Civil liability of parents for the handicapped child

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Abstract: The civil liability resulting from parents' dereliction of duty for their children pre-birth culminating in physical or mental disabilities is considered an overriding matter requiring be specifying and enucleating although has not been disputed in Islamic jurisprudence thereinafter. The aforesaid matter is accomplished with due attention to certain jurisprudential rules e.g. principles of harm and causation which clarifies that off and on the parents are liable for the incidence of such harms therein. Sometimes the liability in tort arising from the action of mental disabled culminating in marring the others attributes to their testamentary guardians, in which juridical texts confirm it, specifying its scope of negligence thereafter.
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1. Introduction

In the society some people suffer from physical handicap due to certain grounds e.g. warfare, acts of God, car accidents or genetic disorders respectively. The handicapped fellow naturally suffers from social deprivations and being exposed to an untimely death, secluding from the society due to the appearance of severe injuries therein.

Sometimes the person makes the handicaps himself e.g. industrial accidents and sometimes he/she plays no role in the case i.e. handicaps bringing out due to acts of God or felonies against the entirety of body and etc.

In penal jurisprudence offences against the entirety are considered the most overriding ones aiming at the fellows' right to life and the presumption of inviolability, providing severe criminal penalties therein.

Launching grievous bodily harms off and on causes the death of the person which is considered the draconian feloniously consequence and sometimes brings about light consequences e.g. crimes against members of the body resulting physical handicap and the extinguishment of real dividends thereafter.

Certainly the premeditated and non-intentional crimes must be separated.

Crimes against members of the body are committed in various forms but they are divided into two categories:

a) Premeditated crimes

b) Non-intentional crimes (quasi intentional, intentional tort, having the force of quasi intentional and intentional tort)

A crime is declared premeditated when the murderer has a criminal intent therein.

So the aforesaid conditions are considered in the premeditated crimes, otherwise in the case where the lack of those conditions is regarded, the crime is said non-intentional.

The draconian judgment in personam considered in premeditated crimes is punishing the person in exact measure (blood vengeance).

The blood vengeance is a peculiar criminal reaction by virtue of which the humans' life is secured.

The Almighty vindicates the intellectuals in canonization the case when He says:

O intellectuals! Thou are aware that there is an existence enjoined in blood vengeance. Thou art abstaining from felony.

Justifiable texts subscribe on the necessity of blood vengeance and its overriding aspect respectively.

Imam Sajjad is quoted as saying that:

O the body of believers of Mohammad! Thou mayst know that the blood vengeance brings about existence in Islamic community.

There are no scientific arguments about fellows catching physical or mental disabilities due to their parents' neglects hitherto.

There are no peculiar verdicts about the handicapped discerned in Shiite jurisprudence and it seems that the textual proofs do not implicate the disabled rights but it is feasible to benefit from t'other proofs e.g. principles of harm and causation besides concrete cause to scrutinize the case respectively.

In the following thesis we scrutinize the most overriding instances by the emphasis on researches about jurisprudential laws therein.

Principle of harm

Principle of harm is viewed one of the typical

jurisprudential rules enjoying principal consequences which has been scrutinized by many Shiite jurists as an absolute rule.

There is no divergence of view considered in its authenticity of documentation and Fakhr-Al-Mohaqeqin has counterclaimed it as its successiveness thereinafter.

Sheikh Ansari has criticized it by scrutinizing Mohaqeqin's quotation and it clarifies that he vouchsafes the matter of successiveness.

The aforesaid successiveness has been disputed by certain scholars but there is no fuss relating the authenticity of the documents for its content symbolizing the principle of harm therein.

The relevance between the principles of harm with the liability in tort is based on the fact that we use it as a tortuous liability.

There is divergence of views about the implication of traditions and their purport and some of them believe that the principle of harm means prohibition of tortuous conduct; others say that the award on tort has been prohibited meaning that there is no award in divine law.

Certain scholars believe that there is no procured tort and it must be made good therein. Imam Khomeini assumes the purport of the award as a decree-law and says that the Prophet has adjudged a state criterion as a ruling and the high office of state, prohibiting the nation he has command of causing harm.

