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STUDYING THE MENS REA OF MURDER

MOHMMAD ALI ARDEBILI¹ AND AMINEH MOKHTARI²

1: The Islamic Azad University, Science and Research Branch, Department of Criminal Sciences
and Criminology

2: Student in the Islamic Azad University, Science and Research Branch, Department of
Criminal Sciences and Criminology

*Corresponding Author: E Mail: Amineh.mokhtari65@gmail.com

ABSTRACT

In the present paper, murder has been considered among the different type of homicide (murder, manslaughter and quasi- intentional homicide) and among the constituent elements (Actus and Mens Rea and legal element)only the Mens Rea of murder have been studied. Therefore, the present study examines the Mens Rea of murder in two separate sections. First section is related to the position of intention and will in the study of mens Rea of murder that each one of them in two separate discussions was analyzed. The second section of the study refers to the constituent elements of Mens Rea containing knowledge and awareness, malice intent and finally the effect and opposition of intention (motive) in the mentioned crime.

Keywords: Mens Rea, Murder

INTRODUCTION

Homicide is the biggest aggression to the physical totally of persons that is following the most severe punishment from the beginning so far. The homicide has different types that its type, severity and degradation of the punishment are different with each other based on the Mens Rea. In this regard, murder

is the most sever of different types of murder. In the history of legislation in Iran, murder law has been undergoing enormous changes. The importance of the crime in one side and severity of punishment in the other hand needs to more accurate and comprehensive criminalization. Considering that the type of

homicide is determined based on the Mens Rea and since there is significant difference between murder and manslaughter; so studying the Mens rea of murder and its constituent elements have significant importance. For this reason, the researcher attempts to study the Mens Rea of murder based on the changes of Islamic penal code approved in 2013.

First section: the position of intention and will in murder

What is important in the intentional crimes is establishing the intention and will in committing a criminal act. The act that is done outside the intention and will of the prisons is not in the classification of the intentional crimes. In this section, the position of intention and will on the intentional crimes has been studied.

First discussion: studying the will and its position on murder

In this discussion, conceptualization and the position of will has been studied in the research of Mens Rea. As it would be mentioned, will is one of the components of mental element of crime and by declining the will in the crimes, the intentional and unintentional offense is not considered as the act of perpetrator. For this reason, determining the situation and position of

intention has the special importance in the present discussion.

The literal and legal meaning of will

The literal meaning of will refers to aim, purpose and end (**Dekhoda, 1994**). In some cases, it refers to desire and enthusiasm of soul for doing an action.

The shortest definition regarding the will is the evaluation and selection of a work by a person who his conscious understands it (**Ketabi, 1996**). Some of the lawyers wrote regarding the will:” the researchers of philosophy field attempt to call an action as the will of a person so that spiritual quality is obtained after confirmation of the action. The spiritual quality leads the human power toward doing an action or leaving an action. Some of the other lawyers in this regard believe” will is spiritual and mental state that its origins apparently is nerve and mind. In the legal terms, the concept of will is willing or leaving an action since each crime originate from leaving or doing an action, so it can be stated that there is an will in all crimes “ (**Pad, 1984**). Some other believes “will is a spiral element that is necessary for creating all crimes” (**Ali abadi, 1999**).

However all mentioned definition has some weakness and strength points that it seems none of them was unsuccessful to represent a suitable definition of will. Will should be

arisen from the willing and decision of offender, so in the common viewpoint, the actions which the persons has no role for occurrence of them is not interdicted.

Arrangements of will

For performing the will, the existing of some arrangements is necessary. Reflecting or having some concepts regarding a movement is priority on its intentional start. Some of the jurists believe that the arrangements of an intentional action formation consist of mind, soliloquy, effort and will, respectively (**Khomeini, 1987**). Some of other modern jurists express that: "will is a state of decision making which depends on the work issue" (**Khomeini, 1987**). However it should be noted that pointing to the issue only is discussed in the legal assemblies and it has no legal situation since the necessity of such order in direction of will formation is not seen in criminal law provisions of Iran.

Position and necessity of will

The primary basis of the criminal intent and criminal responsibility is will. In the criminal law of Iran, will has a main role and subject act of criminal law is action. In the financial crimes, doing a criminal action a voluntary act is the basis of mens rea and a condition of punishment enforcement.

There is a difference between intentional actions desired for criminal law and

intentional acts outside the scope of law field. Criminal law only brings to account those intentional acts that have prohibited them at the beginning. However intentionality of criminal act is the primary basis for punishing the guilty person.

