

In kind compensation for bodily injury

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Abstract:

Compensation for bodily injury was made in the form of monetary amounts covering the costs of treatment, in order to restore the condition of the injured body to what it was before the injury, even roughly, knowing that in most cases the treatment cannot restore the injured body to the state it was in Before the occurrence of the damage, this article aims to explain how the medical development in the German judiciary has employed the judgment of compensation in kind for bodily harm by obliging the person who damaged the organ to provide it from his body or from other donors, otherwise he is sentenced to the expenses of installing artificial organs.

Keywords: *Body, damage, compensation.*

Indemnisation en nature pour préjudice corporel

Résumé :

L'indemnisation pour préjudice corporel a été versée sous forme de sommes d'argent couvrant les frais de traitement, afin de rétablir l'état du corps blessé tel qu'il était avant le préjudice, même approximativement, sachant que dans la plupart des cas, le traitement ne peut pas rétablir le corps blessé dans l'état où il se trouvait avant la survenance du préjudice. cet article vise à expliquer comment le développement médical dans le système judiciaire allemand a utilisé le jugement d'indemnisation en nature pour les dommages corporels en obligeant la personne qui a endommagé l'organe à le fournir à partir de son propre corps ou d'autres donneurs, sinon elle est condamnée à prendre en charge les frais d'installation d'organes artificiels.

Mots clés : Corps, dommage, indemnisation.

Introduction:

Compensating for physical harm no longer means just obligating the person who caused the harm to bear the costs of treatment—such as hospital stays and medication expenses—for the entire duration of medical care. Instead, compensation for physical harm has evolved to the point of being able to provide **in-kind material compensation**. Thanks to scientific and medical advancements and the invention of successful human organ transplant surgeries, it has become possible to restore the body to its pre-injury state by obligating the person responsible for the harm to provide the organ they damaged. The person responsible must provide the organ from their own body or from another person, and at their own expense. Often, a judgment is made to provide the organ at the expense of the person who caused the harm, whenever this is possible and permissible by religious and legal standards, by making them cover the costs of transplanting the organ they damaged¹.

The transfer and transplantation of human organs refer to moving healthy organs from completely healthy bodies into bodies where the organ to be transferred is diseased or damaged, so that it can take its place and perform its functions².

The rapid scientific development of human organ transplant operations has encouraged the German court to rule in favor of **in-kind compensation** to repair physical material damage. This

¹ Mahmoud Abdel Rahim El Deeb, *In-Kind Compensation for Reparation of Harm to the Injured Person (A Comparative Study)*, 1st ed., Dar Al Jami'a Al Jadida, 38-40 Souq Street, Azarita, Alexandria, Egypt, 2013, pp. 46-47.

² Mashkour Al Khalidiyyah, *The Civil Liability of a Doctor in the Field of Human Organ Transplantation*, A thesis submitted to obtain a Master's degree in Private Law, Contracts and Liability Specialization, Faculty of Law and Administrative Sciences, University of Algiers, 2001, p. 11.

is considered an application of general rules, provided it's possible and doesn't cause harm to the responsible party. Otherwise, a monetary compensation ruling is the alternative.

If in-kind material compensation for physical material damage is possible, this aligns with the idea of punishment if a punishment is ruled. However, this type of compensation differs from punishment in that these organs can be provided by someone other than the responsible party, at the latter's expense. This often happens whenever possible.

Consequently, what is the basis for **in-kind material compensation** for physical harm? And what are the conditions and forms of **in-kind material compensation** for physical harm?

The topic of **in-kind compensation** for physical harm is important because it can restore the injured person's body to its pre-assault state. It also serves as a strong deterrent for the offender when they're ordered to provide the organ they damaged from their own body. **In-kind material compensation** for physical harm aligns with the concept of **Qisas** (retaliation) and punishment. They agree on most conditions, but the goal of the former is to restore the body to its pre-harm state, while the goal of the latter is to deter through punishment.

Islamic jurisprudence has established in-kind compensation as a general principle. The basis for in-kind material compensation for physical harm, however, is derived from the concept of **Qisas** (retaliation), as the rules established by Muslim jurists for **Qisas** are in complete agreement with what legal scholars have decided regarding **in-kind compensation**¹. This type of compensation achieves justice and also clarifies the limits of waiving one's right to physical integrity through organ donation.

