

JURISPRUDENTIAL CRITERIA OF MALICE IN INTENTIONAL MURDER

Ali ZANGANEH^{1*}, Mohammad NOZARI FERDOWSIEH²

¹ Master Student of Judicial Jurisprudence, Department of Theology and Islamic Knowledge, University of Qom, Iran.

² Assistant Professor and Dean of Jurisprudence and Islamic Law Basics, Department of Theology and Islamic Knowledge, University of Qom, Iran.

***Corresponding Author:**

Email: alizanganeh71@gmail.com

ABSTRACT

Murder is an offense of result and its realization depends on obtaining a particular result; that is, a human's loss of life. Principally, the mental element (mens rea) of a crime encompasses all components of an objective element (actus reus). In order to attribute a crime as a murder, in addition to committing a felony act, malice should also be regarded as a component of the crime result. Accordingly, the jurists believe that a crime is considered a murder when it has a criminal intention or a general malice as well as the intention to the result or a specific malice. For this reason, the intention is an integral component of the mental element of the murder. The objective of this paper was to investigate a jurisprudential criterion to detect malice (mental element) in the murder with the intention of the result. Regarding the literature of the present study, it was revealed that the general and specific malice are the most essential components in the realization of the mental element of the murder. Therefore, according to the jurisprudential aspect, the criteria to detect malice in the murder are both the intention of the commission and the result of the commission.

Keywords: *Murder, Malice, Intention of the commission, Intention of the result.*

INTRODUCTION

Murder is the greatest harassment to the bodily integrity of an individual, and it has different kinds regarding the degrees of murder based on the mens rea (mental element). Therefore, malice (mental element) is a component of a crime. Specifically, the criterion and principle to categorize the murder is the perpetrator's mental interaction during committing a crime. Accordingly, the murder is divided into general categories including murder and involuntary manslaughter. An individual is attributed a murderer and is punished when both legal and external elements of the crime are observed, and the commission occurs in the reality due to the perpetrator's volition. In fact, a mental (voluntary) relationship between the commission and the perpetrator is needed and it is called the malice (mental element of a crime). The present study aimed at investigating the jurisprudential criterion to detect the malice and the intention to the result in the murder. Besides, it introduced some malice features in the murder along with the intention to the result based on jurisprudential principles.

COMPONENTS OF MALICE (MENTAL ELEMENT)

Regarding jurists' discussion, two terms of criminal intent (intent of commission) and the intent of the result are the important components in the formation of the mental element of

an offense, particularly an intentional (deliberate) crime (Mohaqq Heli, 1969: 245). In order to examine the components, some related concepts need to be defined.

Intention

Regarding various etymologists' views; intention is defined as to make an effort and to urge to achieve a specific goal. The term "intentional" also means to do something on purpose (Ardebili, 2013: 234). Conventionally and colloquially, the concept of intention is related to voluntarily pretending behaviors including "desire" or "urge". In the colloquial literature, the manifestation and expression of the volition to do a particular act (such as drinking), mystically means that the subject has an intention to do an action. It doesn't make any changes until it is just an intention in the mind and hasn't been occurred objectively and practically.

Types of Intention

Regardless of any categorizations for the intention term, for example direct and indirect intentions, in order to make a mental element of a crime; there are two general intentions; including the intention to the commission (criminal intent) and the intention to the result.

- **Intention to the Commission**

An intentional crime requires a criminal intention to fulfill the mental element of a crime. Criminal intention has not been defined in the law, but the legislator often determines it by examining various issues in legal contexts. (Valid, 2009: 249). In the involuntary crimes, there is also the intention of the commission, but it differs with the voluntary ones in which the intended commission is illegal which results in punishment and retaliation. However, in the voluntary crimes, when the crime is directly committed by the perpetrator, his liability is not subject to illegality of the intended commission. The criminal intent has several components that constitute the mental element of the crimes.

