

Medical act regulations (a study in Islamic jurisprudence and man-made laws)

ضوابط ممارسة العمل الطبي (دراسة في الفقه الإسلامي والقوانين الوضعية)

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Abstract:

Man being the end of all social order, his protection in his bodily integrity has been in the center of laws' interest. Consequently, with the development of medicine, the notion of the legitimacy of the medical act, considered as a type of violation of the human body and the right to life, has been debated by the juridical literature. Through this study, an essential conclusion has emerged: The medical act remains one of the essential tasks that are incumbent on the physician, and for what, number of regulations and conditions were put in place by laws, and supported by the jurisprudence and the judicial power, so that a medical act is legitimate. And since the fundamental aim of the medical profession is to achieve healing, medical science seeks to find the appropriate means of treating and combating disease, the physician must have no other concern than to ensure a legitimate interest.

Keywords: Medical act; medical profession; legitimacy; treatment; respect for scientific principles.

ملخص:

الإنسان هو غاية التنظيم الاجتماعي، لذلك كانت حمايته في كيانه المادي أمراً أساسياً تدور حوله نصوص القوانين جمعاء، ومع تطور التقدم الحاصل في الميدان الطبي أثبتت مسألة مشروعية العمل الطبي على اعتبار أن المسألة تتعلق بجسم الإنسان مع ما قد يترتب عن الأمر من المساس بحق الإنسان في الحياة، بحيث تم التوصل إلى نتائج مهمة من خلال دراسة جوانب هذا الموضوع تتمثل في أن العمل الطبي يبقى

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من المهام الضرورية التي تقع على عاتق الطبيب لذلك تم وضع ضوابط وشروط خاصة تبيح التدخل الطبي، وهي الشروط التي حددها القانون واتفق الفقه والقضاء على لزوميتها لاكتمال عناصر المشروعية. فمهنة الطب وجدت أساسا لتحقيق غاية العلاج ويبحث علم الطب في إيجاد الطرق الملائمة للعلاج ومحاربة الأمراض حيث يجب أن يكون الباعث على عمل الطبيب هو رعاية مصلحة مشروعة. كلمات مفتاحية: العمل الطبي؛ مهنة الطب؛ المشروعية؛ العلاج؛ مراعاة الأصول العلمية.

JEL Classification Codes: I 14, I 15.

1. Introduction:

Since Antiquity, and through his practices, man has dealt with nature, and has faced its dangers. Consequently, medicine has become one of the oldest professions ever known to human civilization, although at the time, a primitive profession¹.

However, the medical profession has continued to develop gradually. First, by being restricted to certain people without others, second, by organizing it in line with the nobility of this profession, and then through the emergence of medical unions, and the promulgation of regulations and laws that clearly determine the duties of people affiliated with these unions. This is why various constitutions around the world, including the Algerian Constitution², as well as treaties and charters, have stipulated the man's right to life and bodily integrity as two fundamental rights.

Every science or work has its own means without which, it is neither valid nor can be achieved in the ground. The more accurate and complex knowledge or work is, the more accurate and effective are means of achieving it. Medicine, as one of the experimental sciences, has its own means that distinguish it at every stage, starting with examination and diagnosis, and ending with treatment, whether normal or surgical practically³. In practice, these are the medical professions or specialties, as well as the tools and equipment necessary for their accomplishment known in the medical field. Moreover, the latter owes its development and prosperity to the development of these devices and these specialties.

Islam also defined these means that can be deduced from the collection of the prophetic sayings (Hadiths) mentioned in the chapter of medicine or cure. Among them, the saying of prophet Muhammed narrated by Ibn Abbas: "Healing is in three things: A gulp of honey, cupping, and branding with fire (cauterizing); nevertheless, I forbid my followers to use (cauterization) branding with fire"⁴.

Also narrated Aisha, she said that she heard the Prophet Muhammed saying: "This black seed is healing from all diseases except (As- Sam). Aisha said: What is As-Sam? He said: death"⁵.

This study explores the rules of medical practice to be known in terms of knowledge of its principles, provisions, and utmost importance. What is meant by medical act? How can legitimacy of the medical practice be fulfilled in Islamic jurisprudence and man-made laws? This study addresses those questions within an analytical approach, commensurate with the nature of the topic, in a context that includes a scrutinizing of the basis of the legitimacy of medical act in Islamic jurisprudence (the first chapter), and the basis of the legality of medical act in man-made laws (the second chapter).