This topic was chosen for its importance and novelty in the field of conventional compensation methods. Before medicine

¹ Mahmoud Abdel Rahim El Deeb, Previous reference, pp. 48-49

advanced, compensation for physical harm was ruled in the form of a sum of money that covered the costs of treatment, hospital stays, and any harm or lost earnings suffered by the victim, without the possibility of restoring the body to its pre-injury state. This topic links compensation to medical advancements in the fields of human organ transplantation and the invention of artificial organs.

Using a comparative approach, this article clarifies **in-kind compensation** for physical harm as it appears in German jurisprudence. It also relies on descriptive and analytical methods to present the topic according to the following outline:

- **Chapter One: Conditions of In-Kind Compensation for Physical Harm**
- **Chapter Two: Forms of In-Kind Material Compensation for Physical Harm**

1. Conditions for In-Kind Compensation for Physical Harm

In-kind compensation for physical harm has both judicial and jurisprudential foundations. This type of compensation requires the fulfillment of general conditions according to the principles of civil liability, as well as specific conditions based on health law.

In-kind material compensation for physical harm is contingent on a set of conditions, including the elements of civil liability, especially that the fault must be intentional. The injured party must also demand this specific form of compensation from the party who caused the harm, and this type of compensation must be feasible.

1.1. Proving the Elements of Personal Responsibility

Full **in-kind material compensation** for harm is based on a liability that requires proof of fault. Therefore, anyone seeking

this type of compensation must prove the intentional fault, the physical harm, and the causal link between them.

1.1.1. Proving Intentional Fault

This type of compensation is based on **intentional fault** that must be proven. The harmful act committed by the responsible party must be intentional because it is one of the most serious forms of compensation in terms of enforcement. Its subject is the body of the responsible person or another donor and the recipient's body. Additionally, it combines compensation with punishment, so there is no room to demand this type of compensation for harm caused by mere negligence.

The provable fault is **tortious fault** (also known as a delict), which is a breach of a prior legal obligation. This obligation includes respecting the rights of all and not harming them. It is an obligation of due care and taking precautions and caution to avoid harming others¹.

Fault has also been defined as a person's deviation from the normal and usual behavior of an average person. This is an objective standard. A person is considered at fault if they exhibit behavior that contradicts the behavior of a normal person who is neither negligent nor overly cautious². Fault consists of two elements: a **material element** and a **moral element**. The material element refers to the breach and transgression, which is the violation of boundaries that must be respected in one's conduct³, through either a positive or negative action¹, and

¹ Raed Kazem Muhammad Al-Haddad, Compensation in Tort Liability, Al-Kufa Journal, College of Law and Political Science, University of Kufa, Iraq, Vol. 1, No. 8 (08), 2010, pp. 74-75.

² Khalid Mustafa Fahmy, Compensation for Victims of Terrorist Acts (A Comparative Study), 1st ed., Dar Al-Fikr Al-Jami'i, 30 Souq Street, Alexandria, Egypt, 2008, p. 87.

³ Raed Kazem Al-Haddad, Previous reference, pp. 74-75.

through an intentional or unintentional deviation. Intentionality is also measured based on the behavior of an average person under the same circumstances as the perpetrator, without relying on a personal analysis of the offender's character.

As for the **moral element**, for a person to be held liable for a harmful act, they must be aware that their action is harmful. This awareness is tied to age and mental capacity; a person who lacks discernment is not held liable for fault². It is important to note that the decisive factor for a person's state of discernment is the time the fault was committed.

This type of compensation requires the fault to be **intentional**. This categorizes the forms of fault based on the intention of the person who caused the harm. **Intentional fault** means the will of the person who caused the harm was directed toward intentionally causing the damage. Since things are defined by their opposites, unintentional fault (also known as a "quasi-delict") is a breach of a prior legal duty and a deviation from the care of a reasonable person, accompanied by awareness but without the intent to harm others³.

1.1.2. *Proving Physical Harm*

Anyone demanding **in-kind material compensation** for physical harm must prove that they have suffered a present, actual, or a certainly future physical and material harm. This harm must be a direct result of the harmful act they were subjected to, whether it was foreseen or not. The harm must also affect a personal interest of the injured party, which is the physical injury itself.

¹ Khalid Mustafa Fahmy, Previous reference, pp. 77-84.

² Raed Kazem Al-Haddad, Previous reference, p. 75.

³ Khalid Mustafa Fahmy, Previous reference, pp. 85-90.

Physical harm refers to an organic defect that leads to a reduction or complete loss of physical components¹. The scope of **in-kind material compensation** for physical harm is limited to non-fatal physical injuries².

