

## **Organ and Tissue Transplants in Comparative Law**

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### **Abstract**

Although transplant of organs and tissues have given rise to various medical, legal and even moral and religious problems, there is no doubt that the law can remove many of the existing obstacles. While in many aspects, prosperity of transplant operations in the world has been made possible to a great extent according to the law, this same law has sometimes acted as an impediment against progress in this area. The present article tries to conduct a general survey on the problem of organ transplant and reviews the approaches of different legal systems towards this matter. They include the law and comparative study of organ and tissue transplant in several developed countries and some muslim countries.

**Key words:** organ and tissue transplant; patients; comparative study; transplant operation; Islamic law.

### Introduction

When Christian Neethling Barnard (1922), South African heart surgeon<sup>1</sup>, performed the first heart transplant operation in 1967 at the “Groote Schuur Hospital” in Cape Town, the world realized that a new era of surgery had arrived. Up to that time, the public had been minimally aware of advances of organ and particular kidney transplantation. But when Barnard performed the first human heart transplant successfully, the newspapers throughout the terrestrial globe proclaimed in headlines daily advances in the transplant world.

From a historic point of view, at the turn of the twentieth century, Emerich Ullmann in Vienna transplanted a dog’s kidney from its normal position to the neck. This auto transplant worked quite well. But when Ullmann transplanted a kidney from one dog to another, the function was short-lived. Later, he transplanted a dog’s kidney to the neck of a goat and it was a successful operation<sup>2</sup>. Alexis Carrel (1873-1944) a French-born cardiologist who had immigrated to America<sup>3</sup> took up Ullmann’s work and perfected leak proof vascular anastomizing techniques, used vein grafts in 1902. Afterwards, some attempts to transplant kidneys continued to fail, because there was no way to affect tolerance in adult humans, to a donor organ any more. Eventually, a team at the “Peter Bent Brigham Hospital” in Boston transplanted a kidney from an identical twin to his brother who was dying of kidney failure in 1954.

Two types of organ transplantation, that is, “auto transplant, and hetero transplant”, are currently in use. Auto crafts of nerve, skin, cartilage, tendon, bone, veins, arteries, blood-forming tissues, lungs, cornea, liver, pancreas, bone-marrow and other organs are used to repair or replace damaged structure of the

body. For instance, in 1991 “Susan Southon’s heart helped a man from Oklahoma survive. Her liver was donated to a patient from Pennsylvania, and her cornea was transferred to Texas for transplant. Her bones were used in corrective surgery and some parts of her skin were removed to be used as transplant tissues for fire victims. Finally, it was decided that the rest of her body be interned in an anonymous grave on Wednesday.” Nowadays, there are two leading sources of organ and tissue transplants: live and dead bodies with respect to most organs and tissues such as pancreas and liver, it is necessary to identify the difference between the organ taken from a living person and that taken from a corpse.

The reason necessitating this identification is their different treatment by the law. In spite of extensive advancements made in this area, a number of people losing their lives in the world because of suffering from illnesses curable through transplant still transcend the actual number of transplant operations. In short, it can be said that demand to receive organs for transplant, exceeds supply and the gap is constantly widening. For instance, in 1990, only in the United States, 18591 patients needed kidneys for transplant, while nearly half of them actually received the kidneys. From the total number of 40959 patients, only one of every 20 patients requiring heart transplant, has received it. 14751 patients were in need of livers but only one patient from every five has been granted a liver. Among 4108 patients needing pancreas, one patient in every eight has received the organ. From the total number of 4618 patients who were in need of combined heart and lung, only one in every 85 has succeeded in obtaining the combined organ. The above figures should be viewed taking into account the fact that all cases of

patients requiring transplant organs are not registered in waiting lists; however, the number of patients having registered their names in the national list is far greater than the number of available organs. With regard to vital organs such as heart, this means that one third of the patients whose names were on the waiting list lose their lives before having the chance to obtain the required organ, and one patient from the list dies every 4 hours.

There is always unfavorable or even terrible news regarding organ and tissue transplant in the world mass media, but encouraging news are not considerable. Bills presented to the patients' family following a transplant operation; surgeons, prosecuted by judicial authorities charged with negligence in performing their duties; the number of patients whose names are registered in transplant waiting lists; dispute among doctors about dead bodies; great difference between the expenditure of preserving defective organs and their transplant; trade of organs; contagion of AIDS and other infectious diseases through transplant operations; the role of law in the field of transplant; and many others, are among the important issues that need to be studied. Although transplant of organs has given rise to various medical, legal and even moral and religious problems, there is no doubt that the law can remove many of the existing obstacles. While in many aspects, prosperity of transplant operations in the world has been made possible to a great extent by the law, this same law has sometimes acted as an impediment against progress in this area. The present article tries to conduct a general survey on the problem of organ transplant and reviews the approaches of different legal systems towards this matter, and includes two leading parts:

A) The law and comparative study of organ and tissue transplant in:

- 1) Several developed countries;
- 2) Some Muslim countries.

