

# Removing Factors of Criminal Liability in Abortion

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## Abstract:

Liability means in word the obligation for performing a work, and responsible person is an individual who undertakes an obligation against another person, and will be inspected in case of failure. Therefore, liability is always accompanied by obligation. In the field of criminal law, content of this obligation is to undertake the effects and outcomes of criminal behavior; i.e. tolerating the punishment for a blameful behavior of criminal. We shall not deem the liability only on the criminal due to the crime commitment, but we shall first account the crime he committed to him, then inspect him. Capability of accepting the crime is called attributability according to the jurists who define it the subject's enjoying the ability of understanding and power. As a result, an insane or non-adult person will not have any criminal liability as he doesn't understand or distinguish good and bad actions. A person committed a crime unintentionally (such as a forced or reluctant) is exempted from liability, because he is unable to perform obligation. Thus, it shall be said that in fact the criminal liability is deemed for a person whose dangerous actions are blameful. The factors waiving the criminal liability mean the factors removing the criminal liability of criminals.

*Keywords: Embryo, Abortion, Removing Factors, Criminal Liability*

## 1. Introduction

In Iranian criminal law, there is a difference between justifying factors and removing or justifying factors of criminal liability. The effect of removing factors of criminal liability is failure in punishment of a person qualified, but because there is committed a crime on victim, society may require protecting itself against the repetition of such behavior. Though an insane or minor is non-blameful, the society intends to send an insane to a safe mental hospital and impose a kind of controlling minor by the non-criminal protective proceedings. In this section we try to analyze the removing factors of criminal liability.

## 2. First: Mother's Insanity

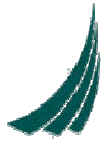
Undertaking responsibility means a person's complete control of his actions, understanding concept of the actions and his ability of selecting obedience or disobedience of law. An insane criminal lacks such complete control, understanding and capability. Therefore, he is not responsible for his actions and is exempted

from criminal liability. In legal terminology, an insane is a person who is unable to distinguish vice and virtue, good and bad; in psychology, insanity is a mental disease or psychosis or a serious mental disease in which the thinking, behavior, conduct, senses and actions are deviated from the ordinary and correct way.

Such a person is not punished in England but, on the other hand, is deemed a dangerous potential person who shall be protected as he may commits crime again. Thus, when a criminal is found insane, the result will be rendering the special judgment of "Not Guilty by Reason of Insanity".

In this judgment, the judge has right, depending on the crime committed, to order sending to hospital and guardian, taking care, medical treatment or absolute releasing on the strength of Criminal Procedure (Insanity and Unfitness to Plead) Act passed in 1991.

The same stand is acceptable in all legal systems in the world. In Iran, for example, this decision has been reflected in Article 51 of Islamic Punishment Law, based on which "an



insane committing crime, in any level, will be exempted from the criminal liability". Note 2 of the said article introduce the condition of removing criminal liability in circular insanity as the insanity during crime commitment.

In addition to this general judgment, in many cases the reason condition has been mentioned as the condition of crime commitment. This subject is included in the punishment law passed in 2013 in article 150 and note 1 of the same article.

For example, if mother commits abortion due insanity (circular or permanent), this is a removing factor of liability, and she shall not be convicted for payment of blood money or punishment.

### **3. Second: Minority**

One of the elements of criminal liability is perception but the human understanding of the nature and outcomes of his actions is not equal and regular in all life steps from the beginning to the end of life. During the birth, a child is unable to understand what he performs. It causes that the children not reaching a definite age lacks the criminal liability in all legal systems. After reaching this age up to reaching the age of complete criminal age, there are different actions taken against the adults as it is sometimes more difficult to prove their crime.

In British law, for instance, 18 is the age of complete criminal liability and the children under 10 don't have any criminal liability. But it shall be said that this age was first 7 in common law which increased to 8 as per article 50 of Children and Young Person Act passed in 1933, then to 10 according to the amendments made on the strength of article 16 of Children and Young Person Act passed in 1963.

