

Review Paper

Criminal Liability Arising From Medical Staff's Negligence in Abortion



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ABSTRACT

Background and Objectives: Abortion has been accompanied by challenges in various legal systems and religious doctrines, with different countries adopting varying criminal policies regarding it. Regardless of the legal systems' perspectives on the permissibility of abortion, the issue of criminal and civil liability of medical staff in cases of abortion remains significant. While various provisions have been set forth in the Islamic penal code (IPC) and the law on protection of family and youth in Iran, the concept of negligence has received less attention in this field. The aim of this research was to examine the responsibility of medical staff in cases of neglect that result in abortion.

Methods: The present study was conducted using an analytical-descriptive method and relied on library sources. Additionally, information was gathered through documentary research involving the study of laws and reputable jurisprudential sources.

Results: Based on the research findings, different rulings exist regarding negligence, with possible implications of intentional crime attributed to medical staff in certain cases.

Conclusion: According to the investigations conducted, the legal system in Iran, among others, considers medical staff liable for punishment even in instances of mere negligence. Furthermore, upon meeting certain conditions, such as the presence of a duty and a causal relationship, medical staff will be held responsible for negligence resulting in abortion.

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Introduction

Medicine has always been a human necessity, and healthcare professionals have held a high societal status due to their pivotal role in human health and life. In this regard, adhering to professional ethics is the most important attribute of the healthcare workforce. Neglecting these ethics can lead to legal, civil, and disciplinary responsibilities. Abortion is one of the realities of women's lives today, which has unfortunately escalated due to social, cultural, and economic challenges. This trend poses risks to the health of mothers as well. Governments have adopted various approaches to addressing this issue. Some legal systems, based on reasonable, experimental, and relational principles, have adopted a strict stance on this matter. Iran's legal system falls into this category, wherein, aside from therapeutic abortions regulated under article 56 of the law on the protection of family and youth, all other instances involving intervention in abortion (whether direct, causative, or accessory) are subject to criminal sanctions. To establish responsibility for criminal behavior or medical error, three elements are necessary: Wrongful conduct, resulting harm, and a causal link between the conduct and the harm. Within the context of behavior, the possibility of committing a crime through omission presents a significant legal challenge [1]. Nevertheless, according to the definition of a crime in article 2 of the Islamic penal code (IPC), the occurrence of criminal behavior through omission is feasible, as safeguarding society and maintaining order and security sometimes require individuals to perform duties prescribed by the legislator. Thus, the omission is not merely inaction; it can threaten essential societal values, security, and order, just as the commission of certain acts can affect the community. Refraining from performing a duty constitutes an obligation placed upon the individual.

The importance of a comparative study on the impact of healthcare professionals' omission in abortion lies in two aspects. Firstly, in jurisprudence and law, there are various perspectives concerning attributing criminal behavior to the perpetrator of the omission. Secondly, in some instances, abortion is carried out by healthcare professionals through omission, and in these cases, the subject's applicability aligns with a crucial criminal element.

Given these considerations, the main question of this research is whether healthcare professionals are liable for an omission resulting in abortion. To address this

question, we explored various perspectives in jurisprudence and law.

Methods

A comprehensive assessment was conducted over the past five years (from 2019 to 2023) using reputable databases, such as [Magiran](#), [scientific information database \(SID\)](#), [IranMedex](#), and English databases, including [Scopus](#), [PubMed](#), [ScienceDirect](#), and [EBSCO](#). However, no specific article exclusively addressing the topic of healthcare professionals' omission in abortion was found. The focus remained primarily on abortion itself, along with an examination of Iran's legal rights and Imami jurisprudence. Thus, the subject of the article encompassed the following facets:

Firstly, it explored the issue of criminal liability arising from omission, encompassing various discussions in both jurisprudence and Iranian law, with references to specific examples within each context.

Secondly, it examined the crime of abortion in Imami jurisprudence and Iranian law, focusing on the liability of healthcare professionals.

Discussion

Various assumptions can be contemplated regarding the subject, which are mentioned below:

The legal and ethical implications of failure to act

In this scenario, the failure to act has no direct impact on the occurrence of murder or injury; the individual could have prevented an abortion through their actions, but they chose not to intervene. For example, a pregnant woman's doctor witnesses her experiencing bleeding but fails to provide assistance. In such cases, the individual cannot be held responsible for the outcomes resulting from their inaction. However, legal experts believe that committing a crime through failure to act does not require specific conditions, as ethical obligations are sufficient. Just as everyone is accountable for refraining from committing murder, individuals also have a duty to prevent such acts through inaction [2]. Some Sunni jurists also hold the view that failing to act can lead to intentional homicide even without a specific obligation [3].