2. The basis of the legitimacy of medical work in Islamic jurisprudence:

Medicine is a noble profession that affects communities, as it protects the Muslim from harm, fulfills brotherhood and applies the principle of mercy. Learning medicine is a sufficient duty, so there must be someone from the Muslim community who performs this duty⁶. Therefore, it is imperative for the Muslim doctor to learn the Shari'a (Islamic law) rulings, and the established manners related to his work.

2.1 Definition of the medical act:

It is agreed upon among the scholars of Shari'a that medicine is a sufficient duty. i.e., a legal obligation that must be discharged by the Muslim community as a whole, such as funeral prayer; unless enough members in the Muslim community discharge the obligation, the remaining Muslims will be then, freed from the responsibility before God. This is a response to the needs of community in terms of care, and a social necessity⁷. However, medicine is a sufficient duty ~~where~~ there is

more than one doctor in the same place. On the otherhand, if there is only one doctor in a given place, this doctor is then bound to exercise the functions, which are proper to him.

In other words, the exercise of the profession of doctor becomes an absolute duty of which he cannot be discharged.

2.1.1 The concept of medical act:

In Arabic, when we use the verb *tabba*, we typically refer to the action of providing cure to a patient. It is the concept of medical practice which means healing the body and the soul. As for the concept of medicine from the conventional point of view, scholars have defined it in various definitions, all of which revolve around close meanings:

- Al-Ezz Ibn Abd al-Salam stated in *Quaa'ed al-ahkaam fi masaaleh al-anaam* (The principles of rulings on people's affairs): "Medicine is like *Shari'a*; it is instituted to bring the benefits of safety and well-being, and ward off the harm of malfunctions and ailments. The purpose of medicine is to preserve health, when present and to restore it when lost, to eliminate the illness, or to reduce it as much as possible. To reach that, it is sometimes necessary to bear the slighter of the two evils, to remove the greatest one, and miss the lower of the two interests in order to achieve the greatest one".

- Ibn Sina, (Avicenna) also defined medicine as "*...The science by which we learn the various states of the human body, in health, when not in health, the mean by which health is likely to be lost, and when lost, is likely to be restored to health*"⁸.

- Ibn Khaldun also defines medicine as, "a craft that looks into human body as it ails and as it becomes healthy, and its practitioner tries to protect health and cures and prevents disease, with the help of drugs and food, after determining all of the disease that affects each member of the body, and the causes of these diseases that result from it, as well as the drugs indicated for each disease. Establishing that by inference to the medical preparations, and to the effects on the disease, the signs indicating its maturity, and the acceptance of the drug by the illness; first in the natural state, then in the excrement and the pulse, in close proximity to the force of nature, which remains the mastermind in

case of strength, as in case of illness". He also says: "Doctors collaborate with nature and help it along. For it is nature which is the 'organizer' of state of health or disease⁹.

Thus, the concept of medicine in the terminology of scholars and doctors has a close meaning. And this is nothing more than an attempt to identify what the human body is facing in terms of health and disease, and an attempt to Try to cure this disease and treat the body with the appropriate medicine. Therefore, some scholars have described it as being the science and the art of treating and preventing disease.

2.1.2 Religious provision for medical act:

Muslim scholars have agreed that learning the medical profession is a sufficient duty (Fardh Kifayah) i.e., an obligation that must be discharged by the Muslim community as a whole, unless a group of them does it, because treatment or healing diseases is not a duty according to most of Muslim scholars and Imams of the different doctrines. (Ima:am/n, a Muslim priest or someone who studies Muslim law). It is rather, in the circle of the permissible (al-mouba-h)¹⁰, but they differed on which is the best, medication or patience? as stated in the hadith of Ibn Abbas in the Sahih about the slave maid who was suffering from Epilepsy and who asked the Prophet to pray for her. He said to her: If you like, you can be patient, and have Jannah (paradise), and if you like, I pray to Allah to heal you. She said: Rather be patient. But I get bare! pray to Allah for me, not to get bare. And so, he did.

