

# Feasibility of Legitimate Defense against Attackers without Criminal Liability With Emphasis on the Islamic Penal Code Approved in 2013

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## Abstract

The personal characteristics, such as insanity in the attacker have caused doubt about the possibility of defense to repel the attack of these attackers. Proponents of the permission of defense rely on arguments, such as the absence of a requirement to flee, the non-punishment of the defense, the non-necessity of the offense being a crime, and the illegitimacy of the offense. On the other hand, the opponents of defense have cited arguments such as the necessity to flee, lack of criminal responsibility of the attacker and the crime of rape, and they believe that the only way to counter the attack of this group of attackers is to rely on emergency. Before 2013, the legislator was silent about the defense against attackers without criminal liability. In the Islamic Penal Code approved in 2013, in Note 3 of Article 156, the defense has been accepted against a type of person without criminal liability called insane. The present article has investigated the evidence of this type of defense with analytical-descriptive method, and by emphasizing the Islamic Penal Code approved in 2013, it has considered the permission to defend against attackers without criminal liability.

**Keywords:** legitimate defense, persons without criminal liability, permission of defense, violation, criminal liability, emergency, insanity

## 1. Introduction

From the lexical point of view, the infinitive defense with the (active) reaction is from the root of repulse. Repulse means to remove harm and evil by using power (Taj al-Aros, 2005: 115). In terms of terminology, the legitimate defense of a legal right that a person can resort to in a necessary situation and with seemingly criminal behavior, an imminent or actual violation that threatens the

custom and honor, property or freedom of the body of that person or another. (Shams Natari and Abdullah Yar, 2011: 98).

According to Article 156 of the Islamic Penal Code approved in 2013, legitimate defense is subject to compliance with conditions regarding attack and defense. One of the issues related to conditional defense, which jurists and jurists have less clearly and explicitly commented on, and the Islamic Penal Code also lacks clarity and comprehensiveness about it, is the possibility of legitimate defense against the attack of persons without criminal liability. Persons without criminal responsibility are those who, despite the crime, sometimes the perpetrator cannot be punished due to reasons such as young age or insanity (during the commission of the crime) due to the removal of responsibility and the inability to attribute the crime (Goldozian, 2017: 361).

The opinion of some jurists is to tolerate defending against an attacker without criminal liability. Most of the world's legal systems have accepted the obligation to escape in the case where the attacker is not criminally responsible. Some jurists have rejected the impossibility of defending against persons with no criminal liability based on the lack of criminal liability of this group of attackers. In the context of the feasibility of legitimate defense against the aggression of persons not criminally responsible, other theories have been presented, each of which has its supporters and opponents. One of these theories of the feasibility of defense is based on the nature of aggression, in this sense, if violation means to interpret crime and illegal behavior; we must consider the illegitimacy of defense against persons without criminal responsibility, such as the insane and children.

This is because the behavior of a insane and a child is not a crime. On the other hand, if we interpret rape in the sense of illegitimacy - not crime - the legitimate defense against the insane and the child will have no problem. The last theory in this field is the permission of repelling the attack of persons without criminal responsibility, citing emergency - not legitimate defense. The flaws of this theory will be mentioned in the article.

Until 2013, Iran's Islamic Penal Code lacked clarity and a clear indication in the field of legitimate defense against persons without criminal liability, and the application of the law of the time was mostly cited to justify this defense. However, in 2013, the lawmaker in Note 3, Article 156 of the Penal Code, established a provision that, although the basis of that note and its limitation about the insane, without referring to other persons without criminal responsibility, such as children, drunkards, unconscious persons, and sleeping persons can be objected. However, it has this advantage and positive feature that Note 3 of the aforementioned article refers to the permission of

defense against insane attack. In this article, it will be attempted to the point of view of permission of legitimate defense against the attack of persons without criminal responsibility to be prevailed over the point of view of non-permission by emphasizing the Islamic Penal Code approved in 2013.

