

# **Human Rights in Iran Unit**

University of Essex

## **Research Paper Series**

*New Islamic Penal Code of the  
Islamic Republic of Iran: An Overview*

31 March 2012

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*This research paper provides an overview of the new Penal Code of the Islamic Republic of Iran of 2012. It introduces the central principles of Iranian criminal law, and provides an overview of the key human rights concerns within the new Penal Code. There is a real need for a greater clarity on these issues, due to their significant implications for the human rights situation in Iran.*

## **New Islamic Penal Code of the Islamic Republic of Iran: An Overview**

Mohammad Hossein Nayyeri\*

### **1. Introduction**

In the aftermath of the 1979 Revolution, the Islamic Republic of Iran (IRI) was formally established and a new Constitution based on Islamic ideology was prepared and adopted into law. The very first article of the Constitution declared the Twelver *Shi'a* School of Islam to be the formal religion of the State<sup>1</sup> and Article 4 expressed that all laws and rulings should be in conformity with the Islamic *Shari'a*.<sup>2</sup> The Guardian Council—a politically influential twelve member body which includes six clergy members who are mandated and appointed by the

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<sup>1</sup> *Shi'a* Islam is the second largest branch of Islam with 10-13 percent of the entire Muslim world mainly located in the Middle East: Iran (66-70 million, 90-95%), Iraq (19-22 million, 65-70%), Pakistan (17-26 million, 10-15%), Turkey (7-11 million, 10-15%), etc. Although there were several *Shi'a* branches through history, modern *Shi'a* Islam is divided into three main branches and the largest *Shi'a* sect is the Twelvers. For more information about the size and distribution of *Sh'ite* Muslims see: "Mapping the Global Muslim Population: A Report on the Size and Distribution of the World's Muslim Population", Pew Research Center, October 7, 2009; <[http://www.pewforum.org/Muslim/Mapping-the-Global-Muslim-Population\(6\).aspx](http://www.pewforum.org/Muslim/Mapping-the-Global-Muslim-Population(6).aspx)> accessed 18 March 2012.

<sup>2</sup> Article 4- "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 this is up to the Islamic jurists (*foqahā*) of the Guardian Council."

Supreme Leader of the IRI—was formed to enforce this requirement (Art. 91)<sup>3</sup> and most of the key positions (e.g. Supreme Leader, Head of the Judiciary, Attorney General, Head of the Supreme Court, etc.) were tailored exclusively for the *Shi'a* clergy. Meanwhile, the idea of “rule of *Shari'a*” raised and fundamentalist figures who for years had aspired to the establishment of an Islamic society in which *Shari'a* law rules came to power. Despite the protests of some lawyers and human rights defenders, who paid a high price for their opposition, the project of Islamization of the justice system commenced, and to that end, an initial step was to replace Iran’s General Penal Code (1926) with the Islamic Penal Code.

In 1981, the first part of the Islamic Penal Code (the Law of *Hudud* and *Qisas*<sup>4</sup> and their Rules) was adopted by the IRI Parliament. This law drew from *Shi'a* jurisprudence (*fiqh*) sources, and in particular, from the *Tahrir Al-Vasilah*, the book on *Shi'a* jurisprudence written by Ayatollah Khomeini. Defense lawyers, judges and law professors who opposed reliance on *Shari'a* law, and thus opposed the passage of this Code, were later expelled from their professions, forced to resign, or exiled from Iran altogether during a state-initiated process of “purification” designed to purge the judiciary and legal profession of any un-Islamic elements. To this end, Ayatollah Khomeini declared the “National Front”, a secular political party to be apostate since they had called for a public demonstration against the law of *hudud* and *qisas*.<sup>5</sup> Another Grand Ayatollah (Golpayegani) issued a *fatwa* and asserted that those who deny the *qisas* rule are apostates as it is the essence of Islam.<sup>6</sup>

So, the law entered into force and was followed by subsequent parts of the Code<sup>7</sup> all based on Islamic *Shari'a*. As a result, for instance, the punishment for murder was replaced with *qisas* (retaliation) and crimes such as adultery and sodomy and consumption of intoxicants became punishable by Islamic *hudud*. Therefore punishments in violation of international human rights

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<sup>3</sup> Article 91- “In order to safeguard the Islamic ordinances and the Constitution, with the aim to examine the compatibility of the legislation passed by the Islamic Consultative Assembly [Parliament] with Islam, a council to be known as the Guardian Council is to be constituted with the following members:

1. six just (*ādel*) Islamic Jurists (*foqahā*) conscious of the present needs and the issues of the day, to be appointed by the Supreme Leader.
2. six jurists, specializing in different areas of law, to be elected by the Islamic Consultative Assembly from among the Muslim lawyers nominated-by the Head of the Judicial Power.”

<sup>4</sup> A detailed definition of Islamic *hudud* (crimes with fixed severe punishments) and *qisas* (retaliation for homicide and bodily harm) is provided in the first chapter of this paper.

<sup>5</sup> Iran Newspaper, ‘The National Front declared apostate’, March 10, 2010, 61; <[http://iran-newspaper.com/1388/12/19/Iran/1389/Page/61/Iran\\_1389\\_61.pdf](http://iran-newspaper.com/1388/12/19/Iran/1389/Page/61/Iran_1389_61.pdf)> accessed 20 March 2012.

<sup>6</sup> Ibid.

<sup>7</sup> *Diyat* and *Ta'zirat*.

norms, such as stoning to death and amputation as well as discrimination against women and non-Muslims, were incorporated into the law. Years later, in 1991, these laws (*Hudud*, *Qisas*, and *Diyat*), together with general provisions, were revised and incorporated into a single body of law termed the “Islamic Penal Code”, which was adopted as an “experimental” law for a period of 5 years.<sup>8</sup> However, for the next 20 years it never became a permanent body of law—instead it was continually renewed for further discretionary periods. Finally, Iran’s Parliament decided not to renew it anymore and instead replaced it with a new Penal Code which was adopted in January 2012. However even this new body of law comes with discretionary language—it too is temporary and “experimental” for a period of 5 years.

The original Bill of the new Penal Code had been proposed several years ago by the Judiciary and was waiting to be passed by the Judicial and Legal Commission of Iran’s Parliament. The original Bill had been prepared during the reformist Presidency of S. Mohammad Khatami. Likely as a result of international pressure on Iran to reform its laws, the then Head of the Judiciary, Ayatollah Hashemi Shahroudi, tried to establish a more favorable image of the justice system of the IRI and to that end, commissioned his Judicial Deputy to prepare the Bill of new Penal Code. It is fair to say that, the Bill took some steps, albeit of a limited nature, forward; for example, it prescribed the possibility of replacing the punishment of stoning with hanging or flogging. However in other ways the Bill was less progressive—it retained all corporal punishments and in some cases prescribed even harsher punishments.<sup>9</sup> It also criminalized actions that had not been previously explicitly penalized, such as witchcraft which was not criminalized in the old Penal Code.

