

Civil accountability resulting from the cultivation and transplantation of body organs in the laws of Iran, Egypt and Afghanistan

Dr.Seyyed ali alavi "Ghazvini"¹

Professor of law
TehranUniversity

Matiullah "Asim"²

Ph.D Candidate

Abstract

In the process of organ transplantation, several factors are involved, any of which may cause civil accountability: the organ donor, the recipient, or the transplant medical centers. Currently, there is no special law for compensating people who suffer through organ transplantation, and the traditional law of civil accountability is not capable of proving some of the elements and conditions, especially the relationship of causation. Therefore, a special system should be created to compensate for the damages caused by organ transplantation by establishing a special law. According to the results of this research, those who may be held responsible for causing damage include doctors, medical groups, laboratories, hospitals, and other persons who caused the damage. If the fault of any person is proven, it is obvious that compensation for the damage is the responsibility of the person causing the damage, provided that other conditions are met. It seems that the basis of civil accountability in the transfer and handling of body parts follows the theory of fault.

Key words: Civil Accountability; Organ Transplantation; Principles of responsibility; Doctor; Acquittance.

Introduction

Civil accountability is the obligation that a person has to compensate for the damage caused to another person as a result of his/her illegal act. Civil accountability is the responsibility of a person to compensate for the damage caused to another person, regardless of whether the said damage is caused by the actions of the responsible person, the actions of people related to him, or caused by objects and properties under his/her ownership or possession.

In the transfer of body parts, if a person is harmed, the damage must be compensated according to civil accountability, which is called civil accountability. The famous theories that form the foundations of civil accountability are risk theory and guilt theory.

Guilt Theory: According to this theory, a person is responsible when he commits a fault or a mistake in performing his/her actions.

In the law of Afghanistan, in the second paragraph of Article 59 of the Civil Code of Afghanistan, it is stated as follows: Any type of legitimate surgical or medical procedure that is performed with the consent of the person or their parents, guardians, or legal representatives with the compliance of the technical and scientific standards, is allowed. A doctor who does not comply with the above is guilty and is responsible for compensation, which is also the case in Egyptian laws.¹

In Article 495 of the Penal Code of Iran, it is written as follows: If a doctor causes death or bodily harm in the treatment he performs, he is the guarantor of the payment unless his/her action is in accordance with medical regulations and technical standards, or he was acquitted before the treatment and did not commit any fault. In fact, the new penal law has accepted the basis of fault, whereas before this, the doctor was the guarantor of any damage that occurred during the treatment given to the patient, even if he did not commit malpractice.²

In the 32nd article of the Public Health Law of Afghanistan, the following is written about doctors: If a medical officer is negligent in the diagnosis and treatment of patients, causing physical or mental harm, the perpetrator is considered responsible and should be prosecuted according to the law.³

In the laws of Egypt and Afghanistan, three conditions have been established for the responsibility of the doctor and his/her medical group: the presence of a medical mistake with fault, damage, and causal relationship.

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None of the above books and treatises have explained the civil accountability and its effects due to organ transplantation in the laws of Afghanistan, Iran, and Egypt. In this discussion, all its aspects have been mentioned.

The lexical and terminological concept of Civil accountability

Definition of Civil accountability:

Civil accountability is a set of rules that oblige the person causing the damage to compensate for the damage suffered. In other words, in any case where a person is forced to compensate another person, it is said that he/she has civil accountability towards him/her.⁴

Terminological definition

In legal terminology, "responsibility" is mostly used to mean "guarantee," although the cases of using "guarantee" are more extensive. For example, the word "guarantee" is also used to mean "contractual guarantee" and "exchange guarantee," which cannot be used in these cases.⁵

Accountability has been defined by almost all scientists in the same way. The meaning of all definitions is the same: that a person must be responsible for compensating for the damage caused by their actions.

Civil accountability: is the obligation to compensate for the loss caused by someone's illegal act to another. Civil accountability is defined in the Civil Law of Afghanistan as follows: When a person suffers damage due to a mistake or fault, the perpetrator is obliged to compensate for the damage.⁶

Medical accountability

It is the obligation of the doctor to compensate for the damage caused by mistakes, crimes, and damage resulting from medical practices.⁷

Civil accountability is divided into two parts: contractual civil accountability and non-contractual civil accountability.