- ✓ **Volition**

Volition or, in a better way, "volition for commission or omission" is the first and most important component of the mental elements of the crimes. It is regarded as the most fundamental and essential element to fulfill the mental element of voluntary and involuntary crimes. Volition to commit a crime means a desire to commit a criminal commission. (Validi, 2009: 235). Jurisprudentially, it is necessary to form the volition to commit a commission or take an omission as follows: (Gorji, 2003: 30)

1. Come to mind, 2. Confirmation of benefit, 3. Zeal, 4. Dogma

- ✓ **Awareness and knowledge**

a. Awareness of judgment : To be aware of the criminal judgment and to understand it.

b. Awareness of subject: To be aware of the subject and to understand it

- **Intention to the result**

It means that the perpetrator obtains the intended result in committing a crime. In that case, he deserves to be punished. The intention to the result is the same as a specific malice. In the language of jurisprudence, "an intentional crime is committed both in action and intention", while the intention means the intention to the result (Mohaghegh Helli, 1969: 195). In the criminal law, the intention to the results is defined as an offender's intent to a result that is commonly obtained from a crime, for example in murder case, a murderer intends to lose the victim's life. In the intentional offenses, the offender has an intention to the result. In the



intentional crimes, the perpetrator has an intention to the result. In the contracts and unilateral obligations, the intention to the result is defined as the intention for the priority of the legal effects on the contracts and unilateral obligations.

THE CRITERION OF THE JURISPRUDENTIAL DETECTION OF MALICE

There is a variation of malice, while the most basic types of malice are general malice and specific malice to fulfill the mental element of crimes. Jurisprudentially, the criterion to detect a malice is the intention to the commission and result.

Types of Malice

The types of malice are as follows:

- *General and Specific Malice*

General malice refers to the self-conscious volition of an individual in committing a criminal act. Most crimes require general intent, meaning that the prosecution must prove only that the accused meant to do an act prohibited by law. Whether the defendant intended the act's result is irrelevant. Malice is always necessary in order to consider a crime as an intentional one, but in some crimes, in addition to the general malice, a specific malice is also required. That is, in addition to the intention to commit a criminal act; another intention for the realization of a crime is required to be exemplified by the legislator. Presumably, in the assault and battery crime, a general malice in beating suffices and it is not necessary that the assailant intends to injure. However, in the murder, in addition to intentionally and deliberately committing a criminal act (for instance beating or shooting), the intention to murder is also necessary in order to consider the perpetrator as a murderer (Nourbaha, 2005: 190).

- *Malice aforethought*

It is the "premeditation" or "predetermination" (with malice) required as an element of some crimes in some jurisdictions. In other word, making a decision is prior to committing a crime and it is opposite of simple malice. In Iranian Criminal Law, no precise rules have been predicted for the malice aforethought.

- *Decisive malice and probable malice*

Decisive malice is defined as a criminal intention which is unconditional in committing a crime, and probable malice is defined as an intention to commit an action which might result in harmful consequences.

A problem which is raised here is: Is a decisive malice possible in involuntary manslaughter crimes?

In order to answer the above question, it should be noted that as it was mentioned earlier, in the decisive malice, the perpetrator decisively and certainly intends to realize the result of a criminal action, while in the voluntary manslaughter crimes, the perpetrator predicts the result of his commission and commits it voluntarily and deliberately. Hence, the obtained result is significantly worse than what the perpetrator intended to do. Thus, if the perpetrator doesn't have an intention to commit a specific crime, such as assault while the results of this commission is worse than his expectation, and the injuries result in the victim's death, although the perpetrator doesn't intend to murder the victim, the committed crime is called involuntary manslaughter or "violation of the intention" .



MURDER ALONG WITH THE INTENTION TO THE RESULT

This kind of murder is, indeed, in accordance with the principles related to the mental element of intentional offenses bound to the results which have been investigated in the previous section. According to Article 144 of the Islamic Penal Code: "In the pursuit of the intentional crimes, in addition to the perpetrator's awareness of the crime, his intention to commit the felony act need to be specified. Therefore, the mental element of this crime encompasses a criminal intention and an intention to the result.

COMPONENTS OF THE MENTAL ELEMENT OF THE MURDER ALONG WITH THE INTENTION TO THE RESULT

In the intentional crimes, including the murder and the mental element of the perpetrator contain awareness or knowledge, the volition to commit, and the volition to the result or the criminal intention. Regarding the abovementioned, the following can be considered as the components of the mental element of the murder along with the intention to the result:

1. The volition to commit a crime against the law
2. The awareness of illegality of the crime
3. The intention to the loss of life

In other words, "the criminal intention (general malice) is along with the intention to the result (specific malice)".