After the first draft of the Bill was reviewed and passed by the Judicial and Legal Commission in 2010, it was submitted for approval of the Guardian Council. Not surprisingly, the Guardian Council announced its numerous objections and, in five stages, declared more than 220 cases of violations of *Shari’a* law in the Bill. After revising the disputed articles several times, the Commission passed the final version of the Bill which was approved by the Guardian Council on 18 January 2012. The new Penal Code shall be signed by the President and officially announced sometime in the next couple of months. Two weeks after the Code is officially announced, it will be entered into force and take the place of the old Penal Code.

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<sup>8</sup> In 1996 the new law of *Ta’zirat* was passed and inserted into the Penal Code as its Fifth Book.

<sup>9</sup> For instance, article 221-24 of the Bill of new Penal Code (reflected in article 235 of the new Penal Code) had prescribed up to 74 lashes for kissing by two (male or female) homosexuals; while under the old Code (art. 124) it was punishable by up to 60 lashes. In addition, a harsher approach to security crimes was observable in the Bill. For example, contrary to the old Penal Code, article 153-8 of the Bill (reflected in article 46 of the new Penal Code), had forbidden the suspension of the punishment for the crimes against security of the state.

The purpose of this paper is to provide an overview of the new Penal Code of the IRI and a brief analysis of the concerns the Code raises from a human rights point of view. So that the paper is understandable for laypersons, the paper will first provide a summary introduction on crimes and punishments under the Islamic Penal Code. In that section, there will be an examination of categories of crimes and punishments under Islamic law and some basic definitions of terms and rules of the Islamic justice system of the IRI. Then, selected problematic areas under the new Code such as juvenile execution, stoning to death, and inequality between Muslims and non-Muslims and men and women, will be examined in further detail. Finally, the conclusion will expound on how the new Penal Code places a greater emphasis on Islamic jurisprudence and is in clear conflict with internationally accepted human rights standards.

## 2. Crimes and Punishments under the Islamic Penal code

In order to evaluate the changes of the new Penal Code, it is crucial, first, to look at the basics and context of the Islamic criminal law. In fact, this chapter promises to offer a glimpse into the Islamic Penal code of the IRI which is based on *Shi'a* Islam and the relevant jurisprudence. This will help the laypersons and non-Iranian lawyers to better understand the recent changes of the new Penal Code. Under the Islamic Penal Code, crimes and punishments are divided into four categories: 1-*Hudud*, 2-*Qisas*, 3-*Diyat*, 4-*Ta'zirat*. In this chapter, each category and its exclusive rules, as well as the relevant terms and principles will be examined.

### 2.1. Hudud

Crimes punishable by *hudud* (i.e. the limits, or the limits prescribed by God; singular: *hadd*) are those with fixed and severe punishments in Islamic sources. Crimes punishable by *hadd* under the Second Book of the new Penal Code include the following:

- a) Illicit (out of marriage) sex (*zina*)
- b) Sodomy and homosexual act between men (*livat*)
- c) Homosexual act between women (*mosahaqa*)
- d) Pimping (*qavvadi*)
- e) Unfounded accusation of sexual offences (*qazf*)
- f) Insulting the Prophet (*sabb-al-nabi*)
- g) Consumption of an intoxicant (*shorb-e-khamr*)
- h) Theft (*serqat*)
- i) Waging war against God (*moharaba*)
- j) Rebellion (*baqy*) and Corruption on earth (*efsad-e-fel-arz*)

The relevant *hadd* punishments for the above mentioned crimes range from the death penalty (e.g. for sodomy and rape) and amputation of limbs (e.g. for waging war against God and theft) to flogging (e.g. for pimping and consumption of an intoxicant). The main feature of *hudud* punishments is that they are regarded as fixed by God and therefore immutable.<sup>10</sup> So, there is no possibility of mitigation or replacement of the punishment and it also cannot be waived by people (e.g. the judiciary or victims).<sup>11</sup> Article 219 of the new Penal Code provides that:

*“The Court may not change the quality, type and amount of the hadd punishment or replace or mitigate or remove it. These punishments [i.e. hudud] may only be removed, mitigated or replaced through pardon and penance as stipulated in this Code.”*

The believed purpose of the institution of *hadd* crimes is deterrence from acts assumed harmful to the Islamic society. It is because of this that *hadd* penalties are advised to be carried out in public.<sup>12</sup> Another feature of the *hadd* crimes is that obtaining a conviction is very difficult. This is due to the strict rules of evidence for proving these crimes and defining the crime very strictly, so that many similar acts fall outside the definition and cannot be punished with *hadd* penalties. For example, 14 requirements expressed in the Penal Code (art. 266) have made it nearly impossible for a thief to be sentenced to the *hadd* penalty. However, it has been carried out in some occasions over the last three decades. There are also some eminent *Shi’ite* Muslim scholars who do not believe in execution of *hadd* crimes in current times.<sup>13</sup>

## 2.2. Qisas

Crimes punishable by *qisas* (retaliation) are a category of crimes under Islamic criminal law, in which, homicide and bodily harm are punishable by the same harm (i.e. the death penalty for murder and inflicting the same injury for bodily harm);<sup>14</sup> This is best illustrated in the old maxim “An eye for an eye, a tooth for a tooth, and a life for a life”. The Penal Code, in its Third Book, in conformity with Islamic law, has implemented the law of retaliation. *Qisas* in Islamic law is

<sup>10</sup> Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (Cambridge University Press 2005) 54.

<sup>11</sup> Since the objective of *Hadd* penalties is to protect public interest, they are labelled as claims of God (*huquq Allah*) and not claims of people (*huquq al-nas*), which apply to the interests of private persons. The distinguishing feature is that claims of God, unlike claims of people, cannot be waived by people; see *ibid*.

<sup>12</sup> According to article 101 of the old Penal Code: “It is appropriate that the judge informs people of the time of execution of *hadd* punishment and it is necessary that not less than three pious people attend the execution of *hadd* punishment.”

<sup>13</sup> Emaad al-Din Baaghi, ‘Right to Life’ 23 <[http://www.emadbaghi.com/archives/cat\\_book.php](http://www.emadbaghi.com/archives/cat_book.php)> accessed 12 May 2011.

<sup>14</sup> Peters (n 9) 39.

based on verses of the Quran, including the famous verse: “And there is life for you in retaliation, O men of understanding” (2:179). These verses, however, conclude with the preferred option, namely, forgiveness.<sup>15</sup> In fact, the victim or his/her heirs, instead of retaliation, may ask for *diyya* (financial compensation), which the Quran deems preferable to *qisas*.

Retaliation can only take place if it is demanded by the victim in cases of bodily harm, or the victim’s next of kin (*awliyā-al-dam*) in cases of homicide. If there are no next of kin, the Public Prosecutor acts in place of the next of kin. Victims and the next of kin, however, have the right to forgive the offender and ask only for the blood money (*diyya*). They can also fully withdraw their claim to retaliation and blood money. Quite similar to the ‘private justice’ system, this law takes the wishes of victims’ families into main account: victims’ next of kin have the right to determine whether the condemned is sentenced to death or demand financial compensation (*diyya*) as an alternative to choosing death (art. 344). They have also the right to be or choose the executioner (art. 416).