## **2. Literature Review**

### **2-1 Theory of permission of defense if it is possible for the defender to escape**

It should be noted that the discussion of the permission of the defense or lack of permission, if it is possible for the defender to escape, is not specific to the attackers who are not criminally responsible, such as lunatics, minors, etc. Rather, it is relevant in all situations, whether the attacker is criminally responsible or not. However, in the case of persons without criminal responsibility, they have been considered much due to their personality and status. In the case of possible escape for the defender, they have provided various statements and justifications.

Shahid Thani has said in *Al-Rawzah al-Bahiyyah* in the description of *Lam'at Al-Damshqiyyah* that if the defender is unable to defend, it is obligatory to flee if possible (Jabai Ameli, Latfi, 2011: 716). That is, if the defender does not have the power to defend, in choosing between death and escape, he must choose to escape, but if he has the power to defend himself, defense is permissible and even obligatory in some cases, such as defending life and privacy. Therefore, if it is possible to get rid of the attack by both defense and escape, it is not obligatory to escape. Therefore, where the defender does not have the power to defend, it is preferable to choose to run away. But otherwise, it is not necessary to flee, and if the defender injures the attacker while defending, he is not responsible because defense is a right, and secondly, the legislator is not obliged to flee (Ardabili, 2012: Vol.1/293).

The requirement to flee if possible is a distorted argument, because fleeing is not a defense in cases where it can be considered an easier way. The attacker has done his own damage with his attack, and this is where the rule of action is implemented. Therefore, in the case of defense, the reason why he is the attacker is because he is a steward, so the responsibility is on him (Marashi, 2018: 97). It is worth mentioning that the proponents of defense in the case of the possibility of escape have pointed out that escape is not a means of defense, so that it is included in the rule of *sahl-fala-sahl*, and even in some cases, even if the defender escapes, the value of the attacked case is not preserved, such as where the issue is the violation of honor or property or defense of another (Audeh, Farhoudnia, 2011: Vol. 1/446).

Some jurists have chosen an intermediate method in these cases, explaining that if the attacker was insane and a minor, he should run away, not defend. There is no need to run away from a sane and mature attacker. Some others according to the application of Article 61 of the Islamic Penal Law approved in 1991, which of course is also visible in Article 156 of the Islamic Penal Law of 2013; Even if it is possible to escape, the defender is considered entitled to defend against the aggressor (Shams Natri, 2014: 409).

## **2-2 The theory of non-permission of defense in case of possibility to escape**

Imam Khomeini stated in *Tahrir al-Wasila* that if it is possible for someone to escape from the clutches of the attacker by means other than fighting, it is safe for him to escape (Khomeini, 1984: Vol.1/448). Here, the imam has not given the duty to run away and has only instructed the defender to run away as a precaution. Sheikh Tusi also believes that if it is possible to run away, it is obligatory to run away (Tusi, 2008: Vol.7/279); and they have also mentioned that if the defender has the possibility to escape, he should run away, otherwise he should defend himself (Allameh Hali, Beita: Vol. 157/1). Apparently, the majority of jurists have not issued a ruling to allow defense in case of escape.

The opinion of the opponents of defense, if it is possible to defend, is based on the rule of *Ala Sahl Fala Sahl*, it means that in defense, one should follow the gradual steps of defense from easy to hard and when there is an easier way to repel the attack, choose the same. Therefore, if it is possible to escape, one should escape and if one defends himself in this situation, that defense will not be legitimate because the standard of proportionality has not been met and it will cause the defender to be held responsible.

