

Jurisprudential and Legal Investigation of Effectiveness of the Muslim's will on Using Bodily Organs of the Testator

Najjari F^{1*}, Khalilzadeh M¹

¹ Department of Forensic Medicine and Toxicology, Shahid Beheshti University of Medical Sciences, Tehran, Iran

ARTICLE INFO

Article Type:
Review Article

Article History:
Received: 9 Jan 2016
Revised: 8 Feb 2016
Accepted: 14 May 2016

Keywords:
Jurisprudential
Muslim
Death

ABSTRACT

Background: Human being is owned by God and is allowed to own him/herself and make a decision on his/her organs after demise, including the right of making will on using his/her organs in the case of death.

Methods: This study is a review of Jurisprudential and legal investigation of the effectiveness of the Muslim's will on using bodily organs of the testator in Iran. The findings that used, based on the studies were carried down in Iran and published in databases such as Google scholar, religious book and request for opinion emulation searching is done by using valid keywords.

Results: This study concluded that using of organs of the deceased is acceptable for solving the problems of another live Muslim person. The legal department of the judiciary has declared also that organ donation is acceptable, but no organ may be sold since it is not included as a property.

Conclusion: According to different religions and laws in the different countries similar studies are limited also in the Islamic countries, too. But there is disagreement on the studies in our country. There is a fundamental difference between the view of the proponents and that of the opponents of removing organs.

Copyright©2016 Forensic Medicine and Toxicology Department. All rights reserved.

► *Implication for health policy/practice/research/medical education:* Jurisprudential and Legal Investigation of Effectiveness of the Muslim's will on Using Bodily Organs of the Testator

► *Please cite this paper as:* Najjari F, Khalilzadeh M. *Jurisprudential and Legal Investigation of Effectiveness of the Muslim's will on Using Bodily Organs of the Testator. International Journal of Medical Toxicology and Forensic Medicine.* 2016; 6(4): 231-6.

1. Introduction:

The new medical science with its breakthroughs like the science of revitalization has saved lives of thousands of human beings.

Corresponding author: Fares Najari, MD;
Department of Forensic Medicine, Faculty of Medicine, Shahid Beheshti University of Medical Sciences, Tehran, Iran.
E-mail: fares.hospital@yahoo.com

The brain death theory came on the heels of these breakthroughs, i.e. loss of brain activity is not an end to life, but a sign of imminent death, and the fact that organ donation is possible as long as the other cells are alive. Therefore, using the organs of other human beings with the brain dead may save the lives of a number of needful patients. Organ transplantation is common in today's modern world like heart transplantation for a patient with heart failure, or transplanting kidney, cornea, lung, skin, liver etc. (1).

Brain death refers to the complete and irreversible cessation of all functions of the brainstem and cerebral cortex. The diagnosis and confirmation of brain death are important in two terms; first, medically speaking, the brain death equals to the demise of the patient. Second, the organs of the patient with brain death could be used in transplantation of important organs such as heart, kidney, etc. (1).

The relationships between human being and his/her bodily organs have been pointed out repeatedly in the texts of the Iranian legislator within a genitive combination structure which is itself an indicative of a genitive relationship between the noun governing the genitive and noun in the genitive case (2).

For example, there exist certain Qur'anic verses where God expresses, in genitive combinations, the soul, body, and organs of the human being as possessions of their owner (1).

- Strive with your possessions and your lives in the way of Allah!: At-Tawba (Repentance): 41
- Lo! Allah hath bought from the believers their lives and their wealth....: At-Tawba (Repentance): 111

The legal discussions, e.g. offenses against individuals, give the impression that such a relationship between human being and his/her organs has been deemed certain, indisputable and included in his/her natural rights, and presumed constantly free from any argument and approval in two disciplines of law and jurisprudence.

The legal relationship between human being and individuals or properties may be realized in different forms such as objective or obligatory (individual) relationships (2).

Article 29 of the Iranian Civil Code specifies certain primary objective rights such as ownership (including object or benefit), right of exploitation, and right of easement to ownership of others.

It seems that the relationship between human being and his/her organs may be deemed as natural ownership with no impediment against; because the nature of the possession, i.e. the body, is in such a way that makes this

ownership possible for human being, i.e. sovereignty of men over his body with the right of possession free from credit and external cause based on which the person is allowed to possess his/her body and benefit from its organs in line with laws.

