

Different modes of collaboration of causative and perpetrator in murder from Islamic law

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Abstract: : one of issues addressed in Islamic penal code is occurrence of crime with direct and effective intervention of perpetrator and occurrence of crime and criminal consequence with indirect of its causative. On the other hand, since in Islamic penal code based on warranty juridical principle, criminal responsibility for warranty to perpetration and warranty to causation is discussed, so where neither perpetration nor causation hold in the crime, no one would be liable for the crime. Therefore, understanding the nature of each committed by perpetration or causation in crime and explanation of rules and orders governing them is an effective step toward determination of their liability extent and therefore achievement of rights and providing judicial security for all members of society and establishment and continuation of criminal justice. Hence, using this approach the present article attempts to investigate different modes of collaboration of perpetrator and causative in murder in Sunnite and Shia religions and Imami jurisprudence in a comparative manner. In this regard regulations of Islamic penal code are adjusted with ideas of practitioners of Islamic jurisprudence. Generally, we conclude that most of jurists believe in the liability of perpetrator when causative and perpetrator collaboratively commit a crime, unless the causative has more liabilities than perpetrator, even if causative and perpetrator are equal, the perpetrator is liable and if perpetrator, for any reason has no contribution in murder and or perpetrator is natural agent and human as the tool, it is known as pure causation and the issue of causative and perpetrator's collaboration is not debated.

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1. Introduction

The issue of causative and perpetrator is a debate criticized by jurists for its extent and limits and conditions. This debate is particularly of importance in murder and judicial community is largely involved with it. Presenting the subject of causative and perpetrator, particularly from juridical point of view is a subject that jurists have very different ideas about it, especially where collaboration of causative and perpetrator and or precedence of causative on perpetrator are the case, jurists present various assumptions that some of these assumptions resulted in various results and or some of assumptions regarding collaboration of causative and perpetrator have been neglected by then. Given the importance of this issue, we try to investigate collaboration of causative and perpetrator in murder in a juridical manner.

- Whenever the perpetrator and causative collaborate with each other, three models are involved:

1- Perpetrator is weaker than causative.

2- Perpetrator is stronger than causative.

3- Perpetrator and causative are equal in terms of weakness and power.

This division is regarded in all juridical books and based on these Islamic scientists and jurists have determined liabilities and responsibilities of each one. It is said that whenever perpetrator and causative collaborate, perpetrator is liable if: i) both perpetrator and causative have equal contribution, ii) perpetrator has more contribution than causative, as Saheb Riaz believe that perpetrator is liable if both have equal contribution or perpetrator has more contribution than causative. (1) Besides, Saheb Sharaye (2) in his book titled "confiscation and Imam Khomeini" (3) in *Tajrir-al- Vasileh* and First Martyr in Lam'e (4) addressed this issue and presented some examples. In article 363 of Islamic penal code, legislator follows famous notion of this principle concerning liabilities under the title of collaboration of causative and perpetrator and states: in the case of causative and perpetrator's collaboration in crime, perpetrator is liable unless causative has more contribution than

perpetrator. In article 318 of Islamic penal code concerning causation in crime it is stated: a human who does not directly commit the crime but provides the causes of crime being committed against a person and gives the example of well cavity and considers the producer of well cavity as the causative such that if no well was present, no falling would occur.

- In order to explain three above mentioned modes, we investigate them separately.

1- As said before, one of conditions mentioned in the case of causative and perpetrator's collaboration in juridical books is when causative has more contribution than perpetrator. For example the one who invites another one to eat a toxic food and invited one eats it without being aware of its toxicity and dies. In this assumption, although the guest has eaten the food as perpetrator but because the causative did not give him/ her any awareness and since causative did know the food is poisoned, so inviter is legally liable and shall be punished as the causative of murder. (5) in other words, civil law refers to criminal result occurred which is attributed to his/ her action and identifies him/ her as the respondent. Therefore, in above case, unawareness of perpetrator makes perpetration weak, so that causative is liable. By more contribution used by jurists we mean attribution achievement because crime performer adopts the liability when attributing the crime to him/ her is possible; so when causative and perpetrator collaborate in a crime, causative is liable if he is stronger than perpetrator in attributing the crime; in other words, the relationship of attributing the crime to causative is achieved. (6) in general it seems that in penal code and particularly in Imami criminal jurisprudence, the issue of liability becomes important where liability could be attributed and where this is not possible, perpetration of causation would become null and void; so we can talk about causative and perpetrator and stronger contribution or liability of each of them where liability could be attributed and or there is at least possibility in this regard.