The harm must be a **certainty of occurrence**, whether present or future, and not just a possibility. A future harm's causes are present, but its effects are delayed until the future. This means the harm has not yet occurred, but its occurrence is certain because the cause of the harm is established. However, all or some of its effects are delayed until the future. For example, in the case of an injury where doctors confirm that a damaged organ will lose its function in the future³, compensation cannot be granted for a harm for which there is no evidence to confirm its future occurrence⁴.

Future harm can take one of two forms:

1. **It can be a consequence of the original, present harm**, branching out from it as it develops over time. For example, if a person is injured in the eye, a judge can award compensation for that injury, while the eye's inability to see after the wound has healed is considered future harm. "Similarly, disfigure-

¹ Essam Ahmed El-Bahji, *Compensation for Damages Resulting from Applications of Genetic Engineering in Light of the Rules of Civil Liability*, 1st ed., Dar Al Jami'a Al Jadida, 38 Souq Street, Azarita, Alexandria, Egypt, 2006, p. 76.

² Hasiba Maamir, *Corrective and Punitive Compensation in the System of Civil Liability*, *Al-Haqiqa Journal*, Faculty of Law and Political Science, Ahmed Draia Adrar University, Vol. 16, No. 40, 2015, p. 519.

³ Belhadj Al-Arabi, *The General Theory of Obligation in Algerian Civil Law (The Legal Fact - The Illicit Act - Unjust Enrichment - The Law)*, Part Two, 6th ed., University Publications Office, Central Square, Ben Aknoun, Algeria, 2014, pp. 155-157.

⁴ Raed Kazem Al-Haddad, *Previous reference*, p. 77.

ments that the injured party suffers as a result of facial wounds are considered future harm"¹.

2. The harm may arise sometime after the injury due to complications, without any prior indication of future harm. In this case, the harm is unforeseen at the time the compensation is awarded. The solution is to reserve the right to reassess the compensation due to the exacerbation of the harm.

Direct harm is the damage that arises from a harmful act, where the occurrence of this act inevitably leads to and is sufficient to cause the harm². The harm requiring compensation must be a direct result of the harmful act. The directness of the harm is determined by establishing the causal link between the harmful act and the damage. If there are multiple causes, the directness of the harm is sought, which the legislator has described as the **natural consequence** of the harmful act in Article 182 of the Algerian Civil Code³. Harm is considered a natural consequence of the harmful act if the creditor could not have avoided it with a reasonable effort⁴. **Indirect harm**, on the other

¹ Essam Ahmed El-Bahji, Previous reference, p. 85.

² Nasser, Rania. Estimation of Compensation for Harm in Civil Liability. Master's thesis, Faculty of Law and Political Science, University of Oran 2 Mohamed Ben Ahmed, 2015, pp. 17-20.

³ Order 75-58, including the Civil Code, dated 20 Ramadan 1395 AH corresponding to September 26, 1975 (Official Gazette of the People's Democratic Republic of Algeria), No. 78, dated 24 Ramadan 1395 AH corresponding to September 30, 1975, p. 990, amended and supplemented by Law No. 07-05, including the Civil Code, dated 25 Rabi' al-Thani 1428 AH corresponding to May 13, 2007 AD (Official Gazette of the People's Democratic Republic of Algeria), No. 31, dated 25 Rabi' al-Thani 1428 AH corresponding to May 13, 2007 AD, p. 3, art. 182.

⁴ Al-Sarhan, Adnan Ibrahim, and Nouri Hamad Khater. Explanation of the Civil Code, Sources of Personal Rights ("Obligations") (A Comparative Study), 1st ed., Dar Al Thaqafa for Publishing and Distribution, Downtown,

hand, occurs as a result of the original act but is not directly connected to it. The original act is a necessary factor for the harm to occur but is not sufficient on its own, as other causes intervene¹.

The victim's health condition is taken into consideration to determine whether the harm was a **direct consequence** of the harmful act or if the harm was pre-existing. The French judiciary has established three possibilities:

1. If the injured party did not have a visible or specific disability or handicap, they are entitled to compensation for the full extent of the harm they suffered.
2. If the victim had a visible and specific disability or handicap, the person who caused the harm is only liable for the new harm they caused, which is in addition to the pre-existing disability.
3. If the injury causes an exacerbation of the pre-existing disability or handicap, the person who caused the harm is liable to compensate for all the harm. For example, if a person with one functional eye or who is blind in one eye is injured in their good eye, the person who caused the harm is responsible for compensating the full loss of sight, even though they only damaged one eye. Similarly, Islamic jurisprudence entitles them to the full blood money (**Diya**), not half of it².

