

Double Permission in Operations to Remove and Transplant Organs from the Dead to the Living to Members of the Dead's Family in Order and Limitation.

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Send Article Date: 24 / 12 /2023 Date of acceptance of the article: 14 / 05 /2024

Abstract:

The society's need to ensure health security is dramatically increasing. Therefore, it seeks to find ways and means that enhance the health aspect. One of the medical and scientific developments in this field is the possibility of transplanting organs from a living or dead person to another alive. Yet, these operations are challenging particularly in its legal regulation. One of its regulations regarding the unclear position of the dead person (consent or refusal), the law authorized the relatives, orderly and exclusively, to declare their position on the transplant of organs from their dead relative to another person.

key words: Double Permission- Relatives' Permission- Order of Relatives- Limitation of Relatives' permission.

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Introduction:

Life and enjoying it is an innate, mountainous thing in human beings. Trying to prolong it to the furthest extent is a fundamental goal worthy of attention and pursuit, and giving high price and precious efforts to make it a reality in people's lives is one of the most beautiful and noble goals. That's why we find myths and legends built around the existence of the river of life and immortality in previous civilizations. Also, among the things that ALLAH Almighty afflicted the Children of Israel with, in order to return and repent and accept their repentance, is that He ordered them to kill themselves, and within they will live after their death but in real life in the Hereafter, and they refused only because their innate love of life prevailed over the side of obedience to ALLAH command, and if they had done so, it would have been better for them.

In view of the innate love of life, as we mentioned above, we find societies keen to protect the right to life and physical integrity that emanate from it, in one way or another, and give it wide attention and encourage it legally among their first goals and objectives. Therefore, they push by every means they deem appropriate to promote this right and what emanates from it, and defending it and researching ways to prolong the enjoyment of it, such as the scientific method, especially the medical ones, including scientific discoveries at the level of medicines, devices, and diagnostic methods, as well as the legislative means, such as laws, devices, agreements, and others.

Among the recent medical discoveries is the possibility of removing organs from the living or dead to re-implant them into living patient, this is often the last solution to preserve their lives, or to restore functionality in an organ to activate it in the way it was supposedly prepared or created for it. As might be expected, the matter is not without challenges if it is left without oversight or regulation. Therefore, the current health Law of 2018 was issued to organize some subjects in the field of health, among them regulating organ removal and transplantation operations.

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From this regulation, the law granted permission to a group of individuals of the deceased or dead to give their consent to carry out the operations to remove organs from their deceased relative, whether in the event that it is not clear that this deceased person consented to the removal of his organs, as in the repealed law of 1985, or in the absence of evidence that he did not refuse such operations, as in current health law.

This permission is granted by the text of the law exclusively to a specific group and in order, and according to it, they can also grant a second permission to doctors to begin the process of removing the organs of their deceased relative, with the permission of the law.

From the above, there is no doubt that the issue deserves attention from several angles, including the social, religious, and legal foundations for approving such permission, as well as restricting it to individuals and not others, and their arrangement.

We will try to study the case and solve the problem of double legal permission and discuss its legal and religious foundations and the theoretical problems it raises, and if the health law in the field of transplantation of organs especially from the dead to the living is effective.

This can't be claimed at all that the problem of the subject was solved due to the conviction that studying it from multiple angles on the one hand, and also studying it, requires following up on developments that appear to one researcher and are hidden from another.

We will follow the descriptive approach to learn about the topic and the inductive approach through researching legal texts because they are suitable and this will be done through these two sections:

_ Legal permission for a group of family members of the dead to grant consent to remove organs from their relative.

_ Legal permission from the family members of the dead to begin the process of removing organs from their relative.

SECTION I: Legal Permission for a Group of Family Members of the Dead to Grant their Consent.

Granting permission to specific individuals to dispose of their relative dead's body is very dangerous, and it must be a branch of a person's right to dispose of his body, alive or dead. We will discuss this right (first requirement) and then the transfer of this right to family members (second requirement).

First Requirement: Bodily Integrity and a Person's Right to Dispose of his Body Parts:

The human body and its organs that were entrusted to human being to perform various functions that enable him to live and therefore the task of preserving them and prolonging his life was the task of the human being himself. As a result, we will discuss the definition of body safety and protecting it and the human right to dispose of his organs.

Definition of Body Safety and Protecting It Legally:

It is not to allow any kind of violation to occur on the human body, whether physical, psychological, or mental, or the threat of harm, regardless of the person being subjected to this harm, his gender, nationality, color, religion, social or political status, or other, and regardless of who the aggressor is (Adli, 2007, p. 37).

The right to bodily integrity is a legal status that enables its owner to monopolize it, as it is essentially a right with regard to its physical and functional integrity, the level of health that one experiences, and its psychological, physical, and mental tranquility (Raslan, 2022, p. 5). The integrity of the body is an interest for the individual, as the liberals base their ideas on it, and an interest for society, as the socialists see it, and if the two interests conflict, the interest prevails society, as happened recently in the Corona pandemic, where vaccination was imposed on individuals in most countries, including liberal ones.

Accordingly, it is necessary to protect both the physical side of the human body, including organs, systems, tissues, and cells, what is apparent and what is hidden, what is natural and what is not, such as the sixth finger on one hand, and what may be added

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in terms of artificial organs, and the psychological side, which is the psychological activity of emotions and joy, sadness and other things. Protection is also granted to someone who is given a drug or is told bad news while knowing its consequences for the one who informs him (Raslan, 2022, p. 9).