Now, we consider cases of stronger contribution of causative than perpetrator separately.

Childhood: whether in Islamic penal code or in civil code, childhood is essentially a factor that removes penal liability based on which if a child is in an age he/ she could not differentiate good and bad or loss and benefit, penal liability does not hold for him/ her. But if the child is in an age he/she could distinguish, if he/she repeats the guilt, he/she shall be punished and civil liability and indemnification shall be borne by him/ her. (7) there are narratives and hadiths in Imami jurisprudence that prove this rule. For example removal hadith (8) by which the children have no liability; besides Imam Sadegh

stated that punishment does not hold for a child who cannot distinguish bad from good (9); in a hadith from Mohammad, purposefulness and mistake by a child are regarded equal. (10) So, non- sound actions done by a child are regarded mistakes. (11) In article 49 of Islamic penal code, penal liabilities of children are discussed: in the case of crimes done by children, they are exempt from penal liability and their upbringing would be undertaken by their caretakers and if required, they shall be referred to juvenile correction and rehabilitation center. Moreover, in article 50 we read: if an infant commits murder or battery and assault, his/her mature caretaker is liable, but in the case of financial loss, the child is liable and the loss shall be compensated from child's asset by his/her parents.

Deception: in some cases, the individual does not commit any action, but deceives another person to take the action. In which case perpetrator is wise and free and recognizes his/her own action but he/ she is not aware about its consequences, i.e. she/he does not know his/her action results in loss, so she/ he is deceived. If any loss occurs, deceiver shall compensate. (12) there are many cases of deception. If the judge as a result of perjury of some people orders for nemesis, it is deception. Some jurists believe that in the case of deception, the party suffered from loss is entitled to ask both of them to refer (13).

Unawareness: the third case makes causative's contribution stronger than perpetrator is when perpetrator is mature, wise and free, but is not aware of the order or subject of crime where causative acts intentionally. For example the one who digs a well in a property belonged to another person without her/his permission and covers it and the first one who is not aware of the well pushes the second one on the well; here the one who dig the well is liable (14). Necessarily, as a principle and general rule it can be said that whenever the act of a causative involves punishment, he/ she is liable, whether the perpetrator is other than victim or another person commits murder. Therefore, any act performed by a free individual and naturally leads to murder and there is no difference between his/her act and murder and the act of wise and free executor such that it could be rationally and legally attributed to him/her, the actor of cause is liable (15). Sometimes murder medium is a mature, wise and free person but he/she sees himself/herself religiously bound to perform the act ordered to him/her that seems relates to unawareness of deception, like a false testimony that leads to nemesis (16).

Compulsion: when compulsion of slain (perpetrator) is as a result of the act of another one (causative), disagreements arise about liability of

non- liability. For example, if a person chases another one with a knife in his/her hand and the second one is forced to escape and fall himself/herself into a well or fall down a roof, Sheikh in Mabsoot believes that the causative is not liable because he/she has caused only the slain escapes but he/she has not forced him/her to kill himself/herself (17). Allameh Helli in his book, "The principles" has investigated this issue and believes that if causative forces the perpetrator, so he is liable, otherwise he is not liable (18); but it is not known what is meant by him by "Elja" meaning 'forcing' does it mean forcing or it contains compulsion as well? Anyway, in describing statements of Allameh the author of Meftah-al-Keramat" criticizes Sheikh's notion and believes that logic and wisdom imply that the causative of compulsion shall be liable because the slain has fallen down himself due to the fear of dying caused by causative and if he/she was not forced he/she would not act this way and volunteer nature of his/her action does not exempt the causative from liability, because he/she had no other option (19). It seems that in analyzing this issue, different aspects of it shall be considered. Certainly, where the act causes perpetrator's will decline, causative is liable, because in this case attribution of act to perpetrator is not correct; but if perpetrator's will does not decline, his/her fall down is either accidental or voluntarily; in first case, causative is certainly liable, because the incident could not be attributed to slain and the case is purely causation not collaboration of causative and perpetrator. Sheikh Toosi has investigated this issue and believes that if escaping one falls into a well being unknown to him or the well collapses during escaping and he falls down the well, causative is liable (20). But if a person falls himself from a high height voluntarily two modes could be assumed: 1) if fall down is not fatal but accidentally it leads to death, for example an escaping person who falls him down from the second floor of a house, he certainly knew that he would survive and he had made a choice between certain death (by causative) and being injured and he had chosen the second option that led to his death. Here, causative is liable because he has placed the slain between two choices and that the logic ordered him to choose the second option, i.e. falling down from second floor. Some jurists believe in this case causative is liable (21). From statute point of view, compulsion has not been discussed explicitly in the case of collaboration of causative and perpetrator. But by reading article 326, legislator stated that producer of compulsion is not liable, because according to article 326: whenever a person scares another person and causes him to escape and the second one falls him down from a high place during escaping or falls down a well and dies, if that

