

A Review of Applicability of Banning (Hajre) in Jurisprudence from the Perspective of Forensic Medicine

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ABSTRACT

The topic of ward is among the important topics in jurisprudence and Forensic Medicine. Banning literally means prohibiting. The term of prohibition means preventing someone from being involved in financial or non-financial affairs and is called being banned. A person is banned from all affairs such as an unlettered person or some of the affairs such as a dying person. Banning has two forms; it sometimes is in the interests of the one banned from and his/her rights and sometimes for the benefit and the right of others. The objective of this brief article is an evaluation of extent banning applicability in Forensic Medicine topics and its relation with concepts and logics of the Islamic law.

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► *Implication for health policy/practice/research/medical education:* Applicability of Banning (Hajre) in Jurisprudence

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Banning literally means prohibiting and preventing. Ward means someone cannot act in favor of him/herself and is banned form deduct or the first doubt are called forbidden (Haram) because it is prohibited and the intellect is called the first banning because it prevents one from abominations. In terms of jurisprudence, banning means being prohibited to act and the one who is prohibited is called disabled, and article 1207 states: "the following individuals are wards and are banned from acquisition of properties and rights: 1. Minors, 2. Those without Intellectual development, 3. Lunatics" (1, 2).

Most legal experts believe banning to be limited to financial affairs. Dr. Emami has expressed in definition of banning: banning means a person being prohibited from interfering in financial affairs; but is must be

expressed that banning is not only limited to financial affairs and it has certain provisions and issues in non-financial affairs as well, such as the right to retribution and divorce. Thus, banning cannot be limited to financial affairs, even though the financial affairs have been focused more by jurists and legal experts (3).

Shia jurists usually mention and explain six causes in Al-Hajr book which are: 1) being minor or child, 2) being disabled, 3) Madness or insanity, 4) real Bankruptcy, 5) disease resulting in death, and 6) Slavery or servitude which are known as sextet articles. Shahid Sani states in Masale Al-faham: limiting banning articles to six items is contractual and inductive and not rational and there are other articles other than sextet articles such as mortgagor being banned from mortgage property, banning buyer from

selling before paying the price, banning salesperson from the price before succumbing sales and banning apostate who has accepted repentance (Parental Apostate) (13).

There are many articles for banning in public jurisprudence similar to the Shiite jurisprudence, but the method of public jurists for mentioning articles of banning is slightly different compared to Shia jurists. They discuss about minors, madness and philosopher as an article of banning and also refer to other articles such as Slavery, disease leading to death and liabilities (14). We face four of the six mentioned articles of banning in the forensic medicine, which will be explained in detail.

A) Being minor:

Various medical references have mentioned the age under 13 years to be considered as minor, but Iran's Forensic Medicine considers full 9 lunar years for girls and 15 full lunar years for boys as age of puberty to comply with the sacred religion and adapting according to Article 1210 of the Civil Code and conventional Immediacy.

Two types of puberty are examined:

1) Criminal puberty, which is signs and symptoms of establishment of the power to differentiate good and evil or good and bad of objects and actions and behaviors which is evaluated by asking series of questions from the person and that person will have criminal liability if this ability is deemed to be present,

2) Civil puberty: which is signs and symptoms of establishment of the power to differentiate of benefit and harm or profit and loss objects and actions and behaviors which is also evaluated by asking a series of questions from the person and that person will have civil liability if this ability is deemed to be present.

The person is considered as a normal person in sight of Forensic Psychiatry with regard to all aspects of criminal puberty, civil puberty, and has both criminal and civil liabilities (4, 5). A person without two characteristics "maturity" and "growth" is considered to be minor in jurisprudential term. There are detailed discussions about being minor by citing Quran verses and hadiths about being

minor and method of authentication of growth age. For example, we can read in Sura Al-Baqara: (Those who are parents) test the orphans so that you can give their property back whenever they become mature and do not try to use their property due to the fear that they grow up and take their property. Anyone who wealthy should refrain the property of the orphan and anyone who is poor can yes their property as needed in return for taking care of them and bring witnesses when you want to give their heir property back to them (even though) God is sufficient to calculate (6, 7).

1) The Target of discussing verse is executor and guardian of the child, who of course father is as well. The main discussion here is about orphans so the purpose is paternal grandfather, trustee and religious judge. The Command implies the testing of orphans stating that children are prohibited and banned from making decisions about their property, thus, this This verse refers to banning in children.