A number of jurisprudent theologians specify the relationship between a human being and his/her organs as an ownership which corroborates the above issue (3).

As an example, the late Ayatollah A. Al-khoei believes the relationship between a human being and his/her act, soul, and liability as a genitive, natural, and formative relation and maintains that a person has a preferable natural ownership on the aforementioned affairs, i.e. a person enjoys sovereignty for possessing his/her soul and states, and based on the conscience and morality of sages, a person dominates his/her act, soul, and liability and this is approved by the legislator and has not banned individuals from taking possession of their souls (3).

Jurisprudentially speaking, there are restrictions on this kind of ownership, including defining law (self-harm prohibition) when the person is alive, and prohibition of mutilation of the deceased, and the necessity of burying the deceased at the time of the death.

The transfer of bodily organs ownership right is possible by either the person himself when alive, or after his/her death.

It is hard to imagine that a person who possesses organs is able to separate them from his/her body, except for nails and hair, and transfer to another person, however, it is feasible. The Iranian Penal Code has not declared the self-harm prohibition, when it causes either death (suicide) or defect, a crime and has not determined any punishment for it.

According to the aforementioned jurisprudential judgement, there comes a contradiction between the verdict of "permission of transfer of organs ownership right" and "self-harm prohibition" when it comes to the intentional transfer of ownership to the other. The verdict of "self-harm prohibition" is preferred over "permission of transfer of organs ownership

right”; thus, a human being is not allowed to amputate his/her organs with the aim of realizing a transaction, exchange, or donation. There is another verdict titled “necessity of saving the other” which in conflict with “self-harm prohibition”; however, the latter is preferred which restricts “necessity of saving the other” to other cases; in other words, saving the other is obligatory as long as no loss of life occurs. Therefore, transfer of organs when alive by the person himself is not permissible if there is a loss of life, and is permissible if causes a loss that could be ignored rationally (4).

According to the Divine Law, a deceased Muslim is subject to certain defining laws such as “necessity of being buried” and “mutilation prohibition” (5).

Given these verdicts, the preferable verdict on the transfer of organs of the deceased is prohibition.

If “saving the life of another Muslim” - in which “being a Muslim” is a requirement- is dependent upon amputation of an organ of a deceased Muslim, the verdict of “necessity of saving of a Muslim’s life” shall be in conflict with two aforementioned defining laws, and according to the jurisprudential arguments, the verdict of “necessity of saving of a Muslim’s life” is preferred over two other mentioned verdicts.

This is pointed out in decisions and sought answers of the contemporary jurisprudent theologians such as Ayatollah A. Al-Khoei, who puts that amputation of a deceased Muslim – like eye or other organ- for transplantation into another alive person is not permissible; otherwise, paying the blood money for the organ to the heirs shall be binding. However, amputation of organ from a deceased Muslim for transplantation into another alive Muslim is permissible; however, the blood money should be paid. In any event, transplantation of an organ into the body of another is acceptable, and the transplanted organs shall be deemed a part of the body of the alive person, the latter shall be subject to juristic judgements of an alive person. It is also permissible if an alive person makes a will on transplantation of his/her organs after his/her demise.

The will is defined as a word derived from concepts of vow, ordain, and advise, and in the absence of the deceased, taking his/her affairs into consideration. Since making the will is a certain right, as indicated in an authentic narration by Muhammad Ibn Muslim from Imam Sadiq (peace be upon him) (6).”

Making will is continuation of the authorities of human being when s/he is alive; in other word, making will bridge the periods before and after the death. Therefore, the scope of the will covers all legal affairs which are in effect legally for a person when s/he is alive and s/he expects them to be observed after the demise.

The abovementioned tradition has a wide generality which covers all types of will on property and bodily organs. Our’anic verses reflect this generality on will, and since every human being is allowed to make a will on his/her organs since s/he is entitled to transplant them to save another alive person. Also, there is not any impediment in this connection like self-harm in post-death period.

There are different standpoints over the primary judgement on permission of using organs after demise. Some jurisprudent theologians deem such a will effective and some others do not, and a number take elaboration here into the account. Experts believe that if the owner of an organ expresses his/her consent via a will on transplantation of the organs, the will shall be valid and effective since no affront shall be made to the deceased by the aforementioned consent (4).