In-kind material compensation for physical harm must cover both **foreseen and unforeseen harm** in the case of **tort liability**. However, in the case of **contractual liability**, compensation is only for foreseen harm. It can be inferred from Article 182,

near Al Hussein Mosque, Al Hujairi Building, Amman, Jordan, 2008, pp. 422-424.

¹ Nasser, Rania. Previous reference, pp. 20-21.

² Al-Sarhan, Adnan Ibrahim, and Nouri Hamad Khater. Previous reference, pp. 422-424.

paragraph 2, of the Algerian Civil Code¹ that compensation for foreseen harm applies to breaches of contractual liability, whereas the principle is that compensation covers both foreseen and unforeseen harm in tort liability. The issue of whether harm was foreseen is only raised in the context of contractual liability, not in tort liability, because in the latter, compensation is granted for both foreseen and unforeseen harm as long as its occurrence is certain. **Foreseen harm** is the damage that the contracting parties expected to occur if the contract was not performed at the time it was concluded, or that could have been expected based on known circumstances².

However, the issue of foreseen harm is not usually relevant in a medical context. For instance, if a patient contracts with a doctor for surgery and the doctor informs them that the procedure will result in the loss of function of an organ, the patient will undoubtedly not agree to the procedure. In the medical field, as soon as the contracting parties expect there to be foreseen harm, the hospital contract will not proceed. This is especially true since health law prohibits the removal of organs, tissues, or cells from a living person for transplantation if it poses a risk to the donor's life.

1.1.3. Proving the Causal Link

To obtain compensation, the injured party must prove the **causal link** between the harm and the perpetrator's behavior. This link establishes that the harm is a **natural and direct consequence** of the breach of legal duty and is an independent el-

¹ Order 75-58, including the Civil Code, amended and supplemented, art. 182.

² Filali, Ali. *Obligations: The Act Entitled to Compensation*, 3rd ed., Moufom Publishing, National Institute of Printing Arts, Reghaia Unit, Algiers, 2015, pp. 383-384.

ement from the other two¹. Logic and Article 124 of the Algerian Civil Code stipulate that "any act whatsoever committed by a person by his fault, causing harm to another, obliges the one who caused it to provide compensation"². Therefore, the harmful act must be linked to the harm as a cause is to its result, regardless of the type of liability (personal or objective) or whether it arises from a personal act, the act of others, or the act of things³.

The issue of **multiple causes** has sparked a debate between two theories:

1. **The "Equivalence of Conditions" theory (von Buri)**, which considers all causes.
2. **The "Adequate Cause" theory (von Kries)**, which posits that only the most effective cause should be considered and separated from secondary causes. A cause is considered effective if it is proven to have been sufficient to cause the harm⁴.

The burden of proving the causal link falls on the injured party in cases of civil liability based on provable fault.

The causal link can be indirectly negated by proving an **external cause**, through the means of breaking the causal link outlined in Article 127 of the Algerian Civil Code. This is done by proving that the harm arose from a cause for which the perpetrator had no hand in, such as a **sudden accident, force majeure**, or a **mistake committed by the victim or a third par-**

¹ Raed Kazem Muhammad Al-Haddad, Previous reference, pp. 78-79.

² Order 75-58, including the Civil Code, amended and supplemented, art. 124.

³ Adnan Ibrahim Al-Sarhan, Nouri Hamad Khater, Previous reference, p. 425.

⁴ Raed Kazem Muhammad Al-Haddad, Same reference, pp. 78-79.

ty¹. The causal link is a factual matter subject to the discretion of the trial judge without oversight from the Supreme Court².

1.2. The Injured Party's Demand for Full In-Kind Material Compensation

For a judge to grant **in-kind material compensation**, the injured party must demand it by filing a lawsuit with the competent court. The lawsuit must demonstrate the fulfillment of all conditions for full in-kind material compensation, especially the elements of civil liability. The judge is bound by the principle that they cannot award the plaintiff more than what was requested. Consequently, the judge's authority is not absolute, but they do have the power to determine the appropriate type of compensation for the physical harm.

2. Forms of In-Kind Material Compensation for Physical Harm

Based on Article 124 of the Algerian Civil Code³, **in-kind material compensation** for physical harm is permissible, as this article is absolute and does not specify the methods of compensation. When a person who caused harm is ordered to provide the damaged organ and cover the costs of its transplantation, this is considered **full in-kind material compensation** for physical harm. However, if they are ordered to cover the costs of artificial organs along with treatment expenses, this is considered **incomplete in-kind material compensation**.