2) This verse indicates the fact that children should be tested before the onset of maturity because it states: "و ابتلوا اليتامى" which means test the orphans and it was mentioned that minor and underage person is considered to be orphan in practice. Thus, the purpose is testing children before puberty. In addition to this, the term of "حتى" is used so that the testing of orphans is done continuously before they reach the age of puberty so that their condition to manage their finances is clear in terms of rational growth when they reach the age of puberty. In addition, it is stated that the meaning of testing is gradual education of orphans (8, 9)

3) The intended person who is detected to be grown up is tested with whatever that is appropriate so that qualification and lack of qualification is revealed. For example, if the child is a boy, they should put him in charge of costs of the home for one month so that his prudence and growth becomes clear and if the child is a girl, they should put her in charge of household chores and test her growth in this way, in other words, knowing how to live and understanding of the Resurrection are both necessary in realization of growth. Shia have expressed in

their interpretation of growth: growth is a sensual state which prevents wasting and destroying property and makes a person spend on property in matters which are rationally appropriate (knowing how to live). Some other Shia scholars have said: knowing what is good for you and its implementation are requirements of realization of the growth which means growth will happen when the person knows how to act about his/her Property (10, 11). Property of minor or insane person belongs to father and paternal grandfather and greater and if father and paternal grandfather are both alive, they are both share this ownership. Now if both have the same opinion about a matter it is valid and if they have a conflict, the previous opinion is prior. But if both have their opinions at the same time, there are several points of views about the nullity of both of them or priority of father's opinion or grandfather's opinion. The guardian appointed by the father or paternal grandfather will be responsible if the father and paternal grandfather are not alive and the governor will be responsible if the guardian is not specified (12,13).

B) Insanity or madness: insane is someone who has corrupted intellect or does not have the power of reasoning and understanding and has complete and strong mental disorder. Such person has absolutely incapable of acting about matters until not having the power of reasoning and understanding. Because the insane person does not have reasoning and understanding similar to minor and all provisions about minors are used for insane person as well and its reason is mentioned in 1st Hadith and narrative and Also, Article 1213 divides madness into two forms of permanent and periodic (14).

1) Permanently Insane: person is someone who "has impaired brain and nervous system and defect in reasoning at all times". According to Article 1213 of the Civil Code, all transactions of Permanently Insane person are absolutely voided. Thus, enforcement of guardian is ineffective. Imam Hussein says: "انقطاع يتم اليتيم بالاحتلام و هو أشده-". و إن احتلم و لم يؤنس منه رشده و من كان سفيفها أو "ضعيفا- فليمسك عنه وليه ماله". The weakness in

the Qur'an and Hadith is someone who has weak Intellect which is true about the insane person and such decree can be an example of "سفيفها أو ضعيفا" and such sentence is due to the appropriateness of the sentence to the topic. In addition, when incompetent is considered to be banned in this case, the insane person should be banned through the first method which is according to famous act of Shia jurists.

2) Periodic insane: Person, someone who does not have permanent insanity and has different time periods and is insane in one period and wise in another. According to article 1213 of the civil code, transactions of periodic insane persons are valid only if that person's sanity is obvious. Thus, we will refer to the rule in case of not being sure about the sanity of the periodic insane person during the transaction due to doubt about capacity and ability of vindication and the rule in case of transactions of these persons is the nullity or inaccuracies because it is related to the will of the creator of transaction while there are doubts about the presence of this requirement, in them. (15, 16). There are terms of psychosis or psychotic in general and schizophrenia manic- depressive patients in various medical sources which are also respectively called permanent insanity and periodic insanity. Of course, there are some cases which in turn may be scrutinized by forensic experts which are: A) patients with a type of borderline personality disorder characterized by a kind of "stable instability". Such patients may experience periods of madness or psychosis in the period of their disease B) patients with a form of delusional disorder such as delusional disorder, suspicion or envy or magnanimity and.... C) People with severe and profound mental retardation that may usually be irresponsible in related crimes commensurate with their delusional content. The person will not have any civil and criminal liability in the foregoing in the event of it being proven. Madness to any degree leads to removing any liability in Shia and Public Jurisprudence and financial and non-financial banning insane person continues until that person becoming sane

again and being a guardian of insane is similar to being a guardian of minor (17, 18).

