

# General Characteristics of the Circumstances Excluding Criminal Liability under the Criminal Law of Muslim Countries Practicing the Anglo-Saxon Law

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**Abstract---** *Islamic criminal law does not contain any institutions of the General Part; therefore, there is no general list of circumstances that exclude the criminality of the act done. The main research objective of the presented study was to form an idea on the basis of foreign legal literature of the role of existing circumstances that exclude liability under the criminal law of Muslim countries professing the Anglo-Saxon legal system, as well as to analyze the current actual criminal law; the study employed, in particular, comparative legal, dialectical, structural-functional, and formal-logical methods. A distinctive feature of Islamic law is the priority of the religious norms of Islam, which regulate all spheres of Muslims' life. The question of the role of circumstances excluding criminal responsibility under the criminal law of Muslim countries practicing the Anglo-Saxon law is considered by current Islamic law in the prospect of accurate qualification of the criminal act committed, as well as in order to establish the very legitimacy of such an act. According to the analysis conducted, the following list of circumstances excluding liability under the criminal law of Muslim countries can be identified: not reaching the age of responsibility; state of insanity; delusion; committing a crime under duress; justifiable defense; extreme necessity; repentance.*

**Keywords---** *Legal Insanity, Delusion, Coercion, Necessity, Repentance.*

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## I. INTRODUCTION

Up to date, despite the progressive social development in various areas of life, religion has not spent its regulatory role. Religious norms to a certain extent influence social relations in various countries; at the same time, universal religions, including Islam, which has formed a major religious legal system in many countries, occupy a special place in the modern world.

The criminal law of Muslim countries serves as an integral part of the Muslim religion, which appeared in the VII century and spread in the regions of North Africa and the Middle East, as well as in some separated countries of Southeast Asia.

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The criminal law of these states is, in fact, considered an integral element of Islam and is aimed at protecting its main values.<sup>1</sup>

Islamic criminal law does not contain any institutions of the General Part; therefore, a general list of circumstances that exclude criminality has not yet been produced. According to the analysis of some of the sources of Islamic criminal law, to such legal circumstances can be attributed the following: not reaching the age of responsibility, state of insanity, delusion, committing a crime under duress, justifiable defense, extreme necessity, and repentance.

## II. METHODS

The presented study is of complex nature; it involves consideration of various aspects of the application and development of the institution of protection on the basis of circumstances excluding the criminal responsibility. Thus, the study is based on a set of methods and techniques of scientific knowledge, peculiar to the science of jurisprudence. In particular, the study used comparative legal, dialectical, structural-functional, formal-logical methods.

## III. RESULTS

A distinctive feature of Islamic law is the priority of the religious norms of Islam, which regulate all spheres of Muslims' life. The question of the role of circumstances excluding criminal responsibility under the criminal law of Muslim countries practicing the Anglo-Saxon law is considered by current Islamic law in the prospect of accurate qualification of the criminal act committed, as well as in order to establish the very legitimacy of such an act.

## IV. DISCUSSION

The definition of circumstances that exclude criminality and liability to punishment for a crime and, in this regard, exclude the incurrance of criminal liability, is directly related to the definition of a crime itself. It should be noted that these circumstances seem to highlight the significance of the elements of *actus reus*. Consequently, the circumstances that exclude criminal responsibility indicate the absence in the actions of a person of any objective and subjective grounds for bringing to criminal liability.

Thus, the Sharia, along with the criminal law of Jordan, which can be attributed to the countries practicing the Anglo-Saxon law, provides for the following types of circumstances that exclude criminal responsibility: personal restraint to commit a crime; the necessity to commit a criminal act; legal insanity of the subject of the crime; alcohol and drug intoxication; recognition of the subject of the crime under age of discretion; commission of actions that are within the legal limits of the exercise of personal rights; execution of an order; use of corporal punishment by parents to the children of their own; exercise of professional duty. The same circumstances of exemption from criminal liability, except for the last two, are provided for by the Penal Code of Palestine.<sup>2</sup>

The age of criminal responsibility is considered to be the age of puberty or legal majority; according to Persian literary giant Saadi Shirazi, the age of majority is established if there are the following signs: 'upon reaching the age