“The state only interferes as a referee, to supervise the correct application of the law during the trial and the execution of the sentences”<sup>16</sup>. This is clearly different from the Western and Western-inspired codes, where the victim’s heirs are not admitted as parties to the criminal trial.<sup>17</sup> A similar system of trying homicide existed in Western Europe in the Middle-Ages. Such systems originated in societies where the state was absent or weak and the accepted reaction to homicide was revenge on the killer’s tribe, taken by the victim’s next of kin. With the emergence of strong states in Western Europe, the state took over the prosecution of homicide and private prosecution disappeared. In the Muslim world this did not happen, although strong states did arise.<sup>18</sup> However, through the changes made in the IRI’s Penal Code in 1991, homicide began to reflect a public approach also and we can see a combination of public and private prosecution in the current Penal Code. As a result, if a murder is seen by the judge as a breach of public order and security, even though the murderer is forgiven by the victim’s next of kin, the court may still sentence the offender to 3 to 10 years of imprisonment.<sup>19</sup>

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<sup>15</sup> Bassiouni M C, ‘Death as a Penalty in the Shari’a’ in Peter Hodgkinson and William A. Schabas (eds), *Capital Punishment: Strategies for Abolition* (Cambridge University Press 2004) 173.

<sup>16</sup> Ibid 186.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Article 612 of the Fifth Book of the Penal Code (*Ta’zirat*).

According to Islamic *Shari'a*, retaliation for homicide or bodily harm is only allowed if the victim's blood money (*diya*) is the same as or higher than the offender's. If the value of the blood money of the offender is higher than that of the victim, for retaliation the victim or his\her next of kin would have to pay the difference to the perpetrator. Thus, if a woman is killed by a man, the murderer may be sentenced to death if the woman's next of kin demand it, but they must pay one half of the blood money of a man to the offender<sup>20</sup>, since the blood money of a woman is half that of a man<sup>21</sup>. Moreover, sometimes the relationship between the murderer and his victim prevents retaliation. According to *Shi'a* jurisprudence as reflected in the Penal Code, a father, and any ascendant (e.g. father's father), cannot be put to death for killing his child (or descendant).<sup>22</sup> This rule does not apply to mother and the ascendant (e.g. mother's mother) and has its roots in patriarchal systems where fathers hold authority over women, children, and property.

### 2.3. Diyat

In cases where someone has accidentally or semi-intentionally caused a person's death or bodily harm, or if someone has done so intentionally but a sentence of retaliation could not be pronounced, e.g. because the offender is forgiven by the victim or his/her next of kin, a liability for *diya* (blood money) is created. The blood money for a Muslim man is the standard against which the values of all other categories of persons are measured, both for life and for injuries. According to traditional *Shari'a*, the standard blood money is 100 camels or 200 cows or 1,000 sheep, which was given a monetary value of 675,000,000 IRI Rials [around \$34,000 US Dollars at the time this paper was written, when the average annual wage in Iran was approximately \$4,400 US Dollars<sup>23</sup>] for the Iranian year 1390 (2011-12)<sup>24</sup> by the Head of judiciary.<sup>25</sup> In the new Penal Code, the old article which was repellently referring to the numbers of camels and cows

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<sup>20</sup> "Article 379- When a Muslim woman is murdered, the right to *qisas* (retaliation) is created; however, if the murderer is a Muslim man, prior to *qisas*, the heir(s) of the victim [*vali-e-dam*] should pay the murderer half of the *diya* (blood money) of a man..."

<sup>21</sup> Article 544 – "The *diya* (blood money) for murdering a woman is half that of a man".

<sup>22</sup> According to article 299 of the new Penal Code "*Qisas shall be delivered only if the perpetrator is not the father, or any ascendants, of the victim ...*". The cases of killing of children by their own fathers happen mostly in cases of honor killing. In such cases, the *qisas* punishment cannot be delivered against the father and he may only be sentenced to 3-10 years imprisonment. For example, see: <<http://iranhr.net/spip.php?article970>> accessed 30 March 2012.

<sup>23</sup> Source:<<http://ilna.ir/newsText.aspx?ID=220046>> accessed 30 March 2012.

<sup>24</sup> Source:<<http://rc.majlis.ir/fa/law/show/798088>> accessed 24 March 2012.

<sup>25</sup> According to article 543 of the new Penal Code the Head of the Judiciary is supposed to announce the annual monetary value of *diya* at the beginning of every year.

and sheep for the blood money has been removed and instead the value of the blood money has been left to be determined by *Shari'a*, an external source, rather than within the Code itself.

#### **2.4. Ta'zirat**

Crimes punishable by *ta'zir* are less serious crimes which their punishments are not fixed and left at the discretion of a *Shari'a* judge. In principle, all forbidden or sinful acts, that do not constitute *hadd* offences, homicide or bodily harm, are punishable under this category. The Islamic judges may, at their discretion, impose punishments on those who have committed such acts. However, most of the *ta'zir* crimes are dealt with in the Penal Code and the judge applies the punishments stipulated in the Code.

In practice, *ta'zir* is the most important category under which punishment is administered. The Fifth Book of the Penal Code (*Ta'zirat* and Deterrent Punishments) deals with *ta'zir* crimes and as it was adopted as a "permanent" law it was not part of the recent changes of the Penal Code (Books 1-4) which were "experimental". However, according to article 19 of the new Penal Code, in order to make the new Penal Code more organized, a new categorization is introduced and *ta'zir* punishments are divided into 8 levels. The first and severest level includes *ta'zir* crimes punishable by imprisonment for 25 to 30 years, confiscation of properties and a fine of more than one billion Rials (approximately US\$50,000). The eighth level refers to *ta'zir* crimes which are punishable by imprisonment for less than 3 months and a fine fewer than 10 million Rials (approximately US\$500) and flogging of less than 10 lashes.

### **3. Problematic Areas**

The new Islamic Penal Code of the IRI contains many amendments to its predecessor. This chapter will discuss the problematic areas of the new Penal Code from the human rights point of view. In terms of problematic areas, it intended to address the issues which are in conflict with internationally accepted human rights norms and standards. However, given the immensity of the subject, this will be limited to some selected areas including: the execution of juveniles; two vague crimes of "waging war against God" and "corruption on earth"; the brutal punishment of stoning to death; inequality between men and women as well as between Muslims and non-Muslims; apostasy, and finally the threats to the rule of law.

### 3.1. Juvenile Execution

According to Islamic sources, the criterion for criminal responsibility is reaching the age of maturity which, according to the *Shi'ite* School of the IRI, is 9 lunar years (8 years and 9 months) for girls and 15 lunar years (14 years and 7 months) for boys. Many lawyers have argued for years that recognition of criminal responsibility for a girl of 8 years and 9 months old and a boy of 14 years and 7 months old is wrong and violates international standards including the Convention on the Rights of Child and conflicts with the modern needs of society. They also discuss that while the minimum age for many legal affairs such as the application for a driver's license, obtaining a passport, and signing a deed, etc. is 18 years old, and people under the age of 18 years old are not considered as meeting the physical, mental and rational requirements for these acts, those same people, if they commit a crime, will be treated as an adult with full criminal responsibility.

