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THE FOUNDATIONS OF THE SUBJECTS OF CRIME UNDER SHARĪʿA

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Abstract: This article examines the foundations of the subject of crime in Sharīʿa. It discusses the age of responsibility, mental soundness, and the role of coercion in determining criminal responsibility under Islamic law. A key point of the article is that a person cannot be regarded as the subject of a crime if the act was committed under coercion. The views presented in the article are supported by relevant verses of the Qurʾān and the Sunna.

Key words: Sharīʿa, subject of crime, criminal responsibility, sanity, puberty, coercion, qāḍī, ḥadd, qiṣāṣ, taʿzīr.

One of the necessary elements of a crime under Sharīʿa is the subject of the offense. The word Sharīʿa is Arabic in origin and literally means “the path leading to water” or “the main path”. In terminological usage, however, it has a much broader meaning. It includes not only matters of worship, but also the regulation of the many social relations that arise among Muslims. According to classical sources of Islamic law, Sharīʿa refers to the law, religion, religious path, and clear way sent by the Creator to humankind through the prophets[1]. As M. Rajabova notes, Sharīʿa includes the totality of religious, legal, and moral rules that are binding on Muslim peoples in Islamic states[2].

Thus, Sharīʿa covers not only legal norms, but also religious and ethical matters. 1Since Sharīʿa also regulates legal and social relations, issues related to crime naturally fall within its scope. This leads to the question of how crime itself is understood. In Sharīʿa, any unlawful act may be regarded as a crime. An unlawful act consists either in doing something that has been prohibited or in failing to do something that has been required. Therefore, whether the act concerns life, property, or another protected interest, conduct prohibited by Sharīʿa is treated as criminal. 4

In deciding criminal cases, qāḍīs paid particular attention to the person who committed the act. This was especially important in determining punishment, because it first had to be established whether that person could be regarded as the subject of the crime. In Islamic law, jurists considered understanding and free choice to be essential conditions for criminal responsibility. Only a person who understands the harmful consequences of his or her conduct and acts with free will may be treated as the subject of a crime. For this reason, jurists held that a person must be of sound mind and must also have reached a certain age. In this context, acting by one’s own will means acting without coercion[3].

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[1] See: Juzjoniy A. Sh. Islom qonunchiligi. Tashkent: Toshkent islom universiteti, 2002.

[2] Rajabova M. Shariatda jinoyat va jazo. Tashkent: Adolat, 1996. – P. 13.

[3] See: Ūda A. At-Tashrīʿ al-jināʾī al-islāmī. – Beirut: Dār iḥyāʾ al-turāth al-ʿarabī, 1985. – Vol. 1.

It follows that, under Sharīʿa, the subject of a crime is determined by three main conditions: 1) sanity; 2) the attainment of a certain age; 3) the absence of coercion.

As in secular law, mental incapacity prevents a person from being regarded as the subject of a crime. From the perspective of Islamic law, mentally impaired persons may generally be divided into three groups: a) those with congenital mental deficiency; b) those whose condition gives grounds for being treated as mentally impaired, 3) those in other states that are considered equivalent to mental impairment.

Congenital mental deficiency itself was studied in three forms: complete, partial, and intermittent. In all of these cases, the person was not regarded as the subject of a crime, because such a condition prevented full understanding of surrounding events and the ability to express a conscious attitude toward them. The same applied to persons suffering from illnesses that weakened the intellect. For example, a person suffering from epilepsy, schizophrenia, or another serious mental disorder before committing an act was also regarded as mentally impaired. Such illnesses were considered sufficient grounds for that classification. 7 8

Jurists also treated the act of a sleeping person as legally similar to that of a mentally impaired person. As evidence, they cited the following ḥadīth: "The pen has been lifted from three:[4] from the sleeper until he awakes, from the child until he reaches puberty, and from the insane person until he regains reason"[5]. This means that if a sleeping person harms others while asleep through dangerous conduct, he is not punished as though he had committed a crime in full awareness. 9 10

Similarly, deaf-mute persons were in some cases treated within the category of those lacking full legal competence. As stated in Mukhtaṣar, if a mute person confesses through writing or gesture to an offense that would normally entail liability, such as zinā, drinking khamr, or theft, the prescribed punishment is not imposed, because such a confession remains doubtful, and punishment is not applied where doubt exists[6].