2.2 conditions of permissibility of the medical act:

The Muslim scholars have set several conditions for the permissibility of medical act, we mention them as follows:

1 – The physician must be scientifically and practically, qualified and competent in his field¹¹. The four imams (Ima:am/ n, a Muslim priest or someone who studies Muslim law), agreed on the obligation of insurance for those who practice medicine without authorization (that is to say without authorization to practice the profession). A physician who ignores the principles of the medical profession is not permitted to treat patients. He is therefore prohibited from exercising because he could harm or even kill his supposed patients. Any unauthorized practice of

medicine, would be considered as a violation of (Shari'a). Moreover, by his alleged knowledge of medicine, he is deceiving the patient, and he is thus declared guarantor of his acts, forbidden and legally prohibited from practicing medicine¹².

2. His intention has to be treating and curing the patient with good faith, and not to harm him. That is, the doctor's work should be motivated by treating the patient, and in general, taking care of a legitimate interest. It is assumed that the doctor, upon starting the medical profession, has good intentions, and that his work is intended to benefit the patient. He should not therefore, perform actions intended to kill the patient, damage one of his organs, increase illness, or make a scientific discovery on him, without intending to treat him. If he deviates from that, he would be responsible for all the damage he could cause to the patient¹³.

3- To work according to the technical principles of the medical profession. That is, his work should be as determined by the principles of the profession, and in accordance with the rules followed by the medical professionals. And if the doctor makes a mistake in his work, he will not be asked about this mistake, unless it is an outrageous one, which is not approved neither by the fundamentals of the art of medicine nor by scientists¹⁴. And the guarantee due to his mistake according to the majority of jurists is as follows: if the amount of compensation is less than one-third of the blood money (diyah), it would be then, from the doctor's money. If it is a third or more, it must be paid by the league of physicians. And if the doctor does not belong to a league, the amount will be then, from the treasury (which corresponds to the insurance and the Doctors Syndicate at the present time)¹⁵.

4- To obtain the permission of the patient or someone acting on his behalf, and there is no doubt that the one who decides whether or not to accept medication and treatment is the patient himself, or his guardian, if he is deficient or unconscious. Only urgent cases are excluded from the need to obtain the permission of the patient or his guardian, for they require rapid medical or surgical intervention to save their lives, since it is not possible to obtain the permission of the patient for losing

consciousness, and the absence of his guardian.

3. The medical act's legitimacy in man-made laws:

The concept of the medical act has aroused the interest of a number of scholars and physicians who have addressed the issue in different respects: human, moral, or legal. Naturally, this was not without generating a great deal of divergence between these actors, essentially due to the difference in the viewpoints adopted by each¹⁶. since each angle tried to expand, to include this concept within its scope, and subject it to the influence of its characteristics. This is what led us to seek what was meant by medical act, by approaching it from the jurisprudential, judicial and legal points of view, with an explanation of the conditions of its practice.

3.1 Definition of medical act:

Determining the meaning of medical act is a complex matter due to the ambiguity that surrounds it, and the intermingling with other acts. It was therefore necessary to find a standard drawn from the opinions of case law, judicial decisions or legal texts, through which the nature of medical act is determined¹⁷.

3.1.1 jurisprudential definition of the concept of medical act:

Jurisprudential opinions differ as to the definition of medical act, and from the analysis of these various points of view, it is clear to us that there are two notions of medical act. One with a narrow meaning, and the other with a rather broad meaning.

1st The narrow concept of medical act: Proponents of this trend have focused the concept of medical act on the treatment stage, as it is the activity that a specialized person undertakes to treat others, in accordance with established medical rules and principles of medical science. Medical act, regardless of whoever does it, cannot go beyond the fact that it is nothing but a necessity for the art of treatment¹⁸.

Much criticism has been leveled against this trend, for not encompassing all stages of the medical act, and limiting them only to the stage of treatment. Another trend which has broadened the concept of medical act has emerged.

2nd. The broad concept of medical act: Proponents of this trend have

broadened the concept of a medical act to annex all stages of medical intervention, including examination, diagnosis and treatment. Some of them have defined it as: "An aspect of knowledge that relates to the theme of healing, relieving disease and protecting people from illness"¹⁹.