The main challenge in this regard is application of corporal punishments and the death penalty to the juvenile. For this, the IRI has always been criticized by international bodies and in return it has tried to justify and deny the cases of juvenile execution. To alleviate some of the criticism the IRI has taken different measures—for example, it has often postponed the execution of the death penalty for juvenile convicts until they reach the age of 18. However, in some cases such considerations have been ignored completely and there is no room for any justification left. For instance, when a juvenile under the age of 18 is sentenced to the death penalty and executed before reaching the age of 18, there is no room left for denial and justification.<sup>26</sup>

The new Penal Code made some changes and innovations in this regard which are apparently in response to these criticisms and international pressures. However they need to be analyzed carefully. At first blush, what is striking is that the new Code includes an article that exempts immature children from criminal responsibility: according to article 146 “[i]mmature children have no criminal responsibility”. Also, article 148 provides correctional measures for immature offenders. In addition, contrary to the old Code, the new Penal Code has stipulated the age of maturity: article 147 fixes the age of 9 lunar years for girls and 15 lunar years for boys as the age of maturity. Therefore, the age of maturity under Islamic *Shari'a* is stipulated as the criterion for criminal responsibility and *fatwas* (i.e. religious opinions) which offer older ages of

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<sup>26</sup> For example, Alireza Mullah Soltani, born in December 1993, was hanged on September 21, 2011, in retribution (*Qisas*) for the murder of Ruhollah Dadashi. Human rights activists objected to the execution of the 17 year old minor and the Islamic Republic of Iran was criticized for killing underage criminal offenders; <[http://www.en-hrana.org/index.php?option=com\\_content&view=article&id=521:17-year-old-alireza-mullah-soltani-hanged&catid=10:children&Itemid=8](http://www.en-hrana.org/index.php?option=com_content&view=article&id=521:17-year-old-alireza-mullah-soltani-hanged&catid=10:children&Itemid=8)> accessed 25 March 2012.

maturity are dismissed.<sup>27</sup> So in fact, the hope that the minimum age of criminal responsibility is changed in the IRI with time is lost.

If the different ages of criminal responsibility for boys and girls are combined with different categories of crimes (i.e. *hudud*, *qisas* and *ta'zirat*) under the new Penal Code, we arrive at various possibilities with different rulings.<sup>28</sup> Looking at these changes, one will confirm that there have been some desirable changes in respect to *ta'zir* punishments. As a result, if children commit *ta'zir* crimes before turning 18 years old, whether they are boys or girls, and whether they have reached the age of maturity or not, they shall be sentenced merely to correctional measures. So, there is no possibility for application of adult *ta'zir* punishments to children and juveniles. In comparison with the old Code, in which reaching the age of maturity resulted in full criminal responsibility, these changes may be regarded as positive, especially for girls.<sup>29</sup>

However, in the case of committing crimes punishable by *hudud* and *qisas*, children may still be sentenced to such punishments. In fact, on the issues of *hudud* and *qisas*, the Code still relies on the age of maturity under Islamic *Shari'a*. Therefore, if a boy—after reaching the age of 15 lunar years (14 years and 7 months)—and a girl—after reaching the age of 9 years (8 years and 9 months)—commit crimes punishable by *hudud* and *qisas*, instead of correctional measures as for *ta'zir* offences, they may be subject to *hudud* and *qisas* rules and will be treated as adults.

Nevertheless, article 90 of the new Code may, in special conditions, exempt such children and juveniles from *hudud* and *qisas* punishments and provide correctional measures instead:

*Article 90 – In respect of crimes punishable by hudud and qisas, if the offenders, who are under 18 years old but have reached the age of maturity, do not understand the nature of the committed crime or its prohibition, or if there is a doubt about their mental development and perfection, then, according to their age, they shall be awarded one of the punishments provided in this chapter.*

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<sup>27</sup> Some Iranian Shi'a clerics set older ages of maturity of girls. Ayatollah Yousef Sanei, for example, had set the age of maturity at 13 and not 9 for girls. But the Penal Code has followed the *fatwa* by the majority of conservative clerics who believe in 9 years as the age of maturity for girls. <<http://marjaeyat.com/fa/pages/?cid=116>> accessed 30 March 2012.

<sup>28</sup> To see the eight imaginable possibilities with different consequences for juvenile offenders look at: Nayyeri, M H, 'Criminal Responsibility of Children in the Islamic Republic of Iran's New Penal Code', Iran Human Rights Documentation Center (IHRDC);

<[http://www.iranhrdc.org/files.php?force&file=pdf\\_en/LegalCom/juvenile\\_executions\\_MHN\\_282791825.pdf](http://www.iranhrdc.org/files.php?force&file=pdf_en/LegalCom/juvenile_executions_MHN_282791825.pdf)> accessed 25 March 2012.

<sup>29</sup> Ibid.

*Note – In recognizing the mental development and perfection, the court may ask for the opinion of Forensic Medicine or employ other means which it deems appropriate.*

Therefore, when, for example, a 17 year old boy or girl commits a murder, if according to the opinion of the judge, s/he understands the nature of the crime, and, Forensic Medicine confirms his/her mental development, subject to other conditions, s/he may be sentenced to *qisas* (i.e. the death penalty). So, contrary to what the spokesperson of the Judicial and Legal Commission of the IRI Parliament asserted<sup>30</sup>, and unfortunately what was accepted and distributed by the media, *qisas* punishment for people under 18 years old has not been abolished and is still a real possibility for such offenders. Similarly, in the case of *hudud* crimes such as an illicit sexual relationship (*zina*), sodomy (*livat*), homosexual behavior between girls (*musaheqeh*), it is still possible for juvenile offenders to be sentenced to violent and inhuman punishments such as the death penalty, stoning to death, and flogging. Moreover, the assertion made by the IRI authorities about the gender equality in the new Penal Code<sup>31</sup>, is not true in respect to *hudud* and *qisas*. Therefore, it is stressed again that, under the new Penal Code, there remains the possibility of the application of *hudud* and *qisas* punishments on people under 18 years old, and obviously it has not been abolished. In addition, contrary to some assertions, the new Code, like the old one, clearly discriminates between boys and girls.

### **3.2. Waging War against God and Corruption on Earth**

*Moharaba* which is usually translated as “waging war against God”, and *efsad-e-fel-arz* (corruption on earth) have been the most vague and problematic offences in the Islamic Penal Code. In order to arrive at an accurate understanding of these offences, it is necessary to refer to the Islamic sources and explain the roots of the concept in Islamic law. The rules governing *moharaba* and *efsad-e-fel-arz* have their origins in verses 5:33–4 of Quran:

*“The only reward of those who wage war against God and His messenger and spread corruption on the earth will be that they will be killed or crucified, or have their hands and feet on alternate sides cut off, or will be banished. Such will be their degradation in*

<sup>30</sup> the newspaper *Donya-ye-Eqtasad*, in its February 12, 2012 edition, in a piece titled “Prohibition of Qisas Punishment for People under 18 Years Old” stated: “Spokesperson of the Judicial and Legal Commission of Parliament stressed that, by passage of the new Islamic Penal Code, *qisas* punishment for people less than 18 years old is prohibited.” <[http://www.donya-e-eqtasad.com/Default\\_view.asp?@=289512](http://www.donya-e-eqtasad.com/Default_view.asp?@=289512)> accessed 28 March 2012.