It seems that the cases should be classified for analyzing. When a perpetrator acts a prohibited legal action without will but the commenting the crime is arisen from his guilty, enforcing the punishment on the offender has no problem. The case is conformity with principles of criminal law and in Islamic penal code, punishment on such offender has been appointed at the article 153:" if a person who is asleep or unconscious commits a crime that is considered as a crime according the law, he will not punish unless he deliberately sleeps and makes himself unconscious by knowing he commit a crime in this situation." in addition, there is a law regarding the drunkenness at article 154 of criminal law:" drunkenness and aboulia arising from consumption of drugs, alcohol and psychotropic substances are not the obstacle for punishing unless it is approved that the offender during committing a crime was improperness. As it is proved that the alcohol and psychotropic substances was consumed for committing a crime, the offender is

punished for two crimes, one of them for consumption of alcohol, drugs and psychotropic substances and the other for committing a crime.

On the other hand, when a crime is occurred and the will of the person is not involved in the crime, he has no responsibility for the crime, although there is a causality relationship between him and the mentioned crime. According to the article 500, if the occurrence of a crime or any other damage does not connected to the behavior of someone and it have occurred due to natural disaster (earthquake, flood and thunderbolt); nobody is the grantor for the crime occurrence. In addition, article 505 of the same law states: "the responsibility of a driver is on the condition that the natural disaster such as earthquake and flood is not the reason of the accident. Therefore, will of each act is the basis of Mens rea of the crime. For this reason, the study examines the intentional behavior as the object of the study and many of defenses and reasons of disclaimer can be justified through removal of will. However, the legislator at article 140 of Islamic penal code prescribed:" criminal liability in Hudud, Tazir, Qisas only is performed that the person during the committing a crime is rational and empowered." although the legislator did not refer to the necessity of will as one of the

main condition for criminal responsibility, in this case, lake of empower can be interpreted as the lake of will. Finally, it can be stated that there is a general absolute relationship between will and intention.

The position of intention in murder

After the intention, intention is considered as the most main the intending mind that should be studied. Intention as the mens rea in the intentional crimes has some elements that in this discussion are considered. Intention in literal term means a will for doing an act 18. It also means doing a work based on the will and mind no based on the happening 4. In addition, intention is an effort and motive for reaching the aim. The aim is the same opposition with order of the legislator that is defined as bad intention. The French lawyer, Emil Garsion, and some of the criminologists defined the intention as awareness of the offender to do the unlawful act (**Sadeqi, 2008**). Some of other lawyer considers the intention as a synonym with the criminal intent, and they assume it as the main will and desire (**Saneii, 2003**). The others believe that intention or criminal intention consist of an interest toward doing an criminal act (**Sadeqi, 2008**). In addition, intention is the will of man toward doing an act (**Goldozian I. , 2007**). Finally, it should be emphasized that "intention" in each definition is mens rea of

the crimes which is called intentional crimes (Ardebili, 2013), the Islamic jurists introduces the concept of intention in the intentional crimes. Sahib Javaher states that: murder is an intention of murderer for killing a person (Sahib Javaher, 2006). Therefore, the concept of intention in Islamic jurisprudence is the intention of specific person. The intention has two elements: mental element that is the intention of doing an act and consequence of intention (Goldozian I., 2007).

The elements of intention in murder

The mens rea element in intentional crimes consist of awareness of committed, intention in behavior, intention in consequence, motivation ant etc.

Awareness

The meaning of awareness is knowledge of the actor regarding the nature and consequences of criminal behaviors and illegitimacy of the act. In other words, the doer knew the subject and legal ruling (Ardebili, 2013).

- **Knowledge of the subject**

In the Islamic penal code, the subject of crime against man is obvious since Qisas against a live man is the punishment of the murderer (Aghaii nia, 2013). Therefore, by limiting the subject of murder against human, the subject of fetus and dead person is not the subject of

the article. In article 220 of Islamic penal code, there is no reference to the necessity of subject knowledge but article 144 of the same law states: “to be fulfilled the intentional crimes not only the knowledge of subject but also the intention of the doer is necessary for committing a crime.” So, the unawareness of the actor regarding the subject based on the article 291 of the same law is considered as quasi- malice. However, it should be considered that knowledge to the subject requires the awareness of doer regarding two things: humanity and survive. The other features of live human such as age, intellect, gender, relative relation, social situation has no effect on type of crime (Aghaii nia, 2013).

- **Knowledge to sentence**

The knowledge of doer regarding the sentences of legislator is a legal presumption in the most penal systems. It means, it is assumed that most of citizens in each level of science and awareness are aware from legal principles. Therefore, nobody can eliminate his/her fault by appealing to their ignorance of law and the claim is not acceptable in the court (Ardebili, 2013). For this reason, article 155 of Islamic penal code states:” ignorance to the decree is not prevented from punishment of guilty person, but the state is not absolute and there is some diverting from the article in some cases in term of some

specific situation. However, it seems that these exceptions are not applied regarding the murder.

