

A jurisprudential analysis of paragraphs B and C of article 290 of Islamic penal code

Ali Zanganeh^{1*}, Mohammad Nozari Ferdowsieh²

¹ Master Student of Judicial Jurisprudence, Department of Theology and Islamic Knowledge, University of Qom, Qom, Iran. ² Assistant Professor and Dean of Jurisprudence and Islamic Law Basics, Department of Theology and Islamic Knowledge, University of Qom, Qom, Iran.

Correspondence: Ali Zanganeh; Master Student of Judicial Jurisprudence, Department of Theology and Islamic Knowledge, University of Qom, Qom, Iran.
E-mail: alizanganeh71@gmail.com.

ABSTRACT

Murder is an offense of result. Intention of the result is the most important component of mens rea or the crime's mental elements which is the defendant's state of mind at the time of the offense. However, another type of murder has been described by the legislators in different countries, including Iran's Penal Code (criminal law), which is not being explicitly embodied in the intention of the result. Accordingly, the murder without the intention of the result has been criminalized based on paragraphs B and C of Article 290 of Islamic Penal Code. Although there is no controversy among the majority of jurists in Iran and even in other countries, on considering this murder as being intentional, it has been controversial in expressing the mental element of the murder. The purpose of the present study was to conduct a jurisprudential analysis of murder crime without the intention of the result and also to examine the mental element of the crime. Regarding the literature of this study, culpability is the only criterion to consider a murder as a deliberate murder which necessitates qisās (retaliated punishment) and its mental element. Therefore, in order for this crime to be the subject of qisās (retaliated punishment), it is not necessary that the nature of the crime be intentional or, to have a force of an intentional crime.

Keywords: Murder, Intention of the result, Culpability

Introduction

Murder is the greatest harassment to the bodily integrity of the individuals, and it has different kinds regarding the degrees of murder based on the mens rea (mental element). Murder as the most capital form of the crimes against the individuals leads to the loss of life and can be seen as a clear indication of the natural crimes. Murder is reproached everywhere and every time from the general public's points of view and has led to intense social reaction. The murder, regardless of the mental interaction, can

be defined as the loss of life from one human by another one. Indeed, such a commission in spite of its inherent evident culpability is considered as a non-criminal action in some cases. However, mental interaction of the perpetrator during committing a criminal offense is specifically regarded to categorize such murders as the criterion and principle. Accordingly, murder is divided into general categories including murder and involuntary manslaughter. In order to consider a murder intentional or physical injury, the perpetrator must, in addition to intentionally engaging in a commission, intend to produce a result. But, the proof of the intention is not easy and sometimes the perpetrator does not intend to achieve the result, even though his/her crime is typically dangerous and deadly. Here, once the perpetrator knows that the death occurs as a result of his commission and yet does his intended commission, it means looking for the result. Even in legal systems of other countries, there is no condition of intention to murder or to cause injury in order to regard a murder as an intentional one.

Access this article online

Website: www.japer.in

E-ISSN: 2249-3379

How to cite this article: Ali Zanganeh, Mohammad Nozari Ferdowsieh. A jurisprudential analysis of paragraphs B and C of article 290 of Islamic penal code. J Adv Pharm Edu Res 2020;10(S1):145-150.
Source of Support: Nil, Conflict of Interest: None declared.

This is an open access journal, and articles are distributed under the terms of the Creative Commons Attribution-Non Commercial-ShareAlike 4.0 License, which allows others to remix, tweak, and build upon the work non-commercially, as long as appropriate credit is given and the new creations are licensed under the identical terms.

Therefore, the present study aimed at investigating the jurisprudence of the mens rea or mental element of the murder without the intention of the result which is the subject of the Article 290, paragraphs B and C in Islamic Penal Code and examining the reason of regarding them as intentional murders.