<sup>31</sup> Spokesperson of the Judicial and Legal Commission of Parliament declared: “the age of criminal responsibility in the old Penal Code was 9 and 15 lunar years which were different between girls and boys and the age of maturity under Shari’a was the criterion. But, in the new Code, we defined the age of criminal responsibility in a way that girls and boys under 18 years old are considered as children and juvenile and the punishments of adults are not applied on them anymore.”, *ibid*.

*the world, and in the Hereafter theirs will be an awful doom. Save those who repent before ye overpower them. For know that God is forgiving, merciful.”*

So, *moharaba* and *efsad-e-fel-arz* are phrased in words taken from the above mentioned verses and translated as ‘waging war against God’ and ‘spreading corruption on the earth’. However, in the definition of *moharaba* there are different views amongst Muslim jurists. While in *Sunnite* schools, the offence of *moharaba* is restricted to armed banditry<sup>32</sup>, according to *Shi’ite* jurisprudence, which is reflected in the Penal Code of the IRI, any person who resorts to a weapon to cause terror and fear or disruption of public security will be considered as a *mohareb* (a person who wages war against God).

Generally speaking, “penal practice in Iran became highly politicized after the Revolution and was used by Special Courts to suppress any form of opposition.”<sup>33</sup> In fact, soon after the 1979 Revolution, Revolutionary Islamic Courts were set up and on charges of *moharaba* and *efsad-e-fel-arz* frequently imposed the death penalty and harsh punishments on, inter alia, political opponents. On the other hand, although, according to Article 168 of the Constitution, “Political and press crimes shall be tried openly and in the presence of a jury”, due to questionable refusal of the IRI to define the “political crimes” in its laws, none of the crimes of political character have been tried in open sessions in the presence of a jury.

Three decades on, the new Penal Code has made some changes in this regard. For instance, unlike the Old Code, it has expressly divided the offence of *moharaba* from *efsad-e-fel-arz* and, adding a new concept (*baqâ*: rebellion), has allocated a separate chapter to each one. As a result *moharaba* has been provided an independent definition:

*Article 277- Moharaba is defined as drawing a weapon on the life, property or chastity of people or to cause terror as it creates the atmosphere of insecurity. When a person draws a weapon on one or several specific persons because of personal enmities and his act is not against the public, and also a person who draws a weapon on people, but, due to inability does not cause insecurity, shall not be considered as a mohareb.*

In respect of the punishment of *moharaba*, the *Shi’ite* jurists hold that the judge can impose, at his discretion, any of the named punishments in the Quranic verse 5:33. Accordingly, article 280 of the new Penal Code provides that:

*“Hadd punishment for moharaba is one of the following four punishments:*

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<sup>32</sup> Peters (n 9) 162.

<sup>33</sup> Ibid 164.

- a) Execution.
- b) Crucifixion.
- c) Amputation of right hand and left foot.
- d) Banishment.”

The changes made in respect of *efsad-e-fel-arz* in the new Penal Code are even more extensive. While the offence was confused with *moharaba* in the old Penal Code, it has been given separate provisions with an extremely extensive definition:

*Article 284- “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 properties, or causes distribution of corruption and prostitution in a large scale, shall be considered as mofsed-e-fel-arz [corrupt on earth] and shall be sentenced to death.”*

It would be true to say that the offence of *efsad-e-fel-arz* is the most vague and extensive provision of the new Penal Code. Potentially, many civil, political, and economic actions can be regarded as *efsad-e-fel-arz*. Moreover, the new introduced offence of *baqy*, though it was prescribed in the old code without the specific title, is another change made in the Penal Code aimed at a harsher approach to security crimes.

*Article 285- “Any group commits armed rebellion against the basis of the regime of the Islamic Republic of Iran shall be considered as bāqi and if it resorted to weapons, its members shall be sentenced to the death penalty.”*

As it clear, under the *Shi’ite* school and the Islamic Penal Code of the IRI, the definitions of *moharaba* and *efsad-e-fel-arz* have been generously extended and are open to further interpretation to include some crimes of a highly political character, such as membership of opposition groups and supporting the overthrow of the Islamic regime. In fact, it has become a powerful lever in the regime’s hand to remove all oppositions. In addition to the extension made to the law, the Revolutionary Courts have broadened the concept even further in practice. In the post-2009 election protests, Mohammad Amin Valian, a 20- year- old student, was sentenced to death by a lower Revolutionary Court for throwing three rocks during a

protest.<sup>34</sup> In fact, the Court interpreted a rock as a weapon and concluded that he was *mohareb*.

### 3.3. Stoning to Death

Under the *Shari'a* law, sexual intercourse is only permitted within a marriage and it is considered as a *hadd* crime to have sex out of marriage. The crime of *zina* has been defined by article 222 of the new Penal Code as sexual intercourse between a man and a woman who are not married to each other. For proving this offence, very strict standards of evidence are applied: the testimonies of four eyewitnesses are required or a confession must be made four times. Persons who have committed *zina* can be punished with the *hadd* penalties of either 100 lashes or death by stoning, depending on their legal status. For a specific group of people, called *mohsan* (man) and *mohsaneh* (woman), the *hadd* punishment of stoning to death applies. Article 83 of the old Penal Code had stated that:

*“In the following cases, the hadd punishment for zina is stoning to death:*

*(a) Zina of a ‘mohsan’ man, that is a man who is married to a permanent wife and has had sexual intercourse with her whilst he has been sane and can have sexual intercourse with her whenever he so wishes.*

*(b) Zina of a ‘mosaneh’ woman with an adult man; a mohsaneh woman is a woman who is married to her permanent husband and the husband has had sexual intercourse with her whilst she was sane and she is able to have sexual intercourse with her husband.”*

This distinction (*mohsan* versus non-*mohsan*) has in fact been made to take the actual and personal conditions of the perpetrators into consideration. Therefore, the stoning may not be awarded if the perpetrator’s spouse is not actually available for sexual intercourse and, for example, absent on a long journey or imprisoned.

The old Penal Code was specific about the manner of execution and size of stones that should be used. Article 102 stated that men will be buried up to their waists and women up to their breasts for the purpose of execution by stoning. Article 104 stated that the stones used should “not be large enough to kill the person by one or two strikes; nor should they be so small that they could not be considered as stones”. The brutality and inhumanity of stoning to death is so

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<sup>34</sup> International Campaign for Human Rights in Iran, ‘Student’s Death Sentence for Throwing Rocks Reversed’; <<http://www.iranhumanrights.org/2010/05/student%E2%80%99s-death-sentence-for-throwing-rocks-reversed/>> accessed 26 March 2012.

grave that even the IRI itself has, to a certain extent, restricted executions. However, many sentences of stoning, especially during the first decade after the revolution, have been given and it has become one of the most challenging issues for the IRI.