Criminal intention is shared among all the intentional crimes. In any intentional crime, the perpetrator must have awareness of committing an action which is considered to be a crime by the legislator. In the murder, a criminal intention is to have knowledge of humanity and the viability of the victim and intent (the violation that consciously perceives committing a particular crime) in committing a behavior against another which ultimately leads to his death (Sadeghi, 2007: 118). Thus, the intention of a criminal offense in the murder is to observe the violation to commit a murder with the knowledge that is forbidden. In other word, the criminal intention to murder is the violation to commit a felony act that leads to the loss of life from a victim with the knowledge that is forbidden.


Regarding Article 144 of Islamic Penal Code passed in 2013, it stipulates: " In the pursuit of the intentional crimes, in addition to the perpetrator's awareness of the crime, his intention to commit the felony act needs to be specified. In the offenses whose commission is dependent on the realization of the result, the intent or the awareness of its commission needs to be determined ". Obviously, the volition issue is related to the physical behavior and the criminal result. Therefore, if the perpetrator of the murder only intends to behave physically; but he/she does not intend to obtain the result, his commission is considered involuntary (Zeraat, 2014: 247). In the intentional crime, the mental component of the crime results in combining the process of volition to commit a criminal act and the intention to the result, for example; if someone intends to murder another, he takes an action to murder the victim (Validi, 2014: 245).

It should be noted that the awareness of the criminal intention is not synonymous with the perception of criminal liability. According to the views of criminal lawyers, perception is a significant issue in the realization of legal capacity and its existence is necessary to criminalize



the perpetrators of a crime. (Mir Sa'idi, 2011: 113). In fact, perception refers to a general mental state, irrespective of the definition of an instance. Nevertheless, the awareness of a particular subject is not intended; it is about the ability to perceive and understand, and that the person who is supposed to be criminally responsible, has the power to understand the phenomena and ordinary and social effects and consequences of his behavior. Therefore, the concept of perception is related to the legal capacity which takes into account the ability to be responsible, regardless of whether the person committed a crime or not (ibid). But, the awareness debate is related to the stage of criminalization and the realization of the crime. The relationship between the legal capacity and criminal liability can be easily stated, so a criminal capacity is necessary, while it doesn't fulfill the criminal liability. However, the legal capacity can occur regardless of criminal liability (Duff, 2001: 20). However, awareness plays a vital role in the construction of the mental element of crime particularly the murder. The dimensions of awareness (awareness of the judgment and subject) have been taken into account in the following section:

Awareness of the judgment

The significance of education and training is proved either through reasoning, or through acquiring the preconditions of Mafouteh (pre-requisites rules related to the time of happening) or through making strict law. Because faith in Islam is about believing and acting on it, belief comes from the science and practice category based on the awareness of the commandments. Therefore, intellectually; it is obligatory for all Muslims to be aware of the teachings of Islam. Some scholars regard training commandment obligatory based on the criterion of reasoning. Some others also believe that training is necessary in case of necessity of obligatory preparations because keeping the rules practical is very important and the first step of practice is awareness of the practice. Therefore, awareness of the practice is obligatory and otherwise the obligation dies out (Al-Ghuray Na'ini, 1986: 205). Some narrations say that in the Last Day, the ignorant human will be asked 'why you did it?' and he answers O, My God, 'I didn't know' then He will say 'Why did not you go to acquire ...?'.


Therefore, the punishment of an individual who didn't enjoin to Good [Ma'ruf] and forbid from Evil [Munkar] is due to his lack of training, and therefore his ignorance is not acceptable. (Bojnurdī, 2008: 125). As stated in Article 155 of Islamic Penal Code, "ignorance does not prevent the punishment of the perpetrator unless it was not possible for him to acquire or if being ignorant of the judgment is regarded juridically an excuse." It is understood that the purpose of awareness of the judgment is to be aware of having a criminal judgment and also to understand it in case of murder. Thus, awareness of the judgment has some subcategories:

- *Awareness of existence of a judgment*

The perpetrator needs to be aware that the murder has already been criminalized by a legislator. Otherwise, he has been ignorant to the judgment; that is, he does not basically know that murder is a crime. Of course, according to Article 155 of Islamic Penal Code, the crimes deserving qisas or retaliation are categorized in the natural and innate crimes, and if one claims ignorance, his claim is not acceptable as the perpetrator has deliberately and wisely committed an action deserving retaliation. But whether it is possible to use "Denial principle" to deny qisas and call it into doubt. To answer this question, two answers are possible; some people believe that the "Denial principle" is not only possible in " *Al-Hudud*" (limits: in the religion of Islam it refers to punishments that under Islamic law (*shariah*) are mandated and

fixed by God), but also includes qisas (Amoli, 1993: 359), when a term in Arabic comes with "Al-", it is a general term and it absolutely doesn't cover punishment and therein no difference can be seen between the "limits" and the others (Bojnourdi, 1993: 161). In addition, it is necessary to be cautious in penal issues specifically the ones related to blood and human (Qodsi, 2001: 78), because when the punishment comes to the exclusion of the accused and taking his life, it is as important as "*Hudud*" or a limiting punishment. (Rahpeik, 1988: 137). Some have also mentioned the probability. The late Saheb Javahir, in the probability of the inclusion of 'Denial principle', stated that based on the narrations from the Prophet Muhammad (pbuh), *qisas* is also categorized in *Hudud* (limits) but when one is doubtful, it is denied. For example when the perpetrator was ignorant to that issue, it is not permissible to kill him as killing an apostate after repenting and becoming a Muslim is forbidden. On the other hand, the famous Imamieh jurists don't include qisas in 'Denial principle' (Najafi, 1984: 223) and the latter view seems more accurate.

- ***Understanding the judgment***

Understanding a judgment goes one step beyond the awareness of the existence of a judgment which means the perpetrator's knowledge of the concept of a criminal judgment and the recognition of its external features. Therefore, when the perpetrator commits a murder, he/she must correctly understand the concept of the legislator's judgment, and its external features. For example, Najafi (1984) believed that when a murderer commits a murder and loses an innocent person's life deliberately and aggressively, this commission necessitates qisas. However, the perpetrator needs to understand this judgment which requires to understand the meaning of two terms: 1. *Masoum-al, dam* (whose innocent and under the support of law) and *Al-mokafei* (both murderer and victim are equivalent in Islam)

Therefore, if the perpetrator basically does not understand the concept of *Masoum-al,dam* or he makes it confused with the term *Mahdur al-Dam* (whose blood may be shed with immunity), it means that he did not properly understand the criminal judgment. The result of not understanding the judgment is the emergence of judgment doubt (*Hokmiah* doubt) that if it is attributed to the concept of a judgment, it is "conceptual", and if it is attributed to its features, it is an "existential".

- ✓ ***Conceptual doubt***

If the concept of a legal term be not clear and the mind be doubtful to determine it, it is a conceptual doubt. Here, although the perpetrator is aware of the crime of murder, he does not correctly understand the conviction of it, for example when he confuses *Masoum-al-dam* with *Mahdour-al-dam*.

- ✓ ***Existential doubt***

In this case, the perpetrator is aware of both the existence and concept of the legislator's judgment, but he is doubtful in determining the external features of the judgment. For example, when the perpetrator knows that the legislator has criminalized the murder, and also he understands the difference between *Masoum-al-dam* with *Mahdour-al-dam*, but he is in doubt about the external features of the mentioned terms.

Awareness of the subject (Victim)

Awareness of the subject is the perpetrator's awareness of elements, nature, conditions and qualities that the legislator has established and they were stipulated in Article 290 of Penal



Code. Consequently, ignorance to genuine and fundamental elements is effective. For example in the crime of murder, the awareness of the subject means to be aware of the existence of a victim and to get a complete understanding of him. , Therefore, awareness of the subject of murder also has the following levels:

- *Awareness of the existence of the subject*

It is defined as the perpetrator's awareness of the existence of the victim. The consequence of not being aware is "thematic ignorance." In cases of thematic ignorance, the perpetrator is not aware of the victim's existence in that place and time. It was stated that according to criminal law: "ignorance to law doesn't deny the liability "; that is, ignorance does not have an effect on the culprits and liability , while, on the other hand, thematic ignorance denies the liability. Therefore, the perpetrator must be aware of the existence of the victim. The legislature in Article 290 refers to the murder conditions using the following phrases; "existence of one or some certain persons, or one or some uncertain persons from a community" and in practice, an intended crime or the like is committed. Although the term Mosouf (described) is mentioned just in one paragraph not the next ones, it is obvious that when someone takes a typically deadly action on a subject, it will be voluntary if perpetrator is aware of the victim's existence.

