

Physicians' obligations in cosmetic surgery in range of medical law and criminal law

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Abstract: On physicians' obligations in cosmetic surgery, their views by jurists have been represented. Some respect for obligation to outcome, some respect for obligation to means, and some respect for obligation to Aggravated means. The legislator in none of legal articles has explicitly mentioned physicians' obligations in cosmetic surgeries, and has just regarded physician's obligation as obligation to means. This can be inferred from the context of Article 495 of the penal code. In paragraph three of article 150 of the penal code, the legislator has argued about satisfaction and compliance with technical and scientific standards in surgical or medical procedures, and has mentioned lack of one of them in the case of crime and damage as grounds for excluding criminal responsibility. Indeed, nothing has been explicitly mentioned about the principle of proportionality, but it seems that if the physician is not committed to any crime, and obtains informed consent about the risks and benefits of operation, without compliance with the principle of proportionality, he can be known in charge for consequences, for which terms of waste has been considered as the basis, and the physician with lack of principle of proportionality in cosmetic surgery will be guaranteed of terms of waste. In this sense, the physician will be obliged to compensate loss, but due to lack of legislator's clarification in penal code to the necessity of compliance with principle of proportionality in the case of lacking compliance by physician in terms of the principle of legality of crime and punishment in the case of observing other conditions set forth in paragraph (c) of article 158 of law, the physician will not undertake criminal responsibility.

Key words: Responsibility; Obligation to means, Obligation to outcome; Cosmetic surgery; Principle of proportionality

1. Introduction

Cosmetic surgery is the state of the art problem in today's society which we increasingly witness increasing records associated to this surgical operation, mentioned that cosmetic surgery derives from plastic surgery, and plastic surgery by itself is divided into two groups of cosmetic surgery and reconstructive surgery, for which treatment is not just related to body but to humans' mind. As psychologists believe that the individuals who take step for unnecessary surgery are exposed to narcissism, thus it cannot deny treatment by such surgeries; Hence, as cosmetic surgery associates to appearance of people, thus any mistake in this context by physician can raise irreversible consequences, because appearance of people in most of cases can pave the way for suitable opportunities of life such as the opportunity for marriage, education and employment. Little motivation to examine physicians' obligations in cosmetic surgery in range of medical law and criminal law due to limited sources in this context has been reported. The rules associated to physicians' obligations in cosmetic surgery in the light of development in criminal rules have been changed, indicating importance of topic and necessity of adapting crimes and obligations of physicians with modern needs of

community. Penal Code of Islamic Republic of Iran relating to physicians' obligations except for crimes of abortion and false certification and revealing the patients' secrets has been conventional, and article 495 of penal code of Islamic Republic of Iran and paragraph three of article 150 of Islamic Republic of Iran, and article 616 of Islamic Republic of Iran state this fact. Hence, physicians' obligations in cosmetic surgery has not been particular entered into discussion in range of medical law and criminal law, and this indicates compliance of physicians' obligations with general rules, where there are two general views about physicians' obligations. Some jurists are in respect for obligation to outcome, and some are in respect for obligation to means, that their argument lies on compliance with society's expedient because absolute obligation for physician refrains individuals from joining to this scared field, and Penal Code of Islamic Republic of Iran has mentioned physician's obligation as obligation to means, and this can be inferred from article 495 of Penal Code of Islamic Republic of Iran. Lack of compliance with physicians' obligations including contractual and compulsory obligations provides causes for physicians' obligations, that such obligations include civil, disciplinary, and criminal and/or mix of all these obligations. The most suitable view on obligation to plastic surgery is undoubtedly obligation to Aggravated means, because on one

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hand it adapts with scientific realities and on the other hand it provides rights of applicants for cosmetic surgery. Yet, with regard to lack of vital necessity and problems associated to views on obligation to plastic surgery, it requires considering such an obligation for physician in case of plastic surgery. Based on this obligation, the plastic surgeon requires making huge effort to get desired outcome for applicant, and also managing to prove his innocence in case of lawsuit against him.