As for the Egyptian jurisprudence's attempts to define medical act, some have maintained that the medical act is an activity that is consistent in the manner and conditions of its conduct, with the rules established in the science of medicine, and aims in itself, that is to say according to the normal course of things, to heal the patient, the principle of the medical act being the healing. That is, it aims to get rid of the disease, or alleviate its severity, or simply alleviate its pain. But it is also considered as a medical activity, all that aims to reveal the causes of poor health or just prevent disease²⁰.

3.1.2 The legal definition of the concept of a medical act:

Reduced initially, to diagnosis and medical treatment, the definition of the concept of medical act has extended to prevention and control, similarly with what it has known in case law circles, and has also been defined, gradually, in legal circles, and has logically developed and extended according to the rhythm of the evolutions that the medical act has known in terms of form and manifestation, in most countries. In France, for example, the Court of Cassation in its definition of the medical act, did not go beyond the therapeutic aspect, at first; and by virtue of which, it ruled that any person who provides care to a patient, without authorization, is in a state of illegal exercise of the medical profession²¹. However, it wasn't long before the concept of a medical act changed to include diagnosis. This appears clearly, in the judgments handed down by the Court of Cassation, which consider as unlawful practitioner of the profession of doctor, any person who establishes the diagnosis of diseases without authorization²².

3.3.3 Legislative definition of the concept of the medical act:

We will deal with the concept of medical act in the French, Egyptian and Algerian legislation.

First: The concept of the medical act in French legislation

The concept of the medical act in French legislation has

significantly evolved. The Law of November 30, 1982 restricted the scope of medical act to treatment only, and the situation remained that way until the Public Health Law came on September 24, 1945 CE, which made examination and diagnosis a kind of medical act. Then came the decision of the French Minister of Health on January 6, 1962²³ to divide the medical act into three categories:

1. Actions that can only be performed by a doctor (such as surgery).
2. The work performed by medically qualified assistants, under the responsibility and supervision of the doctor (such as treatment with light, heat, or radiation).
3. The actions performed by the physician's assistant, by order of the physician, such as intramuscular injections or simple massages. As for the Medical Ethics Act issued under Decree No. 95-1000²⁴, it affirmed that medical act includes diagnosis, treatment and prevention²⁵.

Second: The concept of the medical act in the Egyptian law

The Egyptian legislator did not explicitly define the medical act, even if the latter is implicitly indicated in the text on the conditions for the exercise of medical act. Article 1 of the medical profession practicing law No. 415 of 1954 stipulated that “only Egyptian nationals and nationals from countries with reciprocal treatment in which Egyptians are allowed by law to practice medicine, and those registered in the records of the Ministry of Health and the national physicians’ union, are allowed to practice medicine, including areas of diagnosis, advice, treatment, sampling and testing, surgery, obstetrics and prescribing medication”²⁶.

Third: The notion of the medical act in the Algerian legislation

Like many legislators, the Algerian legislator has not addressed a specific and independent definition of the medical act, even though its concepts emerge in legal texts related to the health and social sphere²⁷, as is the case in the Algerian health law, where we can find texts providing evidence of the medical act. Article 3 for instance, states, “in the field of health, objectives are to protect the health of citizens through equal access to treatment and to ensure continuity of public service for health and health security. Health activities are based on the principles of sequencing and

integrating prevention and treatment activities and re-adaptation of various health structures and institutions”²⁸.

Article 174 of the same law also outlined the main lines of the tasks of health professionals: “Health professionals who are qualified medical practitioners to carry out their duties and within the limits of their competence exclusively, can prescribe diagnostic, treatment, exploration and pharmaceutical materials and they must ensure that good prescribing practices are respected”²⁹. The Algerian Medical Ethics Code³⁰, states “the doctor’s mission is to defend health and alleviate pain”³¹, which can only be “accomplished through medical act”. It also indicated, “the scope of the physician’s specialization or qualification is in all diagnostic, prevention, and treatment activities”³².

In order to accurately determine the tasks assigned to the medical personnel, within the frame work of their employment as public employees, the basic laws related to them came to detail their tasks and professional duties which by performing them, they deserve their salary, and expose themselves to legal accountability, by refraining from them³³.

On the level of social protection, the law stipulates a range of medical acts that are covered by sickness insurance in-kind payments and which are paid by social security funds. These medical acts are: diagnosis and treatment, including biological examinations, organs’ functional and professional rehabilitation³⁴.