According to the scholars of the four Sunni legal schools, if a person consumes an intoxicating substance under coercion, or without knowing that it is intoxicating, or takes it as medicine and then commits an offense while intoxicated, that person is not regarded as the subject of the crime. The reason is that the act was committed in a state in which the person did not fully understand what he was doing. However, if a person knowingly consumes an intoxicating drink without valid excuse, then he is regarded as the subject of the crime regardless of whether the later offense was committed intentionally or negligently. In that case, punishment is imposed according to the offense.

At the same time, Sharīʿa treats the drinking of intoxicants as a crime in itself. In other words, such a person may be punished both for consuming the intoxicant and for any other offense committed in that state. As noted above, this was the view accepted by the scholars of the four legal schools. Some jurists, however, expressed a different opinion. According to that view, if a person commits a crime while intoxicated, he should not be regarded as the subject of that crime, whether

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[4] By the expression "the pen has been lifted", it is meant that the angel who records people's sins ceases to record them in these states.

[5] Ūda A. At-Tashrīʿ al-jināʾī al-islāmī. – Beirut: Dār iḥyāʾ al-turāth al-ʿarabī, 1985. – Vol. 1. – P. 590.

[6] Mukhtaṣar. Tashkent: Cho'lpon, 1994. – P. 332.

the intoxication resulted from his own choice or from coercion, because he neither understood nor perceived the offense he committed[7]. Such scholars held that he should be punished only for consuming the intoxicating substance. Although this opinion did not gain broad support, it was accepted by some jurists. Thus, intoxication was also treated as one of the factors relevant to determining whether a person could be regarded as the subject of a crime. If intoxication resulted from ignorance or coercion, the offender's condition was equated with that of a mentally impaired person, and he was not regarded as the subject of the crime. 12

Naturally, a ḥadd[8] punishment is not imposed where doubt exists. A ḥadd punishment is understood as the right of God, that is, a punishment ordained by Him. Where doubt exists, refraining from applying it is permissible. Qiṣāṣ, however, concerns a matter tied to the claim of the injured party. For this reason, Islamic jurists held that if a deaf-mute person kills another, deafness and muteness do not in themselves prevent him from being regarded as the subject of the crime, and qiṣāṣ may therefore apply.

A certain age, namely puberty, is another essential condition. It should be emphasized that Sharīʿa was among the earliest legal systems to take age into account in matters of responsibility. Scholars of all four legal schools agreed that a minor child cannot be treated as the subject of a crime. The ḥadīth cited above, which states that "the pen is lifted from the child until he reaches puberty", clearly supports this principle. Roman law, one of the oldest legal systems, also addressed the age of criminal responsibility. Under Roman law, only a person who had reached the age of seven could be held criminally liable. Children younger than seven were not punished even if they committed an offense, because that age was apparently considered the beginning of basic maturity. Islamic legal sources, however, approached the age of criminal responsibility somewhat differently.

In the article's view, the period from birth until maturity, that is, until a person fully acquires understanding and volition, may be divided into three stages. The first is infancy, which lasts until the age of seven. During this stage, a person is not held responsible, because he or she has not yet developed a real understanding of surrounding events or of what it means to act independently and by one's own will.

The second stage is childhood. At this stage, understanding and volition have not yet fully developed, although they exist in a weak form. If a child commits an offense during this period, the child bears not criminal but moral responsibility. This, in turn, helps to cultivate a sense of responsibility. The following ḥadīth is cited in support: "Command your children to pray from the age of seven, and discipline them for it from the age of ten"[9]. Although a child of seven or ten understands the ideas of understanding and volition only imperfectly, the ḥadīth reflects the principle that children should first be gently encouraged to perform what religion requires, and if they refuse, they may then be subjected to moral discipline. Here, the word "discipline" means light corrective action for educational purposes, not humiliation or blows to the head, face, or any part of

[7] Ūda A. At-Tashrīʿ al-jināʾī al-islāmī. – Beirut: Dār iḥyāʾ al-turāth al-ʿarabī, 1985. – Vol. 1. – P. 590

[8] Ḥadd refers to types of punishment established by naṣṣ for acts recognized as legal offenses.