The doctrine in favor of escaping if it is possible to escape has argued that due to the equality of people in the current society, unlike the former societies where there were privileged classes, if it is possible to escape, one should not defend and the defense will not be legitimate in this case (Bahri, 2015: 305 and 306). At any time, the personality of the attacker and the person who is threatened, as well as the relationship between them (father and son, husband and wife) must be examined and consequently, based on all these factors, for example, defense is very difficult for an adolescent to be attacked by a child, if it causes severe injuries to the attacker (Sanei, 2003: 261). Some lawyers, despite admitting that there is no clear answer to the issue of defense in the case of the possibility of escape or its lack of permission, are sitting between two approaches to judge, explaining that in the case of doubt as to the legality of the defense or its lack of legality in the case of the possibility of escape, either the interpretation should be in favor of the accused and the defense is considered

permissible, or to be said that the defense is exceptional and should be interpreted narrowly, which in the end, the second approach, which means that the defense is exceptional and it is sufficient to justify it because this approach seeks to confirm the opinion of the legislator, they have chosen because in the interpretation stage, the logical and final interpretation takes precedence over the interpretation in favor of the accused (Elham and Burhani, 2015: vol.1/161 and 162).

The current writer does not consider the above opinion to be correct because first of all, the document that the legislator's opinion in this case was escape and not defense was not presented, so this is an allegation and needs proof. Secondly, the principle of criminalization should be an exception; therefore, in case of doubt as to whether or not a behavior is a crime, one should refer to the principle of non-crime or permissibility of the behavior. Thirdly, friendly institutions such as legitimate defense should be broadly interpreted, and the broad interpretation has no problems if it is in line with the benefit of the accused. Fourth, despite the exceptional nature of criminalization and the principle of non-criminality of behavior, it is not time to apply the impossibility of broad interpretation and the principle of legitimate defense being illegal. It seems that escape is considered a means of defense, therefore, in the case of using an easy means called escape, the use of hard and severe means such as defense is not allowed. The one who considers escape as a means considers escape as obligatory for the person who has been violated (Audeh, Farhoudinia, previous, 446).

To reject the defense if it is possible to escape, some authors believe that in this case, defense is not permissible, because in these cases, defense is not necessary, and one of the conditions of defense is the necessity that if there is no defense, it is not permissible, therefore, if it is possible to escape, one should ran away (Chegni et al., 2017: 635). According to the author, the possibility or impossibility of escape has nothing to do with the discussion of the necessity of defense, but rather, it is examined in the discussion of the appropriateness of defense, because in these cases, defense against aggression is definitely necessary. The only issue is the type of means of defense, whether it is possible to defend by means of escape and retreat or not.

Of course, in the books of general criminal law, some authors discuss the possibility of escape under the necessity of defense, which is worthy of consideration (Sanei, previous, 260 and 261 - Ardebili, previous, 292 and 293 - Noorbha, 2010: 266). In comparative law, these cases have been discussed and they have defended the theory of duty to retreat to the wall, in this sense, if it is possible to escape and retreat, one should not defend (Sanei, previous, 267 - Hamze Joran, 2020: 85). German criminal law is not due to the debates about defense or lack of defense in case of

escape, but due to the condition of non-culpable aggression in the attacker, which we will discuss separately in future discussions.

In the penal code of Afghanistan, if escape is possible, defense is not allowed (General Principles of Criminal Law, prepared by Judicial Education Department: 103). As a final point, if we consider defense as a right, if it is possible to run away, then one should run away, and in this case, one cannot defend and harm the attacker, because the exercise of the right is subject to the condition of health, and the person who exercises his right, he is always responsible for the health of the place and the position on which he exercises his right, because he is free to do the right or not, but if we consider defense as a duty, the conditions of health are not necessary in it ( Audeh, Farhudinia, prevois, 436 and 437). Regarding the possibility of fleeing in legitimate defense against persons with no criminal responsibility, some lawyers have adopted a middle solution to comply with English law. That is, despite not imposing the definite duty of fleeing on the defender, his failure to flee in the event that the attacker is not criminally responsible. Being unnecessary and ultimately illegitimate will increase the lethal defense (Mir Mohammad Sadeghi, 2011: 314).

The author's suggestion is that the legislator should enact a clear and explicit law in this field, because the historical course of Taghtin in the system of the Islamic Republic of Iran is wandering and lacks a clear vision. As long as there is attack and invasion, it is necessary to defend it, and even in the custom of Iranian society, escape and retreat are not interpreted as defense. Escaping is not equal and synonymous with defense in custom, so that it can be said that Ala Sahl Fala Sahl is a supporter or confirmer of escape. Escaping is more like surrender than defense. Requiring the defender to escape is even a form of encouraging the attackers and giving points to the attacker. The legislator can at least put the burden of proving the possibility or impossibility of the defender's escapes on the attacker, so that between the defender's rights and humanity and the attacker's rights to be respected.