scaring leads to will decline and impedes his decision making, scaring one is liable. It seems that above article does not consider the case of compulsion, because it talks about will and authority decline and under compulsive condition, the person acts with his will and authority. But it seems that compulsion make causative's contribution stronger that perpetrator that is induced by causative for perpetrator, but if other factors put a person under compulsion, for example a wild animal who chases a person and he imposes physical or financial harm to another one for saving himself, certainly he is liable, because he harms a person for his benefit.

Coercion: under certain conditions, coercion makes perpetrator non- liable for a crime and this irresponsibility is the most important criminal effect of coercion. Hence, coerced one has no authority in committing the crime and he does not like to perform an action or refuse to perform an action and other powerful force enforces him to commit the crime, so that coercing one is liable and coerced one is not liable. Therefore, coercing one who is causative shall be punished; because he had the intention and will to commit coercion and he also knew that action is crime (23).

Reluctance: in the jurisprudence of Sunnite people, the prominent case of causative and perpetrator equality is the issue of reluctancy to murder. Most Sunnite jurists believe that in the case of reluctance for murder, both, the perpetrator and causative (Makreh and Makreh) are liable, although Abu Hanifeh and some of Sunnite jurists believe that murderer is causative not the perpetrator; but general notion is that liability of both (causative and perpetrator) is equal. In Imami jurisprudence, in this regard, there is no such equality, but in any case perpetrator is murderer, unless perpetrator is immature child or insane. In Shia jurisprudence, equality of causative and perpetrator is observed where reluctant is matured child, because in this assumption, blood money of slain shall be borne by wise caretaker of child "perpetrator" and reluctant shall be punished by life prison (24).

It seems that this order is not consistent to legal principles, because mature child is considered liable to pay blood money of slain, while about immature child, this does not hold and for example for occurrence of murder, nobody is retaliated and this nullifies punishment/ therefore, the notion that there is no difference between mature and immature child in this regard will be justified, because causal relationship between these two is not different (25). One of jurists who believe in non- justifiability of reluctancy in murder is Saheb Javaher who considers murder perpetrator liable and non- liability of reluctant person or issuer of order and claimed for

consensus (26). Basically, evidences related to reluctance such as Raf hadith do not include murder and permit of murder due to judicial principle of “no reservation in murder” (27) is excluded from reluctance topic. Besides, in Jame-al-Shatat we read: where it is stated that reservation is not allowed in murder, manslaughter is intended that if he refuses to murder, murder is not allowed, although kill him, if he is not killed (28). Saheb Sharaye also believe that reluctance is acceptable inly insubordinate of murder not in itself (29). Therefore, in jurisprudence, except murder case, reluctance for other crimes is accepted in subordinate of self and in the case of occurrence of reluctance, reluctant one is liable not the perpetrator of reluctant one. Of course, it seems that achievement of reluctance in subordinate of self occurs if reluctant one is scared to be killed if disobey (30).

Insanity: insanity of perpetrator causes criminal result being attributable to causative and so it involves stronger contribution of causative than perpetrator. Basically, Islamic scientists and thinkers believe that maturity and perfection of wisdom as one of the four conditions of liability and lack of maturity of mind leads to non-liability (31). Hence, whenever an insane one commits murder, according to article 306, it is pure mistake and blood money shall be borne by his/her mature caretaker (32). Saheb-Al-Saraer states that one of conditions for nemesis in the case of murder is that murderer shall be mature and perfect minded (33). Basically, in criminal law, insanity in any form, whether permanent or periodical, the criminal is not liable, provided that in latter case, committer being insane during crime. Author of Riaz refers to consensus concerning non-liability of insane criminal (34). By referring to Raf hadith Sheikh Toosi believes that insane is not liable for crime and says punishment shall hold for liable ones (35). Therefore, it can be said that order for insane is same as children. Legislator and religion also consider liable ones who have three main features: correct understanding, freedom and authority and criminal intent (36). If any of these features are not present, committer would not be liable.

