

Exemption from criminal acts, physicians and surgeons

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Abstract: In medical profession, doctors and surgeons act according to their scientific knowledge, and implement their acquired medical expertise. In doing so, they do their best to utilize all facilities and equipments at their disposal. Not always these efforts, yield intended results. Sometimes, for instance, doctors or surgeons, during operations which are performed according to standard procedures cause patients injuries with perilous consequences which could result in patient's death. Can a surgeon become subject to prosecution due to punditry negligence or intentional wrongdoing causing injuries? To answer this question, theologians and law makers have sought to exempt doctors from punditry investigation and each has, in their own view, justified their actions and relived them from responsibility. This essay investigates the principles on which doctors and surgeons can be exempt from punditry prosecution. Then legitimacy of surgical operations or any other medical treatment upon permission from the patient or his guardian; observing legal procedures in medical and scientific works; professional qualifications of the doctor; considering the balance between benefits of medical operations and the risks involved; following government regulations including circumstances in which actions of doctors and surgeons are exempt from punditry responsibility in Islamic laws; urgency is also an exceptional reason which is very important and causes one to consider everything beyond normal conditions and has been stated as a condition upon which doctors and surgeons can justify unusual measures. Ultimately, it became clear that Islamic law of prosecution is considering elimination of the condition of necessity and is seeking the establishment of the principle of justification of medical operations to its religious legitimacy, regardless of necessity.

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1. Introduction

In medical profession, doctors act according their scientific information, implement their acquired knowledge, and try to utilize all facilities and equipments which medical science has accorded them to their benefit. However, not always these precautions work and yield intended results. For instance, doctors or surgeons, during operations which are done through proper professional procedure, may cause harm with dangerous consequences for the patient, often resulting in patient's death. Can, in these cases, surgeons or doctors be prosecuted for intentionally causing injuries? Theologians and jurists have unanimously expressed their opinions in favor of the doctors and have sought to relive them from responsibilities and have contrived to free them from prosecution. Thus it is fitting that, in this study, we deal with various dimensions of exemption of doctors and surgeons from punditry prosecution.

2- Principles of Exemption of Treatments done by Doctors and Surgeons from Punditry Prosecution in Shiites Jurisprudence.

2-1- Permissibility of Medical Profession in the Exalted Religion of Islam

First judicial principle regarding exemption of doctors and surgeons from punditry prosecution can be discerned from the opinion of jurists- interpreting

the principle of "Necessary permits and starts"; is that whatever is permissible in Islam carries responsibilities and one is accountable for his legitimate actions. In Islamic tradition, learning medical knowledge is "Obligatory sufficiency" and it is incumbent on a Muslim, not to stop learning it unless one has learned it thoroughly (Mousavi Bojnourdi, P.350). Based on the following holy verses and Traditions, it is necessary for the sick to seek medical attention when needed:

1-"do not expose yourselves to ruin through your own hands" (The Quran 2:195).

2-There is an accepted legal principle in Islam, called "No loss in Islam". It means it is forbidden in Islam to harm someone; likewise, one should not allow others to harm him (Hour Amelia, 1995).

3-There is a Tradition narrated from the Blessed Prophet saying:

On the other hand, when it is necessary to acquire medical knowledge, and the purpose of medical education is curing the sick; no one can refute such a necessity. If in case a doctor refuses someone treatment, and cause the person's death or loss of a limb; In addition to having done a religiously forbidden thing (Prohibited), the doctor will be questioned as well. One can conclude that permissibility of medical treatment in Islamic sources,

has been recognized as a judicial principle for the exemption of doctors and surgeons from criminal prosecution, and if those who are responsible, act within religious statutes, one can consider medical practice free from prosecution.

2-2- Principle of Benevolence

Other theological principle which can guide us in dealing with the issue of exemption of doctors and surgeons from punitry prosecution is the principle of benevolence expressed in the holy verse “ma ala l Righteous for God” (Bojnourdi, P.350), Based on theological principles, benevolence prevents retribution. It means that if someone does something for the common good, based on social conventions, one should not be held accountable for its negative, unintended consequences. (Katoozian, 199,) The holy verses “Towbeh: 60,&” is there any reward for kindness except for kindness itself (Al-rah man, 60)?