Contractual accountability:

The civil accountability arising from the contract consists of the obligation that is created for individuals due to the violation of the provisions of the contract.⁸

In other words, the obligation of the promise to compensate for the damage caused to the other party as a result of non-performance of the contract is called contractual accountability.⁹

Non-contractual accountability (mandatory)

Mandatory civil accountability is an accountability that originates directly from material action and law, regardless of whether there is a contract between the parties or not.¹⁰

Non-contractual civil accountability arises when a person disobeys the general law, while he/she should have obeyed it, and his/her disobedience causes harm to others.¹¹

Definition of organ transplant: In medical texts, organ transplant is not universally defined, but it can be described as the resolution of total or partial organ malfunction by implanting or connecting an artificial, natural, or animal organ, whether from the patient or another person. Organ transplantation is a medical procedure that extends and saves lives by transplanting all or part of an organ from one person (living or deceased) to another.¹²

Compensation

Compensating in the word means to eliminate the effect of a mistake that caused damage or loss by doing something. In the term, compensation means that the person causing the loss or another person improves the situation of the victim and brings it closer to the situation before the loss.¹³

Among the constituent elements of civil accountability in the cultivation and transplantation of body organs is the realization of damage or harm to the patient. Damage includes material and moral damage. Moral damage is damage to the moral rights of a person, which is related to the human

personality of a person, such as the right to freedom, etc. In the matter of transplanting body parts, compensations can be claimed if the following conditions are met:

- 1) The loss must be direct and immediate
- 2) The loss must be certain
- 3) The loss has not been compensated before

In spite of these three main losses, other conditions are also raised, such as: the loss must be caused by damage to one of the rights of the injured party which is protected by the law.

Compensation methods

Considering that the goal of civil accountability, from a traditional point of view, is to restore the condition of the injured party to the one before the accident and loss, one should see which method best achieves this goal. The purpose of compensation is to eliminate the damages and losses that have been imposed on people or their properties as a result of the violation of the cause of damage, and its size is proportional to the loss and the deprivation of the victim from the rights that he would have obtained in the absence of the violation of the cause of damage. The cash amount is calculated, but some damages are assessed using a non-cash amount.

Objective compensation

The purpose of objective compensation is to restore the state of the victim to the state before the occurrence of the harmful act. In fact, in the mentioned method, it is trying to compensate the damage caused to the victim in kind. In this way, the loss is compensated as if there were no loss at all. According to jurisprudence, the jurists have also said that this method has precedence over other methods of compensation because in this way the loss is completely eliminated, as stated in Article 329 of the Civil Code of Iran: If someone destroys someone's house or building, he must build it in the same way as before. He should build it first, and if it is not possible, he should bear the cost of it. Civil law of Afghanistan has also identified the method of compensation for damages. As mentioned in Article 38 of the Civil Law in this regard: If a person transfers the family name of another to himself and this act causes damage to the first person, the victim party can demand compensation from the protester in addition to the prohibition. In Article 163 of the Civil Code of Egypt, they write: (Any mistake that causes harm to another person, the perpetrator of the mistake must compensate for his/her own damage). According to the Egyptian law, civil accountability must have three pillars, which are mistake, loss, and causal interest between the medical mistake caused by the fault of the medical department or the hospital in the transfer of body parts and the harm caused to the patient during the operation caused by the transfer of body parts to him.¹⁴

It is worth mentioning that, firstly, objective compensation and restoration of the previous situation are not possible in the cultivation and transfer of body organs, and the lost property may not be available. In moral and physical damages, it is mostly impossible to restore the previous situation.

Secondly, objective compensation can eliminate the source of the loss and prevent future losses, but this method does not compensate for past losses. Therefore, you either have to choose another method to compensate for the damage, or in addition to the objective compensation that prevents future damage, you should also choose another method to compensate for the past damages, which is the same as giving away the equivalent.

Often, the courts of the above-mentioned three countries chose the last method.

Compensation by giving equivalent

This method is actually an alternative to the objective compensation method. If objective compensation is not possible, or if the court does not rule on the method of objective compensation due to reasons, an equivalent or alternative compensation method is used. For example, in the case of transplanting body organs, objective compensation of the majority is excused.¹⁵

In Article 53 of Al-Majlah, it is also stated that when the original property is destroyed, the person responsible is responsible for replacing it."¹⁶

In the laws of Egypt, Afghanistan, and Iran, they have specified that if objective compensation is impossible, equivalent compensation should be used. According to Article 38 of the Civil Code of Afghanistan, Article 163 of the Civil Code of Egypt, and Article 311 of the Civil Code of Iran, it has been stated that the usurper must return the seized property to its owner in kind, and if the property is lost, he must give its equivalent or value. And if it is not possible to return the property for some other reason, then he must give its equivalent instead.

It's written in the public health sketch of Afghanistan: In case of medical negligence, the matter will be referred to the Afghan Medical Council.