- *Understanding the subject*

Understanding the subject of the murder as a step beyond the awareness of the existence of a victim is related to the perpetrator's awareness of the nature and identity of the victim, as well as awareness of a description of the victim that is effective in the realization of the crime. The consequence of no being aware of the subject is thematic doubt. In the crimes of the third book of the Islamic Penal Code, the general judgment for the mistake and the amount of it, have not been stated, but the thematic mistake has been taken into account in paragraph C of Article 290, as well as Articles 294 and 303.



INTENTION TO THE RESULT

Murder is an offense of result which was stated in Article 144 of Penal Code, "In crimes whose occurrence is subject to the realization of the result, the intention of the result or the knowledge of its occurrence must also be established". Therefore, in murder, in addition to the necessity of a general malice, the perpetrator must also have intent for the obtained result, which is synonymous with the concept of "deliberate intention" in the interpretation of the jurists. Therefore, when there is no specific malice, the committed murder is out of the deliberate inclusiveness. For example, if a person beats another in order to train him (without any specific malice) not so harshly, but the victim dies, in this case it is an involuntary manslaughter.

The jurisprudential document of intention of the result, Article 290 in Islamic Penal Code Paragraph (A) of this Article stipulates:

"When the perpetrator does an action with the intention to commit a crime on one or some certain persons and one or some uncertain persons from a community , and in practice, the intended crime or the like is committed, whether the commission typically results in the crime and the like or not. "

The reason to call this paragraph related to voluntary issue is that voluntary and intention are interrelated and according to the jurists, this action is voluntary when it is done with the intention. (Najafi, 1984: 13) and this reason is also mentioned in the narrations (Kelly, 1987: 278).

Paragraph (B) of this Article stipulates:

"If the perpetrator takes an action deliberately and it typically results in a crime or the like, although he does not have the intention to commit the crime and the like, he has been aware that the committed action might typically result in the crime or the like."

The reason to call this paragraph related to voluntary issue is that voluntary and intention are interrelated and according to the jurists, and there is no specific obligation to it in the Shari'a, and the rules of the Shari'ah are predicated on customary matters. Of course, the authentic narratives of the Infallible Imams (AS) are not against the issues mentioned this article and it shows that the mentioned cases result in qisas or retaliation (Kelly, 1987: 280).

Paragraphs "C" and "D" of this article stipulate:

"(C) If the perpetrator doesn't have any intentions to commit a crime or the like, and what he has done doesn't typically result in any crime or the like, but he did a crime and the victim died due to illness, weakness, aging or any other situation, or due to a particular location, or time, typically results in that crime, even if the perpetrator is aware of the unusual situation of the victim or the specific time and place".

(D). If the perpetrator has an intention to commit a crime or the like, without determining one or some certain persons, and in practice, the crime or the like takes place, for example bombing in public places".

The jurists stipulated these crimes as the murder due to the perpetrator's intention (Najafi, 1984: 12).

Therefore, it is concluded that the principles of jurisprudence regarding the mental elements of a murder are the same as the intention to commit a crime, which include the intention to the commission and intention to the result (Mohaghegh Helli, 1969: 245).

Types of murder along with the intention of the result

Murder along with the explicit intention of the result can be categorized into two groups including the definite or indefinite nature of the malice, and also presence and absence of a specific-intent:

- ***Definite or indefinite nature of the malice***

If the perpetrator has already chosen the victim and decides to commit an offense beforehand, then his/her malice is bound and definite. But if there is no malice against a particular person and it does not matter to him who the victim is, his/her malice is absolute and indefinite. The malice is definite when the victim's identity is determined by the perpetrator during committing the crime. Accordingly, a murder is committed when the perpetrator is aware of the victim's identity (Mohaghegh Helli, 1969: 43). According to Article 290 (A), in both cases, it is a murder.