### **2-3 The theory of the possibility or impossibility of defense due to the lack of criminal responsibility of the attacker**

The question that arises here is whether it is permissible to defend against innocent attackers such as insane and child. There is no consensus on legal defense against attackers with no criminal liability.

Sheikh Tusi has stated in al-Mabsut that a person has the right to defend himself against aggression, whether the aggressor is male or female, minor or major, sane or insane. Seyyed Abdul Ali Sabzwari, in the authority of confirming this article, said that defense is intellectual goods, which

has been realized, defense is intellectually good, whether the attacker is big or small (Borji, 2007: vol.1/72). Scholars of law have allowed the defense against the attack of the insane and the minor, although both of them (the insane and the minor) are exempt from punishment, this statement agrees with the opinion of most of the jurists (Audeh, Farhoudnia, previous, 442).

In fact, legitimate defense does not have the aspect of punishment, so that its permissibility depends on the presence of responsibility and fault in the attacker (Saneyi, previous, 257). Therefore, if the attacker is a child or an insane person, there is still the possibility of sticking to legitimate defense, because defense is not punishment, so we make it conditional on the presence of criminal liability in the attacker (Elham and Burhani, Previous, 160). On the other hand, some believe that because an insane lacks moral responsibility, legitimate defense cannot be invoked against his attack (Aliabadi, 2013: Vol.1/232). In fact, this group does not consider the attack of an insane and a child to be unjust, and as a result of its rejection through defense, it is not legitimate (Baheri, Previous, 305).

In Iranian law, culpability of the invasion is not discussed. Therefore, according to the silence of the legislator and the fact that an innocent and irresponsible attack is an attack in any case, we can consider the legitimacy of defense in an innocent attack according to Iran's legal standards (Fletcher, Sidzadeh Thani, 2016: 251). In German law, the existence of an element of guilt in the attacker is one of the conditions for the legitimacy of the defense (ibid.). It should be noted that in Islamic and Iranian criminal law, even legitimate defense against animals is predicted, and animals lacks criminal responsibility just like people who are not criminally responsible. Therefore, when the legislator considers legitimate defense against an animal attack to be correct, with the same reasoning, it should be considered correct to defend against persons with no criminal liability (Article 358 of the Criminal Code approved in 1991 and Article 525 of the Criminal Code approved in 2013-Jabai Aamili, Latfi, Previous, 717).

In fact, the attacker is the enemy, whether he is guilty or not. Of course, it may be a problem that, at least in the case of violation against physical integrity, considering that the punishment of children and insane people, according to Iranian law, is a pure error and according to the legal doctrine, it is a legitimate defense in the case of committing unintentional crimes according to the principles and circumstances of the attack are ruled out (Sawlani, 2012: 101- Saleh Ahmadi, 2013: Vol. 1/313). Is it permissible to defend legitimately in case of attack by irresponsible persons considering that their crimes are unintentional? The answer is yes, because first of all, the crimes of children and insane people are intentional naturally, but in terms of punishment, they are subject to pure error. The intention of a child and an insane person is an error, secondly, when the legislator considers

legitimate defense against an animal, which is not even an animal's crime within the criminal law, acceptable. Thirdly, the lawmaker did not mention the condition of intentionality of the attack, and the lawmaker's silence indicates its lack of conditionality, and this interpretation is in favor of the accused of legitimate defense, who is the defender. Fourthly, defense is instinctive, and instinct is not subject to intentional or unintentional aggression, and people are not punished in criminal law for instinctive behavior. Interfering the personal characteristics of the attacker in the analysis of the defense leads to the confusion of the understanding of this institution, and in most cases, the recognition of the madness of the attacker on the defender during the defense is hidden (this happened to the writer).