Indeed, in cases that a person's obligation is to outcome, lack of obtaining obligation alone for knowing the pledge in charge suffices, unless the pledge proves lack of obtaining outcome is not related to him, but an external agent such as fault by promise has caused obligation remains incomplete, where the pledge in obligation to means is not required proving anything (Kalhornia and Maysam, 2012). Because, the pledge seems fulfilled his obligation, and promise must prove his fault, but here plastic surgeon is neither undertaken a duty that infer loss to an external agent, nor he is released not to know himself obliged to state any definition.

This study aims to respond to this question "how is criminal policy of Iran on physicians' obligations in cosmetic surgery (Shojaepoorian and Siavash, 2010)?"

Shojaepoorian on physicians' obligations in cosmetic surgery, says, there is an agreement on this point that physicians' obligations in healing the patient relies on obligation to means even by a contract or without it (Katoozian and Pishin, 2002).

Katoozian in his book on physicians' obligations, says, physicians' contractual obligation against patient in classification of obligations into obligation to outcome and obligation to means is accounted as a substantial sample for obligation to means.

Katoozian in his book on physicians' obligations in cosmetic surgery, says, civil liability for cosmetic surgery has been regarded as an exception besides mentioning physicians' civil obligations and contractual obligation which is an obligation to means, so that it has been regarded as obligations to outcome (Katoozian and Pishin, 2002).

Picovschi on cosmetic and reconstructive surgery and obligations against them, says, some by believing in division of plastic surgery to cosmetic and reconstructive surgery have introduced reconstructive surgery as an obligation to means. This is in a way that surgery is not an accurate science, thus it cannot ask surgeon for treatment of all patients who have gone under surgical operation, and also no actual treatment has been witnessed in cosmetic and reconstructive surgery to date, thus it cannot talk about treatment in cosmetic and reconstructive surgery.

Hence, it must treat with cosmetic surgeons with strictness so that respect for obligation to means will be resulted by this strictness and this will be without respect for converting obligation to means from outcome and neglecting scientific facts. This study aims to prove or reject this hypothesis that physician's obligation in cosmetic surgery is of

obligation to outcome (Picovschi, 2002). Necessity in cosmetic surgery for principle of acquittal by physician will result in lack of physician's obligation, where principle of acquittal by physician in cosmetic surgery causes resolving physician's *criminal* obligation. This study aims to examine Iran's Legislature approach on physicians' obligations in cosmetic surgery in range of medical law and criminal law, examine role of necessity of cosmetic surgical operations in physicians' obligations, and examine nature of physicians' obligations in terms of obligation to means or outcome in cosmetic surgical operations in penal code of Iran. Library and documentary studies have been used in this study. Data collection method regarding type of research include referral to scientific sources including books, journals, and periodical journals existing in libraries as well as internet sites which encompass scientific research and articles. According to library research method, the instruments such as note taking and forms relating to note taking after collecting from sources will be used to collect data. This is in a way that after finding the sources from the journals and documents relating to the topic of research, the temporary reference from the required contents was provided, and then the stage of note taking by preparation of notes was started, and the contents will be regulated using reference valuation techniques through scientific method.

2. Physicians' obligations in cosmetic surgery in range of medical law and criminal law

Problems and regulations in medical laws including principle of proportionality, acceptance and commitment therapy, permission from patient and considering desired standard and proven expertise at area of cosmetic surgical operations are represented. Particular aims and features of cosmetic surgery that have been mixed with issues such as art, business and psychology are of differentiations that have Aggravated necessity of physicians' obligations. The obligations and duties rooted in law, contract and professional principles are considered in this study so as to examine the rules governing cosmetic surgical operations in range of medical law and criminal law in point of view of jurists, so that this is not unrelated to the rules governing civil and criminal laws.

3. Compliance with principle of proportionality

Here, it is asked whether plastic surgeon in professional perspective obliges to say no to the patient who lacks conditions for surgery; in other words, whether the surgeon obliges to say no, even while the patient is totally consent with surgical operation on him. Necessity to this question is revealed more if we know that we do not face just a concrete criterion in cosmetic surgery despite other surgical operations, but a series of social and mental agents intervene in this surgery. Indeed, the benefits

from plastic surgery are evaluated mostly at area of psychology, and thus they cannot be measured.