B) Organ and tissue transplants from the view point of Islamic and Iranian law.

### **Part I. law and comparative study of organ and tissue transplants**

During the recent years, the science and techniques of bio-medicine have gone through extensive developments, in a way that legal provisions formerly acceptable everywhere, cannot respond to the existing requirements of the society. In a science experiencing constant rebirth and renovation, where one can witness and regulations adapted to the current status of the society is strongly felt. Methods of classical medicine are unsophisticated and deal only with the relation between the physician and the patient, which is based on a merely therapeutic objective. But modern medical methods enjoy different features.

In modern medical methods, persons other than doctors and patients are involved in the treatment, who are the donors of transplant organs such as kidney, heart, etc. and whose legal position must also be examined. The problems of defining the legal position of these donors, determining the nature of doctor's involvement and the role of others such as the eye-bank manager, the donor of the kidney and ..., as well as the use of medical units, devices, and equipment are of special importance.

Legal problems arising out of new medical methods are treated by the rules of private law accepted in medical law, and this approach does not suit the necessities of time especially in

Iran and confuses the judge who is accustomed to ruling on the basis of statutory provisions. Unlike the past, when the classical laws were founded on the concept that medical treatments as well as surgical operations pursue therapeutic objectives, the problems of modern medicine contain new parameters and factors requiring tailor-made legal rules and regulations. Doubtless, classical rules of law cannot respond to modern medical techniques that are marked with some complexity and uncertainty, and this fact strongly questions the authority of the mentioned rules.

In considering the legal aspects of modern medical methods which are mostly built on medical experiences, one had better distinguish between pure scientific experiences and therapeutic ones. The distinguishing factor adapted depends on the goal pursued in practice, namely mere scientific research or finding a practical remedy. The significance of the distinction lies in the fact that judgment based on therapeutic experience will not be so problematic, whereas judgment concerning a pure scientific experience is far more difficult. At any rate, it is the law that sets the standard to judge whether the acts committed by the doctor while performing his duties are justified or not.

Admittedly, there is no considerable difference between the methods adapted for the performance of transplant operations in various countries. However, it may be very helpful to pave the way to cooperate and may help differing attitudes converge through considering experiences gained by others because of the following reasons: the laws and regulations governing these operations are derived from the values and norms of each particular society; the values and norms, as well as the basic concepts of law, doubtless, differ from country to country, and

due to the sovereignty of states, codified rules and statutes of a particular legal system can not be readily adapted to another even with a similar cultural background. We will now discuss the subject of organ and tissue transplants in several developed countries, and then we will focus on some Muslim countries.

#### **A) Developed countries**

**1) The United States:** In the 1960s, the Commissioners on Uniform State Laws started to draft the Uniform Organ Transplant Act with the purpose of presenting it as a model law in this particular field. In 1968, the Commissioners enacted the Uniform Donation of Organs Act whereby people of 18 and over may donate organs of their body or refuse their consent to such a donation. If the deceased has failed to fill out the donation forms but has expressed no disagreement about this matter, particular persons mentioned in the Act may donate one or all of the organs of his body. The mentioned persons should come under one of the six following categories: the wife, the adult daughter or son, either of parents, the adult sister or brother, the grandfather or grandmother, the guardian, or any other person who has the capacity to do this act.

Any of the above-listed persons can donate the organs of the deceased only when others who according to the order of the list, enjoy priority over him/her, are not alive at the time of the deceased's demise and have not expressed disagreement about this Act. According to the Act, whenever the deceased has declared his disagreement about donation of the organs of his body, this declaration shall be deemed irrevocable and no one can effectively consent to donation after his death. Donation of a particular organ does not imply disagreement about donation of

other organs, provided that the deceased's next of kin consents to donation. Here the Act also provides which persons or establishments are able to receive the donated organ and what the purpose of donation should be:

- a) Hospitals, doctors, surgeons or any institutions authorized to conduct transplant operations, therapy, medical and dental training, research, or development of medical sciences.
- b) Authorized medical university or faculty specialized in medical training, research, and development of medical or dental sciences.
- c) A person nominated by the donor to receive the organ, according to the Uniform Act, may donate the organs of his body through his own will or on the basis of other documents and evidence. Where such a donation takes place on the person's own intention, it is enforceable immediately after his death and no will is required. If on the other hand, donation is to take place on the basis of other documents and evidence, and in most cases on the basis of donation cards, the 1968 Uniform State Law will start to work on a new draft on donation of organs, as a response to obvious defects of the 1968 Act.

In 1987 the Commissioners adopted the new Act. The American Bar Association also adopted the new Act in 1988. The new Uniform Act includes a new article titled "Searching and Information Services Regarding Donation of Organs". According to this article, all hospitals are required to ask their patients whether they are willing to donate any organ or tissue of their body. If the answer is positive, the hospital shall ask them a copy of donation document. If the answer given is negative, the

hospital having ensured the physician's concerned, shall conduct discussions with the patients on the acceptance of or refusal from donation. If the patient is to die and the hospital does not possess any document indicating his consent or disagreement about donation, the authorities of the hospital are required to discuss the matter with the patient's closest relative.