It shall be mentioned that this age was 14 for the rape before 1993. It means that any boy under 14 should not be convicted for the rape but only for indecent assault. It was nullified due to incompliance with the biological and

external realities as per the sexual crimes law passed in 1993.

Meanwhile, using such a child (under 10) of immature child in Iranian law by any adult as a mean for crime commitment will cause to deem the adult person as parties' criminals and intellectual subject of crime. On the other hand, the children of 10-18 years old in England will have the complete criminal liability provided the material and mental element of crime is proved, but the type of actions taken against them will be different from the adults as the amending and educational proceedings are more relied upon.

Before 1998, the responsibility of children 10-14 years old was subject in England to proving the material and mental element of crime and also proving the child's awareness of indecency of his action which was nullified as per article 34 of Crime and Disorder Law passed in 1998 because it would finally lead to the loss of children grown up in the healthy families.

The children and juveniles in England went to the trial in the children courts up to 17 years old and are kept in the special children prisons before 21. This judgment is observed in Iran for the children under 18 as per the Criminal Procedure Code.

Such a method is made in Iranian law for the children. In articles 285 to 287 of criminal procedure code passed in 2013, legislator stipulates that the elementary researches are required for children and juveniles 15-18 in prosecutor's office. Article 304 of the mentioned law points that the children courts try the crimes of children under complete 18 years old, which is included in new punishment law passed in 2013 in Articles 88 and 146. In this law, legislator predicted a new chapter of security and educational measures and punishments, which were unavailable in the previous law. This law considers the juveniles as well as the children. Article 146 of the said law stipulates that "immature persons



don't have the criminal liability". Moreover, the legal maturity means the complete age of 9 in girls and 15 in boys as per article 1210 of civil law. In article 147 of Islamic punishment law passed in 2013, legislator follows the civil law and declared the maturity age of 9 in girls and 15 in boys, and declared in article 148 of this law on the immature person punishment that "the security and educational measures are applied for the immature persons as per regulations of this law".

In addition to this article, legislator has rendered some special judgments for the children in different cases. Article 1 of children and juveniles protection law passed in 2002 stipulates that "all persons under complete solar 18 years old will enjoy the legal protections mentioned in this law. Note that the difference of discerning and undiscerning children in Iranian law, inserted in law following the Islamic jurisprudence is that a child under 7 who is unable to distinguish the vice and virtue is called undiscerning, and a child with age from 7 to 9 in girls and 7 to 15 in boys who is able to distinguish vice and virtue is called discerning child<sup>1</sup>. This subject has been included in Islamic punishment law passed in 2013 in note 1 of article 251.

A mother who may do abortion due to the minority and unfamiliarity with some medical issues and child cares shall not be punished as she is unaware of understanding and distinguishing senses, or a child who causes abortion of a woman in any reason will be innocent in any criminal liability, but the blood money of embryo shall be paid to the woman by the child.

#### **4. Third: Physician's Duress**

A condition in this case is free will. It means that a person may be obliged to have free will in his actions for praising and honoring the life, relative and assets. Sometimes a forcing factor decreases the free will of a criminal and moves him to the crime. Another removing

factor of criminal liability, duress is in fact a condition in which criminal who has common mental and intellectual ability is placed in a condition that he commits crime without free will.

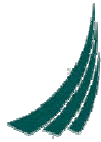
Therefore, the difference of duress and constraint or emergency and reluctance state is this fact that in a constraint condition, resulted from either human origin (reluctance) or the conditions (emergency), a person decided to commit crime with free will for escaping the serious threat taken against him or by evaluating the effects of threat and effects of crime though he is dissatisfied. On the other hand, he is deprived of control in duress, and is unintentionally moved to the crime. In this case, jurists divide duress into two material or mental types and each into external and internal kinds according to the factors depriving the criminal of his powers which I don't explain as it is directly unrelated to the subject of this thesis.