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<sup>1</sup> Ivanov, Yu.A. Muslim Law: Issues of Criminal Justice // JUDICIAL POWER AND CRIMINAL PROCESS, 2015; № 4:297

<sup>2</sup> Rasskazov, L.P., Kangazov, M.R. Islamic law as a form of religious law (In Russ.) // *Obshestvo i Pravo – Society and Law*, 2010; № 1:24

of fifteen, upon the occurrence of pollutions or periods, and upon the appearance of hair in front'. As the poet and writer further pointed out, in fact, the age of majority has only one sign, expressed in the fact that you have taken care of serving God more than the enjoyment of your body, and who does not have this quality cannot be considered an adult.<sup>3</sup>

Still, there is no consensus regarding the majority (age) in Muslim legal schools. Thus, according to some sources,<sup>4</sup> a person up to 9–12 years old cannot be held accountable at all; bringing to criminal responsibility a person between the ages of 9–12 and 15–18 presupposes that the court should determine the majority of the accused.

Legal insanity in Muslim criminal law is considered as part of the moral element of the criminal act.

Article 14 of the Penal Code of Palestine provides for the possibility of exemption from criminal punishment of those who have lost feelings or the right to choose when committing a crime as a result of alcohol intoxication or as a result of taking a large dose of narcotic drugs, regardless of their type and quality if the person was forced to take them against own will.<sup>5</sup>

In this regard, not any type of alcohol or narcotic intoxication excludes the further criminal liability, but only the case when the accused was forced to take it against own will and desire.

The classical Islamic criminal science indicates that the subject's ignorance of the illegality of the act committed, which was confirmed by an oath or pledge, is also considered to be a circumstance that excludes criminal liability. Nevertheless, this colorable suggestion has not been preserved in its pure form in the criminal law doctrine of modern Muslim countries.<sup>6</sup>

However, according to British researchers of modern Islamic law,<sup>7</sup> the factual error, or ignorance, is a reason that excludes criminal liability in the following cases:

1) misconceptions about the facts, and 2) misconceptions about the law.

Misconception about the facts is recognized when the subject believed that the expressed behavior was legitimate because legal errors in relation to the person or objects are allowed.

Of the particular interest is the case of ignorance of the law, which may be the result of personal ignorance or lack of knowledge on certain details of some particular law.<sup>8</sup>

Islamic criminal law explicitly indicates that a reasonable person should know the basics of law and basic prohibitions regarding theft, alcohol consumption, adultery, attitude towards the life of others, etc. Criminal law

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<sup>3</sup> Kerimov, G.M. Sharia: The Muslims' law of life; Sharia responding to the problems of our time (In Russ.) / St. Petersburg, 2012:145–146

<sup>4</sup> Petrovsky, A.V. Islamic criminal law and features of the criminal law of Muslim states: monograph (In Russ.) / Krasnodar: Kuban State University publishers, 2013:91

<sup>5</sup> Kozlihin, I.Yu. Islamic law // Pravovedenie - Legal Studies, 2011; № 3 (296)

<sup>6</sup> Artemov, V.Yu. Basic institutions of the Muslim criminal law: PhD (Law) thesis / Moscow, 2008

<sup>7</sup> Mohamed Al Awabdeh. History and prospect of Islamic Criminal Law with respect to the Human Rights. Dissertation zur Erlangung des akademischen Grades Dr. jur. Berlin, 2005. P. 34

<sup>8</sup> Nail, Ahmed Taha. Sources of acting criminal law in Palestine: PhD (Law) thesis / Moscow, 1994

allows for ignorance of basic prohibitions for recent converts to Islam, as well as for persons who come to Muslim territory from other states.<sup>9</sup>

The circumstances that exclude criminal liability in Muslim countries also include coercion.