One of the applications of this principle is the case of a doctor who, with best of intentions and honesty, tries to heal someone, but the patient dies. Based on the principle of benevolence, the doctor is not responsible and cannot be held accountable and is exempt from punitry prosecution. Holding such a doctor accountable will discourage the medical profession, and doctors would refrain from healing the sick. This will eventually threaten people’s safety and throw the public into chaos.

2-3-Necessity

The other theological principle regarding exemption of doctors and surgeons from punitry prosecution is the principle of “Necessity and the difficulty” meaning necessity makes the forbidden allowable. In Islamic punitry law, necessity is one of the reasons that can justify “wrongdoing”. Meaning, if someone, out of necessity commits an action which, from the perspective of the exalted religion of Islam, is considered “Prohibited”; the person is not accountable and is exempted from prosecution and punishment, the above principle which is rooted in the Quran 2:173, is an indisputable Islamic principle. It has been articulated to resolve difficulties and help them in complex personal and social dilemmas and relieve them from unnecessary pressures. Therefore, anytime there is a duty which is a heavy burden and causes pressure, the principle of necessity relieves them from that duty. Medical operations are not exempt from this principle, because Shiites jurists, especially contemporaries, have elaborated on rules governing medical profession, and have often justified Prohibited (forbidden) acts to save precious lives. Although they respect dead bodies of Muslims and consider autopsy of a Muslim forbidden, but the extent of Prohibited is not without limits. When it is not possible to find a non-Muslim for the purpose, they allow for autopsy to be performed on a Muslim

(Khomeini, p.47).

The majority of Shiites jurists have considered social as a ground for exempting doctors and surgeons from punitry prosecution due to their medical work (Najafi, 198,).

Second martyr also believes that public’s need of doctors justifies legitimacy of exemption. Because when doctors realize that there is no guarantee of freedom of action, they would refuse treating the patients, despite patients’ need. Thus, based on the opinion of jurists one can conclude that the vital need of Muslims, and Islamic society as a whole, for medical profession justifies their exemption from persecution. (Amelia, 2000).

2-4- Permission for Treatment

Shiites jurists claim to have reached a consensus over a doctor’s exemption from accountability when treating a patient without his-or his guardian’s- permission (Khoei, n. d). However, they disagree about a professional doctor who- despite having permission- has failed in patient’s treatment. Famous jurists consider the authorized doctor criminally responsible, because patient’s authorization is for treatment, not for causing loss. Therefore, the authorization does not guarantee physician’s exemption from responsibility for failure, and there is no conflict between such an authorization and responsibility. The same principle is adopted for those who act with the intention of punishment yet commit a criminal offence (Najafi, 1985); (Amelia, n. d). Thus, one can conclude that an authorization for treatment does not give a judicial basis for exempting medical profession from punitry prosecution and a justification for doctors’ actions.

2-5- Doctors’ Exemption from Criminal Responsibility Resulting from Treatment

The last basis for doctors’ exemption from punitry prosecution is due to treatment, according to jurists, is doctor’s exemption because of patient’s –or guardian’s- consent to relieve the doctor from the punitry responsibility. Major Shiites jurists who, believe that such an exemption frees the doctor from responsibility, have relied on the following reasons:

A- In a Tradition, has narrated from Imam Shadegg, quoting Imam Ali has said “Whoever treats humans as a doctor, he must have permission from the patient; otherwise he will be responsible for the consequences. Whoever treats an animal must have permission from its owner.

B- The principle of “Believers to adhere to their contracts.” teaches that a doctor, during making agreement to rend services, should make exemption from responsibility a condition of treating the patient.