Ayatollah A. Al-Khoei maintained that this will is permissible since the reason of mutilation prohibition is insulting the deceased, and in case of a will made by the dead, no affront is made (2).

The contemporary jurisprudent theologian Ayatollah Khamenei believes that using some organs of the deceased with the aim of transplantation into another alive person is acceptable if it is not deemed as mutilation, and expression of the consent of the deceased prior to demise or the consent of the guardians of the deceased is the most precautionary (7).

Ayatollah N. Makarem Shirazi has declared such a will effective and permissible if leads to a treatment or survival of a person, and many other jurisprudence theologians declared it acceptable (8).

Ayatollah Saafi Golpaygani declared that transplantation is not acceptable only by the will of the person unless the reverence of the deceased is fully observed (7).

Ayatollah M.T. Bahjat believes that the will is authentic if the only way of saving the life of a Muslim is this act and there is no other alternative for non-Muslims (9).

Ayatollah M.F. Lankarani maintains that if saving the life of a Muslim is possible merely through transplantation of organs of a Muslim deceased, and in case there is no other alternative from a non-Muslim, the said action is permissible and the will is valid, and the most precautionary decision is to pay the blood money for the organs in line with the note 1946 of the catechism in order to be spent for the deceased, although sale of the mentioned organs is not valid. However, the organ is allowed to be sold prior to death unless it threatens the life or brings about unendurable consequences which make the aforementioned act impermissible (9).

Ayatollah M.J. Tabrizi specifies that sale of bodily organs is not permissible and has legal impediment, and in case of occurrence of the aforementioned act, the owner of mutilated organ is allowed to receive the relevant fund and waive the organ.

Ayatollah H. Noori Hamedani believes that the above mentioned act is permissible (9).

Ayatollah S.A. Sistani declares that there is not any legal impediment for this act if it does not cause loss generally. For example, the donation of a kidney is acceptable if, on the diagnosis of the physician, does not bring about an important loss, and receiving money in lieu of assigning the organ to the other is also permissible. Also, mutilation of organs of a Muslim deceased is not permissible; otherwise, the relevant blood money shall be paid. Burial of the mutilated organ is obligatory unless survival of another Muslim depends upon using it and this is permissible; in this case, payment of the blood money is obligatory; however, in case

of the will made by the deceased, no payment for the blood money should be made; but if it does not cause another Muslim to survive and the will is made, there is a legal impediment against performing this act (8).

The legal department of the Judiciary has declared that bodily organs cannot be sold since they are not included as properties; however, any person is allowed to donate them when s/he is alive or after the demise and receive a property instead (8).

2. Materials and Methods:

This study is a review of Jurisprudential and legal investigation of effectiveness of the Muslim's will on using bodily organs of the testator in Iran. The findings that used, based on the studies were carried down in Iran and published in databases such as Google scholar, MagIran, Medlib, Irandoc, Iranmedex. Searching is done by using valid keywords. Selection criteria of articles including: Studying religious book and request for opinion emulsion in Iran. Exclusion criteria include: articles were not full text and similar studies are limited and in the Islamic countries in the field of studies is limited At the first step, by using the keywords, an initial list of abstracts had been prepared and inclusion – exclusion criteria were evaluated.

3. Results:

According to Our'anic verses, "he who saves a man's life shall be considered as one who has saved the life of mankind as a whole (Chapter Food, Sign 32), making the will on organ donation or selling it, in case of the brain death, with the aim of saving the life of the other is acceptable. It seems the organs of a human being are his/her possessions and his/her organs, even in the absence of a his/her will, are allowed to be transplanted for survival of the other by the guardians of the deceased or a jurisprudent theologian in the absence of the aforementioned guardians. A person is allowed to make a will on the right usage of his/her organs for the post-death period. Also, given the different religious traditions that allow possessions of organs of the deceased, making the will of a

person on using his/her organs after the death is permissible. Although the opinions that deem possession of organs of the deceased or making a will on this impermissible were discussed above; therefore, a human person has the right of ownership over his/her organs and is allowed to sell or donate them when alive or even after the death via making a will except for the cases that endangers his/her life. The achieved wealth in this way is under the possession of the deceased and if it is earned after the demise, it is considered as a possession of the deceased and shall be subject to his/her will.