2- Generally, in collaboration of perpetrator and causative in committing murder for determination of their extent of liability, the order is that criminal liability is on perpetrator (37). But for cases mentioned above, if causative has more contribution than perpetrator, causative is liable for crime. As the legislator states in article 363 of Islamic penal code and also in article 332 of civil code, if an individual digs a well and another one pushes another person in the well, perpetrator would be liable. Of course, it is obvious that his liability holds when he commits murder intentionally and

knowingly. Some jurists and First Martyr and author of Riaz (38) refer to this issue. Therefore, presenter of poisonous food, assuming that eater knows the food is poisonous but eats it, no liability holds for victim for resultant death (39). Of course, just awareness of perpetrator is not enough for attribution of murder to him, but other conditions such as wisdom and authority and maturity shall be present.

3- In collaboration of perpetrator and causative for murder if both are equal in effectiveness, such that none of them has stronger contribution, many jurists believe that perpetrator shall be liable. Author of Tahrir-al-Vasileh (40) and Riaz (41) in latter assumption consider perpetrator as liable for crime, but some other jurists believe both of them shall be considered liable (42). For instance author of Takmaleh-al-Menhaj in discussing the causes, referring to famous narratives considers both of them liable (43).

Discussions

In Sharhe Lam'e we read: whenever crime perpetrator and causative are equal in their contribution in crime, perpetrator is liable as well (44). Of course, in article 363 of Islamic penal code, the legislator following famous narratives orders: in the case of perpetrator and causative's collaboration in crime, perpetrator is liable, unless causative has more contribution than perpetrator. It seems that concerning equality of perpetration and causation effect in murder, justice involves that in the case of their intention and collusion in crime and or attribution of murder to their act, both shall be liable, each one being liable in the limits of his own act.

Perpetration and causation in murder is considered and discussed in Sunnite jurisprudence and it is a topic for which some disagreements have been between them and Shia jurists.

Owner of Pishvaye Malekian states: causation in crime is where an individual causes another one is killed or provides conditions against another one for a crime and he does not directly commits crime, such that if he was not present, crime would not occur (45). He believes that retaliation to committer holds for him, whether as perpetrator or as causative.

Among Sunnite jurists, Aboo Hanifeh believes that only murder and assault and battery deserve retaliation and crime by causation does not involve retaliation or nemesis.

Among Shafei jurists, some scientists such as Ozaei and Aboo Yousef believe that crime including by perpetration or causation deserves retaliation (46).

Hanbalies like Shafeis believe that murder shall be retaliated, caused whether by perpetration or by causation.

Concerning collaboration of causative and perpetrator, Sunnite jurists have notions which have little difference with Shia jurists' ideas.

Malek, pioneer of Maleki religion believes that in the case of perpetrator and causative's collaboration, liability of perpetrator is the order and more contribution of causative and his liability must be proved. But concerning the provision of more contribution of causative than perpetrator, no determined rule is specified and judgment is left to tradition. Of course, in tradition, factors such as insanity, immaturity, unawareness and deception are attributed to perpetrator.

Concerning reluctance, he believes that in common law it is expected that under reluctance person indicates reasonable reaction (47); therefore he believes that reluctant person, even if being mature and wise makes his contribution stronger than perpetrator and attributes murder to him who shall be retaliated.

Concerning collaboration of causative and perpetrator, Aboo Hanifeh believes that perpetrator is liable and concerning the causative, no retaliation is considered for him (48). Even if causative's contribution is stronger than that of perpetrator, the problem is not solved through causation and no retaliation and liability is considered for causative.

Hanbalies refused to state a certain rule in this regard, but it can be implied that in the case of causative and perpetrator's collaboration, liability is for perpetrator, unless causative has more contribution than perpetrator in crime and insanity and immaturity are considered as criteria that make causative superior than perpetrator.

Conclusion: concerning causative and perpetrator's collaboration, most of jurists state that perpetrator shall be liable, unless in cases where causative has more contribution than perpetrator; even where both are equal in contribution, it is perpetrator who is liable. In Sunnite jurisprudence, Maleki and Hanbali religions, perpetrator is identified as liable, unless causative has more contribution than perpetrator and no certain rule is presented and judgment is left for common law. But in Hanafi religion, perpetrator is known to be liable and in no case, retaliation holds for causative. If perpetrator, for any reason, has no contribution in murder and or perpetrator is natural factor and human in the order of a tool, pure causation holds and the issue of perpetrator and causative's collaboration is not the case. A notable point about more contribution of perpetrator is that in some plural forms of perpetrator and causative, exemption of perpetrator from liability does not seem justified, as non-liability of causative where perpetrator's contribution is stronger than that of causative is criticized.

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