Naraqi and the holder of the principle of harm and prohibition of tort have been implied to both categories, vindicating the non-civil liability respectively. In the following discussion propounding the civil liability of parents consider the following exemplum:

If a gander bruises his expectant helpmate in the grip of anger, causing injury to the fetus and making psychiatric disorder, then undoubtedly he is liable for the damage.

It has been proved that the bruising struck to the expectant placenta's womb, severe back-falls, physical stifling labors, come a cropper, accidents and overawing the pregnant mother besides shocks bring about the mentally handicapped children.

It is citable that the principle of harm either exempts the edicts or the counterfeiter of them which means that it excludes the torts and counterfeits where the lack of edicts bring about damage therein.

So the aforesaid assumption says that since there is no verdict accounted in the law by which the defaulting parents becoming inadvertent, so the child has no right to seek recovery and initiating legal suit which is considered a tort edict saying that parents have primary liability for their wanton negligence.

Certain clear-sighted say about the measure of damages and its reimbursement that the assumption about parents' civil liability indicates that the person who causes pecuniary loss and makes restitution, thereinafter the damage sustained remains in effect, rather the disbursement is considered the procure of the lost property particularly off and on the payment and procuring of damage is done by embarrassment and lack of other methods thereinafter e.g. if a person injures another, then the paid cash would not recover his/her sanity.

According to the principle of harm the incurred loss causing the injured to suffer from incapacity for life faultlessly must be relieved and it makes no difference who is liable for damages.

Sutras codified in Islam indicate that the majors are respectable for the legislator and peculiar prerogatives have been granted for the fetus even, giving commutations for the expectants therein.

The Almighty bids in Holy Koran that parents are prohibited to harm their children or vice versa. The verse clarifies that causing harm is prohibited and is treated undue respectively.

Rule of causation

It is considered one of the most overriding rules in jurisprudence enjoying miscellaneous definitions and all Shiite jurists by the consensus of opinions rely upon it thereupon.

There are many verses hinting to the principle of harm and the title of accountability e.g. Anaam, Saba, Zomer and Maedeh chapters, verses 164,104,25,42,9 and 105 respectively.

Many Shiite jurists have quested to plan a standard for it by representing philosophic and logical neologisms which hold twofold dimensions:

1. Ordering to repudiating of perpetration
2. Controlling of delimitation which enjoys no impact on the realization of liability thereafter.

Helli defines the rule of causation when he says that ground is something on the lack of which the loss would not bring into existence but the legal cause of loss is another agent e.g. the ground itself does not mean the realization of a fact, albeit the cause considered in the impressments of interference has been defined by Helli therein.

The ground interferes in causing a detrimental fact but sometimes its effect is so marginal and subtle that leads into doubt e.g. a shopkeeper wets down his fronts and pedestrians pass it over but a man falls to ground and sustains an injury therein.

Should he never sustain an injury if the shopkeeper would not wet it down but is it feasible to consider the ground as the cause of injury?

The answer is no. Kerki answers the question when he says that the cause is something by which the loss is sustained but the reason of incurring differs thereafter.

Rashti says about it that the cause of tort means an action being damaged, albeit occasionally or it is not unlikely that the loss results from it respectively.

Certain actions in essence cause the loss i.e. with

no interfering they cause the loss or being in no contrast with the conditions e.g. hurtling somebody into fire which makes a harm unless there would be a hitch or a condition being lost there.

Other actions causing loss are considered by their characteristics e.g. giving a slap to a person and the injured party dies.

Other actions cause loss occasionally and the sequence of loss is the sequence of res over the cause but not the sequence of an expedient over an expedient respectively which are divided into four parts:

a) The cause stands in a locality other than the landed property.

b) The uncontested possession would be permitted.

c) Possession would be expedient to rational motives.

d) Possession is considered forcible by the stand of common usage, howbeit not being legal prohibitions e.g. park the vehicle on the footwork.