C- The Public’s need for medical services, and doctors’ refusal to serve if held accountable, makes the principle of exemption from responsibility

necessary. For, if doctors are not exempt from responsibility, they would refuse treatment from their patients. However, some jurists have criticized this argument by saying that exemption works if the job has been done; then the possessor of the right can free the indebted from responsibility. Otherwise, receiving exemption becomes the truth of Disposal of property is not right under any circumstance. The phrase means “collapse of a right which is yet to be established” Based on the holy verse, Believers to adhere to their contracts, believers is obliged to stay loyal to their contracts. Therefore, if in the process of contracting services of a doctor, his exemption from responsibility has been mentioned, it is legitimate and does not contradict the contract. Furthermore, exemption from responsibility does not negate having rights. Rather, exemption is established after the establishment of rights, not before. The existence of rights proceeds exemptions to it. Therefore, it is a fallacy to assume existence of exemption negates having rights. He finally concludes that society’s needs for doctors, treatments and healings show that physician’s exemption from accountability prior to commencement of treatment is not considered collapse of the rights prior to its establishment. Thus, according to Shiites jurists, if a doctor who circumcises; or a doctor takes one’s blood for health reasons, mentions his exemption from accountability before starting treatment, is not conditioned to lack of carelessness and in accomplishing duties against possible dangers by the guarantor (Ibid, P.47).

3- Principles of Exemption from Punditry Prosecution regarding operations by doctors and surgeons in Iran’s Penal Law

3-1 Legal Permission to Practice Medicine

In modern times, governments issue license to practice medicine only to those who have received theoretical and practical education in university faculties and other institutions of higher learning and have acquired necessary degrees. Obviously, when someone graduates from this field, and acquires necessary license to practice based on existing regulations, the Law allows his/her practice and profession and predicts possible unintentional damages. Otherwise, fear of responsibility and prosecution would scare people away from medical science and practice of curing patients (Peiravy, 2002).

Like other legal systems in the world, the legal system in Iran, has authorized qualified individuals in medical profession to do the necessary treatment within legal regulations, without fear of responsibility. The law in Iran concerning medical practice was first passed in 1911. The first article stated:

No one, in any part of Iran, can engage in Medical or Dentistry professions, unless he has

obtained license from the Ministry of Sciences and has registered it in the Ministry of Interior.

According to the Article 10 of the above law, “Whoever practices medicine contrary to the above regulation, will first be warned, then jailed for four months, and upon 3rd offence will be jailed for a year”. Up to 1955, due to shortage of educated doctors and desperate need of the country, the law did not restrict licensing medical practice to graduates from Medical colleges and other scientific institutions. However, in 1955, given the preparedness obits execution, the law regarding medical, Pharmaceutical, and food regulations was passed. It is necessary to mention that treating patients is a professional matter. If the doctor realizes that the case at hand is beyond his/her knowledge and ability; he should refer the patient to a specialist, for lack of specialist cannot be used as an excuse(unless in emergency situations).

3-2 Intention to Cure

The other legal issue raised by jurists, involving exemption of doctors and surgeons from punditry prosecution, is the intention to cure through medication or surgery. It means that doctors or surgeons treat or operate on a patient with an intention to cure, not with a criminal intention. Therefore, since their purpose is to benefit society, their actions cannot be regarded as criminal.

3-3 Necessity of Medical Treatment or Surgery

One of the issues dealt with in Iran’s penal law, as a basis for exempting doctors and surgeons from punditry prosecution, is necessity of medical treatment or surgical operation. Based on General Prosecution, Article 32section 2, 1974 Amendment, if a patient or a surgeon treat or operate on a patient, an action which is deemed necessary according to medical science; or another word, if the person’s life or health depends on it, the action cannot be regarded as an offence. However, since some unnecessary medical treatments or surgical operations are permitted and credible in religious laws, the lawgiver tried to make some arrangements to accommodate medical operations as permissible. Therefore, in Article 59 section 2, all medical treatment or surgical operation, are considered justified, under certain conditions. It was necessary to have harmony between civil laws and religious beliefs. Otherwise laws could not be implemented and would have become redundant. Thus, lawmakers, by writing the Article 59 section 2, replaced legitimacy for necessity (Nourbaha, 1990).