¹ Order 75-58, including the Civil Code, amended and supplemented, art. 127.

² Khalid Mustafa Fahmy, Previous reference, p. 107.

³ Order 75-58, including the Civil Code, amended and supplemented, art. 124: "Any act whatsoever committed by a person by his fault, causing harm to another, obliges the one who caused it to provide compensation."

2.1. Full In-Kind Material Compensation for Physical Harm

In-kind compensation for physical harm is not a new concept; its origin can be found in the principle of **Qisas** (retaliation). German judges have ruled in favor of full in-kind compensation for physical harm, and European jurists have called for this type of compensation. Consequently, this form of compensation is based on both judicial and jurisprudential foundations.

2.1.1. The Jurisprudential and Judicial Basis for In-Kind Compensation for Physical Harm

In-kind compensation for physical harm has both judicial and jurisprudential foundations, each with its own legal basis, which will be explained in the following subsections.

A. The Judicial Basis for In-Kind Material Compensation for Physical Harm

German courts have ruled in favor of **in-kind material compensation** for physical harm by ordering the person who caused the harm to provide the organ they damaged from their own body. This has occurred in several cases. For example, a decision by the German Supreme Court states that "compensation is to be granted to the injured party by ordering the person who caused the harm to restore the situation to what it was before the harm occurred, in cases of deliberate assault on physical integrity, where it is medically possible, provided there is no real danger to the responsible party and the victim."

In another case, a German court ruled that a person who punched another person in the eye, causing a retinal tear, had to provide his retina for a successful transplant to the victim, as requested. The German judiciary also ruled in another case for the transplantation of a kidney from the offender to save the

victim who was deliberately beaten by the offender. "The judge was courageous to make such a ruling"¹.

B. The Jurisprudential Basis for In-Kind Material Compensation for Physical Harm

Jurists have raised the issue of the **compulsory removal of human organs** from the person who caused the harm to repair the damaged organ. This type of organ transfer has been called compulsory organ removal. For example, "Saint-Blancat" wrote about a case where a villain shot a police officer several times, damaging his kidneys to the point where he could only be saved through an organ transplant. He questioned whether the assailant should be forced to have his kidney removed and donated to save his victim. The author wondered why the law allows the execution of a criminal by guillotine, but defends against the removal of his kidney to save his victim.

French law, specifically Law No. 614/54 of April 14, 1945, allowed for the imprisonment of young people from certain groups who failed to perform compulsory service to obtain their blood. The state of the army and public health justified this measure. This concept could extend to an obligation for blood donation for those who fail to assist a person in danger. German jurist **Karl Engisch** supported this view, stating that the blood donor's consent is not a matter of debate if the recipient's life is in danger and there is a close relationship between the donor and the recipient who opposes the donation.

However, the jurist **P.J. Dole** argued that a perpetrator of a harmful act can never be forced to compensate for their fault by undergoing surgery, but he did not elaborate on his viewpoint².

¹ Mahmoud Abdel Rahim El Deeb, Previous reference, pp. 46-48.

² Mashkour Khalida, Previous reference, pp. 33-34.

Since Article 124 of the Algerian Civil Code is absolute and doesn't specify the method of compensation, and there is no text that prohibits **in-kind material compensation** for physical harm, and because health law permits and regulates organ transplantation, it is permissible to rule in favor of **in-kind material compensation** for physical harm within the framework of legislation on human organ transplantation. This would be done by obligating the person who caused the physical harm to provide the damaged organ from their own body or from another person.

In-kind material compensation for physical harm combines punishment with compensation. It serves as a means of repairing the harm and punishing the offender whose intentional fault in damaging the victim's organ has been proven. This type of compensation is also not in conflict with the rules of Islamic Sharia, which allows for **Qisas** (retaliation) for injuries, a principle known as **al-Qawd**.