In 2002, the Head of the Judiciary issued a directive and asked the judges for a moratorium on stoning. However, since the directive was not binding, it was ignored by some hard-line judges. Therefore, the practice of stoning continued, as highlighted by cases like that of Sakineh Mohammadi Ashtiani, which attracted international attention. Several years later, the Bill of new Penal Code was proposed by the Judiciary and, contrary to expectations, it had only provided the possibility of replacement of stoning with hanging or flogging in special conditions. Finally, the Judicial and Legal Commission of Parliament—which was commissioned to pass the Bill—removed the same article and left no room for predictable disagreement from the Guardian Council. So, the Bill of the new Penal Code was approved by the Guardian Council without this article and, therefore, many years of debates and struggle for abolishing or replacing the punishment of stoning to death in the Penal Code was left frustrated.

The new Penal Code, like the old Code, under the Chapter of *zina* (illicit sexual intercourse) has provided flogging for *zina* committed by an unmarried person: “the *hadd* punishment for *zina* committed by an unmarried person (*zina-ye-qeyre-mohsaneh*) is one hundred lashes”. But when it comes to adultery of a married man or woman (*zina-ye-mohsaneh*), quite surprisingly, and contrary to the old Code, this chapter of the Code is silent and makes no provision in this regard. The silence of the new Code in not repeating the old article on stoning caused some people to assume that stoning was abolished. But it cannot be seriously suggested that adultery is no longer a crime and is now decriminalized. It will still be the case that when a married man or woman commits adultery this may be punished, and it is unclear what punishment, other than stoning, may be applied.

We must not forget that, according to Islamic jurisprudence (*fiqh*), adultery committed by a married man or woman is a *hadd* crime which is assumed as punishable by a fixed and immutable sentence of stoning. Moreover, judgment and punishment are the areas that Islamic jurists claim their full authority and tend to apply their own “law”, i.e. *fiqh*, on them. So despite the silence in the new Code, it clearly cannot be claimed that adultery committed by a married person is permissible and no longer punishable under the new Islamic Penal Code.

Paying attention to other articles of the new Code, it is evident that the idea of decriminalization of adultery and abolishing stoning is mere wishful thinking. Articles 172 and 198 of the new Code clearly refer to stoning to death for adultery. Article 172 provides: “[s]ubsequent denial after confession shall not result in removal of punishment, unless in crimes punishable by stoning or execution...”. According to article 198 “... *zina* shall be proved

by testimony of two just men and four just women; unless when the *hadd* punishment for *zina* is execution or stoning, in which case, testimony of at least three just men and two just women are required...”.

In addition, article 220 of the new Code refers the punishment of the *hadd* crimes that are not provided in the Code to Article 167 of the Constitution. Article 167 again refers such cases to authentic Islamic sources and *fatwas* and therefore opens the door of references to *fiqh* books and *fatwas* of Islamic jurists. According to the Islamic sources endorsed by the IRI, the punishment of adultery committed by a married person, as stipulated in the old Code as well, is stoning to death. Moreover, although the further step of asking for a *fatwa* from the Leader, or his delegate, is needed and has been added to the process of issuing the decision on stoning to death<sup>35</sup>, it does not mean that stoning to death is abolished. Thus, although not directly referred to in the new Code, adultery committed by a married person and the punishment of stoning to death are still very much part of the IRI’s criminal framework. Instead, these provisions have merely been moved to a more obscure position so as not to attract the attention of critics; and in fact, they play their old role, though indirectly, in *fiqh* sources as the new parts of the new Penal Code.<sup>36</sup>

### 3.4. Apostasy and Blasphemy

Although it had been prescribed in the Bill of the new Penal Code, apostasy (*ertedād*) is not mentioned as a *hadd* crime in the Penal Code. In fact, apostasy, together with witchcraft (*sehr*) and innovation in religion (*bed’at*), had been proposed as new *hadd* crimes in the Bill of the new Penal Code, but none were passed by Parliament. This, however, does not mean that, for example, an apostate is left without punishment; because articles 220 of the new Penal Code and 289 of the Criminal Procedure Code lay down that the courts must apply *Shari’a* rules in cases in which the Code does not give a ruling. As a result, persons have been sentenced to death for apostasy in Iran, although the Penal Code does not contain provisions making this a punishable offence.

In the most recent case, pastor Yousef Nadarkhani was convicted by the lower Court to death for “apostasy from Islam,”. Iran’s judiciary claimed that Nadarkhani, 33 years old, who was born

<sup>35</sup> According to article 221 of the new Penal Code: “When the reference to article 167 of Constitution is required, the judicial authority shall ask for a fatwa from the Leader. The Leader may delegate this issue to other person(s).”

<sup>36</sup> Nayeri, M H, ‘The Question of "Stoning to Death" in the New Penal Code of the IRI’, Iran Human Rights Documentation Center (IHRDC)  
<[http://www.iranhrdc.org/files.php?force&file=pdf\\_en/LegalCom/The\\_Question\\_of\\_Stoning\\_to\\_Death\\_in\\_the\\_New\\_Penal\\_Code\\_of\\_the\\_IRI\\_EN\\_172447845.pdf](http://www.iranhrdc.org/files.php?force&file=pdf_en/LegalCom/The_Question_of_Stoning_to_Death_in_the_New_Penal_Code_of_the_IRI_EN_172447845.pdf)> accessed 23 March 2012.

to a Muslim family, is an apostate due to his adoption of Christianity at age 19. In September 2010, the Court of Appeals affirmed Nadarkhani's death sentence for apostasy, but in June 2011 the Supreme Court remanded the case to the lower court for further investigation.<sup>37</sup> The Supreme Court, however, rejected arguments that apostasy is not a crime under Iran's laws simply because it is not codified in the Islamic Penal Code, and held that the crime is recognized in the *Shari'a* and by the founder of the Islamic Republic, Ayatollah Khomeini.<sup>38</sup>

Blasphemy by insulting a prophet (*sabb-al-nabi*) is another serious offence in the Islamic *Shari'a*, incurring the death penalty for the perpetrator. Although it was mentioned in the old Penal Code (art. 513), the new Penal Code includes a separate chapter<sup>39</sup> and express provisions keeping this a capital offence. According to article 260 of the new Penal Code, any person insults the Prophet of Islam or other Great Prophets shall be considered as *sābb-al-nabi* and punished by death. The note of the same article has provided the same punishment for those insulting the twelve *Shi'ite* Imams and the daughter of the Prophet. The positive point about this new article is omission of the ambiguous notion of "insulting the sacred values of Islam" prescribed in article 513 of the old Penal Code, which was open to broad interpretation. It must be noted, however, that article 513 has not been changed or removed as it is part of the Fifth Book of the old Penal Code which was not part of the recent changes.<sup>40</sup>

### 3.5. Inequality on the Basis of Gender and Religion

One of the most prominent human rights principles is that all persons are equal before the law and entitled to the same legal protections. The International Covenant on Civil and Political Rights (ICCPR) stipulates that "all persons shall be equal before the courts and tribunals" (art. 14) and that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law" (art. 26). Under classical Islamic law, as under other pre-modern legal systems, the principle of legal equality of persons is not recognized. The Islamic

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<sup>37</sup> Human Rights Watch, 'Iran: Christian Pastor Faces Execution for Apostasy'

<<http://www.hrw.org/news/2011/09/30/iran-christian-pastor-faces-execution-apostasy>> accessed 23 March 2012.