3-4 Legitimacy of Medical Treatments and Surgeries

Upon Islamic revolution’s victory, one of the main goals of law making became making existing laws consistent with Islamic teachings. Islamic Republic of Iran’s Constitution Article 4 has clearly stated such a goal. Thus, parallel to the reforms which

were carried out in other areas of the laws of the land, laws regarding medical practice became subject of reforms. With passing new regulations, some of the legal texts which were against Islamic teachings were nullified. Yet, until 1992, there were no explicit legal statement in the law regarding concordance of medical laws with Islamic teachings. Eventually, with the passing of Islamic Punitive laws in 1992, Article 59 Section 2, it was emphasized that actions of doctors and surgeons are exempt from are exempt from punditry prosecution, only if the acts are based on religious regulations (Khomeini, PP.557&558).

Yet, this law has created a new challenge. The meanings and limitations of religious regulations are not clear, and actions of doctors and surgeons have not been defined. The only matter emphasized is consistency of medical treatments and surgical operations with the exalted religion of Islam. It appear that the key to resolving this problem, and the way of removing this obligation is in judge's referral to credible religious sources to find the proper decree. Article 167 of the Constitution and also Article 214 of the penal law, Passed in the year 2000, have allowed the judge to refer the matter to authoritative religious sources (Fatwas), if the law is silent, ambiguous, or without details.

2-5 Patients or Guardians' Consent

Based on general principles governing penal law, consent of the victim cannot justify criminal act. For, crime is an act which disturbs social order. The purpose of instituting punitive laws, more than anything else, is maintaining order, and protecting common good (Ardebili, 2001) . Therefore, since the main victim of the crime is society, and punishing criminals is public's prerogative, victim's consent does not nullify perpetrator's crime. One cannot present the given consent as an excuse to justify the act and prevent prosecution. However, there are instances where implicit permission of the law, or social convention, presents consent as justification. In these cases, despite the fact that the components of crime are not nullified, consent, as justification has removed the label "criminal" from the perpetrator.

To justify some illegal acts, jurists unanimously agree on the element of consent of the victim being a condition of permissibility of the act. However, there is no consensus that consent of the patient-or his legal representative- can be a basis for justification for medical operations. Some do not consider consent a basis for exemption from punditry prosecution; yet others consider consent as a basis for exemption of doctor from punditry prosecution (Sane'i, 1997). Some legal texts also consider patient's consent as a basis for doctors' and surgeons' exemption from punditry prosecution.

According to Article 59 section 2, Islamic

Punditry Law (IPL) passed in 1991, consent of the patient, his guardians, or his legal representatives-under certain conditions- can justify medical treatments and operations. As one can see, patient's consent is a justifying factor, and has a categorical and external aspect. Therefore an act which, under normal circumstances is considered misconduct, according to the law itself, has been considered permissible and legitimate. And because of that, its perpetrator is not criminally accountable. Thus one can claim that based on some existing legal texts, and importance of consent in justification of some medical misconducts, and also views of Shiites jurists who consider patients' consent –alongside other conditions- as a basis for exemption of medical treatments and operations from punditry prosecution.

3-6- Law's Permission

Some Jurists believe that if in the process of treatment wrongdoing is committed- unintentionally, in good faith, done through the legal, scientific, and technical procedures- the medical practitioner must be free from responsibilities. Because the law allows medical practice and licenses are issued for it, it is necessary that doctor be free from any kind of responsibility. This group of jurists does not consider patient's consent as a determining factor in exempting medical practices from criminal prosecution. Only law's explicit or implicit permission is effective in this matter. Obviously, this matter is very problematic. Because, although someone, acting legally, causes harm on someone else, should undoubtedly be free from responsibility, but one must know that the doctor must also acquire patient's consent as well. Because doctors' rights are limited by the patient's rights over their bodies.(Shoja' Pourian, 1994). In Iran's Penal laws, law makers have set up a category for "actions which are not considered criminal". Article 32 section 2, deals with executing Islamic punishments, Article 59 section 2 which is currently in effect, under certain conditions, allows for committing medical and surgical actions.