The new section also requires the officers in charge of enforcing fire-fighting laws, or other persons who in emergencies are engaged in rescue operations, as well as the hospital staff, to conduct reasonable search to find documents indicating disagreement by a potential donor of organs about donation. The 1987 Act prohibits the trade of bodily organs for the purpose of their transplant or for large sums of money, even if extraction takes place after the victim's demise.

## 2) The United Kingdom

Organ and tissue transplants are accepted in principle, in the English legal system, and many UK citizens have now signed donation cards. In England, there is no legal definition of death, and the responsibility of finding this important fact lies in the clinical diagnosis. In order to remove an organ from a living but close-to-death donor, continuation of breathing function by heart after the death of the brain is necessary. Death should be approved by the following competent persons:

- a) Specialized experienced physician or the one with at least five years experience in such affairs;
- b) Other physicians should be relatively experienced and not be weak in clinical matters. None of the above physicians may be a member of the tissue or organ transplant team. In UK where most current legal problems are solved by relying on judicial

precedence, it is the precedence that determines the conditions and manner of performing transplant having taken into account the circumstances of the case. In England, 80% of granted kidneys are obtained from dead bodies while only 20% are donated by the relatives. The government of this country has made endeavors to encourage people to donate their organs through their wills and save the lives of patients having no other way than experiencing an organ transplant.

The Human Tissue Act 2004 has replaced the Human Tissue Act 1961. The actual legal situation is not very clear because the law is in transition. The Human Tissue Authority has published in January 2006 a so called Code of Practice on donation of organs, tissue and cells for transplantation. This code is currently awaiting approval from Ministers and Parliament. The following is an extract from this code:

*“Adults*

24. The Act makes clear that where an adult has, whilst alive and competent, consented to one or more of the scheduled purposes taking place after their death, then that consent is sufficient for the activity to be lawful.

25. In cases of potential donation, trained staff should determine whether the deceased person had given consent for organ, tissue or cell donation by checking with the NHS Organ, tissue or cell donation by checking with the NHS Organ Donor Register or any other source, such as a will. If consent is established, the deceased person’s relatives or those close to them should be told.

26. If no records are held, an approach should be made to the deceased person’s relatives or close friends by a transplant coordinator or a member of the team who cared for the patient or both together, to establish any known wishes of the deceased person.

27. If the family or those close to the deceased person object to the donation, for whatever purpose, when the deceased person (or their nominated representatives- see below) has explicitly consented clinicians should seek to discuss the matter sensitively with them. They should be encouraged to accept the deceased person's wishes and it should be made clear that they do not have the legal right to veto or overrule those wished. There may nevertheless be cases in which donation is inappropriate and each case should be considered individually.

28. If the deceased person's wishes are not known and the deceased has nominated a person to deal with the use of their body after death, then consent can be given by that nominated representative.

29. If neither of the above applies, consent can be given by a person who was in a 'qualifying relationship' immediately before the death of the deceased person (see paragraph 37 below).

#### *Nominated representatives*

33. This section applies to adults only.

34. Adults may nominate one or more people to represent them after death over the issue of consent. Trained healthcare professionals should make reasonable enquiries at the hospital, the prospective donor's GP or with the deceased person's relatives to establish if a representative has been nominated.

35. The nomination and its terms and conditions can be made orally or in writing. An oral nomination must be made in the presence of at least two witnesses. A written nomination must be signed by the person making it, or signed at the direction of that person, in the presence of at least one witness who attests the signature.

36. Where more than one nomination is made, the nominees may act jointly or individually unless the conditions of the nomination state otherwise. Nominations can be revoked by the potential donor or renounced by the nominated person at any time.

*Qualifying relationships*

37. Where the wishes of the deceased person are unknown and, in the case of an adult, a nominated representative has not been appointed, someone close to the deceased person can give consent to the removal and use of organs or tissue in transplantation. The HT Act ranks persons in a qualifying relationship for the purposes of obtaining consent in these circumstances in the following order (highest first):

- a) spouse or partner (including civil or same sex partner) 2
- b) parent or child
- c) brother or sister
- d) grandparent or grandchild
- e) niece or nephew
- f) stepfather or stepmother
- g) half -brother or half –sister and
- h) friend of long standing" (NYS, 2007, PP. 33-34)

**3) The Republic of Ireland**

In Ireland, there is no specific legislation on the subject of organ transplant. None of the operations performed in England to transplant tissues may be performed in Ireland. An agreement was reached between the Forensic Medical Office of Dublin and the Surgeons Society, regarding a transplant operation, according to which the occurrence of death had to be certified by two physicians unrelated to the transplant team. The consent of the donor's closest relative was also required. Although many of the citizens have signed the kidney donation cards, the legal validity of such cards are still in doubt.