<sup>38</sup> Ibid.

<sup>39</sup> Second Book, Part 2, Chapter 5 of the new Penal Code.

<sup>40</sup> According to article 513 of the old Penal Code: "Any person insults the sacred values of Islam or any of Great Prophets or the [twelve *Shi'ite*] imams or the Holy Fatemeh [daughter of Prophet Mohammad], if considered as *sāb-al-nabi* shall be punishable by the death penalty; otherwise shall be sentenced to one to five years imprisonment."

Penal Code of the IRI, clearly, follows the classical doctrine and violates the principle of legal equality by provisions that discriminate on the basis of both gender and religion.<sup>41</sup>

Under Islamic *Shari'a*, men and women are treated differently with regard to, inter alia, evidence, *qisas* (retaliation) and *diya* (blood money). Therefore, for example, the testimony of a man has twice the strength of that of a woman.<sup>42</sup> Additionally, amongst the Islamic countries, the Iranian Penal Code is the only one that still specifies that a woman's *diya* (blood money) is not equal with the blood money of a man.<sup>43</sup> As indicated above, the full *diya* for a Muslim man is the standard against which the values of all other categories of persons are measured. Article 544 of the new Penal Code (similar to the article 300 of the old Code) provides that: "[t]he *diya* (blood money) for murdering a woman is half that of a man". As a result, if the heirs of a murdered woman demand the *qisas* (death) of her male killer, they have to pay half the blood money of a Muslim man:

*"Article 379- When a Muslim woman is murdered, the right to qisas (retaliation) is created; however, if the murderer is a Muslim man, prior to qisas, the heir(s) of the victim [vali-e-dam] should pay the murderer half of the diya (blood money) of a man..."*

However, quite surprisingly, the new Penal Code, although insists on the inherent inequality, has prescribed a new solution to alleviate the inequality of *diya* between men and women. The note of article 545 provides that:

*"In all the cases of homicide that the victim is not a man, the difference between the diya and the diya of a man shall be paid from the Fund for Compensation of Bodily Harms."*

Basically, the Fund for Compensation of Bodily Harms is established to exclusively compensate bodily harms caused by car accidents when the perpetrator is escaped or not identified or when the vehicle is not insured. In fact, the IRI, while still insisting on this inequality, has found an unusual solution to the problem. This is one of the rare occasions that Parliament has taken a step forward from the original Bill provided by Judiciary. However, this shall not be considered as a fundamental change towards equality for women: in the cases of bodily injuries that do not cause death, the *diya* for men and women is still only equal until it reaches to the one third of the full *diya*. This means that, if the *diya* of the injuries of a woman is higher than one third of the full *diya*, it will be decreased to half that of a man's *diya* for the same injuries.

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<sup>41</sup> Peters (n 9) 177.

<sup>42</sup> Article 198 of the new Penal Code.

<sup>43</sup> Peters (n 9) 162.

*Article 554- “The diya of [harms to] limbs and bodily abilities, up to one third of the full diya, is the same for man and woman; however if it reaches, or exceeds, one third of the full diya, the diya of woman shall be decreased to half.”*

Therefore, if, for instance, a person causes a woman to go blind in both eyes, while the *diya* of the same injury for a man is full *diya*, the payable *diya* of the woman is half of the full *diya* of a man, and is not payable from the Fund for Compensation of Bodily Harms. So, clearly, any assertion about equality of men and women under the new Islamic Penal Code is not accurate.

As discussed above, however, gender is not the only basis of inequality in the Islamic Penal Code. In fact, under Islamic *Shari’a*, religion too has always played an important role in respect of enjoyment of rights and, therefore, Muslims and non-Muslims have not enjoyed the same rights. Different treatment exists, for example, with regard to the law of retaliation and blood money. If a Muslim kills a Christian, for example, the *qisas* (retaliation) cannot be requested by the heirs of the victim and they can only ask for *diya*:

*“Article 299- Qisas shall be delivered only if ... the victim is ... equal in religion with the perpetrator.*

*Note- When the victim is a Muslim, the fact that the murderer is a non-Muslim does not prevent the qisas.”*

In addition, before 2003, even the amount of blood money for non-Muslims was a highly controversial issue and different religious scholars had different views in this regard. In 2003, an amendment was made in the Penal Code and the equal blood money for religious minorities was accepted. Accordingly, article 548 of the new Penal Code has provided that:

*“According to the order of the Supreme Leader, the diya (blood money) of the religious minorities which recognized in the Constitution shall be equal to diya of Muslims”*

However, clearly there is a problem with regard to believers of religions that are not recognized in the Constitution of the IRI. According to Article 13 of the Constitution, only Christian, Jewish and Zoroastrian Iranians have been recognized as non-Muslim religious minorities of Iran. The believers of the above mentioned religions are described in Islamic sources as *Ahl-al-kitāb* (who believe in a religion which possesses a revealed scripture).<sup>44</sup> This is while under international human rights law, the term “religious minorities” covers all religions and beliefs held by

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<sup>44</sup> Waardenburg J, *Muslims and Others: Relations in Context* (Walter de Gruyter 2003) 24.

minority parts of the population.<sup>45</sup> So, the IRI has limited the term “religious minorities” to the three above-mentioned religions and does not recognize the believers of other religions such as Baha’is, Sufis, Mandanis, etc. as religious minorities. It is even worse when it comes to non-believers and atheists and those converted from Islam. As a result, for example, if a Muslim kills a Baha’i, *qisas* (retaliation) is not possible, neither can the victim’s heirs claim blood money.<sup>46</sup>

Another issue where non-Muslims (whether or not belong to the three recognized religions) are put in an inferior position to Muslims is that under classical Islamic law the testimonies of non-Muslim witnesses against Muslims are not admitted in court.<sup>47</sup> Moreover, with regard to the application of certain fixed penalties, the new Penal Code follows the old patterns of Islamic *Shari’a* and treats non-Muslims differently and sometimes harsher. For example, if a non-Muslim (whether married or not) commits *zina* (illicit sex) with a Muslim woman, or commits *livat* (sodomy) with a Muslim man, he shall be sentenced to death.<sup>48</sup> But this is while, if the perpetrator is a Muslim, the death penalty may be given only if he is married (*mohsan*). Similarly if a non-Muslim man commits *tafkhez* (*livat* without penetration) with a Muslim man, he shall be sentenced to death; while, if he is a Muslim he shall be given 100 lashes.<sup>49</sup>

### 3.6. Rule of Law and Principle of Legality

The main principle of modern criminal law is that a person shall not be convicted of, and punished for a criminal offence, unless that offence is defined and the penalty is prescribed in law. This was regarded as so important that it was raised to the status of a human rights principle and included in article 15 of the ICCPR. This norm is violated by many states, including the IRI, that have implemented Islamic *Shari’a*. Similarly, according to article 36 of the

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<sup>45</sup> United Nations Human Rights Committee, in its general comment on Article 18 of the ICCPR, declared that “The terms ‘belief’ and ‘religion’ are to be broadly construed”. To make it more clear, it has stipulated that this article protects “theistic, non-theistic and atheistic beliefs, and is not limited to traditional religions”. It has also declared that freedom of religion is protected by this Article “unconditionally”; See: United Nations Human Rights Committee ‘General Comment No. 22: The right to freedom of thought, conscience and religion ( Art. 18)’ 2 (1993) CCPR/C/21/Rev.1/Add.4.

