

Principles of Compensation for the Transfer of Infectious Body Products in Islamic Jurisprudence

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Abstract

Background and Objectives: Careers related to body products are targeted toward saving patients from certain death. Such careers serve a necessary and important role. In case of the incidence of any human fault and organizational failure within the irreparable course of body product manufacturing, the negligent person is liable to pay compensation according to the principle of *Tasbeeb* (causation). Although negligence has occurred in almost all cases, in case of incidence, it is impossible to prove. Regarding this, the present study aimed to find a good solution to vindicate the rights of patients under such circumstances.

Methods: The review study was conducted using the library recourse for data collection.

Results: If infectious products are transferred directly, the conductor does not need to have committed the fault to prove liability according to the principle of *Itlaf* (wasting). On the other hand, if causes involved in the transfer of products are found to have committed a the fault, their liability can be proved under the principle of *Tasbeeb*.

Conclusion: When the causing agents involved in the transfer of products have not committed a the fault, or their fault is not proved, the principle of *Ghorur* (deception) will be a good solution that protects the deceived victims. Patients who trust a wide and complex organization and its equipment, which is solely responsible for the important task of transferring the body products, and refer to it with confidence, are actually deceived by its appearance, and this brings about the means of deception rule to be enforced.

Keywords: Legal Liability, Compensation and Redress, Jurisprudence.

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Introduction

One route of microbial transmission to body is the use of infectious body products. Every day, many people may need body products due to diseases or accidents. Most of these individuals are affected with various illnesses through the transfusion of infectious therapeutic substances, particularly blood. Such victims suffer from heavy losses and may be subjected to gradual death (1).

The question arises here is that who is responsible for this event. Should we follow the Western law and search for fault according to the well-known rules of civil liability, look for a different way to find some exceptional

systems as found in Western law, or resort to the particular rules of Islamic jurisprudence in order to prove liability without fault? The issue of civil liability incurred by the transfer of infectious body products now prevails around the world under different legal systems. The related victims usually come from the less-privileged members of the society and patients who need more protection. Civil liability without fault towards such people has been accepted more or less in various systems during the recent decades.

With this background in mind, the present study aimed to investigate the legal responsibility of those involved in the transfer

of infectious body products when there is no fault. Since any loss of life or financial loss may occur directly (*Itlaf*/wasting) or indirectly (*Tasbeeb*/causation), it is first studied whether the principles of wasting and causation can be applied for the cases related to the transfer of infectious body products. Then, it is stated whether the responsible person can be determined by relying upon other principles, such as the principle of "no harm" and "deception", when it comes to loss and harm incurred by causation.

Methods

The review study was conducted using the library recourse for data collection

Result

1- Applying the Islamic legal principle of Itlaf (wasting) to the transfer of infectious body products

Itlaf occurs when someone directly harms another. It lies under the category of liability without fault in Islamic jurisprudence; i.e., it covers both *Itlaf* by fault and without fault out of negligence. For *Itlaf* to occur, it is important to prove that the action which has caused harm was conducted by *Mutlif* (i.e., one who incurred *Itlaf* or wasting). An unintentional occurrence of *Itlaf* does not lead to the disavowal of responsibility. Even the knowledge or negligence of *Mutlif* when causing harm is not a prerequisite for *Itlaf* to take place.

The principle of *Itlaf* applies as much to the matters of human body and life as to property. Almost all Islamic jurists frequently refer to this principle when dealing with the issues of *Qisas* (retaliation), *Diya* (blood money), and particularly physician's liability. Therefore, the principle of *Itlaf* certainly covers the issue of human body discussed in this study. The principle of *Itlaf* is applied to the cases in which a person dies due to the transfer of infectious body products, experiences the dismemberment of a limb or functional impairment, or afflicted with a chronic illness all through his/her life.

However, if a microbe enters one's body via the transfer of a product and causes some

health problems, but the person recovers his/her full health after a period of time, there arises a question that whether *Itlaf* has occurred in this case or not. To answer this question, we should first look at the meaning of the term *Talaf* (wasting). *Talaf* literally means destruction, demolition, ruination, and wasting (2-4). These meanings are all related to the above-mentioned question as it can be argued that one's health is destroyed during illness, and health recovery does not deny this argument.

In case of the transfusion of an infectious substance, *Mutlif* is the one who is directly involved and injects the product. As stated earlier, when a person is a conductor (*Mubashir*), there is no need for proving his/her fault in *Itlaf*. Therefore, if a microbe enters the patient's body without any fault or even lack of knowledge on behalf of the conductor, he/she will be held liable by the principle of *Itlaf*.