It is citable that many Shiite jurists believe that the consideration of casual relation between the damage and an action is correlative, in other words the expectance of occurring of a detrimental incidence is null by sheer force of habit respectively.

Shiite jurists have defined the rule of causation differently e.g. the loss is not suffered directly i.e. Down syndrome is considered one of the mental and genetic disorders and one out of 600 to 800 newly-born babies suffer from it especially in Europe and United States respectively.

Mongolism occurs due to chromosomes aberration and children suffering from it have 46 chromosomes instead.

Research shows that females' chromosomes mutate at their 30-year-old up causing the birth of mentally handicapped children e.g. if a carline becomes pregnant at the age of 45, causing the birth of a handicapped child, then the rule of causation says that the parents are considered the cause therein.

Research shows that if parents prompt to spermatoschesis when entering upon old, most probably the child would be mentally handicapped and the hazard exposed to such a child is said in the ratio of $\frac{1}{2000}$, $1/1000$, $1/100$ and $1/40$ at the ages of 20, 30, 40 and 50 respectively.

Shiite jurists and certain scholars have talked about multifariousness which means that if multifold factors interfere to cause a loss, then they are titled the liability therein.

There is no implication about the civil liability of parents for the handicapped children in traditions and jurisprudential texts but we can refer to the nature of verses and ask the implied views of lawgivers e.g. parents are indebted to their children therein. Islam has ordered the heeding of progenies' sanity pre and pro birth, taunting the parents who derelict of performing their functions undoubtedly.

Reprieving of the punishment of sinful acts for a pregnant woman is considered one of the most overriding moral principles in Islam, absit omen to prevent the sustaining of an injury to children and off and on has reprieved the execution of judgments pro-weaning respectively.

The other consequential matter is considered the prohibition of termination of pregnancy, issuing verdicts of punish in exact measures to the crime of perpetrators and blood wit respectively.

Perpetrators of abortion would sentence to criminal penalties as stipulated on the penal code.

It is notable that the aforesaid matter is regarded in other religions e.g. the kirk also prohibits the abortion as a fatal sin and regards the interval of pregnancy as the outset of homos' personality.

It is plausible to deduce the lawgivers' implicit view with regard to the fact that the abortion is considered a fatal guilt, exercising criminal penalties for the perpetrators and it makes no different whether the perpetrator is a male or female therein. Nevertheless the embryo enjoys rights and advantages e.g. inheritance through for the fetus, making a will for it and mortmain for it and etc.

The gestation period is not considered a material damage, henceforth dereliction of duties endanger the sanity of placenta and fetus and many physicians and psychologists say that the semiosis of a pregnant woman wields influx on the fetus.

For example the appearance of fright, heebie jeebies, fury and execration on a pregnant female has a knock-on effect on her nervous system, releasing the chemical materials e.g. acetylcholine and epinephrine besides the severe stresses i.e. her pessimistic views about gestation therein. Consulting with genetic consulting centers pre matrimony or having a child is considered very exigent respectively.

Scrutiny of multiple doubts considered about the liability of parents for the handicapped child

Here we scrutinize two options about the aforesaid cases:

a) Inconsistency of civil liability and the rule of deeds

Sometimes the parents of a handicapped child use drugs pre-fetal period to breed their child well and off and on the parents are issueless, embarking upon to use drugs pro-forming of a parasitic fetus and it seems that they have the intention of doing favor but unfortunately it leads to mental and irreversible disabilities.

The other assumption clarifies that parents embark upon using drugs to self-preservation but the action endangers the fetus e.g. consumption broad antibiotics during the gestation period respectively.

Can it feasible to consider the aforesaid duties as

the options of the removal of civil liability of parents?

To answer the above-mentioned question we scrutinize the rule of deeds firstly. Regarding the Koranic verses, satisfactory and textual proofs it seems that the rule of deeds explains the condition that when a man-jack contemplates to do a favor, whatsoever; nobody would keelhaul him/her i.e. when a person mars another fellow and the pederast purports to do goodness, then the doer is in no charge of it therein and he/she is not treated as a responsive since shouldering a responsibility and compelling him/her to non-monetary relief is considered a typical reprimand.