In accordance with Sharia rules, a person who was put in a position forced to commit a crime under threat of death or serious bodily harm if refuses, cannot be brought to criminal responsibility. However, this provision does not apply to murder; it seems that this norm is based on the rule that it is impossible to save your own life at the expense of another person's.<sup>10</sup>

Coercion is associated with the characteristic of a criminal act as a deliberate act of will; Islamic criminal law had drilled down the consideration of coercion as a circumstance excluding criminal liability. Thus, legal expert Abdel Kader Ode defined the following mandatory conditions for the exclusion of liability in the cases of physical violence application:

- The crime is committed to saving oneself and loved ones from death or injury;
- The accused could not otherwise avoid the realization of the threat against him;
- The person threatened to incarnate the stated threats was nearby and had a real opportunity to implement it immediately.<sup>11</sup>

Islamic criminal law pays serious attention to cases of coercion of persons under the age of majority, because, due to the age characteristics, their ability to assess events may be less resilient than in adults.<sup>12</sup>

The Muslim Law School provides that a person who committed a crime cannot be held accountable if it was caused by the task of protecting life or own property or protecting other persons and their property from the danger that was not caused intentionally by the said person. This necessity does not apply to those who, in accordance with the legislation, have to put their lives and health at risk.

A person who committed an act qualifying as a crime shall be exempted from criminal liability if provided evidence that the committed act was to prevent a result that caused damnification or more grievous harm to said person, its honor or property, or for other people, their honor and property under person's control or under direct supervision. The condition for criminal liability exemption is that the person, who has committed the crime within the limits deemed necessary and reasonable, performed this act in order to achieve the goal of proportionality between the damage caused and the harm prevented.<sup>13</sup>

The 'necessity' in the above definition should also be considered as an urgent need.

Thus, in accordance with Article 341 of the Criminal Code of Jordan, only the following actions are considered as justifiable defense:

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<sup>9</sup> Akhkumbekova, Zh.D. On some general issues of the relationship between the norms of religion and law in the Muslim legal system // 'Black Holes' in Russian Legislation, 2012; № 5

<sup>10</sup> Elayan, G.F. Bases of the Muslim criminal law / Makhachkala, 2002:45

<sup>11</sup> Amin Omar Ahmed Babiker (Sudan) DEVELOPMENT OF THE CRIMINAL LEGISLATION OF THE SUDAN (Basic institutes of the General Part): PhD (Law) thesis / Moscow, 1999:90–91

<sup>12</sup> Repp R. 'Qanun and Shari' a in the Ottoman context, in Islamic law: social and historical context, edited by Al-Azmeh. London, 1988. P. 124–146.

<sup>13</sup> Elayan, G.F Criminal liability for encroaching upon property under Muslim criminal law: PhD (Law) thesis / Moscow, 2000

1. Killing or the inflicting wounds in the course of defending oneself or another person, provided that the assault and defense were executed simultaneously, the attack was unjustifiable, and the defense had no other way to avoid such an attack, except for killing or wounding;
2. Killing or wounding another when protecting own or supervised property in the case when the act of defense was performed during tampering and/or theft, which were accompanied by violence.<sup>14</sup>

The immediate occurrence of the encroachment or attack is considered as the second condition for the legitimacy of the justified defense; damage when the attack has not yet begun, or when the attack has already ended, cannot qualify as a necessary defense.

The third condition for the legitimacy of the justified defense referring to the encroachment is the actuality of committed encroachment, which exists not only in the imagination of the 'defending' but in reality.

The fourth condition of the phenomenon being considered is the fulfillment of the requirement of criminal law that does not allow exceeding its limits in the exercise of protection, i.e. the defense must be within the boundaries of the need to take action to repel an attack and not pursue the intention to cause unnecessary harm to a person who has committed an unjustifiable attack.

Such formulation seems fully justified since an indication in the very definition of the necessary defense of the conditions for declaring it lawful (following the rule of not exceeding its limits) guides the attention of law enforcement agencies to determining the adequateness of an attack and defense, which, in turn, leads to errors in using the institution of justified defense when actions taken to repel an attack are considered as exceeding the limits of necessary defense.<sup>15</sup>

Although Islamic criminal law does not explicitly indicate the extreme necessity (Article 18 of the Palestinian Penal Code and Article 89 of the Criminal Code of Jordan) as a basis for exemption from criminal liability; when considering the norms of criminal law of particular Muslim states it follows that these rules can also be applied in the cases associated with extreme necessity. Noteworthy that a person cannot invoke the implementation of actions in case of extreme necessity if according to the law the very same person was supposed to prevent an impending danger.<sup>16</sup>

Following the French criminal law, criminal codes of most Arab states also do not contain any special rules on extreme necessity. Undoubtedly, the absence of such regulations in the criminal law does not mean that the law enforcers who are guided by the doctrine do not employ this institution of criminal law. At the same time, the expediency of introducing these norms into the criminal code does not raise any doubts.<sup>17</sup>

A special type of exemption from criminal liability (applicable only to certain crimes) that is allowed by Islamic criminal doctrine is repentance. It is recognized that by demonstrating own repentance the offender confirms that he/she has already changed and does not need to be punished.