Analysis of the Mental Element of Murder

Before Iranian revolution in 1979, the Iranian criminal legislator in edict of Penal Code passed in 1925, did not provide any definitions for the murder. Article 170 of Penal Code stipulates that "the punishment for murder is execution, except in cases where it has been legally exempted." After Islamic Revolution in Iran, Islamic Penal Code of 1982 and 1991, didn't define the murder and they merely cited its instances and features. The Islamic Penal Code, amended in 2013/5/1, was also approved by the Legal and Judicial Commission of the Islamic Consultative Assembly without presenting any definitions for murder term and it merely mentioned instances and features of the murder. Therefore, given that the concept of murder is clear, the legislator did not define it; but what matters is to recognize the instances of the murder and to separate the murder and involuntary manslaughter and pure lapse. On the contrary, jurists have provided various definitions for the murder, some of which have been taken into account in the following section:

Some believe that murder is "to kill a person by the means of a cold weapon or a firearm, etc., whether directly or indirectly."^[1] In his definition, there is no reference to the intention of the murderer. Murder may occur but the absence of any intentions to murder changes it to an involuntary manslaughter such as murder in driving accidents.

Others stated that: "murder is a commission without a legal, intentional and conscious permission of a human leading to the death of another person"^[2]. In this definition, firstly, there was no need to refer to *without legal permission*. Secondly, when it be intentional, *conscious* term makes it redundant, since intentional consists of two pillars of will and intention. Thirdly, the lack of referring to term *Mahghun-al-Dam*; that is somebody whose blood may not be shed with immunity, since one may murder a *Mahdor al-Dām* person, that is whose blood may be shed with immunity, and if this definition is presented for intentional murder, it results in *qiṣāṣ* (retaliated punishment). It is necessary to refer to *Mahghun-al-Dam*, that is the murder of a woman who had committed adultery with a strange man by her husband.

Murder is an offense of result, the realization of which depends on obtaining a particular result; that is, a human's loss of life. Thus, as it was mentioned earlier, basically, the mental element must contain all components of *actus reus* (material element) of a crime. Therefore, in order to realize the mental element of the murder crime, in addition to the malice conduct, it should also be part of the result of this crime. Principally, a murder is committed along with a criminal intention or general malice and the intention to the result or particular malice. Thus, the intention to the result can be considered as an integral part of the mental element of the murder.

Nevertheless, other forms of murder have been drafted by the legislators in different countries, regardless of embodying explicitly the intention of the result. Such practices are observed in Iran's criminal law. Accordingly, the present study examined the murder without the intention of the result in B and C paragraphs of Article 290 of Islamic penal Law and also it investigated its mental element of the murder from a jurisprudential point of view.

Murder without the intention of the result

Apart from the murder with the intention of the result, considering the harmful consequences of this crime, legislators in different countries have presented instances and features of the murder without requiring an explicit intention to commit the murder. Such cases of the murder that are referred to "murder without the intention of the result" are in Iran's Penal Code only in one instance. In Iranian criminal law before the revolution, the murder was considered only intentional when it was committed with an explicit purpose of loss of life from the victim. In other word, before the Islamic Revolution, the legislator depending on the legal principles, regarded the intention of the result as an integral part of the mental element of the murder. However, after the revolution, regarding A and F paragraphs of Article 206 of the Islamic Penal Code, amended in 1996, legislators gave an example of the murder without any intention of the result.

A and F paragraphs of Article 206 of the Islamic Penal Code provide:

"When the murderer deliberately committed a crime that is typically deadly, even though not intended to kill a person, and also when the murderer did not intend to kill a person, and his committed crime is not typically deadly, but due to the victim's illness, aging, disability, childhood, and etc., his commission is typically deadly, and the murderer is aware of it, it is an intentional murder."

The legislator in these cases substitutes "probable malice" with "particular malice" or intention to the result. In other words, in this case, the intention of committing a deadly action is replaced by the intention of loss of life.

To find out that one's commission is deadly, there are two criteria:

A) Generic criterion: When the committed commission is evaluated in nature is typically deadly. Sometimes inherently; it is a tool used by the murderer. If the used tool is regarded as a lethal weapon, such as shooting with a firearm, it is typically a deadly commission. Therefore, the use of a lethal weapon is a criterion to ascertain a committed commission as deadly^[3].