However, since such people engage in a difficult and dangerous job and welcome all dangers to help patients who severely suffer from diseases, their job is considered as the best example of benefaction. Consequently, they are exempted by the rule of benefaction inferred from verse 91 of *Surah Tawbah* stating that "There is not upon the doers of good any cause [for blame]" (5). Ibn Idris Helli (6) refers to this rule to deny the responsibility of an expert physician without fault. Unlike the common belief considering the physician liable, he regards medical staff as an example of good action and acquits the physician of any responsibility.

2- Applying the Islamic jurisprudence rule to Tasbeeb (causation) in relation to the transfer of infectious body products

With regard to *Tasbeeb*, cause refers to a factor that is not directly involved in the destruction of property but provides grounds for wasting. In other words, one performs an action as a result of which, or for some other reasons, wasting occurs. Several causes are involved in the process of the transfer of products. These causes are divided into two general types of human and organizational.

As stated in the first section, fault is not required to create liability in case of *Itlaf*, but the case is different with *Tasbeeb* (indirect wasting) where fault is necessarily required (7). Like *Itlaf*, intention does not play a role in *Tasbeeb*; however, if fault is not involved, harm cannot be attributed to the causer and cannot be considered liable. A negligent person is the one who intentionally performs a harmful act but does not intend to inflict harm, yet he/she knows that his/her action might be harmful or he/she acts in a way that may commonly lead to harm. According to different rules and regulations, faults may include imprudence, carelessness, lack of skill, lack of respect for state regulations, inattention, and negligence.

According to the above-mentioned points, if *Itlaf* occurs in relation to the issue of the transfer of infectious products, based on the general rule, the conductor does not need to be negligent. However, direct involvement in the transfer of infectious product is only restricted to the person who is in direct contact with the patient's body. Such a person can be considered responsible for compensation under certain conditions.

On the other hand, it was found that if the causing agents involved in the transfer of the product are proved to have committed the fault, they can be prosecuted under the principle of *Tasbeeb* (causation). However, there are cases in which the causing agents involved in the transfer of body products have not committed the fault, or if they have, their fault is not proven.

For instance, Blood Transfusion Organization is responsible to conduct sufficient tests and studies on blood products to guarantee their health and quality. However, if they fail to fulfill their responsibility for any reason and some infectious products are transfused to patients and leads to microbial infection, their negligence cannot be proved in this respect. As a result, the organization will not be responsible by the principle of *Tasbeeb*.

Under such condition, on the one hand, the patient experiences loss, which cannot be compensated; on the other hand, he/she must encounter such a wide and complex

organization to prove its negligence by him/herself, which is far from justice. Consequently, it is required to seek for a criterion other than *Tasbeeb*, which would be based on fault. To this end, it seems that we can refer to the principles of "no harm" and "deception".

3- Applying the principle of 'no harm' to the transfer of infectious body products

The principle of 'no harm' is an important principle in Islamic jurisprudence, which can be relied upon in almost all Islamic legal issues. Based on various meanings and definitions provided for "harm" and stipulations made by some Islamic jurists (8-11), property damage and physical harms can be obviously subjected to the principle of 'no harm'. In other words, no one is entitled to harm another individual by the misuse of his/her position. However, this principle does not have a positive aspect and is not effective to prove automatic liability (i.e., responsibility for compensation) (12-19).

The principle of 'no harm' is set by the divine legislator as gratitude to His servants. In this regard, He intended to avoid any harm out of His grace to His servants. Therefore, it would be contrary to His gratitude if He sets to prove the person in charge is responsible to compensate for the harm he has caused. Moreover, if the principle of 'no harm' was sufficient for the rule related to compensation, what would be the reason for establishing other entities, such as *Itlaf*, *Tasbeeb*, deception, encroachment, and waste for trusted property and several others?

Whenever a harm is inflicted, we could resort to the principle of 'no harm' and rule on compensation, and all the entities in Islamic jurisprudence would be put away. However, all these entities are sufficient by themselves to rule for responsibility, and it is not required that such responsibility is proved by the principle of 'no harm'.

Incorporation of the traditions that consider harm as a requirement for liability in the principle of 'no harm' by Islamic jurists indicated that the principle of 'no harm' is not effective by itself to prove responsibility. Therefore, as Islamic jurists commonly

believe, it can be argued as a general rule that the principle of 'no harm' only rejects the rule of harm; therefore, in case of transferring infectious body products, like other similar cases, we cannot rely on this principle to prove responsibility.