3-7 Following Scientific and Technical Procedures

In Article 59 section 2, has paid full attention to this matter and has explicitly pointed out "Following Scientific and Technical Procedures". The meaning of "scientific and technical procedures" is knowledge and experiences which the doctor has learned. And these procedures may be interpreted differently by different doctors. Doctors have the right to chose, as they sees fit, a particular treatment for the patient. No one can hold doctors responsible for choosing a particular way of treating a patient. As a result, one cannot take a tough stance on the subject of "following scientific and technical procedures" unless some obvious scientific principles have been ignored.

3-8 Doctor's Qualifications

A doctor is the only person who has the legal right to cut someone's limbs, which may even lead to one's death. These acts gain exemption from punitry prosecution only if the doctor is qualified to take such an undertaking Islamic Punitry Law, Article 59, has not explicitly mentioned doctor's qualifications. The law has only mentioned "following scientific and technical procedures". It seems one must surmise that the doctor must be qualified to do the particular operation.

3-9 Considering the Balance between the Operation and its Possible Consequences

In Islamic Penal Code, there is no explicit reference to "considering the balance between operation and its possible consequences". It has only been stated that the operation must be carried out with "following scientific and technical procedures". However, considering that medical profession is the result of necessity; it is obvious that the doctor must undertake treatment or surgery only when there is a reasonable balance between the undertaking and its possible consequences. Thus it is mandatory for the doctor to establish a balance between risks of disease and risks of treatment. If sickness does not fundamentally threaten the patient; there is no reason to jeopardize patient's health by a treatment which may harm or kill him. On the contrary, if there is expedience or benefit in treatment for the patient; the doctor has the right to take over the authority over patient's body.

3-10 Following Governmental Regulations

Law makers of the Islamic Penal Code, in Article 59 section 2, have explicitly mentioned "following governmental regulations" as one of the conditions for exemption of doctors and surgeons from punitry prosecution. According to Dr. Ja'fari Langroudi, government regulations are the totality of all legislated statutes, by-laws, directives, and finally all regulations issued by the government authorities acting on their proper capacities (Ja'fari Langroudi, 1994). The measure for deciding the doctor's breach is the court, not any convention or tradition. In these cases, the judge, upon realization of the breach of regulations or any all wrongdoing committed by the doctor, finds the cause and effect relationship between wrong done and the harm suffered. Only then, the judge can issue a decision. Otherwise, due to inability to show cause and effect relationship between doctor's wrongdoing and the harm suffered, criminal responsibility cannot be established.

4- Urgency and its Effect on the Conditions of Medical actions' Exemption from Punitry Prosecution

Urgency is an exceptional, yet important case upon which some general rules of conduct for medical and surgical practices are ignored.

4-1 Meaning of Urgency and Urgent Medical and Surgical Operations

Also, some legal texts deal with the issue of urgency and some cases have been determined for it. For example, based on Article 1 of the executive By Law, "Law regarding punishing for refraining from helping victims and removing mortal dangers", passed on 31 Dec 1985, "Medically Urgent" has been defined as "medical actions that are required to deal with patients and treat them, and if there are no quick action done, it may cause loss of life, loss of limb(s), or untreatable side effects". Article 2 of the above By Law has enumerated cases of medical urgencies as the following: poisonings, burns, child deliveries, wounds as a result of vehicle accidents, heart failure or stroke, coma, suffocation and breathing disorders, infectious illnesses such as meningitis, infantile diseases which require blood transfusion. It is necessary to mention that the lawmakers, in Article 2, section 11 of the above By Law have expanded on the urgent medical and surgical urgencies. Thus one can define "urgent medical or surgical operations" as those medical actions which are crucial and failure or inaction will result in death or serious health problems for the patient (Peiravi, 1999).

4-2 The Authoritative Source that will decide on the Question of Urgency

Although the lawmakers of the Islamic penal laws have not dealt with the question of who determines "urgency", but as it will be demonstrated it is the doctor that decides this important matter. First, considering the status quo in penal law, anytime investigation and decision making is required for a technical and professional matter, and there is a need for the opinion of the experts, it is reasonable and fair for the court to seek the opinions of the professionals. Then they may refer to it in order to make a decision. Article 83 of the law of investigation for the general and revolutionary courts, is a good example of the above point. Second, it is appropriate for the social convention that the medical professionals should be the ones who decide on the question of urgency. Third, when a doctor faces a case which has been described as urgent, and health or life of a patient is dependent on surgical operation; it is obvious that in the situation of shortage of time and necessity of surgical operation to save the patient makes it appropriate that the closest professional person to the patient decide on the question of urgency and act.