Meanwhile, it seems that basically, a lethal weapon not only legally but also commonly cannot prove the realization of a murder. The intention of murder alone is by all tools, whether frequently or infrequently lethal toward the victim, in the connection of the murder, suffice being intentional. Moreover, regarding the lethal weapon, the only reason that jurists consider a murder an intentional crime is an implied intention in such cases. For example, comparing an offender who pushed the

police in order to run away and then the police fell down and his head hit the blocks in the street and he died, with an offender who hit a police on head with an iron pipe in order to get rid of being arrested. Although the intention of the murder is not explicitly mentioned in either of these two cases, the second example shows an implicit intention to murder. Here, the offender might have predicted the police's presence, but in the first example, there is no such prediction, rather he aimed to make the police busy. Therefore, such a prediction itself implies the intention of the murder. According to the abovementioned, since the deadly commission might be typically deadly or infrequently deadly, each one is explained in the following sections:

In the Islamic Penal Code passed in 2012, the legislator rightly called consciousness to know a commission lethal and thus the court cannot pass a judgment to realization of intentional murder unless the offender be aware of it. In accordance with paragraph B of Article 290 in the Islamic Penal Code, "if the perpetrator commits an action intentionally and it typically leads to a crime or the like, although he did not intend to commit the crime and the like, he was aware that the action can typically lead to a crime or the like", so it is a murder.

In paragraph (C) of the same Article, it has been repeated in another way. "If the perpetrator does not have the intention to commit a crime and what he has done, typically doesn't cause the committed crime against the ordinary people, it is not intentional murder. However, if the victim (*Mujuni'Aliya*) suffers from illness, weakness, aging, or any other condition, or if a particular place or time, typically cause committing the crime, provided that the perpetrator is aware of the victim's unusual condition or a particular place or time condition." The term "intention" in the sentence "although he does not have the intention of committing the crime and the like" in the referred Article, means he desired to cause the death. Thus, if the perpetrator does not want to cause the death, but he is aware that his commission typically leads to death, according to paragraph (B), he is known as an intentional murderer. In paragraphs B and C of Article 290, the legislator does not consider the intention to kill important in the murder, but he suffices a typically deadly commission, absolutely important in paragraph B and, a typically deadly commission, relatively important in paragraph C of this article, in order to consider a killing as a murder. Therefore, a typically deadly commission is divided into two absolutely and relatively deadly commissions:

In paragraph B of Article 290, the legislator made a judgment based on the perpetrator's type of conducts, and considered some murders. The characteristic of this type of conduct is to be typically lethal. The term typically, in "typically lethal" is related to the conduct of a normal and healthy individual. This kind of murder is so important that even a group of jurists believe that a murder is an intentional commission due to committing a criminal conduct, when there is an intention to the result but no criminal conduct, it is not regarded as a murder^[4]. Contrary to the pre-revolutionary view of the lethal weapon (Article 171 of the General Penal Code), it should be noted that today, lethal

weapon and its use, cannot make a murder commit an intentional crime by itself. But, the type of using the lethal weapon can make a murder commit an intentional crime. Therefore, a typically lethal commission is not caused by the lethal weapon (for example, squashing of the throat, it can be typically lethal, but there is no lethal weapon), and also the use of the lethal weapon doesn't necessarily show a commission to be typically lethal, for example, when someone shoots another one's ankle.^[5] It is also controversial to say "the typically lethal commission is the same as the lethal weapon" because here the commission which is a behavior, not a tool or how to use it has been discussed. Therefore, in accordance with how to use this tool, the behavior of the criminal is important. Sometimes this tool is used on the path of criminality, and sometimes it is dangerous and deadly, but it is not used on the path of criminality.