3.2 Conditions for exercising medical act:

Most of the legislations set conditions and restrictions to control and regulate the field of health, and so does jurisprudence and comparative justice³⁵.

3.2.1 Legal authorization to practice the medical profession:

Laws and legislations governing the medical profession do not allow in many cases, the use of certain rights which affect the life of individuals, their bodily integrity, their health or interests, with the exception of those who meet the specific conditions and possess the well-defined characteristics, required in many countries, by the legislator³⁶.

One of these rights is the right to exercise the profession of doctor, and as the work of doctors of all specialties is carried out on the human body, the legislator asks whoever exercises this right to have a degree of scientific competence, and sufficient technique to reassure the legislator, and so to achieve the interest sought by the legislator, in determining this right. And in harmony with this, conditions necessary to authorize the exercise of the profession of doctor, were set up by various countries with various legal systems, and among them, the French legislation which reserved chapter IV of the new law on public health (With the reforms concerning: public health policy, bioethics of health risks, organization of paramedical professions, continuing training for companies and veterinary pharmaceutical establishments, medical devices, etc.³⁷, for health professions, and devoted the first axis of this chapter to medical professions, determining the conditions of their exercise, under the title “The exercise of the medical professions”, treated by articles L.4111-1 to L.4111-3. In this regard, the French legislator has distributed the conditions of exercise, into general conditions and under general conditions that are common to all disciplines.

As for the general conditions, chapter 1- 4111L. Art L 4111 -1: states that "no one may practice the profession of doctor, dentist or midwife unless he is:

1- Holder of a diploma, certificate or other title mentioned in Articles L.4131-1, L.4141-3 or L. 4151-5.

2- Of French nationality, of Andorran citizenship or of a member state of the European community or party to the agreement on the European Economic Area, Morocco or Tunisia, subject to application, if applicable either from the rules set out in this chapter, or those resulting from international commitments other than those mentioned in this chapter.

3- Listed on a table of the order of physicians, on a table of the order of dental surgeons or on a table of the order of midwives, subject to the provisions of articles L.4112-6 and L. 4112-7. These conditions consist particularly, in having a diploma, a certificate or other equivalent title (M 1-3 / 4.4131-L 4151-5 / L. 4141), as well as French nationality

and being registered on the record of the doctor's order. The Egyptian legislation also, devoted 17 articles of Law No. 415 of 1954 to the exercise of the profession of doctor. The first article states that: “No one is authorized to give medical advice or to medically visit a patient, to perform surgery, to induce childbirth, to prescribe medication, to treat a patient or to take a body sample human patients, among those provided for by the Minister of Public Health, for medical diagnosis or for laboratory analysis in any way, prescribe medical glasses, and in general, exercise the profession of doctor in any capacity whatsoever unless he is Egyptian or comes from a country whose laws allow Egyptians to practice medicine there, and if his name has been entered in the registers drawn up by the Ministry of Public Health and without prejudice to the special provisions governing the profession of obstetrics, and brought to the table of the order of doctors of the Union of medical practitioners. Foreigners who have enrolled in an Egyptian university before the application of the provisions of Law No. 142 of 1948 are exempt from the citizenship requirement”.

As for the Algerian legislation, the Algerian legislator settled this question in the second subchapter on the conditions of the exercise of the health professions, of chapter IV on health professionals, articles 166 to 184, the Algerian law on health³⁸.

The Algerian legislator has also, emphasized the issue of legal licenses, through the provisions of the code of medical ethics³⁹.

3.2.2 The patient's consent to medical intervention:

The legitimacy of the doctor's intervention to treat the patient's body depends on the patient's prior consent; in the absence of this consent, the medical act loses one of the basic conditions of its legitimacy, and the attached doctor bears the consequences of the risks resulting from the treatment, even if he does not make the slightest mistake in doing so⁴⁰.