#### 4) Germany

In Germany, like many other European countries, transplant operations are accepted in principle by the law. In 1995, it was declared in Munich that donation by a living donor is only permissible between relatives or connected persons. The reason to reject donation between unconnected persons was declared to be lack of human causes, possibility of abuse, danger of contagion and the threat of organ trade. But the main problem is that there are never enough voluntary donors of organs or bodies to meet the demand for transplant surgeries.

The law of 5 November 1997 on the donation, removal and transplantation of organs contains rules regarding the removal of organs from a deceased person.

*“Section 2*

(1) (...)

(2) In a “donation- declaration” one can give consent to organ donation or oppose it or delegate the decisions to an expressly mentioned person. Consent and delegation can be given from 16 years of age onward, refusal from 14 years of age.

(3) The Registry of declarations

(4) Consultation of the registry after death

*Section 3 Removal with the consent of the donor*

(1) Removal is only permitted when

- a) the donor has consented to it
- b) death has been established according to rules that conform to the actual state of medical science
- c) is performed by a physician

2) Removal is not permitted when

- a) the deceased person has opposed the removal
- b) brain death has not been established

3) The physician has to inform the next of kin of the envisaged removal.

*Section 4: Removal with the consent of others persons.*

(1) If a written consent or a written refusal of the donor are lacking, the physician who wants to remove organs has to ask the next of kin whether they are aware of a declaration of the will of the deceased person regarding removal. If this is not the case, removal is only permitted with the consent of the next of kin. The next of kin have to decide according to the presumed will of the donor.

(2) Next of kin are:

- the partner
- adult children
- partner
- adult brothers/ sisters
- grandparents

(3) If the decision on organ donation has been delegated to a representative has takes the place of the next of kin".  
(NYS, 2007, pp 12-13)

### 5) France

There are two articles in French Law which deal with the issue of removal of organs.

The articles L1232-1 to 6 the code of Public Health, as amended by the law 2004-800 Of 6 August 2004 regulate the removal of organs from deceased persons.

*"Art. L 1232-1*

A removal of organs from a person whose death has been established in a duly manner, may be performed if the person

concerned has not expressed his refusal while alive. This refusal may be expressed by call means and notably by an inscription in a national registry. It may be revoked at all time.

If the physician does not know the will of the deceased, he has to ask the next of kin about a possible refusal expressed by the deceased during his life and inform them about the purpose of the envisaged removal.

The next of kin are informed of their right to know the removal.

*Article L1232-2*

If the deceased was a minor or an adult under legal protection, a removal is only permitted with the written consent of the parent(s) or guardian" (NYS, 2007, p.12)

## **6) Finland**

The following Act repeals law No. 355 of 26 April 1985 on the removal of human organs and tissues for medical purposes. Sections 8 to 10 of Chapter 4 (Removal of Organs and Tissues from a deceased donor) of the Act No. 101/2001 of February, 2, 2001 on the medical use of human organs and tissues stipulates the following:

*Section 8*

*General Preconditions*

"Organs and tissues may be removed from the deceased, and may be stored for mater treatment of another person's disease or injury.

Death must be certified as laid down by Ministry of Social Affaires and Health decree.

Physicians who certify death may not involved in removing organs and tissues."

*Section 9*

## Consent

“Organs and tissues of a deceased person may be removed unless there is a reason to assume that the person would have objected while still alive, or that a near relative or other close person would object. If a person has, while alive, given consent to the removal of organs and tissues for the purpose referred to in sections 8 & 1, the measure can be performed despite being forbidden by a near relative or other close persons”.

*Section 10*

## Restrictions on removal

“Organs and tissues may not be removed if this impedes investigation of the cause of Death.

No action may be taken to remove organs or tissues if the police have to carry out an investigation to establish the cause of death and object to such removal or if removal would materially impede forensic investigation of the cause of death”.

*Section 21 of Chapter 7 (Miscellaneous Provisions) is phrased as follows:*

## “Definition of death:

A person is considered to be dead when brain function has totally ceased”. (NYS, 2007, pp. 10-11)

**7) Denmark**

Danish legislator paid attention to the issue and enacted the following parts for the specific persons. Part 4 (Transplantation), section 14 (Transplantation from deceased persons) of the Act No. 402 of 13 June 1990 on the examinations of cadavers, autopsies and transplantation amended by Law No. 432 of 29 May 2001 provides for the following:

“Section 1, subs. I from a person who has died at or has been admitted dead to a hospital or similar institution, tissue and other biological materials may be removed to treat disease or bodily injury in another person according to the rules in subs 2-4.

Subs. 2. the intervention may be undertaken providing that the deceased has made a decision in writing to this effect on completion of his or her 18 th year. The same shall apply if the person has expressed an opinion in favor of such an intervention verbally.