[9] Aḥmad al-Sharbāṣī. Yasʾalūnaka fī al-dīn wa-l-ḥayāt. – Beirut: Dār al-Jīl, year of publication not indicated. – Vol. 1. – P. 60.

the body that could threaten life. This stage begins at seven and continues until puberty. If, during this period, a child commits theft or zinā, no ḥadd punishment is imposed. Even in the case of homicide, qiṣāṣ is not exacted. In both situations, however, the child may still bear moral responsibility, and taʿzīr may be imposed as a disciplinary punishment.

The third stage is maturity. At this point, a person is regarded as responsible for every act committed. This stage begins with puberty and continues until the end of life. Thus, criminal responsibility requires understanding, volition, and the attainment of puberty. In determining puberty, jurists relied on the following ḥadīth: "The pen has been lifted from three: from the child until nocturnal emission occurs, from the sleeper until he awakes, and from the mentally impaired until he regains reason"[10]. The phrase referring to the child until nocturnal emission means that nocturnal emission marks the point at which a male's deeds begin to be recorded. In essence, the record of one's deeds begins at puberty. A male is therefore regarded as having reached puberty when nocturnal emission occurs. This indicates both physical and mental maturity, as well as the capacity for reproduction. From the same perspective, a female is regarded as having reached puberty when menstruation begins. Since these signs may appear at different ages in different individuals, Sharīʿa nevertheless required the establishment of an age from which criminal responsibility could be assessed.

Most Islamic jurists regarded fifteen as the age of puberty for both males and females. In their view, the real purpose of identifying puberty was to determine whether a person had attained intellectual maturity and could understand his or her own conduct. By the age of fifteen, any physically and mentally sound person is generally able to distinguish right from wrong. In most males, nocturnal emission will already have occurred, and in most females, menstruation will already have begun. If such signs have not appeared by that age, this is treated as evidence of physical weakness. Criminal responsibility, however, depends mainly on intellectual maturity. 20

Abū Ḥanīfa, however, held that if by the age of fifteen nocturnal emission had not occurred in a male, or menstruation had not begun in a female, the final age limit should be eighteen for males and seventeen for females[11]. Since the ḥadīth makes nocturnal emission a condition, he argued that persons who have reached fifteen but still show none of these signs cannot automatically be regarded as mature. Islamic jurists also identified the earliest possible age of puberty. For males, the earliest age at which signs of reproductive maturity may appear is twelve, and for females, nine. If a twelve-year-old boy reports physiological changes recognized as signs of puberty, his statement is accepted. The same applies to a nine-year-old girl. Even so, where puberty appears at such an early age, qāḍīs were expected to act with caution in imposing criminal responsibility and punishment. In some cases, physical puberty may appear even though full intellectual development is still delayed. Since understanding and volition are essential foundations of criminal responsibility, the judge must act with special care in such cases. 21 22

Although Sharīʿa generally treats fifteen as the age of criminal responsibility, a great burden in this matter is placed upon the qāḍīs. When considering the person who committed the offense, the judge must consider that individual as an individual and take into account age, signs of puberty, and mental competence, namely understanding and volition, in deciding whether the person should be regarded as the subject of the crime. It is precisely in such cases that the independence and trust

[10] Aḥmad al-Sharbāṣī. Yasʾalūnaka fī al-dīn wa-l-ḥayāt. – Beirut: Dār al-Jīl, year of publication not indicated. – Vol. 1. – P. 602.

[11] See: Burhān al-Dīn al-Marghīnānī. Al-Hidāya. – Beirut: Dār al-kutub al-ʿilmiyya, 1990.

granted to qāḍīs become evident. For this reason, the saying arose that every faqīh is a scholar, but not every scholar is a faqīh.

An act committed under coercion is not always treated in the same way as an ordinary crime. If a person commits an offense not by his own will but because another person compels him to do so, he is not automatically regarded as a criminal simply because the act occurred under coercion, although the act itself may still be regarded as a crime.

According to the jurists, coercion is of two kinds: complete coercion and partial coercion[12]. Complete coercion means that a person commits an offense against his own will under pressure from another and has no alternative but to do so. Partial coercion means that the person also acts against his own will, but some way of avoiding the act still exists, although he fails to take such measures because of short-sightedness. It should be noted that only in the case of complete coercion is the offender not regarded as the subject of the crime.

Many Islamic jurists, however, held that in crimes committed under coercion the issue of the subject of the crime should also be considered in light of the seriousness of the offense. On this basis, they divided such crimes into three categories.