Actually, obtaining the patient's consent before proceeding with the medical intervention on his body, is of great importance especially in cases where such an intervention could constitute a threat to his physical integrity and his right to life. Below, we give examples about the notion of condition of consent in certain legislations: for example, in the French legislation, the

French legislator has underlined this principle in the Code of medical ethics in its articles (36-41-42). Article 36 thereof stipulates that “the patient's wishes must be respected in all cases, and when the patient refuses the treatment or intervention proposed by the doctor, the latter is bound to respect his will. If the patient is unable to express his or her wishes, the doctor should turn to his relatives; unless this is not possible, or in emergency or impossibility”. Article 41 of the same law states: “no mutilating intervention may be performed without informing the person concerned and without his consent, except in emergency or impossibility”. As for article 42, it stipulates: “a doctor called upon to provide care to a minor or a protected adult must endeavor to warn his parents or legal representative and to obtain their consent. In case of emergency, even if these cannot be reached, the doctor must provide the necessary care”. Reinforcing this situation, many French jurists have argued in favor of the need for patient consent in order to ensure the legitimacy of the medical act. So, they require the consent of the patient, his or her guardian or whoever has this quality, and even set the conditions of validity, for this consent to be admissible⁴¹. Consent must therefore be free, insightful and conscious, emanating from a conscious and perceptive and distinctive will. The jurists' argument is that the consent must constitute a preservation of the right of the individual to his physical integrity and appropriate treatment of his body. And the French justice, in turn, supported in many of its judgments, what the jurisprudence had agreed upon, as was the case with the French court of Douai, which ensured that the surgeon must obtain the consent of the patient or his legal guardian, to conduct the operation he intends to undertake. He must also inform the patient of the potentially dangerous consequences of the treatment⁴².

3.2.3 Medical intervention for the purpose of treatment:

The medical act finds its legitimacy in the notion of therapeutic necessity. This idea indicates that the need for medical intervention for treatment, in order to eliminate the disease and the pain of the patient, or to alleviate them, justifies the legitimacy of a medical act on the human body. Thus, the objective of the treatment becomes a strong justification for the legitimacy of the medical act⁴³. In this context, we will explain the

position of the French, Egyptian and Algerian legislations vis-à-vis the necessity of the purposes of medical treatment. In the French legislation and the ethics laws of the medical profession, texts continually confirm this requirement. Article 32 of the current laws. "The doctor is personally required to provide an appropriate treatment since he agreed to supervise treatment. once he has accepted to respond to a request, the doctor undertakes to personally provide the patient with conscientious care ...".

As for the Egyptian law, the Egyptian legislator, unlike the French, did not explicitly stipulate the requirement of the intention to treat, however, the Egyptian Penal Code states: "The provisions of the Penal Code do not apply to any act committed in good faith, in accordance with a right established in the Shari'a", since good faith is a condition required to enjoy legally established rights. There is no doubt that the intention of the treatment is the desired goal of the medical intervention which is based mainly on the good intention of the doctor to treat his patient, by directing his intention and his will towards the patient in order to drive out his pain, or at least to reduce it⁴⁴.

Regarding the position of Algerian legislation, the Algerian legislator has also taken the greatest care in therapeutic acts, and does not conceive of the existence of any institution dedicated to medical care, whatever its nature is, without the exercise of its task which is treatment. In this context, Article 281 of Law 18-11 stipulates that "For the benefit of all citizens, health structures and institutions shall include the provision of primary, secondary and high-level treatments, as well as urgencies, according to an organizational chart defined by regulation. Public and private health structures and institutions can also provide home treatments, hospitalization at home and palliative treatments. The manner of its application shall be determined by the provisions of this Article through regulation". The Algerian legislator has also dealt with treatment in article 16 of the Code of medical ethics which stipulates that. "The doctor and dental surgeon are authorized to carry out all diagnostic, preventive and treatment work, and it is not permissible for the doctor or dental surgeon to provide or continue treatment or provide prescriptions

in fields beyond his specialties or capabilities except in exceptional cases”⁴⁵.

3.2.4 Compliance with the rules and principles agreed upon, in medical science:

A medical act is considered admissible and legitimate only if the doctor takes into consideration, when performing his functions, the rules and principles agreed upon by his predecessors in the same field, and codified today, in codes of medical ethics, and dealt with by many modern legislations within the frame work of the laws and regulations governing the medical profession. As a result, these medical rules and principles are now universal and internationally recognized in the medical field⁴⁶. However, a question arises in the circles of jurisprudence and comparative jurisprudence about the limits of this condition: How can theories and scientific methods be established medical principles and rules? They become so, when two conditions are met, as some answered⁴⁷.