#### **2-4 The theory of the possibility or impossibility of defense due to the nature of the violation**

It is important to know the nature of violation in the legitimate defense of persons without criminal responsibility. An attack against which a legitimate defense is made must necessarily be against the law (Fletcher, Seyyedzadeh Thani, Previous, 250). In the sense that the violation must have no legal description (Norba, Pishin, 261). According to this interpretation of the nature of violation, defense against persons without criminal responsibility is not correct and is responsible, because defense against crimes is foreseen and the act of a person without criminal responsibility is not considered a crime, therefore, defense against the aggression of a child and an insane person is legitimate. (Odeh, Farhoudinia, Previous, 440 and 441). In Article 157 approved in 2013, it is stated that defense against government forces is not legitimate, and this provision can be interpreted in such a way that violation must be a crime, otherwise it cannot be defended. In Article 246 of the Penal Code of the Arab Republic of Egypt, it is also stated that legitimate defense is permissible and permitted to repel anything that is a crime (Hajarian, 2011: 133). It is also stated in the criminal law of Afghanistan that the attack must be against the law and unjust. Paragraph 5 of Article 60. Max Planck has recommended that the word "unjust" be removed from this legal article of Afghanistan because it is redundant and may cause confusion and various interpretations (Tawheed Khaneh, 2009: 173).

In contrast to these theories, other ideas have been proposed. Some doctrines have not explicitly stated that violation must necessarily be a crime, but have explained the nature of violation with terms such as unjust, which is not necessarily synonymous with crime (Baheri, Previous, 304). It has also been stated that it is not necessary for violation to be a punishable crime, but it is enough to be illegal (Audeh, Farhoudnia, Previous, 2011: 443).

This group of doctrines has objected to the doctrine of non-permission of defense against the attack of an insane person and a child due to the fact that the attack is a crime. To explain that the behavior



of an insane and a child is a crime and they cannot be punished. In other words, the insane and the child have criminal capacity, but they lack criminal capacity. Therefore, assuming that the attacker's behavior is a crime, there will be no problem in defending against people who are not criminally responsible. Therefore, it is not necessary for the aggressor to be criminally responsible for the attack, but it is enough that the attack is considered a crime (ibid.). Those who consider the illegitimacy of an attack to be a condition and not its criminality, say that it is obliged or sometimes obligatory to defend oneself against another attack, regardless of whether that aggression is a crime or not, because the mere act of violation makes the blood of the attacker considered halal. Therefore, the legitimacy of preventing violation makes the blood of the aggressor lawful, not the act of violation, so it is not necessary that violation is considered a crime (Audeh, Farhoudnia, Previous, 2011: 441).

In Iran's legal system, violation should not necessarily be considered a crime because, as mentioned before, legitimate defense against an animal attack is also accepted in Iranian law, and animal behavior is not considered a crime under any interpretation. Crime is a description of human behavior not an animal. In fact, what is important is to repel the attack, not the attacker. Another drawback is that by what criteria should the defender determine that the attacker's behavior is a crime? Is it a crime or not to recognize the behavior of ordinary people? Another point is that all attacks against property, diseases, etc. are not necessarily criminalized, for example, in jurisprudence books; defense against ogle on one's privacy is considered a defense license (Jabai Ameli, Latfi, Previous, 2011: 784). While in Iran's legal system, according to the principle of legality of crime and punishment, ogle is not a crime, even though it is a sin according to Sharia law. Finally, defense in the case of an imminent attack is also explicitly accepted by the law (Article 156 of the Criminal Code approved in 2013), however, in the case of an imminent attack, the attacker's behavior has not yet manifested itself, and in other words, the material element of the attack has not been fulfilled. Therefore, if violation means a crime, it should not be considered permissible in the case of imminent aggression, because the behavior without fulfilling the material element is not included in the legal definition of crime.