1. The first category consists of crimes in which coercion has no legal effect. If, under the coercion of another, a person commits homicide, gouges out someone's eye, or inflicts a severe blow that leads to death, then, according to the consensus of the jurists, he remains the subject of the crime and punishment is imposed. As evidence, they cited the following verses:

– "Do not kill the soul which Allah has forbidden, except by right"[13],

– "Those who harm believing men and believing women for what they have not done bear upon themselves slander and manifest sin"[14].

These verses show that unlawful killing and unjustified harm are prohibited. Therefore, in any circumstance, a sane person of the required age who intentionally commits such an offense is regarded as the subject of the crime. There were, however, differences of opinion regarding the punishment where such acts were committed under coercion. In the Ḥanbalī and Mālikī schools, scholars generally held that qiṣāṣ should apply. Among the Shāfiʿīs, two views were found: qiṣāṣ and diyah. Most Shāfiʿī jurists supported qiṣāṣ, although some considered diyah preferable because coercion introduces doubt into the matter. The Ḥanafī school also contained disagreement: Zufar supported qiṣāṣ, whereas Abū Ḥanīfa and Muḥammad held that a discretionary taʿzīr punishment was sufficient, while Abū Yūsuf favored diyah.

2. The second category consists of acts that are not treated as crimes when committed under coercion. Allah has permitted that a person acting under compulsion should not be held criminally liable for certain otherwise prohibited acts, such as eating carrion or drinking blood in a state of necessity. As the Qurʾānic verses indicate, forbidden things were explained in detail except in cases

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[12] Ūda A. At-Tashrīʿ al-jināʾī al-islāmī. – Beirut: Dār iḥyāʾ al-turāth al-ʿarabī, 1985. – Vol. 1.

[13] Qurʾoni karim ma'nolarining tarjima va tafsiri. Translation and tafsīr by A. Mansur. Tashkent: Toshkent islom universiteti, 2004. – P. 148.

[14] Qurʾoni karim ma'nolarining tarjima va tafsiri. Translation and tafsīr by A. Mansur. Tashkent: Toshkent islom universiteti, 2004. – P. 426.

of necessity[15], and a person who is compelled by necessity, without rebellion or transgression, incurs no sin[16]. These verses show that a person who, under coercion or dire necessity, commits such otherwise prohibited acts is not sinful and therefore is not punished.

3. The third category consists of acts that remain crimes even when committed under coercion, but for which punishment is not imposed. If offenses other than those mentioned above are committed under complete coercion, the person who performs them is not treated as the subject of the crime. This category includes theft, insult, slander, damage to another person's property, and similar acts. Although no source expressly permits such conduct in coercive circumstances, jurists concluded that because the offender did not act of his own free will, he should not be regarded as the subject of the offense. This conclusion rests on the principle that even a small degree of doubt should operate in favor of the accused. As support, they cited the verse: "Except for one who is compelled while his heart remains secure in faith"[17].

Sharīʿa seeks, in every situation, to apply standards of justice carefully and precisely. It would not be correct to say that every person who commits an offense under pressure or necessity can never be regarded as the subject of a crime. Every sane person who has reached the relevant age must, even under coercion, understand what he is doing and answer for it where appropriate. At the same time, in order to protect human rights, Sharīʿa gives great importance to the careful examination of the subject of the crime in every criminal case and to the imposition of an appropriate punishment. Even coercion itself is divided into several forms when crimes are assessed. 31

In conclusion, Sharīʿa requires, above all, full understanding and free volition before a person may be regarded as the subject of a crime. From this follow three principal conditions: sanity, the attainment of a certain age, namely puberty, and the absence of coercion. Some scholars criticize Sharīʿa on the ground that it does not specify one fixed age for the subject of crime. Yet every human being is created as a unique individual, and the establishment of one rigid age of responsibility may itself violate the rights of certain persons. For this reason, Sharīʿa makes puberty the decisive condition of responsibility. This shows that qāḍīs examined each alleged offender individually and with special care. Under Sharīʿa, it is difficult not only to punish a person unjustly, but even to classify someone as the subject of a crime without careful scrutiny. Sharīʿa prefers releasing ten guilty persons to punishing one innocent person unjustly. This shows how carefully standards of justice were developed in Islamic law.

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