1st. The theory must be announced by a recognized medical school, after validating it and proving it by means of repeated experiments⁴⁸.

2nd. The scientific theory or method must be scientifically recorded before starting to apply it in practice. When these two conditions are met, the scientific theory or the treatment method becomes a fixed fact that must be taken into account and not to be overlooked in the various stages of medicine. In France, jurisprudence and judicial writ consider that the doctor or surgeon is required to follow the basic principles and rules of medical sciences that he is supposed to know, whether he is a doctor or a surgeon. Therefore, it is unacceptable that he ignores them. Note that if the doctor is obligated to stick to scientific principles when performing medical act, this does not mean that he is obligated to apply these principles, as long as there are differences resulting from the existence of more than one opinion between supporters and opponents of this or that current. Then, no reproach will be made to the doctor, for having done what he considers preferable, whenever he exerts the necessary amount of care, and he shall not be responsible of his medical act, even if he failed in it. However, if the medical act performed by this doctor is

tainted with an error, he will bear unintentional responsibility, in which the medical error is qualified in accordance with the general rules relating to unintentional error⁴⁹.

4. Conclusion:

By way of conclusion, we may say that the medical act is one of the essential and fundamental tasks that is incumbent on the doctor, because if treating diseases is an issue recommended by society to preserve the human kind, it also includes the obligation of practicing medicine, as a way to treatment. As a result, the principle of the sanctity of the human body and physical integrity has been reconsidered, and the infringement of the human body in accordance with the conditions established by the Sharia and the law, has become legitimate. To this end, we propose a set of recommendations. In this regard, a doctor should:

- Respect the conditions for practicing medical act.
- Improve patients' health and preserve human health.
- Respect established rules and principles of medicine.
- Preserve public health, by providing preventive and curative health services.
- Maintain the patient's health, and organize his/her life during the exercise of the medical profession.

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² Law No. 16-01 of March 6, 2016, which includes the constitutional amendment, G.R. No. 14. Article 41 of it states that the law punishes violations of rights and freedoms, and everything that affects a person's physical and moral integrity.

³ Samira Agrorou, Criminal Responsibility of Doctors in Light of Modern Scientific Development (A Comparative Study), An-Najah New Press, Casablanca, Edition 1, 2015, p. 47.

⁴ It was included by Al-Bukhari in his Sahih, chapter on Al-Shifa in three, vol.10 / 168 (Hadith No. 5680) :Zainab Saad Muhammad Abdel Aziz, Medical Banking and the Legal Rulings Related to It, Al-Wafa Legal Library, Alexandria, 1st Edition, 2019, p. 25.

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⁶ Zainab Saad Muhammad Abdel Aziz, previous reference, p. 23.

⁷ Ghada Fouad Majid Al-Mukhtar, Patient's Rights in the Medical Treatment Contract in Civil Law (Comparative Study), Al-Halab Legal Publications, Lebanon, Edition 1, 2011, p. 29

⁸ Zainab Saad Muhammad Abdel Aziz, previous reference, p. 26.

⁹ AL-Muqadimah, the history of the scholar ibn khaldoun by abd al-rahman ibn khaldun, lebanese book house, Lebanon, 1982, p. 917.

¹⁰ Kashida Al-Taher, Criminal Responsibility of the Doctor, Thesis to obtain a Master's Degree in Medical Law, Abakar Belkaid University, Tlemcen, 2010-2011, p. 11.

¹¹ What is meant in our present time is the necessity to obtain a medical certificate and permission to practice the medical profession from the competent medical authority.