The principle for acquittal in surgical operations even plastic surgery or other surgical operations is a definite issue, but what is challenging here turns back to the bound of this acquittal, and whether the person can let the physician free for any test and *seizing* on his body. Definitely, no sound judgment will accept that a person's consent can permit the physician for surgical operation on him, however, *victim* satisfaction cannot be a permission for satisfaction by patient (Jafari Tabar, 1998).

Hence, it can say that if the contract signed between physician and patient is set exclusively based on consent and permission by patient, contradictory to physician's professional duty and obligation to surgical operation will not be authentic. Because in spite of interests of the patient and the physician's oath, this has been in contrast with public morality and order, thus it cannot refer to it for defense based on article 975 of civil law (Noorbaha, 2004).

4. Aggravated medical liability

In division of obligations to obligation to means and outcome, the physician's contractual obligation against patient is accounted as obligation to means (Shojaepoorian, 2010).

Despite views on fruitlessness of such a division, a majority of people believe that physician's obligation in treatment of a patient even with a contract between patient and physician or without it is of obligation to means. In Iran's law, physician's obligations based on article 495 of penal code have been regarded as obligation to means. Now, it must observe that physician's obligation in cosmetic and reconstructive surgery enjoys which features, and in following evaluation of these features by observing different vies and defining suitable view will be considered.

5. Obligation to outcome

Besides talking about physician's civil obligation and his contractual obligation that is an obligation to means, it is common to mention civil obligation of cosmetic surgery as an exception by separation of two cosmetic and reconstructive surgical operations, and embed it in obligations to outcome. This impression derives from immorality and no treatment by such surgical operations. It has been also announced that the physician's obligation in plastic surgery must be known as obligation to outcome, as due to high costs people ask for outcome in beauty and fitness in these surgical operations (Resalat, 2005).

It must be noted that by accepting legality and legitimacy of cosmetic surgery and associated operations and nature of such operations that will not be always resulted in success, there does not exist a suitable justification for declaration of obligation to outcome by plastic surgery, unless

plastic surgery by itself brings about suitable outcome. Hence, plastic surgeon's obligation cannot be known as an obligation to outcome, because in addition to expertise of physician, there are two other fundamental agents including patient's body and defect in medical science that affect having successful surgical operation.

Obligation to means

Some jurists by accepting division of plastic surgery to two segments including reconstructive and cosmetic surgery have introduced the first as obligation to means, and mentioned this argument that surgery is not an accurate science. Hence, it cannot ask surgeon for treatment of all patients who have gone under surgical operation, so that no definite treatment has been brought about for this field of surgery, but on cosmetic surgery it cannot say that there is a treatment for such surgical treatment, thus it must treat with cosmetic surgeons with strictness, where outcome by this strictness will be intensification of obligation to means, and this is regardless of respect for converting obligation to outcome from means, and neglecting scientific realities. Some authors have considered special conditions for cosmetic surgical operations in addition to confirming physician's obligation to means in cosmetic operations (picovschi, 2002).

6. Obligation to aggravated means

One of jurists believe that the most suitable view on plastic surgeon's theoretic obligation is undoubtedly obligation to Aggravated means, because on one hand this obligation adapts with scientific realities and on the other hand provides the rights of the applicant for cosmetic surgery. Indeed, due to lack of vital necessity and problems relating to separation of cosmetic and reconstructive surgical operations, physician's obligation is required in both cases, for which the surgeon must do his best for obtaining applicant's desired outcome (Shojaepoorian, 2010).

Further, in case of lawsuit against physician, he must cope with proving his innocence. Indeed, in cases that the physician obliges to get outcome, lack of obtaining obligation suffices for knowing the promise in charge for outcomes of surgery, unless the physician proves lack of obtaining desired outcome does not relate to him, but an external agent such as fault by promise has caused obligation remains incomplete, where the pledge in obligation to means is not required proving anything. Because, the pledge seems fulfilled his obligation, and promise must prove his fault, but here plastic surgeon is neither undertaken a duty that infer loss to an external agent, nor he is released not to know himself obliged to state any definition (Kalhornia Golkar, 2013).

France's judicial procedure directs to this view that strictness in obligation to cosmetic surgery is generally called obligation to Aggravated means.