In Iranian law, article 151 of Islamic punishment law passed in 2013 includes only duress: "whenever a person commits a behavior, due to the intolerable duress, which is called crime in law, he will not be punished. In the crimes causing punishment, reluctance party will be punished for the criminal subject. The related regulations will be applicable for the crimes leading to punishment and retaliation.

The items related to this article and our discussion are: first, this article is only related to the duress conditions in punishment crimes, and the special regulations shall be referred for duress and its order in the punishments. Second, an important item is that Iranian legislator has omitted duress from article 151 according to article 143 stipulating that confirming intention of commitment of criminal behavior is a condition for crime commitment, because a person in duress won't commits any crime and shall not be punished as he doesn't have any intention. In such cases,

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<sup>1</sup>Mohammadali Ardebili, the same, p. 111



the forced person is like a mean of crime commitment.

Reluctance is in fact a kind of emergency state originated from another person which declines his satisfaction rather than his intention and free will, while duress is indeed a state in which the person doesn't have any intention and free will in crime commitment.

Third, the only condition for confirming the reluctance as per this article is its intolerability. The phrase "it is naturally intolerable" means the kind and objective measure for whether it is tolerable or intolerable.

Fourth, the legislator's meaning of "reluctance party will be punished for the criminal subject" refers to a condition that the reluctance has been caused by another person and doesn't surely include other types of reluctance resulted from the conditions and states.

But if a physician does abortion in duress, he will not be deemed responsible for, because this duress may be for health benefits of mother or a threat taken by another person. In any case, the duress is a removing factor of criminal liability.

#### **5. Fourth: Mother's Intoxication**

Alcoholic drinks and other intoxicants may have the same effect as insanity on individuals and decline the mind and, therefore, inability for control of their actions. But, one is resulted from the mental illness and another using the intoxicants. However, there is another difference between them is that in voluntary intoxication, a person caused this condition himself and will be therefore blamed. As a result, different legal systems have more strict proceedings against such persons than the insane as they are deemed to be blamed.

Indeed, according to the Iranian law, when intoxication removes the criminal liability, as a complete defense, that it happens intentionally or unintentionally, and generally declines the mental element. Thus, unintentional intoxication not declining the mental element

will not be deemed as a complete defense and removing factor of criminal liability.

It seems that if a mother commits abortion when she is intoxicated and lost her consciousness for intoxication and provides the conditions for abortion, she will be punished for intoxication not for feticide.

#### **6. Fifth: Physician's Mistake**

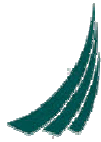
Mistake is an incorrect thought so that a person deems a supposed item the existent or an existent item supposed. The human mistakes are usually originated from his ignorance and unawareness of the real items, which may be itself resulted from his carelessness or imprudence and paying less attention to the issues. In law, mistake is generally a person's inaccurate imagination of a subject based on which he commits an action for which he will be obliged. Jurists usually classify the mistakes into Mistake of Law and Mistake of Fact.

The first is that person commits a crime due to either the ignorance of issues or legislator's prohibitions or result of incorrect understanding and interpretation of legal regulations as he might avoid it if he would be aware of real judgment.

As almost all jurists may believe, mistake of law is principally ineffective on criminal liability of individuals and this liability is recognized in all crimes including intentional or unintentional; because traditionally rule of "Ignorance of Law is No Defense" has been accepted for different reasons including public order.

There is such approach in English law. In common law, ignorance of law never removes the criminal liability under any condition. Hence, this issue is applicable for types of sexual assaults. Generally, such rule has been accepted in Iranian legal system and Iranian judicial system didn't accept this type of mistake.

A physician will not be punished if he does abortion by mistake, but he shall compensate the damages in a way that the physician shall



compensate the damages he arises based on the fundamentals of civil liability. Unlike the ignorance of law, ignorance of fact removes the criminal liability.

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