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<sup>14</sup> Najm, Mohammad Subhi. *Jordanian Penal Code / General Section* // Amman, 1996

<sup>15</sup> Kibalnik, A.G. *Crime and punishment in the doctrine of the Muslim criminal law* // Criminal law, 2007:№ 1

<sup>16</sup> Kamel Said. *Crimes against Person; The General Principles of Crime in the Jordanian Penal Code: Commentary.* / Amman, 1991.

<sup>17</sup> Al Khalaya, M. *Legal Defense in Jordanian Criminal Law* // Bulletin of Peoples' Friendship University of Russia. Series 'Law', 2000; № 2:175-177

All Sunni legal schools allow for repentance as a circumstance excluding responsibility for apostasy (with the exception of insulting the Prophet Muhammad), and for mutiny.<sup>18</sup>

The trial for apostasy provides for the criminal to be given a period during which the latter can repent and return to Islam and thus receive an exemption from criminal liability. Repentance of the rebel is recognized only if the rebel surrenders to legitimate authority on his own. Also, some schools set a specific period during which the offenders must prove the seriousness of their intentions.<sup>19</sup>

According to Shiites, some Shafi'i and also Hanbali school representatives, the repentance of the criminal must be proved by the court, and the fact of prevention of the expected intentions to commit a criminal act is also should be established. In these cases, criminal liability is preserved, and the accused is exempted from only the punishment.<sup>20</sup>

## V. CONCLUSION

It should be noted in conclusion of the study that Islamic criminal law, according to conducted analysis of some of its sources, refers to the above-described circumstances the following: not reaching the age of responsibility, state of legal insanity, delusion, committing a crime under duress, justifiable defense, extreme necessity, and repentance. There is still no consensus in Muslim law schools regarding the majority (age). Thus, according to some sources, a person up to 9–12 years old cannot be held accountable at all; bringing to criminal responsibility a person between the ages of 9–12 and 15–18 presupposes that the court should determine the majority of the accused. Legal insanity in Islamic criminal law is considered as part of the moral element of the criminal act; not any type of alcohol or narcotic intoxication excludes the further criminal liability, but only the case when accused was forced to take it against own will and desire. The classical Islamic criminal science indicates that the subject's ignorance of the illegality of the act committed, which was confirmed by an oath or pledge, is considered to be a circumstance that excludes criminal liability. Misconception about the facts is recognized when the subject believed that the expressed behavior was legitimate because legal errors in relation to the person or objects are allowed. In accordance with Sharia rules, a person who was put in a position forced to commit a crime under threat of death or serious bodily harm if refuses, cannot be brought to criminal responsibility; however, this provision does not apply to murder. The Muslim Law School provides that a person who committed a crime cannot be held accountable if it was caused by the task of protecting life or own property or protecting other persons and their property from the danger that was not caused intentionally by the said person; such provision is not to be applied to those who, in accordance with the legislation, have to put their lives and health at risk. Although Islamic criminal law does not explicitly indicate the extreme necessity as a basis for exemption from criminal liability; when considering the norms of the criminal law of particular Muslim states it follows that these rules can also be applied in the cases associated with extreme necessity. A special type of exemption from criminal liability (applicable only to certain crimes) that is allowed by Islamic criminal doctrine is repentance. It is recognized that by demonstrating own repentance the offender confirms that he/she has already changed and does not need to be punished.

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<sup>18</sup> Peters R. *Crime and Punishment in Islamic law. Theory and Practice from the Sixteen to the Twenty-first Century*. New York, 2005. P. 39.

<sup>19</sup> *Islamic law: study guide / comp. by Mohammad Reza Moshfeghi; trans. from Farsi // Moscow, 2008*

<sup>20</sup> Saher Abdullah Al Jandi. *Responsibility for customs offenses under Jordanian Penal Code: PhD (Law) thesis / Moscow, 2000*

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