7. Procedure of Iran's law to Physicians' Obligations in cosmetic surgery in range of medical law and criminal law

Due to equality principle of individuals against law, the physicians except for definite conditions and cases which are predicted as exemption of criminal obligation, have been acquitted from this obligation, and they are not superior to each other in other cases.

Physicians' crime are classified to two special medical crimes, i.e. the first classification includes crimes such as abortion and false certification and revealing the patients' secrets, and the second includes the crimes derived from medical profession that occur by lack of skill, lack of compliance with governmental systems and so forth, where the first goes beyond the topic of our discussion. A study on legal articles indicates that the legislator has differentiated cosmetic surgical operations from other medical operations, where cosmetic surgery follows other medical operations, and physician's obligation in cosmetic surgery is the same obligation that physician undertakes in all operations.

8. The basis for acceptance of physician's criminal obligation to crimes due to medical operations

To understand physician's criminal obligation, it requires examining basis and theories governing physician's obligation in codified law.

9. Medical operations or illegitimate surgery

According to paragraph three of article 158 of penal code, the legislator has known any surgical operation legitimate under condition of paragraph three of article 158 of penal code. The opposite concept to this paragraph is that any illegitimate medical or surgical operation is a crime, and provides the causes for physician's criminal obligation.

In other words, however the physician observes all scientific and technical standards, and gets permission from patient, and surgical operation ends in death or failure in an organ of body, in case of illegitimacy of surgical operations, the physician will not be acquitted from punishment, for which paragraph three of article 158 of penal code has been considered as the basis.

10. Negligence

Negligent physician's obligation is required in Islamic jurisprudence, however the patient's permission to medical operations is considered (Goodarzi, 1998). According to article 145 of penal

code, negligence has been recognized of features of criminal fault, so that negligence implies that the person regardless of attention to scientific outcomes that can be predicted, takes step for an action that results in killing or body damage, and this occurs by negligence of a person who does not think about his deed[†].

11. Lack of observing state systems

Lack of observing state systems in Iran's criminal laws has been considered as a basis for acceptance of physicians' criminal obligation. The law has not defined the term "state systems" and has not represented a standard for recognition and determination of its features, but this does not imply that it cannot acquire recognition of this term (Langroodi, 1997). The codifier of law terminology knows state systems encompassing all rules and regulations that are out of law.

12. Lack of permission in taking step for treatment

In positive law, with regard to opposite concept to paragraph three of article 158 of penal code that has mentioned one of the conditions for decline of physician's criminal obligation as getting permission from patient, it can deduce that if the physician or surgeon refrains from getting permission regarding paragraph three of article 158 of penal code, his action will be just a crime and will be prosecuted. With regard to legal and jurisprudential text, lack of patient's permission can be known of causes for physician's criminal obligation (Langroodi, 1997).

13. Punishments for physician who committed crime in cosmetic surgery based on penal code

13.1. Major punishments

Major punishments are called to those punishments that the law has predicted one or several punishments for each crime, which enforcing them will be possible by definite writ of court. With this definition, the punishments mentioned in article 616 are major punishments for the committed physician (Langroodi, 1997).

13.2. Physician's complementary punishments in cosmetic surgery

Complementary punishments are called to those punishments that are added to the major punishments. With regard to feature of complementary punishments that are arbitrary and degrees 1 to 6 are considered for them in crimes, and the court regarding the crime and features of crime

[†] Opposite meaning of paragraph (c) of Article 158 of the Penal Code

can sentence one or several cases of complementary punishments besides major punishments.

It must observe that based on the existing rules on physicians' crimes besides major punishments, it can sentence complementary punishments. In this regard, it must state that if the physicians' crimes be under article 616 of penal code, with regard to features of complementary crimes, the judge is allowed to sentence complementary punishments besides major punishments, that features of complementary punishments are limitative.

According to article 23 of penal code in 2013, it has been mentioned refraining from complementary punishments. But, if physician's fault in cosmetic surgery results in failure in an organ of body or damages to body, as physician's punishment in such cases is Payment of blood money, and blood money is not considered as complementary punishments, this there will not be the possibility for exercise of complementary punishments in this case.