5-The Effect of Urgency on the Conditions of Exemption from Criminal Prosecution for Medical Treatments

5-1 The Effect of Urgency of Medical Treatment on the Collapse of the Condition of Consent

If the patient is in a condition that can declare his consent, obtaining consent prior to treatment is

necessary. However, sometimes patient is in a condition that cannot express his consent, yet urgent treatment is necessary. In this case doctor can ignore consent without assuming responsibility. Basically, the state of urgency exempts the doctor from responsibility; if it becomes clear that with delay, one loses the chance for survival. Because one assumes that if the patient gains consciousness; survival instinct would force him to consent to doctor's actions. Hence it becomes clear that it is not necessary to obtain consent to treatment under all circumstances. But it is a commitment which is dependent on conditions of urgency, and the best interests of the patient. Therefore, when a patient is unable to express his will about the treatment, his parents/guardian are not present either, and in the best interest of the patient in immediate treatment, the doctor can operate without having to consult anyone can intervene as a doctor.

5-2 The Effect of Urgency on the Conditions of Legitimacy of Medical Treatments or Surgical Operations

According to explicit statements by lawmakers, amongst factors that doctors are not obliged to consider in the situation of urgency, is the condition of consent. Therefore, it may be assumed that doctors, in emergency situations, should consider other restrictions in their treatments and operations, including the condition of religious legitimacy, otherwise they will have penal responsibility. We must blot out this illusion from our minds. Because if we look at Article 59 section 2 (Islamic Penal Law), we realize that the basis for doctors' exemption from responsibility is nothing but the principle of urgency. According to Islamic Penal laws, whoever, in urgent situations, is forced to commit a forbidden act; that person is not responsible because of the Islamic principle of "Need the function hitch" (urgency allows for doing the forbidden); and is exempt from prosecution and punishment. In legislated laws as well, Article 55 (Islamic Penal Law) justifies harming others. According to this article:

"Whoever, in times of great dangers such as fire, flood, or storm- with the intention of protecting his or other people's life or property- commits a crime, he will not be prosecuted, providing he himself has not caused the danger, and the committed act is proportionate, and necessary for removing the danger."

6- Actions of Doctors and Surgeons which are Exempting from Punditry Prosecution in Islamic Law

Islamic Penal law allows for medical actions providing they are done according to Islamic principles. As a result, doctors are responsible for illegitimate operations and can be prosecuted. There is

no doubt, if doctors treat or operate on someone legitimately, they will be exempt from prosecution and punishment. The question is: What is the meaning of legitimate medical actions, and what are the examples of such actions?

Therefore, it is fitting to discuss the following, so that various aspects of the issue may be investigated and concepts, limits, and examples of legitimate medical actions may be identified.

7-1 Medical Treatments

Article 59, Section 2 of the Islamic Minatory Laws deals with the notion of legitimate medical actions in abstract, and does not define its categories. Therefore, we must refer to the literal and conceptual definitions of the word to figure out what law makers meant. In **Moein Dictionary**, the word T. e. b has been defined as "related to medical", "affiliated with medical matters", "affiliated with medical actions". As a concept, "medical science" has been defined as the science of recognizing various diseases and methods of treating them. Medical actions are defined as "actions which are related to medical sciences and medical techniques (Moein, 1993). One should not assume that the medical actions, approved by law, are only the actions that are medically necessary. Islamic Punditry laws, by eliminating necessity and conditioning them to legitimacy, has looked at medical action in its absolute and abstract sense, without concerning itself with its necessity. Therefore, one can say that all legitimate legal actions, necessary or unnecessary, are included in Article 59, Section 2.