Their argument relies on a narration that discusses Imam Baqir's account of a man requesting water from those sitting under a tent. When they refuse, Imam Ali

holds them responsible for the man's death [4, 5]. However, it should be noted that reputable Shia sources do not corroborate this narration [6] and therefore, scholars do not consider its content credible.

Regarding the principle of criminal imputation, there are differing opinions. Some argue that the law should not infringe on people's solitude and freedoms by forcing them to act. Based on individualistic theories influenced by thinkers, like Jean-Jacques Rousseau, the medical profession is seen as a free entity that can abstain from treating patients. According to this view, a doctor can refuse to provide treatment without incurring criminal liability, even if another doctor is not available locally [7]. Conversely, other scholars, based on ethical principles, contend that failure to act, which is commonly expected of individuals, constitutes negligence and creates legal responsibility [8]. Furthermore, human beings, guided by their conscience, feel obliged to perform such acts. People always desire to assist others in times of need, just as they expect assistance when they themselves are in danger. This ethical and rational rule dictates treating others as one would want to be treated [9]. This perspective is also justified from the standpoint of social solidarity, as fostering greater cohesion and collective cooperation among individuals can lead to laws that outline specific duties aimed at achieving positive outcomes through cooperation and preventing indifference to the needs of others [10].

In terms of comparative law, unlike countries, such as Germany, France, and some states in the United States, certain countries, like England refrain from stipulating a specific crime for failing to assist individuals in need. This discrepancy arises from the perspective of individuals, like Professor Williams, who advocate for individualism. They argue that anticipating such a crime transforms an ethical obligation into a legal duty, potentially infringing on personal freedoms and generating unnecessary law enforcement and judicial involvement [11].

In conclusion, despite opposing views [3], legal experts generally do not hold medical practitioners accountable solely for failing to act. Many legal systems have introduced a crime related to the failure to assist injured individuals due to ethical considerations and the promotion of social cohesion [9, 10]. Iran, like some other countries, has criminalized the failure to provide assistance to victims. The self-restraint from aiding the injured and preventing life-threatening hazards act, approved in 1975, stipulates that individuals who are legally or morally obligated to help injured persons or those in life-threatening situations must not refrain from taking

necessary actions and providing aid. Failure to do so can result in a misdemeanor sentence of six months to three years of imprisonment.

Regarding the conditions for the realization of this crime, the following important points are considered:

- 1) The omission of the material element of this crime constitutes its commission. As soon as this omission occurs, the crime is realized. Therefore, the offense is immediate, not continuous.
- 2) For the crime to materialize, the individual must be in a position of seeking assistance or for the circumstances to indicate the necessity for help. Seeking assistance may also be done by third parties, not necessarily by the person in danger. For example, if a pregnant mother is unable to request help due to her condition, and those around her ask for help from a doctor or nurse, failing to assist will constitute the act of omission mentioned in the article.
- 3) As emphasized in the article, the perpetrator must refuse to help despite having the ability to do so; therefore, individuals who lack this ability due to reasons such as mental or physical conditions will not be held criminally responsible. For example, in a car accident, bystanders who happen to be medical staff may not be able to assist due to their mental state.
- 4) The source of the danger may arise from a disease, accident, natural event, the criminal negligence of a third party, or even the victim's negligence [12]. The question is whether a person who has created the danger can be subject to this article. For example, if a nurse deliberately administers medication to induce an abortion, can the perpetrator be convicted of both committing a crime and failing to assist?
- 5) The absence of danger for the perpetrator or others is a prerequisite for this crime. The wording of the law implies that danger encompasses both financial and life-threatening risks. However, some argue that only cases leading to severe harm prevent the realization of the crime [13].
- 6) This crime is an absolute offense; thus, the result is not a conditional element. Even if failing to assist does not lead to an abortion or additional harm to the mother, the crime will still be realized. Moreover, specific intent is not required for the mental element. Nonetheless, knowledge and awareness are necessary, meaning the perpetrator must be aware of the person's exposure to danger and their condition. This crime cannot be solely deemed as purely material.