- ***Murder with and without a specific-intent***



A murder is once considered a specific-intent crime if the perpetrator committed the offense with the previous plan. The cases of a murder involving a specific-intent crime comparing with the cases with no specific-intent crime are considered immediate which clearly indicates the dangerous state of the perpetrator. Accordingly, regarding the Penal Codes of many countries all around the world, more intense executions are considered for the specific-intent murder. However, Islamic Penal Code whether before or after the revolution have not taken this issue into account. In other words, in Iran's Penal Code, just having a malice to commit a crime, helps to realize its voluntary nature, and there is no distinction between the cases where the murder is committed in accordance with the previous plans and the ones without. Thus, in both cases, the perpetrator has the same punishment. However, in some countries like Egypt, this issue is stipulated in their Penal Code.

Egyptian Penal Code, Article 231:

Premeditation is planning of all acts beforehand that show willful intent to commit a misdemeanor or felony act, of which the purpose is to harm a certain person or any undefined person he finds or comes across whether that purpose is conditional upon the incidence of some event or dependent upon a certain condition.

CONCLUSION

Murder is an offense of the result. Malice (mental element) of the murder is a criterion to lose an individual's life which includes the intention of the action and the intention of the result. They are also categorized into general malice and specific malice which are regarded as the most basic types of malice in realization of the mental element of the crime. Jurisprudentially, the criterion to detect the malice is the intention of the action and result. Other types of malice are analogous and they have no effect on the principle of the mental element and loss of life. Other types of malice in the murder include specific-intent murder, simple murder, and etc. According to Article 290 of Islamic Penal Code, there are two criteria to call a crime or felony act a voluntary one. It is suggested, although the criterion to detect the malice and proof of the intent of crime is intention and commission, judgment and punishment should be made based on perpetrator's other malice in order to make a fair judgment.



References

- Al-Ghurai Naeini, M. H. (1986), *The benefits of principles (Fawad Al-Osoul)*, First Printing, Qom, Islamic Printing Office, , volume 1-3.
- Amoli, Zayn al-Din bin Ali. (1984). *Masalak Al-Afham*, volme 15, Qom: Encyclopedia of Islam Sciences, first edition.
- Ardebili, M. A. (2013), *General Penal Code*, Thirty Third Edition, Tehran, Mizan Publication.
- Duff, A. (2001). *Liability and Liability in criminal law answering for crime*. Oxford and Portland: Oregon, Hart Publishing.

Gorji, A. (2003), Citation of Criminal Law Course, MA in Criminal Law and Criminology, Faculty of Law and Political Science, University of Tehran, Second semester.

Holy Quran

Kellini, M.Y. (1987). Al-Kafi. Volume 7, Tehran: Darol-Kotob al-Eslamiyyah, Fourth Edition.

Mir Mohammad Sadeghi, H. (2007), Crimes against Persons, First Printing, Tehran, Mizan Publication.

Mir Saeedi, M. (2011), Criminal liability of the territory and fundamentals, First Printing, Tehran, Legal Foundation.

Mohaghegh Heli, J.F (2010), Islamic Principles (Shira'-al-Islam), First Printing, Najaf, Mobayat al-Dawab, fourth volume.

Mousavi Bojnourdi, M. (2008), Comparative jurisprudence, First Printing, Tehran, Tarbiat Moallem.

Musavi Bojnourdi, M., Jurisprudential principles, First Printing, Tehran, Meyad, Volume 1.

Najafi, M.H. (1984). Jawaher Alklam in the explanation of Shariah Islam. Volume. 42, Beirut: Publishing House by Ahia Tarath Al-Arabi, Seventh Edition.

Nourbaha, R. (2005). A background of General criminal law. Tehran: Dad Afarin Publishing, Twelfth Edition.

Qudsi, A. (2002), The domain of the effect of ignorance on criminal liability , first edition, Mazandaran University.

Rahpeik, H. (1998). "The flow of doubts in punishment (al-Qa'ida) and retaliation (Al-Qassas)". Quarterly Legal Views, 10 (11), 129-140.

Walidi, M.S. (2009), The essentials for the general penal code, First Printing, Tehran, Jangal publication, volume 1.

Zeraat, A. (2013), A brief description of the Islamic Penal Code passed in 2013, first edition, Tehran, Phoenix Publishing.

