaliation order. Accordingly, here it necessitates duly preparation of the needed platform with culture-building to adjust penal- judicial policy to modern approach of legislator. On the other hand, it is declared by norm that detention of a person may not meet his/her right. Moreover, the subject may demand for insolvency to pay blood money and at last the owner of blood do not benefit from blood money at all. According to attitude of some judges even under such a condition, if retaliation was a right for the government and not right of owners of blood, the practical problem was reduced more and execution punishment in drug abuse related crimes may confirm their given idea.

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Summary of Primary Paper Sections: A

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