Eligible individuals and public and private health centers, in case of violation of the provisions of this law, will face the following disciplinary measures, depending on the circumstances:

1. Recommendation
2. Notice
3. Fine from one hundred thousand to one million Afghani
4. Temporary suspension of activity for six months to one year
5. Permanent suspension of activity
6. Duty suspension for a period of one month to one year, according to circumstances.

In the following situations, the offending persons and authorities are introduced to the judicial authorities:

1. Carrying out the operative procedures of obtaining organs and tissues and transplanting organs or tissues by professional persons that have been done through buying and selling transactions.
2. Transportation, smuggling, and trafficking of organs and tissues by professional or non-professional persons abroad.
3. In case medical negligence and carelessness caused the disability or death of the patient or the donor; after the approval of the Afghan Medical Council, it will be referred to judicial authorities.
4. Transferring and transplanting body parts, except for the cases mentioned in Article 9.
5. Carrying out organ transplant and weaving services before obtaining an activity license.

Amount of compensation

One of the governing principles of civil accountability is the proportionality between compensation and damages. The theory of the proportionality of the amount of compensation with the damage caused has been accepted by the Civil Law, and Article 779 of the Civil Law of Afghanistan states in this regard: Whenever a person, even if he is innocent, acquires something to the detriment of another person without a legitimate reason, within the limits of what he has earned, he is obliged to pay compensation to the injured party. Based on the mentioned article, the cause of the loss, whether he has the capacity; or incomplete and incompetent, he is responsible for compensation to the extent of the damage caused and must compensate the damage caused to the victim.¹⁷

In the third article of Iran's Civil Accountability Law, it is written as follows: "The court will determine the amount of loss and the method and quality of its compensation according to the circumstances of the case. The compensation of loss cannot be determined in the form of annuity unless the debtor provides adequate payment or the law prescribes it."¹⁸

Agreement based on non-compensation

Since the rules of civil accountability fall within the realm of public order, it is one of the cases against which no agreement is possible. However, in contractual accountability based on the principle of freedom of contracts and respect for the sovereignty of the will, the parties to the contract can agree to increase or decrease the accountability of the other party. Of course, such an agreement is valid if the obligee commits a minor mistake and is not contrary to public order. Additionally, the obligee cannot invoke the condition of non-responsibility for deliberate and serious faults, such as adultery and serious mistakes, as it goes against public order and will be invalid.

The second paragraph of Article 830 of the Civil Code of Afghanistan states that it is permissible for the parties to agree to remove any type of accountability of the obligee resulting from the non-fulfillment of his/her contractual obligation. However, the accountability resulting from the fraud and major mistake of the obligee cannot be lifted as a result of the agreement of the parties.

In the employment contract or separate agreement that the employer makes with the worker, the employer cannot avoid the responsibility provided in Article 12 of the Civil Accountability Law of Iran and make the worker a guarantor for the damages caused by his/her economic activity. Such a contract or condition is against public order, as it undermines the guarantee of the rights of those who are harmed by this activity without their involvement in its abolition. It also goes against the directive order of the relationship between the worker and the employer.

However, there is no obstacle for the employer to reduce this guarantee in the private contract he makes with others, or to limit his/her responsibility to a certain amount, or to ask for an exemption from it. The rule that the employer is the guarantor of the mistakes of his/her workers is not related to

public order and can be waived at will. It is not to the detriment of the workers either, because they are responsible for their personal faults anyway.

Therefore, in contractual accountability, with the exception of fraud and serious mistakes that go against public order, in other cases, the principle of freedom of contracts and the sovereignty of the will of the parties require that they reach an agreement regarding any type of accountability arising from non-fulfillment of the obligation by the obligee.

The legislator has explicitly considered such an agreement to be null and void. The third paragraph of Article 830 of the Civil Code of Afghanistan states that any type of agreement based on the removal of responsibility arising from an unauthorized act is void."¹⁹

Conclusion

1) In the event of loss during the operation of transplanting body parts, the operating group or the person in charge of the surgery is responsible for compensating the damage in case of their mistake. The principle is that the mentioned persons are not responsible unless their fault is proven. If their mistake is proven, objective compensation should be made.

2) According to the penal law of 1992 of Iran and the laws of Egypt and Afghanistan, the doctor is basically responsible for the damages caused to the patient in organ transplantation, unless it is proven that he is not at fault or he is acquitted. In order to realize civil accountability in organ transplantation, there are three basic conditions. These three basic elements are: the occurrence of loss, the harmful act causing the loss, and the causal relationship between the occurrence of loss and the act.

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