7-2 Surgical Operations

Islamic punditry laws have not defined the phrase "legitimate surgical operations" and have not offered measures to determine legitimacy. In Persian **Moein Dictionary**, the word "surgery" has been defined as:

"one of the fields of Medical Sciences which deals with removing unhealthy limbs of human body for the purpose of healing the Patient" Also, the word "surgeon" has been defined as: "the one who treats wounds, a doctor who cuts and opens human body for the purpose of treating some diseases, operator"(Moein, 1993). It should not be assumed that the surgical operations meant by law are only those which are for healing the sick; rather the mentioned law in Article 59, section 2 (Islamic Punditry Law), by replacing "necessity" for "legitimacy" (stated in Islamic Punditry Law, 1982), law makers intended to include other surgical operations- which are not health related-in this section. For the purpose of accurately distinguishing and determining "legitimate" surgical operation cases, we should examine currently common types of surgeries:

7-2-1- Organ Transplant Surgery

One of the new developments in medical

sciences is the phenomena of organ transplant surgery. It started with blood transfusion, then it was followed by cornea of the eye, from a dead to a living person. In the recent years the trend has evolved to other organ transplants, from living to living humans, and from the brain-dead to living human. In formerly legislated laws of Iran, According to Article 42 section 3, (General Penal Law) these operations were allowed, providing consent of the possessors of the rights was obtained and government regulations were observed.

The Islamic Punditry Law, passed in 1984, did not reiterate section 3 of the above law. It was only in section 2 those necessary surgical and medical operations were considered justifiable. Since, generally, organ transplant surgical operations, were not considered treatment, they were not included in the Article 32, section 2 of the Islamic Punditry Law and provided the basis for punditry prosecution of surgeon. The stated “necessity” in Article 32 was also, replaced with “legitimacy” upon passing of Article 59, section 2 of the Civil code of Iran. According to the above section, only “legitimate” medical treatment or surgical operation can be justified. The question is this: are organ transplants qualified as “legitimate” according to Article 59 section 2 of (Islamic Punditry Law)?

This issue was taken to great jurists, majority of whom, including Imam Khomeini, may God bless his exalted soul, and the great leader of Islamic revolution, his holiness Ayatollah Khomeini, stated that if a worthy soul’s life depends on it, there is no objection to it (Abbassi, 2011). Based on the above statements, it appears that, surgical operations of organ transplants are included in the category of medical treatments and surgical operations which are mentioned as legitimate medical operations in Article 59, section 2 and its executive By Law. However, the lawmakers were silent on the issue of organ transplants. If there were any complaint filed against a doctor, judges had to-in accordance with Article 167 of the Constitution-search through reliable Islamic writings or refer to the reliable religious decrees .It was in 2000 that a single article titled “law regarding organ transplants from dead bodies and from patients whose brain is lifeless” was passed by the Islamic Consultation Council (Iranian Parliament). The text states: “Hospitals equipped with organ transplant facilities, after acquiring permission from the Ministry of Health, Medical Education, and Treatment, can use healthy organs from a dead body or from the body of patients whose brain- -based on the undoubted opinion of the experts- is lifeless, or patients whose brain is sure to die-according to expert professionals- on the condition that it has been stated in the patients will, or the patient’s ward has agreed to it. Amendment: 1.Diagnosing death of one’s brain is to be done by the

professional experts in public hospitals. Those experts are appointed by the Ministry of Health, Medical Education, and Treatment, for the period of four years. Amendment: 2. Members of the operating team should not be selected from the expert team who decides on the death of the brain. Amendment: 3. Doctors, operating on the dead body are exempt from the payment of blood money.