Paragraph C of Article 290 like Paragraph B considers a typically lethal commission as the essential pillar of the murder. In paragraph C, the same is Paragraph F, more specifically, the characteristics of the victim is taken into account, while the victim described in this paragraph comparing to the victim in paragraph B, is considered unhealthy, ill or unable. But, in paragraph C of Article 290, in addition to the reason, the problems the victim suffers from, the place and time conditions have been mentioned and added. Although in paragraph F of the former Article 206 in penal Code; the legislator referred to some relatively deadly behaviors in which a particular state of the victim has been regarded, but jurists referring to different jurisprudential texts in this regard, have named some other cases of typically relatively deadly behaviors that do not have a similarity with the legislators' examples. In jurisprudential texts, there are cases of murders that due to the time or place conditions have a behavior which turns to a relatively lethal behavior. For example, flogging in extreme heat and cold weather can be a lethal commission,^[6] while such a behavior cannot be regarded an intentional commission in the mild weather. Another example of a relatively deadly specific situation is in an insistency judgment of the Supreme Court. According to this judgment, although spilling petroleum on another person is not typically deadly, if the victim is seated next to the fire, this commission is typically deadly, and if the victim dies or injures, the committed crime is regarded intentional. Many jurists considered this item of the murder at the time of the former Penal Code was included in "and the likes" in paragraph F, Article C-206;^[5] but the legislatures of 2013, considering these situations and particular requirements, in paragraph C, Article 290 replaced it with "or because of a particular time or place conditions" and filled the gap. It is necessary to note that committing a typically lethal commission in this case, like Paragraph A, of Article 290 requires a mental element. But, the mental element of the criminal here, contrary to Paragraph A, is not the intention to murder, but the intention to act criminal in conjunction with the knowledge or awareness of the offender toward his own behavior and his dangerous commissions. The point related to the mental element of these two paragraphs which were not mentioned in the former Article 206 is the

necessity of the offender's awareness or consciousness, The lack of clarification of the doubt caused it to be unnecessary, but the dominant jurispudent's analysis of this paragraph is that the lack of clarification of the offender's consciousness about his own behavior does not necessarily mean that it is not necessary. Its evidences are so obvious that the legislator avoided stating "a very evident point" and considered its existence as a rational assumption. However, in paragraph F of Article 206 of the former Penal Code, it was stated that since the issue of relatively lethal behavior was considered and in relative affairs the condition is the lack of awareness of the individuals, then it was considered necessary to require the awareness of the offender to the situation of the victim. However, the legislator in 2013, stipulated the condition of awareness of the offender to the typically lethal commission and stated: "If the committer committed an commission intentionally and it typically resulted in a crime or the like, even though he didn't have the intention to commit the crime or the like, but he was aware that it typically would cause a crime or the like ", therefore, this mental element of the offender in the typically deadly murders is not the intention of murder, but the awareness of the offender to realize his typically deadly behavior.

The murder, as it was described in Paragraph A of Article 206 of Penal Code passed in 1991, and Paragraph A, Article 290, amended in 2013, is committed with an intention to murder by a mature and wise person using a tool which is mostly deadly, and with a tool that is rarely deadly and incidentally causes murder. But in case the offender uses a tool that is rarely deadly, and doesn't have an intention to murder, even if it causes the death of an innocent person, the *qiṣāṣ* (retaliated punishment) is not approved; since there is no intention to murder and such a tool is not usually deadly. Therefore, the intention of the crime is decisive in the type of murder and when there is no intention to murder, it is not realized intentional, but it is similar to an error. *Javaher Owner and owner Jewelry* means the same as the author of the jewelry believed "If someone with a tool that is rarely deadly, has an intention to murder, and commits the murder, there are two statements on this issue; some regards it involuntary manslaughter, and others regard it intentional". He added that the second statement is confirmed and it stated that "according to the religious principles and rules, including the reasoning, this murder is intentional and the murderer needs to be retaliated (take *qisas*), and this is the most known statement, and all the later jurists believe in it " [7]. Thus, the commission that the murderer commits on the murder victim, if is accompanied by the intention of murder, is regarded intentional and the lethal weapon doesn't interfere in it. In general, in cases in which the commission is typically assessed lethal, the perpetrator's knowledge of the lethal nature of the commission is granted. For this reason, the legislator in paragraph B of Article 206 of the former Islamic Penal Code did not clarify the need for knowledge of the predominant nature of the commission. In fact, this lack of clarification does not mean the lack of necessity of knowledge, but it means the perpetrator's predominant nature of the commission [8].