<sup>46</sup> Peters (n 9) 179).

<sup>47</sup> Article 176(c).

<sup>48</sup> Articles 225(c) and 232(a).

<sup>49</sup> “Article 233 -The *hadd* punishment for *tafkhez* [rubbing penis between thighs and buttocks] both parties shall be sentenced to one hundred lashes and there is no difference between *mosan* and non-*mohsan* and coerced and non-coerced.”

Note -if the active party is a non-Muslim and the passive party is a Muslim, the *hadd* punishment for the active party shall be the death penalty.”

Constitution, as well as article 2 of the new Penal Code, only those acts will be considered to be crimes for which the law has provided a punishment.

As discussed earlier, article 220 of the new Penal Code, however, refers the punishment of the *hadd* crimes that are not provided in the Code to Article 167 of the Constitution. Article 167 again refers such cases to authentic Islamic sources and *fatwas*.<sup>50</sup> It must also be noted that according to article 221 of the new Code: “When the reference to article 167 of Constitution is required, the judicial authority shall ask for a *fatwa* from the Leader. The Leader may delegate this issue to other person(s).” Under the new Islamic Penal Code, the rulings and punishments of several *hadd* crimes such as adultery of a married person (*zina-ye-mohsaneh*) and apostasy, by virtue of article 220, are referred to the Islamic sources. This must be regarded, therefore, as a clear violation of the Constitution and principle of legality and the official announcement of the death of rule of law.

Before the new Penal Code was approved, almost all lawyers believed that Article 167 of the Constitution may only govern civil cases and strongly refused the reference to *fiqh* (Islamic jurisprudence) books and *fatwas* in criminal cases. Although, article 214 of the Criminal Procedure Code, by violating the Principle of Legality, had already opened the door to *fiqh* sources in criminal cases<sup>51</sup>, the passage of the new Penal Code and its article 220 has expressly announced the rule of *fiqh* (Islamic jurisprudence) over all criminal cases. However, in order to downplay the sensitivity around the issue, it has been carried out by keeping this fact under wraps with a single reference to the figure of the relevant Article of the Constitution (Article 167). This, in my opinion, is the most important and dangerous change made in the new Penal Code which must be seen as a big step backward towards the ages when the rule of law was not recognized.

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<sup>50</sup> Article 167 of the IRI Constitution: “The judge is bound to endeavor to judge each case on the basis of the codified law. In case of the absence of any such law, he must deliver his judgment on the basis of authentic Islamic sources and authentic fatwas. In spite of silence or deficiency of law in the matter, or its brevity or contradictory nature, he cannot refrain from admitting and examining cases and delivering his judgment.”

<sup>51</sup> Article 214 of Criminal Procedure Code: “The court order shall be reasonable and valid based on the article of codes and principles to which the sentence is issued. The court is bound to find the sentence of any issue within the codified rules and if there is no code for a subject, the court will issue a valid sentence based on the reliable sources of jurisprudence or reliable fatwa. The courts cannot avoid addressing the complaints and claims or issuing the sentence because there is lack of, or deficiency, or brevity, or contradiction or ambiguity in the codified rules.”;

<[http://www.iranhrdc.org/files.php?force&file=pdf\\_en/Iranian\\_Codes/Iran\\_Criminal\\_Code\\_English\\_143233623.pdf](http://www.iranhrdc.org/files.php?force&file=pdf_en/Iranian_Codes/Iran_Criminal_Code_English_143233623.pdf)> accessed 21 March 2012.

#### 4. Conclusion

It seems that the drafters of the new Penal Code had been caught between two necessities: alleviation of some strong criticisms about violations of human rights in the Penal Code on the one hand and loyalty to Islamic jurisprudence (*fiqh*) on the other hand. However, instead of showing a real concern to find real solutions, they have chosen their old approach and tried to hide and divert the eyes from the problems. Accordingly, many details of harsh and inhuman punishments have been omitted in the new Code and referred to Islamic sources, which, for sure, will lead to application of personal views and more human rights abuses. At the same time, several of the simplest progressive reforms proposed in the original Bill were not tolerated either by Parliament or the Guardian Council. In addition, the strong tendency towards giving a more determining role to the Islamic Jurisprudence (*fiqh*) and a harsher approach towards the security crimes is considerable.

Generally speaking, the new Islamic Penal Code, like its older versions, still sticks to the strict rules of Islamic *fiqh* and is in undeniable conflict with human rights standards in the following areas:

- a) the ban on cruel, degrading or inhuman punishment;
- b) the principle of legality of crimes and punishments (*nulla poena sine lege*);
- c) the principle that all persons are equal before the law;
- d) freedom of religion and belief and freedom of expression;
- e) freedom of children from the death penalty and cruel, degrading or inhuman punishment.<sup>52</sup>

Passage of the new Penal Code with these features conveys this message that the Islamic Regime of Iran, after more than three decades since the Revolution and despite the clear inability of traditional Islamic jurisprudence (*fiqh*) in administration of the modern society and establishment of criminal justice, still ignores the principles and teachings of the modern law and criminology and human rights and insists and sticks to traditional *Shari'a*. This, obviously, has led to the high rate of crimes, shocking numbers of the death penalties, the high rank of the IRI among the human rights abuser States, etc.

To come to a better understanding of the main motivations behind such sticking to Islamic jurisprudence, attention has to be paid to political and religious concerns of the Islamic regime and the clergy. The Islamic jurists and legislators who introduced the Islamic Penal Code have proclaimed their commitment to a special reading of *Shi'a* Islam and to the establishment of an

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<sup>52</sup> Peters (9) 175.

Islamic state based on that reading. At the same time, it constitutes a conscious rejection of legal notions and human rights standards that, for them, are allegedly Western and not universal. They, in fact, believe that the *Shari'a*, being God's law, is superior to man-made law.<sup>53</sup>

As a result they do not embrace those human rights standards which are in conflict with their law. Then, if it is argued that, for example, certain penalties are cruel, degrading and inhuman, advocates of the *Shari'a* would retort that such punishments are prescribed in God's revelation and are therefore divine institutions that are above criticism.<sup>54</sup> Therefore, unless the ideological and traditional approach of the Islamic Regime of Iran and the clerics in power are drastically modified, all changes, inter alia in the Penal Code, will not be deep and real; and before this happens, expecting fundamental changes and considerable improvement of the situation of human rights in Iran seems to be unrealistic.

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<sup>53</sup> Ibid 181.

<sup>54</sup> Ibid 183.