Discussion

Ghorur (deception) is one of the fundamentals of liability which is relied upon in various issues of Islamic jurisprudence (20). It states that if a person is deceived by someone else's act and is harmed, the other party must compensate it. The term *Ghorur* (deception) literally means "to deceive" (21-23).

We can assume four kinds of relationships between *Ghar* (deceiver) and *Maghrur* (deceived person) in terms of their knowledge or ignorance of the fact. In this regard, in the first case, deceiver has knowledge of the fact, but the deceived person is ignorant. In this case, the principle of deception is obviously effective. The second case is contrary to the previous one where the deceiver is ignorant while the deceived person is knowledgeable about the fact. In the third case, both deceiver and the deceived person have knowledge of the fact and know about the potential harms. The principle of deception is not obviously effective in this case as getting deceived would be nonsense. Finally, in the fourth case, none of the parties has knowledge of the fact.

There are two views in this respect as follows:

One group believe that *Ghorur* means deception, but it will not be effective if *Ghar* (deceiver) is not aware of the harmful result of an action (24-27) because:

a) *Ighrar* and *Taghrir* are paronyms which mean deceiving and cheating (*Tadlis*) within which resides the concept of concealing the fact and this concealing the fact would be meaningless without the knowledge of the fact.

b) Men of wisdom presume that *Ghar* is one who has knowledge of the fact and deceives another individual.

A second group believe that *Ghorur* (deception) has nothing to do with the knowledge of the deceiver. If a deceiver gives

property to someone else assuming that it belongs to him/herself, or he/she is allowed by the owner to do so, he/she will be held responsible (28-35). They argue that:

a) Root word of *Ghorur* means deceiving even if the person unknowingly provides grounds for deceiving others.

b) Some traditions support this view and consider both knowing and unknowing deceiver to be responsible.

c) Actions are divided into two categories: Some acts cannot be realized without having an intention (e.g., bowing, where mere leaning down with no intention to respect is not considered as courtesy). On the other hand, the second group of actions, like deception, does not require prior intention.

d) The jurists accepted the same opinion about the tailor, the lender, the transport manager, the real estate agents (brokers). That is, if these persons give someone else money to another, they must be compensated, even if they are ignorant, the owner of the property is someone else.

According to the above-mentioned points, the second view appears more preferred. This view is more consistent with the principle stating that "He who has been deceived shall have a right of recovery upon deceiver". This saying starts with the word "deceiver" in its original Arabic phrase and it is quite clear that emphasis is put on the one who is deceived (i.e., one needs to be deceived to be entitled to refer to the deceiver). It has nothing to do with the act of deceiver or how and under what conditions it must be performed; in addition, it is not important whether the deceiver has knowledge of the fact or not.

Today, the necessity to compensate for all damages is not commonly measured by the standard of punishment for wrong actions. The scope of liabilities based on fault and regardless of fault is so wide today that nobody cares about the spiritual aspect of one's behavior (intention) to consider the offender legally responsible for his/her act.

The morality of civil liability system is increasingly reduced, and the necessity to compensate for the damages of the victims is more emphasized. There is no specific rule in

this regard in Iran's law; therefore, it is required to set some precise rules and establish a particular system to compensate for such damages.

Conclusion

Transfer of infection to an individual through infectious body products may occur in two ways. In this respect, if it occurs directly, the conductor shall be liable by the principle of *Itlaf*, even if he/she has no fault. If a nurse has not committed a fault, he/she can be freed from liability by the principle of benefaction. If *Itlaf* occurs indirectly, such people shall be liable by the principle of *Tasbeeb* (causation) if they have committed some faults. However, if the causing agents involved in the transfer of infectious body products are not proved to be faulty, this principle can be no longer relied upon. The principle of 'no harm' is not applicable either as it is not effective to prove liability.

The principle of *Ghorur* (deception) can be good to prove liability in this respect as some Islamic jurists believe that deception has nothing to do with the knowledge of the deceiver. This view is stronger than the opposite view, which limits the proof of liability to the knowledge of the deceiver, and it is based on the meaning and uses of the term *Ghorur* by philologists and the proofs and evidence that support the former view. When the causing agent of a harm cannot be held liable by the principle of *Tasbeeb* for committing a the fault, the principle of *Ghorur* can be used to hold him/her responsible, provided that he/she has deceived others.

Conflict of interest

The author declares no conflict of interest.

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No

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