B) Personal Criterion, in which the commission is evaluated not based on generic criterion, but in the consideration of the victim against the murderer. In fact, in such cases, the victim's characteristics such as being under age, aging, illness, weakness, and disability make one commission deadly, while it might not be deadly in the same circumstances to a human with such characteristics. Regarding this criterion, contrary to the generic criterion, there is no presumption of the perpetrator's awareness, but his awareness of the mentioned characteristics must be somehow proved. For this reason, the legislator paragraph C of Article 290 of the Islamic Penal Code emphasizes the need for the perpetrator's awareness. Thus, the prosecutor, in position to prove the crime, is obliged to prove the perpetrator's awareness to the victim's special characteristics [3].

So, the question is; what is the basis to regard the mentioned murders as intentional in paragraphs B and C of article 290 in Islamic Penal Code originated from *Imamieh's* Jurisprudence?

From the jurists' points of view, the intention of the cause with the awareness of its causality is in fact synonymous with the intention of the effect. In case of the murder, the intention to commit an offense which typically leads to the loss of life, is considered to be the cause of the murder and is fully synonymous with the intention of the murder's effect; that is the loss of life. [9] In fact, in this view, the intention to commit an act is typically deadly and is not apart from the loss of life, but it is evaluated as its equivalent. [10]. Accordingly, the jurists regard an offense a murder in one of the following states:

1. Committing a murder with a commission of typically deadly, with the intention of loss of life
2. Committing a murder with a commission of typically deadly, without the intention of loss of life
3. Committing a murder with a commission of rarely deadly, with the intention of loss of life [11].

Although there is no specific reason in *Sharia* for paragraph B, but these issues in the rationalist's common law are intentional or are as an intentional verdict. The narrations also refer to *qiṣāṣ* (retaliated punishment) in these cases. [12]. However, the jurists state the intentional nature of the crime in paragraphs C and D because of the intention. [13]. Therefore, it is concluded that the principles of jurisprudence regarding the mental element of murder are the same as the intention in the words of the jurists, which includes the intention to commission and intention of the result [14]

Finally, in order to legally interpret and justify the paragraphs C and D of article 290 of Islamic Penal Code, it seems that the committed offense in these paragraphs is not inherently intentional, but it is the result of a criminal offense committed by the perpetrator. Of course, the error was so intense and the result was somehow predictable to the perpetrator that the legislator regarded it as a murder. In fact, when the perpetrator commits a crime on the victim by the awareness of loss of life as the dominant result of the commission, and with such a predictive ability again commits the crime on the victim, he must

be responsible for the evil consequences of the crime, although he has not explicitly called for the result. .

It seems that for the intentional nature of the crime, the perpetrator didn't have intention or the like to commit, but he typically caused the crime or the like, and where he had the intention to commit a crime (Paragraph 1, Article 290 of Penal Code), the same criterion which is the culpability of the crime has been applied. This criterion is the real subject for qisās (retaliated punishment) which doesn't necessitate giving it an intentional nature or, adding it to the intentional crimes in the judgment.

Qur'an in Surat Al-Asra [verse 33]:

"or take life - which God has made sacred - except for just cause. And if anyone is slain wrongfully, we have given his heir authority (to demand qisas or to forgive): but let him nor exceed bounds in the matter of taking life; for he is helped (by the Law)"

It gives authority to the victim's heir or avenger of blood. Thus, according to "qias mansus al-elah" -through which the legislator expresses the reason and the philosophy of his judgment that in this case, wherever that reason and philosophy exist, the judgment is made- as in murder with intention to the result, the perpetrator with a criminal and cruel intention murders the victim unjustly and the avenger of the blood is given the qisās (retaliated punishment) right. The murder without intention is typically intentional when it is a cruel crime and the victim is murdered unjustly.