Fundamentals of jurisprudence say that there is no deem of liability and it does not mean that the rule of deeds ascertains the responsibility.

Although there is no discrepancy about the principal of edicts and the duck of responsibility as a result of boon but the nature of it is disputable thereinafter. So there are discrepancies on the qualified of the implementation of the rule which says that doing a favor means making an interest, removing of liability therein.

Are the following cases considered of the evidences of boon?

The yardstick of the veracity of boon is merely the determination but is it considered the removal of responsibility?

Ibn-e-Idris in answering to the first question says that a person rousing a beast for fear of self-detriment, by which the beast has inflicted damage to its rider, is not considered the cause of damage and explains the motive:

"He is considered a benefactor since he has embarked upon to prevent the loss".

Some Shiite jurists have criticized the aforesaid argument and they believe that self-favoring causing the harm of others does not a religious impediment. Up to the certainty of the rule of deeds considered in juridical relations means doing a favor to a peer simultaneously by causing harm therein.

Does the favor include to benefit and prevention of loss? Does it remove the civil liability?

The conventional truth says that doing a favor includes both instances but there are discrepancies of opinions about the removal of civil liability e.g. the late Maraqi believes that the rule of deeds dedicates to the prevention of loss but not includes asking for benefit thereafter.

So if a fellow destructs the other's property or restores it, the action is not treated as a removal of civil liability e.g. battering the hoarding of a bosket for the purpose of water supply is considered to benefit, bringing about civil liability.

Destruction of property is an injustice and profiting is not considered a virtue necessarily and it cannot extinguish the indecency of the waste of property respectively but the fundamentals of the rules of causation and non-actual waste in which the person paves the way for depredation e.g. when a person facilitates the footwork of others for the purpose of public interest but the action inflicts damages to one of the gainers, thereinafter; we conclude that his measure is considered a permitted act, enjoying a rational motivation without an indecency aspect respectively.

The last witticism says that whether or not the embarking upon doing a favor is necessary. There are three viewpoints in this case:

1) Considering the nature of the action and non-interfering of the intention on it

2) Considering the intention but not the action per se

3) Necessity of both components

Pay attention to the following points:

1. Deliberate destruction and tortuous conduct for the prevention of landslide losses are considered the favor claiming civil liability.

2. Deliberate destruction and tortuous conduct are allowable when the person is duty-bound to do a favor provided that, the destruction would be considered a favor from the standpoint of custom e.g. testamentary guardian who administer the property of the person under guardianship.

3. If the destruction and tortuous conduct would not prevent the loss, then it is concluded that the notion of deeds is regarded therein.

4. If a person paves the way for doing a favor but a detrimental incident occurs after it, then the person is responsible for the satisfaction of the loss since he is the doer of the action therein.

Considering the mental disabilities of the child due to the drug use by the placenta to prevent the outbreak of diseases, it is said that the aforesaid action is doing a favor since causing the loss and destruction for the purpose of prevention i.e. self-preservation are categorized as deeds and parents claim no responsibility for the mental disability since the conditions relating the self-defense is exposed to danger and the aforesaid doubt falls due to being interdependent respectively. The second assumption saying that the parents have embarked upon to benefit the fetus, using drugs without any prescriptions causing mental disabilities accidental and regarding their liability for the fetus with spermatoschesis, appointing a guardian in case of the is/her inheritance are considered the evidence of doing a favor respectively.

But it is disputable whether or not the aforesaid example is considered the evidence of doing a favor by the standpoint of custom and the doubt is cleared when the drug use is done by consulting a physician.

So it is very overriding to consider whether the action of parents is covered by the rule of deeds or not therein. If the former proves applicable, then they are free from claiming a responsibility and vice versa.

b) Scrutiny of the descended tradition from the prophet entitled "thou and thy property belong to the sire" and its relation with parents' civil liability

The form of the above-mentioned tradition says that the sire claims no responsibility for the loss sustained to his children since the children and their properties belong to him and the right of property belongs to him which has been characterized by the absoluteness of the tradition respectively.