The only obstacle to this type of compensation is the Penal Code, which states in its first article that "there shall be no crime, punishment, or security measure without a law"¹. Since **in-kind material compensation** for physical harm has a punitive nature, and there is no provision in the Penal Code that obliges a person who damages an organ to provide one from their own body as a form of punishment or **Qisas**, this type of compensation cannot be applied in Algeria due to the difficulty

¹ Order 66-156, dated 18 Safar 1386 AH corresponding to June 8, 1966, containing the Penal Code (Official Gazette of the People's Democratic Republic of Algeria), No. 49, dated 21 Safar 1386 AH corresponding to June 11, 1966, pp. 702-753, amended and supplemented by Law 15-19, dated 18 Rabi' al-Awwal 1437 AH corresponding to December 30, 2015 (Official Gazette of the People's Democratic Republic of Algeria), No. 71, dated 18 Rabi' al-Awwal 1437 AH corresponding to December 30, 2015, art. 1.

of its implementation, especially since the death penalty is not carried out in Algeria. In contrast, German courts do rule in favor of this type of compensation.

The first resolution on organ transplantation was issued on January 28, 1985, by the Council of the Islamic Jurisprudence Assembly of the Muslim World League. It based its position on evidence from the Quran and the Sunnah, stating that taking an organ from a living human body and transplanting it into another person who needs it to save their life or restore a basic organ function is a permissible and legitimate act that does not conflict with human dignity for the donor and serves the interest of the recipient.

Jurists have categorized human organ transplantation as a **state of necessity**, which is a harmful situation that can only be resolved by committing a less severe "crime." It is the point where a person, if they don't forfeit something forbidden, will perish or be near death. Organ transplantation is considered a **state of necessity**, which is closer to a legal defense than to an impediment to liability. It requires the doctor to balance the risk of death facing the patient with the physical integrity of the donor, represented by the loss of the organ's function, to save a life on the brink of death.

This type of procedure, authorized by health law, requires the patient's consent and must be for the purpose of treatment while adhering to medical rules. The law has established strict conditions for organ transplantation in Chapter Four of Part Seven, titled **Bioethics**¹.

¹ Qassouri, Fahima, "The State of Necessity in Human Organ Transplantation: A Comparative Study Between Sharia and the New Algerian Health Law," Journal of Studies and Research, The Arab Journal of Humanities and Social Sciences, Department of Law, Faculty of Law and Political Science,

2.2. The Method of In-Kind Compensation for Physical Harm

There are organs that can be transplanted according to the legal provisions of health law.

A. Transplantable Organs and Cells

Ordering the person who caused the harm to provide the damaged organ to the victim is considered **full in-kind compensation** because this type of compensation can completely erase the harm and restore the body to its pre-harm state. Medically, it is known that not all human organs are transplantable, only specific ones based on current medical advancements. These include: human organs, tissues, or cells, and human bodily products.

1. Human Tissues or Cells

Only dual organs can be transferred from a living person to another living person. However, for a deceased person, all suitable and transplantable organs can be transferred. The conditions are as follows:

1-1. Dual Organs Transferred from Living or Deceased Persons: These include the retina, kidneys, cornea, lungs, and tissues. Tissues are defined as: skin, blood vessels, bone tissues, and any other organ, part of an organ, or any tissue that may be transferable in the future according to scientific progress, with the approval of the Supreme Committee for Human Organs.

1-2. Single Organs Transferred from Deceased Persons Only: These include the liver, heart, pancreas, small intestine, and heart valves.

2. Human Bodily Products

It is scientifically agreed that it is permissible to dispose of human body parts that regenerate periodically, as their loss does not cause harm to the body. Even if harm occurs, it is only temporary. The best example of a regenerating and transferable part of the human body is **blood**¹. In this regard, the German jurist **Karl Engisch** stated, "One can imagine an obligation to donate blood for someone who neglected to assist a person in danger, and the consent of the blood donor is no longer a matter of debate if the recipient's life is in danger and there is a close relationship between them and the donor who opposes the removal"².

The Health Law clarifies the ethical aspects related to the rights of blood donors, under Articles 368 and 369. A blood donation procedure must be preceded by a medical consultation with the donor, during which medical rules are observed, and the donor must be informed before and during the blood removal. The blood donor must be at least 18 years old and no more than 65 years old ³. The National Blood Agency supervises the screening of the collected blood to ensure the absence of disease-causing or infectious agents⁴.

B. Conditions for Human Organ Donation

The conditions for transferring human organs from a living or deceased person are outlined below, along with a discussion on the matter of a person who caused harm providing an organ from their own body.

¹ Abu Al-Hasan Mujahid, Osama, Previous reference, pp. 8-9 and 24.

² Mashkour Khalida, Previous reference, pp. 33-34.

³ Law No. 18-11 related to Health, Arts. 368 and 369.

⁴ Law No. 18-11, Arts. 258-264.

1. Conditions for a Person Who Caused Harm to Provide an Organ from a Living Person

To transfer and transplant human organs from a living person's body to another person's body, a set of conditions stipulated in health law must be met.

