

Criminal Liability Resulting from the Violation of Consent in Human Organ Transplantation Operations

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Abstract

Despite the Algerian legislator having established a set of legal provisions regulating the issue of human organ transplantation similar to other legislations these provisions constitute a safeguard ensuring that organ transfer and transplantation procedures do not deviate from their intended framework. However, the spread of organ trafficking has been observed, which prompted the legislator to amend the Penal Code and criminalize such acts in the 2009 amendment to the Penal Code. These operations were also given a specific section within Health Law 18/11 issued in 2018, due to their importance.

The legislator has authorized human organ transplantation under several conditions set out in the aforementioned Health Law, foremost among them being the patient's consent and approval of such procedures. The legislator has explicitly stipulated the obligation to respect the rules related to the required consent for organ transfer and transplantation. If these operations fall outside the scope of these rules, they shift from a state of legality to a state of criminalization.

Keywords: human organ transplantation, element of consent, criminal liability.

Introduction

Human organ transplantation is considered one of the most important modern therapeutic methods that has proven effective in treating patients. However, it may also result in a deterioration of the health condition of either the donor or the recipient. Given the seriousness and importance of these procedures at the same time, most laws and legislations have sought to regulate them by establishing a set of rules and controls to ensure their success and to protect the parties involved.

Among these legislations is the Algerian legislator, who regulated these operations in the latest amendment to Health Law 18-11, dedicating a chapter entitled: "Provisions relating to the

removal and transplantation of human organs, tissues, and cells.” Consent is considered one of the most important of these conditions for the application of the justification for medical acts, and it holds particular importance in cases of organ transplantation. Consent must meet certain conditions in order to be valid and to produce its legal effects. Organ transplantation procedures involve, in most cases, a direct infringement on bodily integrity, and there is also the possibility of failure due to the body’s rejection of the transplanted organ or other medical reasons.

The issue appears more complex in relation to the donor, as the procedure does not aim to achieve a direct benefit for them, unlike the recipient. This raises the following questions: **Is the donor’s consent to organ removal sufficient as a basis for its legality under Algerian law? And does a mere violation of consent in organ transplantation operations give rise to criminal liability for those performing them?**

To answer these questions, this research paper has been divided into three main sections. The first section explains the element of consent in human organ transplantation in all its components. The second addresses the criminal liability arising from the violation of consent in organ transplantation procedures, while the third examines the main offences resulting from such operations.

First: The element of consent in human organ transplantation operations

It is not sufficient for organ removal and transplantation procedures to be considered lawful merely because they are carried out within their legal and regulatory framework, that is, in compliance with the general legal conditions governing this type of operation most importantly, that the procedure must be for therapeutic or diagnostic purposes, be performed free of charge¹, and not pose a risk to the donor alone. In addition to these conditions, it is also necessary to fulfil specific requirements, foremost among which is obtaining the free and informed consent of both the donor and the recipient. It is a well-established principle in the medical field that the patient’s consent must be obtained for any proposed medical intervention. Accordingly, consent is required from the donor in the context of human organ transplantation², as well as from the recipient.

In order for this consent to produce its legal effects, it must satisfy a set of conditions, the most important of which are the following:

A/ Conditions of consent: Consent is based on three essential conditions:

1- Informed consent

The general rule in organ transplantation is that it constitutes an exception to the principle of the inviolability of the human body, and it cannot be permitted without conditions. Accordingly, the physician is obliged to inform the person undergoing organ removal and to make them fully aware of all potential harms and risks³, including rare, minor, or exceptional complications. Article 360, paragraph 4 of the Health Law states: “No organ or cell removal from a living

¹ Article 358 of the Health Law provides that: “The removal and transplantation of human organs, tissues, and cells may not be the subject of any financial transaction.”

² Zahdor Achauak, “Criminal Liability of Physicians Resulting from Human Organ Transplantation and Trafficking,” *Journal of Legal Studies*, Issue 1, pp. 9–66.

³ Ahmed Omrani, *Protection of the Human Body in Light of Modern Medical and Scientific Practices in Positive Law and Islamic Law*, PhD thesis, Faculty of Law, University of Oran, 2010, p. 209.

person may be carried out for transplantation purposes without the informed consent of the donor.” Similarly, French legislation, since the Law of 4 March 2002, has established an important rule in Article 1111-4 of the Public Health Code, requiring that consent be both informed and free, a formulation that is widely repeated across many legal systems.