Subs. 3. Apart from the instances set out in subs. 2, the intervention may only be undertaken if there is no statement from the deceased’s immediate relatives give consent for the intervention. Where the deceased is not survived by any immediate relatives, the intervention must be undertaken.

Subs. 4. If the deceased is under 18 years of age, the intervention may be undertaken only if the parent who has custody of the child has given consent for the intervention.

The amendments in 2001 concern the wishes of the deceased. In particular, the deceased’s next of kin may not oppose an intervention to which the deceased has given his written consent, unless the deceased has stipulated that the decision to carry out an intervention is subject to acceptance by the next of kin." (NYS, 2007, pp. 7-8)

### **8) Italy**

In Italy the legislator considered a part of the Act for the removal of organs from a deceased person. The law No. 91 of April 1999 on the removal and transplantation of organs and tissues (that has repealed law No. 644 of 2 December 1975) and the decree of 8 April 2000 on the removal and transplantation of organs and tissues and amending the provision on the declaration of citizen’s wishes with respect to organ donation for the

purposes of transplantation regulate the removal of organs from a deceased person.

“In order to increase the number of deceased donors, legislation has introduced the criterion of the ‘presumed consent to donation, if informed’. This criterion can be explained as follows: All citizens are required to take an explicit position on donation i.e. their will to or not to donate their organs upon their death, and are informed that their silence (i.e. a missing declaration on the subject) will equated to tacit consent to donation, so that they will be considered to be potential donors. From this definition, it is clear that for the ‘presumed consent to donation, if informed’ to work, a central role is played by information. Each citizen must be sent a notification requesting that they declare his/her free will regarding donation, therefore each person has full knowledge of the request. Within 90 days of receiving the notification, the will (consent/no) has to be expressed, in the manner defined by the Ministry of Health. The expression of this will, which can be modified at any time, is collected through a national database system.

It should be noted that for people under 18 years, consent can be given by relatives that have parental authority; in case of disagreement between parents, consent cannot be given. Donation from people who are not in full possession of their faculties, as well as from minors in the custody of public or private welfare centers is forbidden”. (NYS, 2007, PP.15-16)

## 9) Sweden

Swede legislator deals with organ transplant only with respect to a deceased person. He considered two sections for this purpose.

The Transplant Act, promulgated 1 June 1995 provides for the following with respect to the removal of organs from a deceased person:

*Biological material taken from deceased persons:*

*Section 3*

“Biological material intended for transplantation or some other medical purposes may be taken from a deceased person if that person has consented to or if it can otherwise be ascertained that the measure would agree with the deceased person’s attitude.

In cases other than aforesaid, biological material may be taken unless the deceased has objected such an action in writing or spoken against it or there are some other reasons to suppose that the action would be contrary to the deceased person’s attitude.

If information concerning the deceased person’s attitude is contradictory or if there are otherwise special objections to the action, the action may not be performed”

*Section 4*

“Even if the biological material may be taken by virtue of section 3 (2), this action may not be performed if a person who was close to the deceased objects to it. If there are persons who were close to the deceased, the action may not be taken before one of them has been informed of the action intended and of their right to forbid it. The person informed shall be given a reasonable length of time to reach a standpoint concerning this action” (NYS, 2007, P.32)

**B) Muslim countries****1) Saudi Arabia**

In this country, since the rules and regulations governing the society have their origin in Islamic Sunnite Jurisprudence, it is argued that the known principles of Islam deem legitimate whatever not expressly forbidden and therefore, every transplant which is considered as a legitimate injury and should be regarded as any other legitimate affair, is recognized lawful. Thus, there is no legal or religious prohibition against transplant in Saudi Arabia. The decision of the Saudi Grand Islamic Jurists in 1981 allowed transplant operations by arguing that it is an indication

of philanthropy and Islam encourages any act of social philanthropy.

## 2) Egypt

The Act 103 of Egypt 1962, which replaced the Act 247 (1959), concerns the Eye Bank Institute and declares eye transplant lawful, while saying whose eyes may be used for such operations as follows:

- a) The eyes of the persons donating their eyes on human considerations or through preparing a will;
- b) The eyes removable on the basis of medical diagnosis;
- c) The eyes of accident victims;
- d) The eyes of death convicts;
- e) The eyes of unidentified bodies.

Regarding organ and tissue transplant, the mentioned Act emphasizes that an apt hospital should establish a blood bank (art.2). The Act expressly provides that the consent of the donor should be in written forms, and the inheritor should enjoy legal capacity, otherwise the guardian's consent would be sufficient (art.3). From the viewpoint of Al-Azhar University Jurists and Scholars, no text brought out from the sources of Islamic Law, makes obstacle on the way of organ and tissue transplants, and as inferred from the verses of the holy Quran and Prophetic tradition no prohibition is narrated as well. Therefore in as much as all acts inflicting a legitimate injury on human body are recognized as lawful by the holy Islam, and every act of human motivation is encouraged in Islam, the Al-Azhar University declared transplant lawful in 1977.