- ¹² Hassan Shamsi Pasha, Hassan Shamsi Pasha, Muhammad Ali Al-Bar, *The Doctor's Responsibility Between Jurisprudence and Law*, Dar Al-Qalam, Damascus, 2004, p. 58.
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- ¹⁴ Ahmed Sharaf Al-Din, *Legal Provisions for Medical Work*, National Council for Culture, Arts and Literature, 1983, P. 41.
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- ¹⁷ Ahmad Muhammad Subhi Agrier, *Administrative Liability for Damages to Medical Public Facilities (Comparative Study)*, Law and Economics Library, Riyadh, 2015, p. 120.
- ¹⁸ Samira Agrorou, previous reference, p. 34.
- ¹⁹ Heger, Gilbert and Glorieux, *the necessity, a criterion of the medical act*, Paris, 1955, Vol 1, p. 74.
- ²⁰ Mahmoud Naguib Hosni, *Explanation of the Penal Code (Scientific Section)*, Dar Al-Nahda Al-Arabiya, Cairo, Edition 6, 1989, p. 174.
- ²¹ Judgment issued on June 20, 1929.
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- ²³ Articles 2, 3, and 4 of the decree of January 6, 1962, renewing the list of medical work that can be practiced by doctors or paramedics, amended and supplemented, the Official Journal of the French Republic dated February 1, 1962.
- ²⁴ Decree n ° 95 - 1000 of September 6, 1995, JORF n ° 209 of September 8, 1995 on the code of medical ethics, p.13305.
- ²⁵ As stated in Article 70: "Any doctor is in principle authorized to perform all acts of diagnosis, prevention and treatment".
- ²⁶ Article 1 of the medical profession practicing law No. 415 of 1954.
- ²⁷ Ben Zita Abd al-Hadi, previous reference, p. 147.
- ²⁸ Law No. 18-11 of July 2, 2018, relating to health, R. No. 46 of July 29, 2018, p 3.
- ²⁹ Law No. 18-11.
- ³⁰ Executive Decree No. Executive Decree No. 92-276 of July 6, 1992, including the Code of Medical Ethics, GR, No. 52 issued on July 8, 1992, p. 1419
- ³¹ Article 7 of Executive Decree 92-276.
- ³² Article 16 of the same executive decree.
- ³³ Articles 22 and 19 of Executive Decree Nos. 09-393 and 09-394 of November 24, 2009, which include, respectively: the basic law for employees belonging to the corps of medical practitioners working in public health, and the basic law for

employees belonging to the corps of medical practitioners specializing in public health, JR, No. 70 issued on November 29, 2009.

³⁴ Article 8 of Law No. 83-11 of July 2, 1983, relating to Social Security, GR, No. 28, issued on July 5, 1983, amended and supplemented by Law No. 08-11 of June 5, 2011, GR No. 32, Issued on June 8, 2011.

³⁵ Samira Agrorou, previous reference, p. 101.

³⁶ Fatima al-Zahra Manar, previous reference, p. 36.

³⁷ With the reforms concerning: public health policy, bioethics of health risks, organization of paramedical professions, continuing training for companies and veterinary pharmaceutical establishments, medical devices, etc. (public health code, 19th ed-2005 Dalloz.

³⁸ For instance, Article 166 of Law No. 18-11 previously referred to stipulates the following: “The practice of health professions is subject to the following conditions:

1. Enjoying the Algerian nationality,
2. Possession of the required Algerian diploma or equivalent certificate,
3. Enjoying civil rights,
4. Not to be subjected to any penal ruling inconsistent with practicing the profession,
5. Enjoying the physical and mental capabilities that are not incompatible with the practice of the health profession”.

³⁹ Article 2 of the Algerian code of medical ethics provides that “The provisions of this Code of Medical Ethics are imposed on every doctor, dental surgeon, pharmacist, student in medicine, dental surgery, or pharmacy licensed to practice the profession in accordance with the conditions stipulated in the legislation and regulation neglected by them”.

⁴⁰ Boukharis Belaid, previous reference, p. 29.

⁴¹ Samira Agrorou, previous reference, p. 116.

⁴² Douai July 10, 1946. D. 1946, p. 351.

⁴³ Muhammad Boukoutis, previous reference, p. 34.

⁴⁴ Samira Agrorou, previous reference, p. 118.

⁴⁵ Article 16 of M. a. I. C as: & quot; The doctor and dental surgeon are authorized to carry out all diagnostic, preventive and treatment work, and it is not permissible for the doctor or dental surgeon to provide or continue treatment or provide prescriptions in fields beyond his specialties or capabilities except in exceptional cases.

⁴⁶ Muhannad Boukoutis, previous reference, p. 35.

⁴⁷ Usama Abdullah Qaid, previous reference, p. 164.

⁴⁸ Louis and Jean, The civil liability of the physician, 1978, P. 50.

⁴⁹ Samira Agrorou, previous reference, p. 151.