Leaving an action preceding another action

In general, abandoning an action should not be equated with committing a crime in certain cases. Abandoning an action preceding another action occurs when, for instance, an individual imprisons their pregnant spouse in a room

and denies them water and food, to cause their death or abort the fetus. In such cases, the perpetrator is punishable not solely for abandoning the action but for the act of confining the person. Therefore, such cases do not constitute a suitable example of committing crimes against bodily integrity through the abandonment of action. Nevertheless, some legal experts have labeled cases of abandoning actions preceding another action as the abandonment of action. They have conflated examples and confused instances of pure abandonment with instances of abandoning actions that precede murder. For instance, they have regarded the death of a patient resulting from a hospital's to provide care as an act stemming from abandonment of action [1]. They have stated that, due to this confusion, scholars do not differentiate between murder resulting from a positive act and abandonment of an action, such as confining someone, denying them water and food, and allowing them to die, which would make the perpetrator responsible for murder [14]. Regarding these cases, the following points are significant:

Firstly, although the presented argument is valid and murder is deemed intentional when other conditions are met, these instances do not constitute examples of abandoning an action. Secondly, the assertion that scholars unanimously accept murder resulting from abandoning an action is inaccurate. There is a difference of opinion on this matter, leading some scholars to differentiate between instances of intentional murder resulting from abandoning an action and instances that precede the action. For instance, the author of Jawaharlal Kalam asserts that if someone imprisons another and forbids them access to water and food, causing them to die after a period, during which a normal person cannot survive without sustenance due to health, illness, hunger, thirst, etc. the perpetrator commits intentional murder, and there is no contradiction or problem in this matter [15]. However, they hold a different perspective on murder resulting from abandoning an action, which we will discuss in the relevant discourse [15]. Other Shia and Sunni jurists also share this viewpoint [16, 17] and some even consider it a consensus [18]. Therefore, the viewpoint of scholars cannot be extended to the abandonment of an action that precedes another action.

Omission of action

The main subject that has sparked debates among legal experts and scholars revolves around the feasibility or non-feasibility of committing crimes against bodily integrity through the omission of action. For instance, the question arises as to whether intentional murder can be realized through the inaction of a nurse responsible for

caring for a pregnant woman. In the following sections, we will delve into the viewpoints of legal experts and Islamic scholars on this matter.

Islamic scholars' perspective:

Certain Islamic scholars do not universally agree on the realization of criminal offenses against bodily integrity through the omission of action. For instance, the late Ayatollah Khoei believed that it was impossible to establish the existence of intentional murder through omission of action, which he considered a negative matter [19]. Similarly, Sayyid Javaher al-Jawhari acknowledges the possibility of murder omission of action, but he argues that causality is unclear in such cases [15]. Some Sunni scholars also do not hold the individual who neglects action responsibly, as they believe that causality does not apply in these scenarios [20].

While Islamic scholars generally provide specific guidelines in matters of jurisprudence, the cases mentioned imply that many scholars believe in the feasibility of committing crimes against bodily integrity through the omission of action. For example, in instances of neglecting medical treatment by a doctor, forcing someone to relinquish their property, and withholding testimony that leads to someone's death, some scholars hold the neglectful party responsible [19].

Contemporary scholars generally hold a similar viewpoint. Grand Ayatollahs, such as Musavi Ardabili, Bahjat, and Makarem responded to a query regarding a nurse refraining from administering medication to a patient during specific hours. They stated that if the neglectful individual had an obligation and responsibility and was approached for assistance but failed to fulfill their duty, then their negligence could be attributed to causing death, and they could be held responsible not only for the sinful act but also as a guarantor [21].

Legal scholars' perspective

Some legal scholars, during the implementation of the IPC in 1991, held the view that crimes against bodily integrity could not be committed through omission. According to these scholars, the legislator used the word "kar" (act) in the threefold elements of article 206 of the IPC, which implies an active deed. Therefore, they argued that a perpetrator must engage in an action, and considering article 2 of the IPC, which defines a crime as an act or omission punishable by law, crimes against bodily integrity cannot be committed through omission.

This viewpoint aligns better with the principle of legality of the crime and punishment [22].

It has also been noted that there is no legal document indicating that depriving a person of life is considered intentional homicide without the individual performing a positive physical act [23].

Regarding this matter, it must be clarified that

Firstly, article 206 IPC approved in 1991 is primarily intended to explain the conceptual element of homicide, not the perpetrator's behavior in this crime. Thus, relying on this article alone cannot negate the possibility of intentional homicide through omission.