C) Disease leading to death: There are different definitions about disease leading to death in different medical sources but the one which is close to applicability of banning is that patients who do not have life expectancy similar to those commonly perceived in the society such as all patients admitted to the cardiac intensive (CCU) intensive care (ICU), patients with advanced internal complications such as cancer and blood disseminated infection whom usually between 30-10% suffer from other psychological complications such as psychotic delirium and... where by the common law of Forensics any act about civil or criminal liability or both has deadline until full or relative healing of disease. The ill person is prohibited from making decision about more than one-third of his/her property if this decision making is gratuitous and free but it is valid if the deal is with reasonable prices (19, 20).

D) Pixilated (Lack of growth): Being pixilated means intellectual foolishness and stupidity and someone who has the habit of extravagance and wastefulness in financial possessions is called pixilated in jurisprudence. In the civil law, pixilated is someone who is remiss in financial costs and economic costs and does not have wise effects. The law makers have also expressed: pixilated is someone who spends own property in non-true and irrational intentions. Sheikh Tusi has also said the definition of Pixilated: Pixilated person is the one who should be banned because of wasting own property and not using it properly and using it in a wrong place (21).

The banning of pixilated person is proven with advent of foolishness even though the governor has not ruled about it because being pixilated is a reason for being banned and its existence leads to banning and this verse in the Quran has proven banning due being pixilated and another matter is that someone who has not grown is pixilated. In other words lack of growth is synonymous with being pixilated and Almighty God has said: "و لا تؤتوا السفهاء اموالكم الّتى جعل الله لكم و لا تؤتوا الّتى جعل الله لكم" this means do not give your

belongings to those who are not wise because God has made them a cause of your living. So nothing is given to pixilated person (22). Banning of the pixilated person is removed only by ruling of the governor because detection of foolishness requires evaluation because it is hidden and it has also been said that: none is a subject to ruling of the governor and the recent comment is stronger because foolishness is the cause of banning and banning starts by proving the foolishness and ends by its end which is due to the word of God in the Qur'an: "فأن أنستهم منهم رشداً فادفعوا اليهم اموالهم" where God made returning of property a subject of authorization of growth and that is why it does not depend to anything else (23, 24). Confession of pixilated person in financial affairs is void and is correct in non-financial affairs such as ancestry despite the necessity of alimony. Also financial possessions of pixilated person are not correct even in case of being reasonably appropriate. However, pixilated person can act in affairs which do not involve the payment of property because pixilated person is banned from financial affairs. Pixilated person can be lawyer for others to perform other contracts because offer and acceptance of pixilated is not a valid in all cases and it is only I case which lead to disposing of property of the pixilated person. Standard intelligence tests (IQ) is usually used for the detection of pixilated people in forensics in cases such as those who suffer from complications of cerebral infarction or cerebral palsy or Alzheimer's disease or dementia and these people are classified on the basis of acquired score from this test. The normal ranking of normal intelligence is between 70 and 100. If the score acquired by a person is between 55 and 69, that person has mild retardation and person has average retardation if the score is between 40 and 54 and the person has severe mental retardation if the score is between 25 and 39 and score below 25 is considered as deep mental retardation and a person is considered to be pixilated if the mental retardation is mild or moderate and is introduced to the court as insane if the person is severely and profoundly mentally retarded (25).

Analysis and conclusions: Using the issues and concepts of banning is greatly important in dynamic Shia jurisprudence and consequently in the forensic. Even though the legislator has limited the applicability of banning in financial affairs to three cases of being minor, not grownup and insane but by considering the Islamic Penal Code and type of forensic experts work who are dealing with patients in most cases, it must be said that applicability of banning in forensic medicine cannot be summarized in just three mentioned above cases similar to Islamic jurisprudence because in medico-legal issues, there are a lot of inquiries of magistrates of courts and judges in courts in addition to civil liability in other cases such as assessing the criminal responsibility of the accused criminals or in custody, death and marriage laws and... Tolerance or intolerance of jail or flogging that forensic experts must be aware of and review and comment about banning of individuals and patients regarding all aspects. Moreover, Article 7021 of the Civil Code has only selected three articles from mentioning sextet articles and this question is raised that don't other articles lead to banning? And has the legislative neglected and defaulted? Or has he made a mistake? Isn't there the need to reform laws based on this gap? Since treatment should be done before the occurrence of the event.

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