14. Consequential penalties for physicians in cosmetic surgery

Consequential penalties are resulted from criminal conviction that manifest as deprivation from social rights, and do not require for term in writ of court[‡]. As Consequential penalties associate to intentional crimes, thus this goes beyond our topic of research, because the topic of research in this study lies on unintentional crimes of physicians in cosmetic surgery in which the physician has the fault for crime. Hence, our intention in discussion is meaningless, thus it should be noted that if physician's crimes in cosmetic surgery be intentional, this will be followed by intentional crimes and included of retribution that goes beyond our topic of research, thus it is neglected to enter it into discussion.

15. Conclusion

With regard to importance of outcomes from cosmetic surgery, it seems that physicians' obligations in such surgical operations include the obligation to outcome. A survey conducted in this study indicates that Iran's legislator has announced physicians' obligations as obligation to means, and this problem is inferred from article 495 of penal code. On the other hand, the legislator has not considered allocation of physicians' obligations in cosmetic surgery, thus physicians' obligations in cosmetic surgery are announced of obligations to means. Hence, if the cosmetic surgeon puts all his efforts in surgical operations and does not commit any fault, he will not undertake any obligation, but with regard to existing rules in cosmetic surgery operations including the necessity to compliance with the principle of proportionality, it seems that in the case of lack of incompliance with this principle in cosmetic surgery regarding lack of faulty by

physician and getting informed consent and loss to patient, the physician with lack of principle of proportionality in cosmetic surgery will be guaranteed of terms of waste, so that the legislator has not mentioned any discussion for none of legal articles on physicians' obligations in cosmetic surgery operations. Hence, physician's obligations in such surgery operations include those obligations that have been entered into discussion by legislator. On role of exemption in cosmetic surgery regarding article 495 of penal code, it can deduce that exemption from the patient by the physician does not imply total exemption of physician from obligation, but approval does not reverse the cause for this, mentioned that approval of fault is undertaken to patient from physician, where the physician remains in charge even with getting exemption. Exemption has a different nature from consent that the legislator has referred to patient's consent in paragraph three of article 158 of penal code, and has accounted it as a reason for crime.

However, in the convincible causes, both civil and criminal obligations are declined, but due to article 495 of penal code and stipulating payment of blood money by *trespassing* physician, it seems that this article is an exception to paragraph three of article 158 of penal code, where the physician will lack criminal obligation but civil obligation in the case of observing the articles set forth in paragraph three of article 158 of penal code by physician. In clarifying legal nature of consent in surgical operations, it must state that the patient's consent will be in sake of patient's permission to the physician for seizing on his body, otherwise it is just meaningless. On role of necessity in surgical operations, it must state that the legislator has referred to necessity of Medical or surgical operations in 1975 and 1983, which this removed cosmetic surgery operations from article 42 of reform of public penal code in 1975 and article 32 of penalty code relating to penal code. Yet, necessity of cosmetic surgery operations is felt by the relationship between cosmetic surgery operations and mental problems. Yet, the legislator has changed the subject in 1995 and 2013 and has used legitimate surgical or medical operations instead of necessary surgery operations. Hence, the necessity in cosmetic surgery operations due to lacking stipulation by legislator does not play a specific role, however, the legislator had referred to necessary medical or surgical operations in 1975 and 1983, and in case of vital necessity in surgical operations and getting informed consent and observing technical and scientific standards, the physician will be exempted from criminal obligation. According to legislator's stipulation in paragraph three of article 158 of penal code regarding legitimacy in surgical operations, it seems doubtful that cosmetic surgery operations lack legitimacy and due to lack of legitimacy they cannot be included in paragraph three of article 158 of penal code, but this doubt can be resolved with regard to Estefta'at from contemporary scholars and jurists, mentioning that majority of jurists respect legitimacy of cosmetic

[‡] Articles 25 and 26 of the Penal Code (2013)

surgery operations. On relevancy between physician's obligation in cosmetic surgery operations and legal articles, Al Nahyan has stated that if the cosmetic surgery operations end in death of patient, punishment below the full amount prescribed by the law will be considered as the basis for physician's obligation regarding article 616 of penal code. Yet, if cosmetic surgery operations end in physical damage rather than death, it will be included in article 495 and paragraph three of article 158 of penal code.

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