2- Free consent of the donor

It is required that consent be free, meaning that it must be issued by a person who possesses sound mental and psychological faculties and is capable of forming a correct opinion without coercion. Any coercion or psychological pressure exerted on the donor would vitiate their consent¹. Accordingly, valid consent must be free from any defects of consent (such as mistake, fraud, duress, and even exploitation). If, for example, a patient believes that the purpose of an organ transplantation procedure is to eliminate a disease while in reality it is merely intended to alleviate pain, this constitutes a mistake that invalidates consent. Likewise, if a physician conceals significant risks associated with organ removal and transplantation in order to obtain the donor’s consent, this amounts to fraud that vitiates consent.²

3- Consent given by a legally competent person (legal capacity)

Consent must be issued by a person who is legally competent, of sound mind, and of full legal capacity. Minority is one of the causes of diminished legal capacity, and some legislations have set a specific age for capacity in the medical field. For instance, English law considers a minor who has reached the age of 16 fully competent to consent to medical intervention. French law, on the other hand, has not established a fixed age of majority in the medical field and therefore does not set a specific capacity threshold for medical transactions.

The same approach has been adopted by the Algerian legislator, who has not specified a particular age in medical matters and has relied on the general rules of law. Referring to Article 40 of the Civil Code, the age of majority is set at 19 years. Moreover, Article 361, paragraph 1 of the Health Law prohibits the removal of organs, cells, and tissues from minors or legally incompetent persons. However, paragraph 2 of the same article provides a single exception, allowing the removal of hematopoietic stem cells from a minor donor only for the benefit of a brother or sister.

As for the recipient’s capacity, Article 364, paragraph 3 provides that in cases where the person is legally incompetent, consent may be given by the father, the mother, or the legal guardian, depending on the situation.

B/ Form of consent

The question that arises in this regard is whether consent must be express or may be implied, provided that it reflects the true will of the person concerned. The prevailing response to this

¹ Khaldoun Fawzi Qandah, Mohammed Fawaz Mohammed Al-Mutalaqah, “Human Organ Transplantation Between Living Persons in Jordanian Legislation,” *Tikrit University Journal for Legal and Political Sciences*, Tikrit University, Vol. 1, Year 6, Issue 20, 2013, p. 428.

² Ali Filali, “Patient Consent in Medical Practice,” *Algerian Journal of Legal and Political Sciences*, Vol. 35, Issue 3, p. 47.

question is unanimous: consent in the context of organ transplantation whether given by the donor or the patient must be express, and implied consent is not sufficient in this field.¹

Accordingly, the consent given by the donor must be in writing, a position adopted by most legislations, including Algerian health law². Article 364, paragraph 2 of the Health Law provides that when the recipient is in a condition that prevents them from expressing their consent, a member of their adult family may give written consent or appear before the territorially competent court president³, who in turn ensures that the consent is free and informed, in order to protect both the patient and the physician performing the procedure.

C/ Revocation of consent

The donor is entitled to withdraw their consent at any time, without conditions or restrictions. Most legal systems agree on the possibility for the donor to revoke their consent whenever they wish. Article 360, paragraph 6 of the Health Law states that “the donor may withdraw the consent they have given at any time and without any procedure.”

D/ Cases in which the legislator allows dispensing with the donor’s consent

The Algerian legislator has permitted the removal of human organs, tissues, or cells without the consent of the patient or their family in cases where it is difficult to contact the patient’s family or legal representatives in due time, and where the patient is unable to express their will and any delay may lead to the loss of their life. This must take place in the presence of the head of the medical department and two witnesses.⁴

Second: Violation of consent in human organ transplantation operations

Before carrying out organ transplantation procedures, it is necessary to obtain the consent of both the donor and the recipient. In the event of non-compliance with this requirement, the physician incurs criminal liability if they proceed with the removal of a human organ in violation of the principles and conditions governing organ transplantation operations under criminal law and the laws regulating such procedures. In such cases, the physician is held liable for offences resulting from the violation of consent, particularly those related to human organ trafficking.⁵

It is established in both legal doctrine and jurisprudence that the victim’s consent does not constitute a ground of justification. Consequently, the donor’s consent to the removal of their organs does not justify an infringement upon bodily integrity, nor does it exempt the person performing the act from punishment.⁶

The Algerian legislator has provided in Article 303 bis 17 of the Penal Code for the criminalization of organ removal without the donor’s consent. This offence may be defined as:

¹ Ihab Yusr Anwar Ali, *Civil and Criminal Liability of Physicians*, PhD thesis, Faculty of Law, Cairo University, 1994, p. 478.

² Abdelrahman Khelfi, “Criminal Protection of Human Organs: A Study in Jurisprudence and Comparative Legislation,” *Ijtihad Journal for Legal and Economic Studies*, Issue 07, January 2015, pp. 179–197.

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⁴ See: Article 364 of Law 18/11 on Health.