- **Medical Feasibility:** The compensation must be medically possible. This requires conducting all necessary tests on both parties to ensure the success of the operation. For a living person, only **dual organs** can be donated. **Single organs** cannot be donated as doing so would compromise the donor's life, even if the donor is the person who caused the harm, unless a death sentence has been ruled.

- **Informed Consent:** The organ transfer must be preceded by the **informed consent** of the donor, expressed according to specific procedures and conditions outlined in health law. This includes the donor having full legal capacity and expressing their consent before the head of the territorially competent court. The donor can withdraw their consent at any time without incurring any liability.

- **Grave Danger to Recipient:** The patient must be in grave danger that threatens their life. Article 364 of the Algerian Health Law states, "The transplantation of human organs, tissues, or cells can only be performed if it represents the only means to preserve the recipient's life or physical integrity..."¹. Conversely, this means that an organ cannot be transferred if the recipient's life is not in danger. A person may lose an organ without their life being at risk, and in such cases, an organ cannot be transferred to them from a living person. The interest

¹ Law No. 18-11, dated 18 Shawwal 1439 AH corresponding to July 2, 2018, related to health (Official Gazette of the People's Democratic Republic of Algeria), No. 46, dated 16 Dhul-Qa'dah 1439 AH corresponding to July 29, 2018. Arts. 357, 360-364.

must be serious and overriding, and there must be a state of urgency requiring surgical intervention for organ transplantation¹.

• **Donation from Relatives:** Originally, organ transfers were limited to relatives to prevent lineage confusion. However, there is an exception for **cross-donation**, which is a donation between two non-related individuals who do not know each other. The identity of the donor is not revealed to the recipient².

A physician supervising the organ transplant must inform the recipient of the dangers of not receiving the organ and the risks of the operation itself. Similarly, the donor must be informed of all complications resulting from the absence of the organ, the precautions to mitigate them, and the impact of the operation on their professional and family life³.

The person responsible for the harm must bear the costs of the organ transplantation⁴.

The provision of the organ must be a **donation**. Article 358 of the Algerian Health Law stipulates that "the removal and transplantation of human organs, tissues, and cells cannot be the subject of a financial transaction"⁵, because the human body is not a commodity to be bought and sold⁶.

¹ Qassouri, Fahima, Previous reference, pp. 252-254.

² Law No. 18-11 related to Health, Arts. 360, 363.

³ Hawsh, Houda, Previous reference, pp. 144-145 and 151.

⁴ Mahmoud Abdel Rahim El Deeb, Previous reference, pp. 47-49.

⁵ Law No. 18-11 related to Health, art. 358.

⁶ Hawsh, Houda, Previous reference, pp. 148-148.

2. Conditions for a Person Who Caused Harm to Provide an Organ from a Deceased Person

- The purpose of the organ transplant must be to save the recipient's life, treat a serious illness, or compensate for a vital deficiency in their body.

- The deceased must have given their consent before death, not while in a state of terminal illness¹.

- The death of the donor must be medically and legally certified² according to scientific standards set by the Minister of Health. The German jurist **Karl Engisch** believed that a person who damaged an organ could be ordered to provide one from their own body instead of being sentenced to death.

- **Priority rules** must be observed. According to Article 365 of the Health Law, "the organs that have been removed are granted only to patients registered on the national waiting list maintained by the National Organ Transplantation Agency." The Ministry of Health, in collaboration with this agency, also determines the rules for granting organs and tissues from deceased donors based on the principle of equity³.

¹ Law No. 18-11 related to Health, art. 362.

² Mashkour Khalida, Previous reference, pp. 75-77: "Death does not occur at once but is a continuous process across all vital organs in the human body, including the circulatory system with the heart, the respiratory system, the brain, and all tissues and organs. It only becomes certain after confirming its definitive and irreversible nature. There are various types of death, including clinical death, apparent death, and tissue death. The conclusive criterion is tissue death, which is the final death. The task of confirming death is assigned by law to the specialized physician, in accordance with the medical standards set by the committee, with the possibility of modifying these standards based on new scientific research and modern equipment."

³ Law No. 18-11 related to Health, art. 365.

3. Providing the Damaged Organ from the Perpetrator's Own Body

In Algerian law, there is no specific legal text addressing this issue. However, the person who caused the harm can, of their own free will, propose to the court that they donate an organ to the victim to replace the one they damaged. If all legal conditions are met, the judge may approve this solution as a settlement, but it is not an obligation for the person who caused the harm.