7-2-2 Surgical Operations for Prevention of Pregnancies

Surgical operations aim at depriving women from pregnancy and procreation are commonplace in many countries. In the former amended general priory law of Iran 1973, Article 42, section 3, performance of the above operations was subject to consent of the possessor of the right and following government regulations. But with legislation of the Islamic Punditry law of 1982, the situation was changed. Article 32, section 2 of the law allowed only surgical operations that we redeemed necessary according to medical sciences. Since surgical operations for pregnancy prevention were performed for the purposes other than medical treatment, they were deemed unnecessary. Thus, According to the Article 32, they were unjustifiable and the surgeons who committed such operations were responsible and subject to prosecution penalty, and punishment. However, now with the passage of Islamic Punditry Law of 1991, the above policy has changed, and Article 59, section 2 of this law exempts medical treatments and surgical operations which are not in conflict with the religious principles from punditry prosecution. However the question remains: are the operations mentioned, considered religiously legitimate or not? Although, the text of the law is not clear, and there is no consensus on the subject; considering Article 59, section 2 (Islamic Penal Law) has permitted surgical operations which are not in conflict with religious principles; therefore, if surgical operations for pregnancy prevention are permissible within the norms stated in the Article 59; and since there hasn’t been any decree against surgical operations for pregnancy prevention from the proper authorities ; and one can observe practically these operations are performed in medical centers; One can see that these operations do not contradict with our religion; and they fit within the surgical operations which Article 59, section 2 allows; and if a surgeon, following legal procedures, performs them; no legal offence has been committed and there will be no accountability and punishment. However, if the surgeon fails to consider legal conditions such as technical and scientific principles, one cannot exempt the surgeon from punditry responsibility.

7-2-3 Cosmetic Surgical Operations

Cosmetic surgical operation or plastic surgery is

performed to repair or compensate for the loss of organs; they are also performed for the purpose of beautification of existing parts of the body. In the Iranian General Punditry Law, 1973 Amendment, Article 42 section 3; all surgical or medical operations were permissible upon written consent of the patient and following government regulations. Article 1, section 3 of the executive By Law dealt with cosmetic surgeries. Accordingly, written consent of the patient- or the legal guardian of mentally challenged person- was required. If doctors and surgeons performed cosmetic surgery within the confines of the Article 42, section 3 and Article 1 of the executive By-Law; they were free from punditry responsibilities. However with passing of Islamic punditry Law, 1982, the situation changed and its Article 32, section 2 dealt with cosmetic surgeries. Since section 3 of the Article 42, justified unnecessary medical operations; and cosmetic surgery operations were, essentially, non-treatment operations; and did not fit within the confines of the Article 32 of Islamic Punditry Law; legally, they were not considered justifiable; and in case of being committed the surgeon was responsible and could be prosecuted. But later, Article 59, section 2, 1991 (Islamic Penal Law), paid attention to the legitimacy of the operations according to religion; necessity was no longer the issue. Therefore, if one can describe these operations within religiously legitimate acts; and if they are done within the confines set out in the stated section; and since authoritative jurists have not issued any decree against these operations; and practically, it is observed that the public institutions train specialists in this field; therefore, it seems cosmetic surgeries are not in contradiction with religion. Surgical operations stated in Article 59 section 2 are examples that support such a conclusion. If a doctor performs those operations with following other legal regulations, it is permissible and exempt from responsibility and prosecution. Furthermore, one must add that, now- a- days, the definition of sickness is expanded and it is not limited to only physical sicknesses; it includes psychological and emotional ones as well. As a result, cosmetic surgery is a type of general treatment and follows general medical principles.

Discussion

The above research indicates that Islamic law, due to individual and social importance and due to necessities, has exempted certain medical operations from responsibilities regardless of the negative side effects- physical and psychological injuries, even death - of such operations. Legitimacy of medical treatments and surgical operations, permission of the patient or the guardian, following technical and scientific guidelines, professional qualification of the

doctor, being mindful of relationship between medical operation and possible consequences, following government regulations including conditions in which medical treatments and surgical operations are exempt from responsibility in Islamic Punditry law. Urgency is an exceptional case which is very important and its advent would allow a doctor to by-pass certain general rules which, under normal circumstances, govern medical and surgical operations. Islamic Punditry Laws, in contrast to former laws, allows only for those medical operations which are approved by religious principles. As a result, surgical operations or medical treatments which are considered forbidden in religion, could lead to doctor's responsibility and prosecution. It is necessary and fundamental to mention that surgical operations and medical treatments, dealt by law, are not limited to those medically necessary ones. For, Islamic Punditry Law, by eliminating the condition of urgency; has subjected justification of surgical operations and medical actions to their religious legitimacy; necessity or lack of it. It seems appropriate that a judge look at various examples of legitimate medical operations in religious sources and reliable sentence.

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