### 3) Kuwait

The Act 30 enacted on 25 April 1972 in Kuwait, concerning the eye-bank institute, allows cornea transplant upon the same conditions as prescribed in the Egyptian law. The Act 3 of 1983 provides that tissue transplant may not be conducted to the personal benefit of the patient unless medical well-being of the person justifies such an operation. The Act expressly requires the consent of the donor and his age to be over 18. Vein donation should only be gone through human purposes.

### 4) Syria

The Act of 23 August 1972 declares the method of transplant lawful in general. According to article 1 of the mentioned Act, in hospitals, the head of the ward, and in the organization, any person appointed by the Minister of Health, may transplant any organ or part of any organ of the patient such as an eye or the veins, he deems necessary. The Act prescribes the following conditions rendering a transplant operation legitimate:

- a) Transplant should not be performed on any of the donor's vital organs for his survival, unless he consents.
- b) The donor being aware of all the causes and consequences of the operation should express his consent in writing.
- c) Transplant should not be performed on young patients, unless the recipient is his twin brother and the parents consent.

Where the decision of either party, as well as the parent's consent and the sufficiency of such a consent are ensured, the consent of the guardian is enough in the absence of either parent, otherwise the Syriac law expressly provides that a commission consisting of three physicians other than the one performing the operation should approve the necessity of the operation. The Act

expressly prescribes that the transplant operation should be conducted by consent, other than rare cases agreed by the donor enjoying the right of free medical treatment in public hospitals, if his bodily condition so justifies.

### 5) Jordan

The Jordan Act of 24 April 1977 deems transplant operations lawful in general, provided that the following conditions are fulfilled:

a) The transplant operation may not be performed unless in a hospital authorized by the Minister of Health (art. 2). The operation should not be conducted on a vital organ of the body, in such a manner that the removal of the organ may lead to the patient's death. In such a case, even his consent is not legally valid.

b) A commission consisting of three skillful physicians should examine the donor and find that the removal of the organ does not endanger his survival. The donor should consent prior to the operation and accept it willingly. Finally, the operation should be performed free of charge (art. 4).

### Part II. Organ and tissue transplant from the viewpoint of Iranian and Islamic statutes

It has been a long time since the first transplant operation in Iran which was a cornea transplant. At present a new horizon is opened before the patients seeing no chance of survival through kidney, heart, bone marrow, liver and other types of transplant. The first kidney transplant in Iran was conducted in Shiraz in 1968. Before the victory of the Islamic Revolution, a total of 50 kidney transplants were performed in the country.

After the Islamic Revolution until 1984, there were eight kidney transplant centers which gradually increased to 12 in 1989 and 18 at the time of writing this article, and since 1984 more than 4000 kidney transplants have been conducted in Iran. The first case of bone-marrow transplant took place in 1990 and more than 1000 operations have been conducted so far, showing a growing trend.

A few cases of liver transplant were also performed in Iran but during the recent years, heart transplant has found a special position. Meanwhile, the central Eye-Bank of Iran, has doubled its activities during the recent years and the performance of the first six months of 1373 (1994-5) indicated 671 cases of cornea transplant. Although organ transplant has a long history in Iran, due to the modern advancements made during the recent years in some branches of medicine such as immunology or surgery or even the semi-independent branch of organ transplant, the transplant operation has changed from a more academic exercise towards an everyday practice to the advanced centers of the world.

## **A) Organ and tissue transplants from the viewpoint of Islamic law**

### **1) Revelatory source**

There is no doubt that the human body is a masterpiece of divine art, and protection of this is considered secondary to the soul in monotheistic schools and is so important that has been seriously recommended in the holy Qoran. A man presenting an organ of his body to save another person's life is characterized by divine features and commended for his selfless desires. Organ transplant is a life-giving present from one person to another

whereby the donor prefers the well-being of another person to his own, and causes another human being to survive through a will prepared before his death.

Muslims believe that Islam is a complete and comprehensive religion and the Islamic jurisprudence, relying on its unquestionable and fundamental principles, is able to answer every question arisen from advancements in science and technology, and the newly-arisen problems (not experienced before and posed in the world today) are readily covered by one of the general jurisprudential laws and are responded to. In other words, "There is no event that the Lord has no rule on it".

## 2) Jurisprudential deductions

Although from a general view of the Shiite jurisprudence, organ transplant is among the newly-arisen problems, the problem of existence or non-existence of life which is very similar to the issue of brain-death was discussed among traditional and contemporary jurists and decisions have been taken in this regard. For example, "If a person inflicts a blow on another, rendering the latter virtually dead with the slightest signs of life, the former is sentenced to retaliation while the latter is only found liable to pay compensation for injuring a dead body." This means that in such a case, although the victim is not killed by the first blow, due to his being deprived of active life and having only the slightest indication of life, he is deemed to be virtually dead and therefore, the person having inflicted the first blow is known as murderer and the other person is only liable to the extent of compensating for having committed a crime on a dead body. This rule is expressed in article 217 of the Islamic Criminal Code.