- **Malic intent**

Having malice intention means intention of crime committing that the legislator have prevented it. Sometimes the legislators consider the presence of the crime depending to have the specific intention so that the doer has tried to do it (Ardebili, 2013). Some of the lawyers state regarding the malic intent to criminal intention:” in the criminal law, the criminal intention can be considered as an intendancy to do the act which have been prohibited by the law (Nor Baha, 2007).” Most of the experts accept the popular definition of Emil Garson regarding “the criminal intention is knowledge of the doer regarding the illegitimacy of his criminal act. It has been confirmed by some scientists such as Vaber, Bouza and Garrow (Ketabi, 1996). In this regard, malice intent law has been classified into basic mal intent and specific mal intent that each one of them separately is studied.

- 1) **basic intent (basic malice intent)**

The term of intent in the action is used as a synonym with basic intent in the penal code (Aghaii nia, 2013). Some of the lawyers define the basic intent as the will of actor for committing a crime (Goldozian I. , 2001).

The other lawyers are used the term of intent instead basic intent and state” offenses requiring basic intent define a mens rea factor which is no more than the intentional commotion of actus reus (Sadeqi, 2008). In addition, the legislator is used the intention to commit a crime as the basic intent and in the article 144 of Islamic penal code states:” in the fulfillment of intentional crimes not only the awareness of the subject of crime, but also his intention to do the criminal act should be specified (Aghaii nia, 2013).

- 1-1) **Being certain to the aim**

Beside the necessity of intention in the situated action, the mental attention of the murderer to the victim is the other necessary element for proving the intention (aim) of murderer (Sadeqi, 2008).

The intention in behavior should be regarding a specific person or persons or a no significant person or persons of a population and the issue should be observed in all paragraphs of article 290; restrain of the legislator to specify it in the other paragraphs is for preventing the repetition. In addition, the intention of criminal behavior without attention toward the victim is not consist of the intention (Aghaii nia, 2013).

In addition, being certain to the aim is not requires to confront the guilty person with the victim. So, it is induced from the issue that

intention in the behavior should be agree with the aim of guilty person otherwise it is not in the discussion of murder.

1-2) Being certain in the identity

The term of “certain person or persons” is without their identity and characteristic. In this regard, article 294 of Islamic penal code states: if someone due to an mistake in identity commits a crime on someone else in the event that victim and the considered person is not consist of the article 302, the crime is considered as an intentional crimes (Mir Mohammad Sadeqi, 2013). What has happened in this case is an error to recognition no targeting; hence, whether the intention of murderer is killing a person without considering his identity or he wants to kill the victim by another identity, both actions is considered as intentional crime (Mir Mohammad Sadeqi, 2013).

2) Specific intent

The other mens rea of murder is specific intent or intent of victim death since the crime is considered as the crimes bounded to consequence (Sadeqi, 2008). In this regard, the term of illegal of considered action and intention to do it are sufficient for having the basic malice intent. In the absolute crimes, the rate of malice intent is sufficient for fulfilling the mence rea while in the crime bounded to the consequence such as murder, the presence

of specific malice intent is also necessary. The final section of article 144 of Islamic penal code in this regard states”: in the crimes that their occurrence is based on rule bounded to the consequence, the intention of the consequence or awareness regarding its occurrence should be considered. There are some differences between specific malic intention and motivation that causes to distinct them but some of the lawyers are considered the specific malic intention as the motivation (Zeraat, 2013). In view of some of the lawyers, the intention of the consequence is divided into two types: “elementary and explicit intention” and “subordinate intention”. However, some of the lawyers instead the classification is used the “probable intent” and “dogmatic intention” (Zeraat, 2013). The other lawyers by rejecting the recent classification believe that intention always is an individual class no specific class. Based on it, the use of descriptions of explicit and implicit is not suitable for exact intention since it is disagreeable with its nature (Aghaii nia, 2013).

CONCLUSION

By studying the mens rea of murder in Islamic penal code approved in 2013, some of the points can be emphasized. What is important in the present paper is a set of

changes which was done by the legislator, among the common changes regarding the mens rea that is consist of article 290 of Islamic penal code, it can be referred to description of murder types, explanation of need to prove a lake of knowledge regarding the types of crimes causes to murder, emphasis on the effect of place and time situation. In addition, regarding the mens rea, lake of effect of the error in identity in new rules and in article 294 of Islamic penal code, the specific intent is important. Finally, the studied changes with observation of equity, the positive changes are evaluated and the changes were under the ideas of philosophers and professor of this field. It is hope by developing the legal society, more changes and effects is seen regarding the criminal laws especially Islamic penal code.

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