## **2-5 The permission of resisting against persons without criminal responsibility on the basis of emergency**

The state of emergency is the occurrence of a situation in which the retention of rights or money is associated with harming the property of others and as a result of committing a crime (Aliabadi, previous, 215) or in other words, emergency is the state of a person who is forced to choose

between two things that one of those two is a crime, so a distressed person does not lack will and authority (Baheri, Previous, 318). Urgency is provided as a reason for preventing criminal liability in Article 152 of the Criminal Code approved in 2013, which will not be analyzed here. The question is, can the defender defend himself against the attack by people who are not criminally responsible, citing the urgency of the attack?

Those who rule out legitimate defense against irresponsible persons, either due to the possibility of the defender fleeing, the lack of moral and criminal responsibility of the attacker, or the need for the attack to be a crime, have considered it possible to invoke emergency. One of the legal scholars said that repelling the attack of an irresponsible person such as an insane person or a minor is not possible as a matter of legitimate defense, because this attack is not described as unjust, but if it is not possible to prevent harm in another way, in this case, it is due to necessity - not because of defense legitimate - the perpetrator will be found innocent (ibid.: 305).

Or they have mentioned that the attack of an insane person can be rejected through emergency (Ali Abadi, Previous, 232). Therefore, the attack must be a crime and the aggressor must be from a person who has criminal responsibility, and the basis of defense is emergency, not legitimate defense (Audeh, Farhoudnia, previous, 443). One of the jurists has argued that the privilege of legitimate defense is that there is no objection to using more force against aggression, while urgency is based on the absolute balance of interests. The question he raises is this; In the light of absolute equilibrium theory, is it correct to kill the insane attacker? To establish urgency, it must be shown that the protected interests were greater than the possible consequences of the violation. However, here a life has been lost (insane person life) and the life of the defender has been preserved. Therefore, life is not opposed to life, and it is not right for another human being to die in order to survive. Lawyers consider this urgent, arguing that the life of an insane person is more valuable than the life of a defender. This argument is absurd and incomplete because the insane attacker is considered as a half-human (Fletcher, Seyedzadeh Sani, Previous, 249 and 250).

Some doctrines that agree legitimate defense against a person with no criminal responsibility have not found it correct to refer to emergency or necessity with the argument that in the case of necessity, attacking or committing a crime is exempt from punishment, while attacking and committing a crime in legitimate defense is justified and permissible. (Saenei, Previous, 257) At least, regarding the murder of an attacker in the position of emergency, there is a difference of opinion between the doctrines to the explanation that when involuntary killing is not authorized in the Iranian legal system, emergency killing in the first way is considered unauthorized (Mir

Mohammad Sadeghi, Previous, 306). Some others have considered it right to support the emergency even with murder and have cited the provisions of the articles approved in 2013 (Aghaeinia, 2017).

Some other jurists believe that committing murder in an emergency is correct only when the emergency is caused by the guilty behavior of the crime party (Habibzadeh, 1996:75). According to the author, it is not correct to refer to emergency against the attack of persons without criminal liability for the following reasons:

- **First** of all, in legitimate defense, the humanity of threat factor is important, and this is one of the differences between emergency and legitimate defense (Natari, Previous, 406). Therefore, the attack of an insane and minor insider is not included in the emergency and these people cannot be imagined half-human. The attacker's humanity is not affected by his personal characteristics.
- **Second**, in an emergency, the party against whom the crime was committed has a passive role and did not have any impact on the emergency. While in legitimate defense, the attacker has acted against himself (Ruh al-Amini, 2016: 93).
- **Third**, blood money is also invalid in the legitimate defense but not in the emergency. The rule of Al-Ezterar Layabtal Hagh Al-Ghai indicate this (Kamfer, 2021: 201). This money must be paid by the person himself, not by Baitul-Mal. According to the Enrichissement sans cause theory, the embarrassed cannot be exempted from civil liability without a reason (Baheri, Pishin, 319).
- **Fourth**, the issue of emergency in Iran's legal system is only life and property, so if the attack of persons without criminal responsibility is against freedom of body, honor, it is definitely not included in Article 152 approved in 2013.