A question was posed before the late leader of the Islamic Revolution, Ayatollah Khomeini (P.B.O.H.) regarding transplant of organs in the following terms:

“Today, the fact of brain-death is accepted in the world. If the brain-death is ascertained by special examinations and experiments, the person will be deemed to die. Temporary survival of such a patient is made possible by means of artificial aspiration unit medicines. Some organs of some patients such as their hearts or livers are used to be transplanted in other patients’ bodies to save their lives. Please explain your most-appreciated opinion with regard to such operations and removal of organs from the bodies of patients whose brain-death is certain.”

Imam answered: “In such a case, if the survival of another human being is dependent on such an act, it is allowed with the consent of the owner of the heart, liver, etc.”

The esteemed leader of Islamic Revolution Ayatollah Khamenei was also asked: Some patients have lost the activities of their brain due to irrecoverable brain trauma, and are in a state of complete coma and do not respond to internal or external stimuli. Besides, they have no breathing and no response to optical or physical stimuli. In such cases, recovery is absolutely impossible. The patient has only automatic pulses which are also temporary and made possible by means of artificial aspiration unit for a few hours or days. Such a state is medically termed as brain-death.

On the other hand, survival of other patients is dependent on using the organs of patients who are brain-dead. With regard to the fact that brain-dead patients lack international breathing, feeling, thought and movement and shall never recover; it is highly appreciated if you express your opinion whether after the

occurrence of the above conditions, the organs of the brain-dead patients may be used to save the lives of other patients.”

Imam held: “In such a human case, there is no problem if the life of an honorable human being is based on such a vital operation.”

On the other hand, after the rejection of the draft statute on organ and tissue transplant by the Islamic Parliament in 1995, many people in Iran suffered from progressed liver diseases, and were unable to determine the Islamic responsibilities of the were extremely high, the Minister of Health, and Medical Education, through a letter presented to the president, Ayatollah Rafsanjani, asked for the preparation of a new bill on liver transplant to which the President replied as follows: “With regard to the fact that this matter is not proscribed in law or in jurisprudence, no new bill is required. Effective steps should be seriously taken to save the patients, prevent unnecessary costs and encourage scientific progress.”

In accordance with article 8 of the Establishment of Public and Revolutionary Courts Act, the judge is required to find the solution of the case in codified statutes and may not invoke the silence, inadequacy, ambiguity or conflict of rules as an excuse for not deciding the case. In such circumstances, he should decide the case by reference to authoritative decisions of Islamic jurists or Islamic sources, but with respect to the problem of transplant which is categorized among the newly-arisen problems, and there is no express legal solution in this regard, it seems that the judge should base his judgment on authoritative Islamic sources such as the decisions taken by Imam Khomeini (P.B.O.H) and Ayatollah Khamenei. But the majority of judges

believe that having regard to the principal of the legality of crimes and punishments emphasized in the Constitution, the above considerations do not apply to criminal cases and are limited to civil cases. Thus, the mentioned solution cannot fill the lacunae in the subject, because by invoking the views of these judges and jurists, and with regard to the fact that the transplant has no urgency for the donor, it may be argued the organ transplant is a crime and is subject to criminal prosecution.

## **B) Organ and tissue transplant from the viewpoint of Iranian legislator**

### **1) donors consent**

In reviewing Islamic Penal Act 1991, one can find some articles which are deduced from Jurisprudential texts. The Act of Organ Transplantation of the Dead or Those Whose Brain Death is certain 2000 deals merely to the organ transplantation of the dead people.

Iranian legislator didn't point out to the organ transplantation of those who are alive. As a result, a lot of attention should be paid to this issue. According to article 59 (clauses 2) of Islamic Penal Act 1991, every legitimate medical and surgical operation which is achieved based on the following terms is permissible: the consent of the person or his/ her legal guardians and observing scientific and technical standards. Consent isn't necessary in emergently cases. By the phrase "medical and surgical operation", Iranian legislator means only therapeutic operation, not other operations such as those achieved for beauty.

With respect to organ transplantation, when we discuss the question of organ donation, doubtless, we can not consider it as surgical and medical operations. Here, a question is posed: Will a physician or surgeon be criminally libel if s/he achieves organ donation with the donator's consent. There are some responses to

this question. French lawyers tend to consider such surgical operations illegitimate, because they believe that there is not a correlation between the harm and the certain injury which is caused by removing an organ (shekar Amraji and Abbasi, 2008, p.29)

At present, in Iranian legal system, article 59 (clause 2) can be interpreted in some ways. Norbaha (1990, 229) believes that Iranian legislator omitted article 42 of General Punishment Act 1915 and didn't replace an article for that. Hence, one cannot consider a surgical operation permissible merely based on the victim's consent. Because the victim's consent can not justify commission or omission. It is argued that the punishment is considered to defend private benefits and the article enacted to establish public order and to survive the community. Although, Iranian legislator considered some crimes which are committed with the victim's consent, unpunishable. Nobaha (1990, 230) believes that sometimes, the consent removes one of the constituent factors of crime and in some other times, it will allow us to interpreter Iranian legislator's implied consent.