Secondly, the customary interpretation of the term "kar" (act) is broader than a mere physical act and sometimes encompasses omissions as well. For instance, not greeting adults by children is considered a reprehensible act in customary practice. Thirdly, within the framework of the IPC's implementation, the legal department of the Judiciary stated that just as intentional homicide can be realized through acts, such as stabbing or strangling, it can also occur through omissions. For example, if a mother who is obligated to breastfeed her child intentionally withholds breast milk to cause the child's death, she is considered a murderer.

If a person responsible for the care of a pregnant woman solely intends to omit an action, not the resulting consequence (intent to abort a fetus), the described homicide falls under the category of quasi-intentional homicide, and the mentioned responsible would incur the obligation of paying "diyah" (blood money). In article 290 of the IPC, similar to the previous article 206 of the IPC approved in 1991, the legislator uses the term "kar" to explain intentional homicide. The legislator was clear in using this phrasing, which does not negate the possibility of intentional homicide through omission. Nonetheless, to avoid any conflicting interpretations, article 295 has been included. Although this article lacks legislative history, it states that if someone neglects an act they were responsible for and as a result, a crime is committed, the resulting crime is attributed to them if they were capable of performing the act. This crime can be classified as intentional, quasi-intentional, or pure negligence. For instance, if a mother or nurse who has undertaken the duty of breastfeeding neglects to feed the child, or if a doctor or nurse abandons their legal duty, they will be held accountable.

In conclusion, the legislator explicitly accepted the commission of crimes through omission in article 295 of the IPC. However, certain conditions must be met for such a crime to be realized:

Existence of an obligation: As mentioned, the mere presence of an ethical obligation does not lead to the realization of intentional homicide through omission. The person omitting the act must have a duty to perform the omitted behavior. This obligation can be established through various sources, including the IPC and other relevant laws. **Causality Relationship:** Crimes that require a result, such as homicide, necessitate a causal relationship between the act and the outcome. This causality must be established in cases of omission as well. One of the challenges raised by opponents of the possibility of intentional homicide through omission is the difficulty in proving a causal relationship between a negative act (omission) and a positive outcome (homicide). However, the legislator acknowledged this difficulty by including article 295, indicating the possibility of intentional crimes through omission.

Nonetheless, a critique that can be directed at the legislator in article 295 is that it only addresses cases where a person who has both a duty and the capability to perform an act, neglects that duty. This oversight implies a causal relationship between the omission and the resulting crime without independently establishing the causality relationship, which requires further scrutiny.

As a result, in situations involving an independent agent and reliance on another independent agent, where the death is attributable to the latter, the person who refrains from the action—despite having the duty and capability to perform the act—is not responsible for the outcome. It should be noted that in the case of refraining from action, just like in the case of an action, all other conditions of homicide must be present, including the mental element. From this perspective, there is no distinction between committing murder through action and refraining from action. The Legal Department of the Judiciary affirms this point: Refraining from action when accompanied by all the following conditions, will constitute the essential element of intentional murder:

- 1) The act of refraining from action is intentional and aimed at causing the death of a living human being;
- 2) There is a causal relationship between the act of refraining from action and the death of the victim;
- 3) The agent refraining from action is obligated by laws, regulations, contracts, or established customs to perform an act that they have refrained from.

This reflects the approach of Iranian laws regarding abortion resulting from the refraining from action by medical personnel. In previous discussions, it has been mentioned that in some cases, the possibility of committing a crime through refraining from action exists. Now the question arises: If the conditions for refraining from action are met (i.e. the existence of an obligation and a causality relationship), how will the criminal and civil liability of medical staff be determined? For example, if a physician or nurse in a hospital witnesses a mother's injuries and her specific conditions but refrains from saving her child, resulting in the fetus being aborted.

In these cases, if the behavior of the medical staff is intentional and meets the aforementioned conditions, intentional homicide will be established. However, regarding criminal and civil liability, the following points are important: A: Regarding the possibility of applying retribution (qisas) in cases of abortion resulting from refraining from action, different views have been presented by jurists. Some jurists advocate for retribution in cases of intentional abortion [24-26]. According to this view, the application of the retribution rule encompasses the fetus as well, because after ensoulment, the fetus is considered a human being, and committing a crime against it is equivalent to a crime against a human being [15]. In contrast, some jurists argue against retribution, favoring the establishment of blood money (diyah) and corporal punishment (ta'zir) [19-21]. According to this perspective, the distinction between a human being and a fetus is significant, and including the fetus under the rule of retribution requires specific clarification from religious authorities. Additionally, certain narrations stipulate the imposition of blood money for intentional fetal abortion, even if the fetus is not yet animated. For instance, Imam Sajjad (peace be upon him) was asked about a man who struck a pregnant woman, causing her fetus to be aborted. He responded that if it is a drop of seed, the man should pay twenty dinars and if the fetus has taken shape and the soul has been breathed into it, he must pay the full blood money [27].