It seems that if in an attack, even by an animal, loss and damage is done to the attacker himself, it will be a legitimate defense, but if the damage is done to an innocent third party, it is possible to invoke emergency, because in our jurisprudence and legal system, legitimate defense against animals is also accepted. Therefore, the sum of these two concepts must be argued in the said way.

## **2-6 The approach of the Islamic Penal Code approved in 2013 regarding defense against the attack of persons without criminal liability**

In Iran's laws, until 2013, the legislator never specified the permissibility or impermissibility of defense against persons without criminal responsibility, and it was removed from the application of legal provisions that even if the attacker is insane or a child, with the conditions of defense and

attack if defense takes place, it will be legal. But the legislator's approach in the Islamic Penal Code approved in 2013 was somewhat different from the previous laws. In Note 3 of Article 156 of the Islamic Penal Code approved in 2013, the legislator has said that the legitimate defense of blood money is invalid, except in the case of defense against an insane attack, where money is paid from the public treasury.

The meaning and interpretation of this note is that legitimate defense against the attack of an insane is acceptable. Therefore, the interpretations and theories that can consider the non-permission of legitimate defense against the attack of an insane are at least not compatible with the Islamic Penal Code approved in 2013. The late Mohaghegh has stated in the Shari'i al-Islam:

"لو قصد قتل العاقل دفعه و كان هدرا و فى رواية دية فى بيت المال" (Heli: no date: 990)

The deceased Mofaghegh does not give fatwas in the Shari'ah, and satisfy to bring the aforementioned narration that the blood of the insane wasted is in responsibility of public treasure in defense against the attack of the insane. In the book of Kafi:

"ان كان المجنون اراده فدفعه عن نفسه فقتله فلا شىء عليه من قود و لا ديه و يوتى ورثه ديته من البيت المسلمين"

If an insane attacks and a person kills him in a position of defense, then the murderer is retaliated against the murderer, the treasury must give the blood money to the heir (Kafi, 1988: Vol.7/294). Ayatollah Khoei has said in the book Taklama al-Manhaj that:

"لو اراد المجنون عاقلا فقتله العاقل دفاعا عن نفسه او عما يتعلق به، فالمشهور ان دمه هدر، فلا قود و لا ديه عليه و قيل: ان ديته من بيت المال المسلمين و هو الصحيح" (Khoiy, 2014, 211)

According to the unpopular theory of jurists and consistent with Ayatollah Khoei' ideas, Iranian lawmaker considers defense against insane deserving blood money by the treasury.

The reason for this fatwa of Ayatollah Khoei is narration of Abu Basir, with the content that if an insane attacks a wise man and kills the wise man in his defense, there is no retribution and blood money for the defender, and the blood money of the slain attacker of the insane will be given by public treasury. Ayatollah Khoi has another narration called Abulvard's narration, in which an insane attacks a wise man, and the wise man takes the sword from the insane and kills him with the same sword. (Khoei, Saeed, 2013: Vol. 1/249).

The reason for Abulvard narration is the Tal rule. This narration is weak in terms of document, although the content of this narration is narrated in a narration from Abu Basir, the reason for which

is not mentioned. Therefore, they have said if someone is killed and the murderer is not retaliated for any reason and cannot collect blood money from the murderer, blood money is paid from the treasury (Haji Deh Abadi, 2021: 212).

According to the author's opinion, when the attacker exposes himself to destruction by attacking and acts against himself, no money remains from the treasury to invoke the rule of Tal and pay blood money from public treasury. Abulvard's narration is not the same as the conditions of defense, because defense must be necessary, and when a wise man takes a sword from an insane and kills him with it, it is no longer defense, but revenge.

Therefore, the provision of Note 3 of Article 156 of the Islamic Penal Code approved in 2013 is narration. But the question is, if a child, unconscious or drunk person (who are among the persons without criminal liability) attacks another and the defender causes them harm and injury in the position of defense, is it possible to pay the blood money of these attackers from the treasury?