⁵ Maachou Lakhdar, *The Legal Framework of Human Organ Transplantation*, PhD thesis, Faculty of Law and Political Science, University of Tlemcen, 2014–2015, pp. 346–347.

⁶ Osama Abdullah Qaid, *Criminal Liability of Physicians*, D.D.N., Cairo, 1987, p. 338.

“any act intended to obtain human organs, tissues, cells, or any material from a human body, whether living or deceased, in exchange for any benefit whatsoever and without respect for the informed consent of the owner of the organ.”¹ It consists of the perpetrator engaging in a set of criminal practices whose sole purpose is to obtain a human organ without respecting the condition of the owner’s consent as stipulated in health law. Furthermore, from the analysis of the aforementioned article, it is noted that the legislator did not specify the purpose of organ removal without consent; therefore, the offence is established whether the removal is for therapeutic purposes or otherwise.

The Algerian legislator also distinguished between liability arising from the removal of human organs and liability arising from the removal of human cells and tissues, imposing a more severe penalty for the former compared to the latter.

Third: Offences arising from human organ transplantation operations

Human organ transplantation procedures are often complex and require a high level of specialization and extensive knowledge of medical rules and principles, due to their connection with the preservation of life and all matters relating to physical integrity. This, in turn, gives rise to criminal liability when this integrity is violated or compromised. Accordingly, three main offences may arise:

A/ Intentional homicide

If the surgeon is aware that the surgical procedure will lead to death, they shall be held liable for an intentional offence, namely the crime of intentional homicide as provided for in Article 254 of the Penal Code². For example, if a physician performs the transplantation of a non-regenerative organ that results in death, such as a heart or liver transplant, they may be held liable for intentional homicide even if valid consent from the person concerned is present, since the occurrence of death is foreseeable according to the ordinary course of events.³

However, if the removed organ does not normally lead to death according to scientific standards and medical principles, the physician’s liability will fall under the offence of injury resulting in death⁴, rather than intentional homicide.

B/ Assault and battery (beating and injury)

The Algerian legislator has protected the individual’s right to bodily integrity by criminalizing acts of assault and injury, and has set out the provisions governing these offences in Articles 264 to 276 of the Penal Code⁵. Assault on the patient’s body may be defined as: “any pressure exerted on the body tissues or affecting them through an external act without

causing cutting or tearing of those tissues, such as slapping, bruising, pushing, or any contact with the victim’s body, whether or not it leaves a visible mark on the body.”⁶

¹ Zahdor Achauak, op. cit., p. 48.

² Abdelrahman Khelfi, op. cit., p. 194.

³ Ihab Yusr Anwar Ali, op. cit., p. 485.

⁴ Ahmed Omrani, op. cit., p. 247.

⁵ Fawzia Hamel, Criminal Protection of Human Organs under Law 09-01, Master’s thesis, Faculty of Law and Political Science, University of Batna, 2011/2012, p. 50.

⁶ Abdelrahman Khelfi, op. cit., p. 192.

Injury

Injury is defined as: “any act affecting the human body that results in tearing which leads to the destruction of the unity binding the components of bodily tissues. Cutting differs from tearing of membranes in that cutting is superficial and limited to the skin layer, whereas tearing of tissues is deeper, as it affects the internal tissues covered by the skin.”¹

Accordingly, a physician is considered to have committed the offence of assault if they use any medical means for the purpose of performing an organ transplantation procedure, for example, without causing wounds. However, if the act results in tearing of the skin without respecting the established procedural safeguards, it clearly constitutes injuries punishable by law.²

C/ Assault and injury resulting in permanent disability

If organ transplantation operations result in the loss or amputation of a body part, or deprivation of its function, the surgeon is considered to have committed a felony of causing permanent disability under paragraph 2 of Article 264 of the Penal Code. Permanent disability includes, by way of example (and not limitation), loss of sight or loss of vision in one eye. The legislator has listed these forms illustratively. The physician performing such an act is punishable by temporary imprisonment ranging from five to ten years, in addition to a

Conclusion

It can be inferred from the above that consent constitutes an essential element in organ transplantation procedures. However, for such consent to be legally valid, it must be free and informed, and directed toward achieving a therapeutic and medical purpose. This is intended to protect both the interests of the donor and those of the recipient alike. In the event of a violation of this consent or of one of its conditions, the person carrying out these procedures incurs criminal liability for the offences resulting therefrom.

This leads us to suggest the necessity of establishing certain regulatory frameworks for this liability, particularly with regard to the following:

- 1- The Algerian legislator should determine the human organs eligible for transplantation, and not limit itself to prohibiting the removal of organs that lead to death only.
- 2- It is also necessary to specify the age of legal capacity in the medical field in general, and the age of capacity for organ transplantation procedures in particular.

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