Although article 91 of the IPC of 1983 explicitly prescribed retribution for causing the death of a fetus, in which the soul has been blown, the IPC of 2013 and the Law of Islamic Punishments of 1996 did not provide such a clear stance. The IPC approved in 2013 states in article 306 that an intentional crime against a fetus, even after the animation of the soul, does not entail retribution. In this case, the perpetrator, in addition to paying blood money, will be subject to discretionary punishment as stipulated in book five of this IPC. Therefore, according to this law, a fetus is not considered a perfect

human being upon birth and it can be a victim of murder or physical harm. However, it is worth noting that if the crime occurs before birth and leads to deformity or death after birth, or if the deformity persists after birth, then retribution is established. Consequently, the legislator considers the subject of the crime in murder to be a human being, and life begins with the birth of the child. However, for the protection of the fetus, another type of crime is outlined that encompasses blood money and discretionary punishment as needed.

Article 56 of the Youth Protection Act, passed in 2021, also states that abortion is prohibited and considered a crime with public ramifications. Following articles 716 to 721 of the IPC and the provisions of this law, it is subject to blood money, imprisonment, and the revocation of professional licenses. Article 56 of this law is conditional on the consent of the mother, the presence of severe and unbearable hardship for the mother, and definitive untreatable fetal abnormalities. In cases where the hardship is related to fetal illness or abnormalities, there must be a lack of possibility for relief or substitution for the mother's hardship, no signs of the presence of the soul, and the age of the fetus must be less than four months; in such cases, therapeutic abortion is considered feasible. In such cases, medical centers approved by the medical authorities are obliged to carry out abortions exclusively upon the order of a judge and after confirming the absence of signs of the presence of the soul. Relevant information should be recorded and uploaded to the patient's electronic health record or the system specified in article 54 of this law while observing the principles of confidentiality. Outside of these circumstances, if a doctor, nurse, or pharmacist provides abortion tools or directly participates in an abortion, they will not only face penalties outlined in article 624 of the IPC, but will also have their professional licenses revoked. B: Sometimes, refraining from action is perceived as negligence. Even though the healthcare workers do not have the intention to abort the fetus intentionally, their failure to act promptly may contribute to the abortion of the fetus. In these cases, the doctor may still be liable for harm even if they have obtained the patient's exoneration. Article 158(c) of the IPC does not classify a doctor's actions as a crime if they are legitimate, performed with the patient's consent, and adhere to technical standards. According to the consensus of Shia jurists, a doctor who fails in treatment is liable in any case, even if they have obtained exoneration [15]. The IPC also provides for discretionary punishment in addition to blood money for such a doctor. However, in some cases, both the doctor's and the nurse's negligence contribute to the abortion of the fetus. In these cases, the fundamental rule stipulated in

article 496 of the IPC is that a doctor is liable in treatments where they instruct the patient, the nurse, or similar individuals, regardless of the patient's exoneration. However, if the nurse knows that the instructions are incorrect and would harm the fetus but proceeds anyway, the doctor is not liable, and the nurse bears the responsibility for the harm and damages caused.

Conclusion

The examination of the liability of medical personnel in cases of abortion resulting from neglecting their duties is an important topic that bridges the fields of law and medicine. Considering the substantial number of presented cases, the exploration of its diverse aspects is regarded as essential. The results of this study are as follows: Mere neglect of duty by medical personnel, even if it leads to abortion, does not hold them legally responsible for the resulting consequences. However, the legal system in Iran, due to the principle of social solidarity, has defined a criminal offense under the title of "failure to assist the injured," subjecting medical personnel to penalties for not assisting. If medical personnel intentionally refuse to provide medical services to a pregnant mother, leading to abortion, they can be held criminally liable not only for causing harm to the mother but also for intentional neglect of duty and causal relationship, resulting in paying compensation for the fetus and facing imprisonment as a punishment. In instances lacking intent but involving negligence in the execution of actions, not only may compensation be imposed, but also a prison term of up to three years may be enforced, pending the realization of such neglect.

Ethical Considerations

Compliance with ethical guidelines

There were no ethical considerations to be considered in this research.

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Conflict of interest

The author declared no conflict of interest.

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