Therefore, according to note 3 of the aforementioned Article 156, it is not a positive action, but rather objectionable, both in terms of the basis for payment of blood money for the insane attacker and also in terms of the fact that the mentioned note is only about the insane. What are the characteristics of insane that a child, a sleeping, unconscious and drunk person does not have? In all these situations, the perpetrator is not criminally responsible. The author's suggestion is that the legislator consistent with the famous opinion of the Imami jurists accepts the defense against persons without criminal responsibility without the obligation to pay money from the treasury. This opinion is consistent with verse 194 of Surah Al-Baqarah

"فمن اعتدى عليكم فاعتدوا عليه بمثل ما اعتدى عليكم"

The payment of insane blood money by public treasury be misused by his heirs and they will incite insane to attack by taking blood money from public treasury. In the end, it is important that all the contents of this research and all the theorizing were related to the place where the defender has the conditions of criminal responsibility and the attacker does not have the conditions of criminal responsibility. But if the defender, like his attacker, is not criminally responsible, such as the defense of an insane person against an insane person, there will be no other way and argument left but to accept a legitimate defense against the attacker.

### 3. Conclusion

Repelling the attack of persons without criminal responsibility based on legitimate defense is one of the controversial topics among jurists and legal systems in the world. Some people in the state of attack, especially the attack of persons without criminal responsibility, such as the insane and the child, have not made any definite requirement to flee and not to defend themselves, and they consider defense against this attack as legitimate. Another group, according to the situation and personality of this group of attackers has accepted the non-permission of defense and has preferred the option of escape over the attack. Even if it is possible to escape, due to the right and duty of defense and the fact that in an attack, the attacker's reason is stronger than the defender, so the responsibility is still with the reason.

Regarding the legitimate defense against the attack of persons without criminal responsibility, the theory of non-permission of defense has been proposed due to the lack of criminal responsibility of the attacker, because these attackers do not have criminal responsibility, therefore, defense against their attack will not be legitimate. In opposition to this theory, it should be noted that defense is not a punishment, so that it is eliminated in case of lack of criminal responsibility of the attacker.

Another existing theory in the field of the possibility or impossibility of defending against the attack of persons without criminal responsibility is related to the nature of violation. Those who have accepted and interpreted violation in the sense of illegal behavior and crime, believe that it is not permissible to defend against the attack of this group of attackers, because despite them, the attack of a person who lacks criminal responsibility is not illegal and a crime, rather than the authorization of legitimate defense. In fact, violation should also be innocent, but the group that interprets aggression as illegitimate also considers the attack of an insane and a child to be illegitimate, so they consider defense as permissible. In addition to this, a person without criminal responsibility has criminal capacity and does not only have criminal capacity and criminal responsibility capacity.

The final theory of this dispute is the permission of repelling the attack of persons without criminal responsibility on the basis of emergency - not legitimate defense. This theory is not acceptable for various reasons; first of all, the basis of emergency is a dangerous act that has no human origin. While the origin of danger in the legitimate defense is human behavior, insane and a child are also human beings. Second, the victim is completely innocent and passive in an emergency, unlike the victim of legitimate defense. The attackers are not innocent and passive without criminal responsibility. The third is that the blood money is the responsibility of the perpetrator and not another person or institution. Fourth, the issue of emergency is only life and property, contrary to

legitimate defense. What is the duty if an insane person, a child, etc. violates the honor and freedom of the defender's body?

At the end, the Iranian legislator's position regarding legitimate defense against attackers without criminal responsibility, according to the application of Article 156 of the Islamic Law of Iran approved in 2013 and Note 3 of the above-mentioned article, is based on the unpopular theory of Imami jurists, which is suggested to be removed from the law and the legislator consistent with the well-known theory of Imamiyyah jurists considers the blood money of the irresponsible attacker as waste, not on the responsibility of public treasury. In Iran's legal system and Islamic jurisprudence, defense against animal attack is also accepted. Therefore, defense against a human attacker with any personality characteristic is acceptable in the first way, defense is an instinctive thing and an instinctive thing cannot be punished.

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