2.3. Incomplete In-Kind Material Compensation for Physical Harm

When full **in-kind material compensation** is impossible due to the failure of the previously mentioned conditions—for example, if an organ cannot be transplanted, like in the case of a broken bone or an eye that has been gouged out—the judge may order the liable party to cover the costs of installing **prosthetic limbs**. This is considered **incomplete in-kind material compensation** because it does not fully repair the harm suffered by the injured party. Several forms of incomplete in-kind material compensation for physical harm have emerged, which are explained in the following two subsections.

2.3.1. *Bearing the Costs of Installing Prosthetic Limbs*

When full in-kind compensation is not possible, a judge can order the person who caused the harm to bear the costs of installing prosthetic limbs. This is considered an incomplete form of in-kind compensation for physical harm because prosthetic limbs, even high-tech robotic ones, are limited in their ability to perform the original function naturally. This difficulty can be overcome by allowing a combination of a surgical procedure to reduce permanent disability (considered in-kind compensation

for future harm) and a monetary award to the victim (as monetary compensation)¹.

Incomplete in-kind material compensation also includes compensation for all financial consequences of the physical injury, such as the costs of treatment, rehabilitation, doctors' fees, hospital stays, medication, surgical procedures, lab tests, and the cost of prosthetic limbs.

2.3.2. Bearing the Costs of Therapeutic Services

The use of compensation in France has evolved, especially in cases of severe disability. A judge may order the person who caused the harm to purchase a specialized vehicle for disabled individuals or a home equipped with elevators and rooms tailored to the patient's condition. The person who caused the harm may also be ordered to cover the costs of a caregiver or a stay in a rehabilitation center until the patient recovers. If necessary, the person who caused the harm can be ordered to bear the costs of the patient's treatment for the rest of their life.

Providing material compensation for physical harm complements compensation for non-material damages resulting from the physical injury, such as physical pain, aesthetic damage, and the loss of life's pleasures².

Another form of full **in-kind material compensation** is ordering the person who caused sexual harm, leading to the victim's infertility, to cover the costs of medically assisted procreation. Health law outlines the rules for this type of treatment in articles 370 to 376. Medically assisted procreation is a medical activity that enables reproduction outside the natural process in cases of medically confirmed infertility. It includes clinical, bio-

¹ Mahmoud Abdel Rahim El Deeb, Previous reference, pp. 49-50.

² Adnan Ibrahim Al-Sarhan, Nouri Hamad Khater, Previous reference, pp. 403-410.

logical, and therapeutic practices that stimulate ovulation, in-vitro fertilization, embryo transfer, and artificial insemination.

This assistance is provided upon a written request from a living man and woman of reproductive age who are legally married and suffering from medically confirmed infertility. They must consent to the transfer or artificial insemination using only the husband's sperm and the wife's egg¹.

Conclusion

With current medical advancements, a person who loses an organ is no longer limited to medication alone. They can now seek a living or deceased donor to provide an organ. By linking this medical progress in repairing the human body with civil liability, it becomes possible for a judge to order a person who caused harm, resulting in the loss of an organ, to restore the victim's body to its pre-injury state. This is done by obliging the responsible party to provide the damaged organ, either from themselves or another donor, in addition to bearing the costs of the surgery and treatment. German judges have made such rulings in several cases. Therefore, **in-kind material compensation** for physical harm is permissible based on current medical advancements in organ and embryo transplantation and cosmetic surgery.

When the elements of civil liability are established against the person who caused physical harm, and the conditions for **in-kind material compensation** are met—especially that the organ transplant operation is without risk—a judge can award

¹ Law No. 18-11 related to Health, Arts. 373-375, 440, and 441.

the injured party **in-kind material compensation** for the physical harm.

The conclusion is that ordering the transplantation of the damaged organ is considered **full in-kind material compensation**. If this type of compensation is not possible, the person who caused the harm is ordered to cover the costs of treatment and prosthetic limbs, which is considered **incomplete in-kind compensation**.

Based on the above, the following recommendations are proposed: to expand the use of in-kind compensation for physical harm by leveraging medical progress to repair physical harm and order the necessary treatment to restore the victim's body to its pre-harm state. This type of compensation should also be granted by a criminal judge when they rule on a civil lawsuit as a subsidiary to a public lawsuit, because **in-kind material compensation** for physical harm combines both damage repair and punishment, as evidenced by the requirement that the fault be intentional.

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