Conclusion

Murder is a crime bound to the intention while the intention to the result is the most important component of the mental element of this crime. However, sometimes commission is an intentional crime without explicitly implicating the result. Accordingly, the murder without the intention of the result has been criminalized based on paragraphs B and C of Article 290 in Islamic Penal Code. Although there is no controversy among the majority of jurists in Iran and even in other countries on considering this murder as being intentional, it has been controversial in expressing the mental element of the murder. In the Islamic Penal Code passed in 2013, the legislator rightly calls the knowledge and awareness of considering a crime deadly, and therefore the judge cannot make a judgment and call it a murder without acquiring such knowledge. Therefore, in crimes which are typically lethal, the perpetrator's awareness and consciousness toward his/her typically lethal behavior shows if he/she has committed the crime intentionally. According to jurists' points of view, the intention of the cause with the knowledge of its causality is in fact synonymous with the intention of the effect. In case of a murder, the intention to commit an offense, which typically leads to the loss of life, is considered to be the cause of the murder and is fully synonymous with the intention of the murder's effect; that is, loss of life. In fact, in this view, the intention to commit a typically deadly

commission is not differentiated from the loss of life, but its equivalence has been assessed.

Regarding interpretation and justification of paragraphs B and C of articles 290 in Islamic Penal Code, it would seem that the committed murder based on these paragraphs are not inherently intentional, but they occurred due to a criminal error.

Hence, the error has been so huge and the results were so predictable for the perpetrator that the legislator considered the committed error as an intentional commission.

So the criterion for the intentional crime is its culpability that is the real issue for qisās (retaliated punishment). Holy Qur'an put forward the subject of authority for the avenger of the blood in a malicious murder. This reason is true for the murder without the intention of the result; that is, due to the culpability of the commission and the unjust death of the victim, it has the nature and judgment of the murder. Therefore, in order for a crime to be the subject to qisās (retaliated punishment), it is not necessary to have the nature of an intentional crime or to add it to the intentional crimes in judgment.

References

1. Haeri Shahbaghi, A. A description of General Penal Code. Tehran: Assembly of Islamic Reserves, First Edition, 2010.
2. Goldouzian, I. Exclusive Penal Code. Volume 1, Tehran: Jihad-Daneshgahi Press. First edition, 2012.
3. Kalantari, K. Criterion and examples of 'Typically deadly commission' regarding Islamic Penal Code passed in 2011, Quarterly of Legal Rights Comments, 2012; No. 60.
4. Najib Hasani, M. Explanation of the Penal Code; Special section; Cairo: Dar al-Nohsah al-Arabiya, first edition, 1992.
5. Mir Mammad Sadeghi, H. Crimes Against Individuals, Tehran, Mizan Publication, Thirteenth Edition, 2013.
6. Tusi, M. I. H. An explanation of Al-Amamiyah jurisprudence. Volume 7, Tehran: Almkhtab al-Martazouyat al-Alahiya al-Asar al-Jufriya, third edition, 2008.
7. Najafi, M.H. Jawaher Alklam in the explanation of Shariah Islam, volume1, Translated and interpreted by Akbar Nayebzadeh, Tehran: Khorsandi Publishing, First Printing, 1984.
8. Amoli, Z. al-Din bin A. Masalak Al-Afham, volme 15, Qom: Encyclopedia of Islam Sciences, first edition, 1984.
9. Amoli, Z al-Din bin A. Kindergarten in the interpretation of the Damascus shine, volume 15, Beirut: Reviving Arabic heritage, first edition., 1984.
10. Khoey, A. Principles of a complete curriculum. Volume 2: Qom: Imam Al-Khoei Rehabilitation Institute, First Printing, 2007.
11. Al-Hali, J. al-Din A. I. M. A brief beneficial explanation of Mohazab-al-bareh. Volume 5, The researcher Hajjaqa Mojtaba Araghi, Qom: Islamic Society of Publishing, First Edition, 1993.

12. Kellini, M. I. Y. Al-Kafi. Volume 7, Tehran: Darol-Kotob al-Eslamiyyah, Fourth Edition, 1987.
13. Najafi, M.H. Jawaher Alklam in the explanation of Shariah Islam. Volume 42. Beirut: Publishing House by Ahia Tarath Al-Arabi, Seventh Edition, 1984.
14. Mohaqiq Heli, J. ibn H. Islam Principles, Volume. 4, Najaf: Motbaa al-adab, first edition, 1969.