## 2) Brain-dead patients

Removing a vital organ such as heart and liver from the patient's body, will result in his /her death. In this respect, reviewing article 217 of Islamic Penal Act 1991 is very interesting. This article is deduced from jurisprudential sources. This article holds: "when first person inflicts horn on someone which puts the person near to death but the last breath of life remains and the second person hits the last stroke and kills him/her, the first person will be convicted to retaliation and the second person will pay blood-money because he committed crime against the dead person." Here, a question arises: Can one consider the phrase "put the person near to death" as equal to brain – dead person as someone who is irrevocable from death. They believe that brain-death is a manifestation of the death. Therefore, according to article 217 of Islamic Penal Act 1990, it

can be said that putting an end to the life of a brain- dead patient is not considered as homicide but it is regarded as the crime committed against a dead person. The punishment of such a homicide is to pay blood money.

Iranian legislator in the act of organ transplantation for the dead, didn't consider blood-money for the patients whose brain death is certain provided that such harm inflicted?? The above-mentioned Act limits article 217 of Islamic penal Act 1991.

The rules contained articles 59, 60, 295, 319, 322 and 616 of the Islamic Criminal Code, emphasize the necessity of the operation to save the recipient's life by not removing an organ from the body of a brain-dead patient. And no doubt, the judge should limit himself to constrained interpretation of the Islamic Criminal Code and may not extend the rules on ordinary surgical operations to transplant. However, if the transplant operation is categorized among ordinary medical or surgical operations on the basis of the fact that the preliminary stage of transplant is performance of surgery on the donor, the argument is still dubious as regards the donor and there is no evidence on its legality with regard to the implications of article 59 (clause 2) of the Islamic Criminal Code.

### 3) Victim's consent

Article 268 of Islamic penal Act 1991 caused an odd situation in the whole Iranian legal system. Article 54 of Religious Punishment and Retaliation Act 1982 holds: "The right to retaliation doesn't remove by the victim's consent before his/her death and the blood-wits can call for retaliation after his/her death." Therefore, Iranian legislator didn't specify an effect for the victim's consent before his/her death. Therefore, the victim's consent didn't have any effect in committing murder. But a major change took place in article 268 of Islamic penal Act

1991. In this article (268), if the victim forgives the offender, the right to retaliation doesn't remove and the blood-wits can not call for the retaliation after his/her death. This is an odd legal revolution. Murder is a crime in which the highest degree of aggression is committed against a person's body and the most serious punishment (i.e. capital punishment) is considered for it. The principle 4 of Iranian Constitutional Law 2006 holds that all criminal Acts and provisions should be based on Islamic standards. Also, Iranian legislator specified the legitimacy of surgical and medical operation of orations in article 59 (clause 3) of Islamic Penal Act 1991. The Jurisconsults have a consensus that the divine order about murder should be observed and it is cannot be interpreted. Therefore, prescribing mercy- killing with the patient's consent is against the Islamic standards. Since murder is a crime against mankind and if the victim forgives the offender, the blood-wits can call for retaliation after his/her death, the Jurisconsults have a consensus that Islamic governor can consider lesser punishments. Public aspect of homicide is gradually reviving its original status in Islamic Republic of Iran and article 208 of Islamic Penal Act 1991 has been enacted in this respect. As a result, article 268 of the same Act is not consistent with other criminal provisions. But if a physician is charged of murder in a case of organ transplantation, he/she can rely on article 268 of Islamic penal Act 1991 to acquit himself/herself of murder.

### Conclusions

The Act of Organ Transplantation of Deceased Persons didn't point out other sources to provide organs such as the living persons. As it's result, a lot of legal questions in this respect have remained without any response. Although the above-mentioned Act paves some ways for the physicians who face legal dilemmas in organ transplantation there is an ethical problem which physicians face when they want to achieve an operation for organ transplantation in Iran. Iranian people pay a lot of

attention to the ceremony they held for the deceased person including burning and mourning. Hence, they do not let any person or authority to use the organ of their deceased family member or relatives. Furthermore, such as act has somehow a negative impression on other members in a family or even in a tribe. This is so, even if the deceased person wrote a will before his/her death. Therefore, there is a need to promulgate religious and cultural issues in this respect.

### Footnotes

- 1.Lee, H.S.J., the Medical Millennium, the Parthenon Publishing Group, New York, London, 2000, P.8.
- 2.1-Auto transplant, that is, operation in which tissues are taken from one location in patient's body and implanted elsewhere in his body.
- 3.Lyons, Albert S., Medicine: An Illustrated History, Abradals Pres, New York, 1987, PP. 590 and 592.
- 4.Sebastian, Anton, Dates in Medicine, The Parthenon Publishing Group, New York, London, 2000, P.237.

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