The human being is created by God Who authorized him/her to make a decision on his/her organs as long as no loss is made. There are many remarks made by the legislator in Iran, which indicates the relationship between a human being and his/her organs.

The Ayatollahs Al-Khoei, Khamenei, Makarem Shirazi, Bahjat, Fazel Lankarani, Sistani, and Mousavi Ardabili deem the organ donation and making a will on that permissible, although the will is authentic in their standpoints if it brings about no loss for the owner of the organ.

The legal department of the Judiciary has declared also that organ donation is acceptable, but no organ may be sold since it is not included as a property.

4. Discussion:

According to different religions and laws in the different countries, similar studies are limited and in the Islamic countries in the field of studies is limited but there is disagreement in studies in our country. There is a fundamental difference between the view of the proponents and that of the opponents of removing organs from a dead man according to his will. The consent of the next of kin of the dead man is indicative of the permission and consent of the owner of the organ. Thus, this permission is valid and plays the role of a license for removing organ, but this has no role in the administration of organ harvesting and the principle of organ harvesting from the dead as an emergency action is permissible.

5. Conflict of interest statement:

The authors of the present work declare no conflict of interest.

6. References:

1. Sotudeh H. "Brain death". First Edition, Qom, Feghhi Publications; 2014.
2. Katouzian N. Properties and Ownership. Third Edition, Tehran, Mizan Publications; 2007.
3. Khoei A. Catechism. Third Edition, Mashhad, Rastgar Publications; 2001.
4. Mo'men Qomi M. Decisive words. Second Edition, Qom, Bita Publications; 1994.
5. Al-Kulayni M. Usūl al-Kāfī. Third Edition, Tehran, Dar-Al-Kotob Al-Eslamieh Publications; 2009.
6. Sistani SA. Minhaj Al-Salehin. Bita Publications; 1989.
7. Shaykh Tusi AJ. Tahdhib Al-Ahkam. Fourth Edition, Dar-Al-Kotob Al-Eslamieh Publications; 1986.
8. Organ Transplantation. Jurisprudential Research Center of the Judiciary. Jurisprudential Opinions Notification Department, Tehran; 1998.
9. Haeri Shahbaghi A. A Civil Code Review. First Edition, Tehran, Ganje Danesh Publications; 1997.
10. Khoei A. Misbah Al-Usul. Fourth Edition, Qom; 1996.
11. Rouhani M. Replies to Enquiries about the Practical Laws of Islam by Sayyid Ali Hosseini Khamenei", Sixth Edition, Qom; 2011.
12. Hosseini Bahrani SH. Al-Burhan Tafsir Al-Qur'an, Qom, DarolTafsir Publications; 1996.
13. Al-Hurr al-Aamili M. Wasael Shia. Second Edition, Qom, Alulbayt Foundation.
14. Soltan Alian H. Scientific Journal of Forensic Medicine, Tehran, Iranian State Forensic Medicine Organization. 2011;2.
15. Shafi'ei Mazandarani SM. Tazkiah Al Nafs. Tehran, Daftar-e Nashr-e Farhang-e Eslami (The Islamic Cultural Publishing House), 2010;2.
16. Majlesi MB. Bihār Al-Anwār. Second Edition, Tehran, Dar-Al-kotob Al-Eslamieh Publications; 1997.
17. Jurisprudential Research Center of the Judiciary. Jurisprudential Opinions Notification Department, Tehran, Bita Publications; 2011.
18. Jafari Langroudi MJ. Laws of Properties. Third Edition, Tehran, Ganje Danesh Publications; 1994.
19. Safaei H. Individuals and the Incapacitated. Tehran, Mizan Publications; 2004.

20. Toosi M. Al'Mabsout Fi Feqh Al'Emamiah", First Edition, Tehran, Maktabatul Mortazaviyah Publications; 2004.

21. Abdoh Boroujerdi M. Civil Rights. First Edition, Tehran, Ganje Danesh Publications; 2001.

22. Kalantari K. The Principle of Legality of Crimes and Penalties", First Edition, Babolsar, Mazandaran University; 1996.

23. Mohseni M. General Principles of Public Criminal Law. First Edition, Tehran, Ganje Danesh Publications; 1996.

24. Ali Akbari E. The last will and consent of the next of kin in removing organs; 2014.