There are multiple questions occur in the mind:

Question 1: Has the sire the right of constructive possession of the property of children?

Question 2: What does the sire taking possession mean?

Question 3: Regarding the preeminent role of parents on the mental disability of the children, then does the mother claim responsibility only or it backs to the sire to pin the civil liability?

The aforesaid tradition has been applied by Shiite jurists from the standpoint of branches of jurisprudence specificative and by exclusion e.g. certain Shiite jurists like Ibn-e-Sour and Ibn-e-Monzar exemplify that considering the punishment for theft, if the theft is chargeable to punishment and the sire heists the sons' property pro meeting the conditions, therefore the theft is chargeable for punishment but many jurisconsults further to the aforesaid tradition believe that when the sire commits theft, he would not be penance by the lash therein.

The pragmatism of the codification of the aforesaid writ is regarded a doubt which ordains that the properties of progenies belong to the sire by the reality of the incumbency of sustaining of the progenies by the sire respectively. So it is not allowable to penance by the lash regarding the doubt.

If a person commits suicide premeditatedly and his/her act would be materialized, then the avenger of blood has the right to punish him/her in exact measure to him/her crime thereinafter.

Another example explains the usury and the excluded circumstances which denote that the usurer and the lender are considered the sire his son respectively which is not included by the rule of usury interdiction i.e. since the binary properties pother to a single entity, having a unit owner, therefore the usury deteriorates.

It is notable that the aforesaid tradition has been discussed in branches of jurisprudence e.g. disbursement of the minor poor-rate by the sire, endowment of the minors' property and pilgrimage to Mecca respectively.

Delimitation and the standards of title of the above-said tradition have been disputed by the viewpoint of other traditions as the properties of progenies are considered illegitimate for the sire unless by the full consent of the son or when the sire is in a dire need of it, so he is obliged to occupy it by what has been ordained in the custom and good morals, warring of gratification and junketing therein.

Sheikh Ansari discusses about the putting a condition of expediency or lack of mischief in occupying of the tutor:

There are probable reasons exist:

1- The invalidity of the aforesaid condition indicates that the property of the progeny belongs to his/her father e.g. Saad-Ibn-e-Yasar says that he and his properties belong to his father respectively.

Ibn-e-Moslem says in a proverbial tradition descended by the prophet that the sire has the power to occupy of what he desires.

Imam Reza is quoted by Mohammad-Ibn-e-Sanan in his bible titled "grounds" saying that what is considered the pardon of progenies' property for his/her sire is that the son is a gift bestowed by God but the pardon of possession has been restricted to the father's need therein.

The saint in asking the question of the quantity of properties the sire is allowed to possess said that insomuch of his repast without any prodigality when being in dire straits respectively.

The prophet is quoted by Abu Hamzeh Somali saying that he bade a man who was grievant of his sire:

"Thou and thy properties belong to your sire and thou are not allowed to occupy thy son's property unless insomuch as thy necessaries and afterwards he chanted the following paradigm:

"Indeed the almighty does not savor the malefactors".

Sheikh Ansari adds that citation to the aforesaid paradigm indicates that the volition has been reverenced by non-sodality but not the abomination and the sire has no right to occupy of what has been considered a rife corruption therein.

It is concluded that the ownership of the progenies' property by the sire is considered true on the condition of necessity and the sire has no right to occupy of the properties of a mischief adolescent therein. On circumstances when the punishment for theft or exact measure to the crime are lapsed, then the civil liability is not removed and the sire's discretionary correction is seized by the judge according to the jurisprudential and legal purviews.

Eventually when a sire, for the reason of inadvertence and recklessness and despite of the fact of the medical prohibition, embarks upon to reproduction, giving birth to a mentally and physically handicapped child, thereinafter he is not included in the area since so much is certain that the civil liability is vested by him with no extension but when both sire and mater have a preeminent role in giving birth to a handicapped child, ergo the mother is found guilty a fortiori. Many Shiite jurists have excluded the mother's theft from the child or

premeditated murder of the child by the mother, but they believe that the punishment for theft is included therein.

Civil liability of parents for causing damages by the mentally handicapped children

In this section we scrutinize the liability of parents for causing damages by their children on the frameworks of the affected parties.

When a child being whether healthy or disabled cause to sustain a loss, then the first and foremost question is:

Who is responsible for the compensation for the damage?

In past times the question had been answered indecisively i.e. since the child was not responsible for his/her acts, so the compensation for the damages had not been asked by him/her parents but nowadays, with the proceeding of the ambit of the civil liability, there is no doubt that any loss must be compensated which means that everybody is liable for his/her detrimental acts. But off and on adults are responsible for the detrimental acts of others by what has been codified in the law. Parents are obliged to care and mind of their children legally. It seems that litterae humaniores are more overriding than the regulations considered in family ties therein.

Parents are bound to observe their children and their relations with strangers therein. Article 7, law of torts, ratified in 1951 adjudicates that the custody of a mentally defective or an underage child is charged with the parents besides other natural persons claiming the responsibility e.g. fosters and wet nurses.

Responsibility of the parents for their children has been scrutinized in our country's legal system not regarding the kinship but due to the capacity of guardianship respectively.

In France civil code, unlike the jurists of our country, the parents are liable for their children acts severally and jointly and their constructive faults are presumed according to the article 1384, paragraph 4 thereinafter.

The purview provides that the parents are jointly and severally responsible for their children's sustaining loss.

Countries like the United States and England which adhere to the common law have resolved that the liability of parents for their children has been accepted by doubt since there are peculiar customs and usages and they believe that parents enjoy no sweeping authority on their children and the parents are bound to observe their children as a social duty.

The civil liability of parents titled “vicarious liability” is considered an exclusion which says that the person is held liable for his/her ingratitude to observe and breed, thereafter; when he/she compensates a loss, actually has compensated his/her own fault.

Tort-feasor parents are liable for the compensation of their child's physical and intellectual damages and article 7 of the law of torts has discussed the practice of the compensation for loss, being at no odds with the minors and insane civil liability concerning to cause to sustain to others respectively. Article 1216 of civil liability has not desuetude the civil liability as an implied abrogation and says that the injured party has been chosen in action to use both liabilities to recompense a loss e.g. an incapacitated person in reference to article 1216 of civil liability and persons having the custody of a child to the effect of negligence in having the custody respectively. But article 7 provides that the initiation of legal proceedings hinges upon the incapability of the legal guardian to compensate the running or partial of the loss i.e. when the guardian is found tortuous, hence his/her liability for the nonage and the insane is preferential and the aforesaid conditioned priority appropriates the article 1216 to the note 7 therein.

It is citable that when a person disposes his/her property to an incapacitated person and if the latter destructs the trust property, then it is prescribed that the incapacitated holds no responsibility e.g. when a person admits his/her chose in possession to an indiscerning minor, thereafter he/she is not responsible for the destruction of the property.

Discussion

There are no peculiar guidelines instructed about the vested rights of handicapped in Shiite jurisprudence and it seems that the textual proofs do not point to it directly but it is plausible to rely upon other proofs e.g. the rules of causation and harm respectively.

The principle of harm provides that the loss sustained by a person, caused him/her to suffer from mentally or physically disabilities for life must be compensated and it makes no difference by whom the loss lies and it originates from the incumbency of the esteem of reverence therein.

The rule of causation confirms the civil liability of parents for their handicapped child. The principle of goodness says that whether or not the deeds of parents included in the rule, if so the civil liability is removed, otherwise they are considered accountable thereinafter.

Some jurists believe that rely upon the tradition “thou and thy property belongs to your sire” descended by the prophet ascertains that the civil liability of a sire for his disabled son is removed but when he embarks upon reproduction never else the medical prohibitions due to his negligence, giving birth to a handicapped child, is not claimed responsible but the mother is found tortuous all the more therein.

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