There is no doubt that the health of the body includes the integration of the physical structure of the body, its tranquility, and its enjoyment of a healthy aspect. A person can perform his role in such a way that he achieves his individual personal goals and his social goals, which are achieved through the cohesion of individuals with healthy bodies for the advancement and prosperity of society.

The international community has paid special attention to bodily integrity, whether through the United Nations Assembly, or at the level of international agreements, and at the level of the internal laws of countries. For example, we find the Universal Declaration of Human Rights approved by the General Assembly calling for the right to bodily integrity through its third article "Everyone has the right to life, liberty and security of person"(UN General Assembly Resolution No. 217, 1948). We also find that the Arab Charter on Human Rights (Arab League Council Resolution No. 6405, 2004) requires the law to protect the right to life as in the 5th Article "The right to life is an inherent right to every person", and prohibits physical and psychological torture as in the 8th article "It is prohibited to torture any person physically or psychologically or to treat him with cruel, humiliating, degrading or inhuman treatment", as well as slavery and forced labor. It also stipulates security in a way that achieves bodily integrity as in the 14th Article "Every person has the right to freedom and security of his person ..."

Algerian law is only considered applicable in the same context within the Constitution with various Articles (Presidential Decree No. 20- 442, 2020), whether by declaring the safety of the body or by insinuation and exposure, as in the 38th article "The right to

life is inherent to the human being and is protected by law”, and in the 39th “The state guarantees the human sanctity will not be violated”, and 47th “Every person has the right to protect his private life and honor”, and as in the 50th “Every foreigner who is legally present on the national territory enjoys the protection of the law for his person and property”, we also find that the Algerian Penal Code stipulates in the Second Section of Chapter Five of Part one (Law No. 15- 19, 2015) the crimes related to cemeteries and the sanctity of the dead, murder and other major felonies and acts of intentional violence in the First Section of the First Chapter of Part Two, and trafficking in persons in the Fifth Section Bis as in the Article 151 “ Whoever arranges an act that violated the sanctity due to the dead in cemeteries or other burial places shall be punished by imprisonment”, the Article 274 “Anyone who commits the crime of castration shall be punished with life imprisonment“, the article 303 bis 19 “Any one who extracts tissue or cells or collects material from the body of a living person without obtaining the stipulated consent shall be punished by imprisonment from 1 to 5 years and a fine from 100000 to 500000 DZD“, and others.

In addition to these legislations, we find consumer law (Law No. 09- 03, 2009) as in the 4th Article “Everyone involved in the process of preparing foodstuffs for consumption must respect the obligation of the safety of these materials and ensure that they do not harm the health of the consumer”, and environmental law (Law No. 03- 10, 2003) as in the 39th article “This law establishes requirements to protect the following: biological diversity, air and atmosphere, water and aquatic environments, land and subsoil, desert environment and living environment”, and others that have a great interest in the physical safety of humans.

What is worth noting is the safety of the body, which begins with regulating abortion and criminalizing beating, wounding, and other assaults, leading to the protection of the body, even in its material dimension, which is limited to earthly disappearance,

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through crimes of attacking graves, as well as preventive laws such as the environment, consumer, and others.

The Right of a Person to Dispose of his Body Parts:

One of the thorny issues that should be researched is a person's right to dispose of his body parts, and this is what we will address in the direction that says it is forbidden to dispose of organs, and another that sees it is permissible.

Those who say it is forbidden rely on evidence including:

Man belongs to ALLAH alone and his creating is in his creation, and no one of creation has the right to dispose of this creation in a way that harms it or leads to its corruption or destruction, and because the duty is to preserve what ALLAH has commanded to be preserved, in order to achieve the caliphate in the optimal way that ALLAH fully intended. The religion cannot be achieved except with the completeness and perfection of a person's mind, soul, and body in harmony as he intended it to be (Wassel, 2009, p. 03). Therefore, a person is prevented from causing harm to himself, and therefore what he does not have the right to do by himself cannot bequeathed to others after his death, and based on this, he has no right to dispose of his body in any way. On the commands of ALLAH, and more importantly, other than him.

Among the rules that indicate the prohibition of action is preserving religions prior to preserving bodies, warding off evils prior to achieving interests, it is not permissible to neglect a duty or commit a forbidden thing in order to achieve what is permissible or recommended, whatever leads to what is forbidden is forbidden, the obligation of the individual takes precedence over the obligation of sufficiency, the temporary obligation. Provided absolute duty (Ettawil, 2012, pp. 23-24).

There are many who advocate permissibility especially in recent times, including the jurisprudence councils, the Council of Senior Scholars in Saudi Arabia, the Supreme Islamic Council in Algerian April 20, 1972 (Briber, 2022, p. 05), and others. These

fatwas are based on the basic principles of permissible things, the principle of empathy and compassion, the great interest of the patient, and the principle of altruism and benevolence (Ettawil, 2012, p. 14).

It is also said that it is permissible to take an organ from a living person to another to save it from certain destruction, because it is necessary to save a drowning person or a fire person when the rescuer is most likely to think that it will be saved, and he may perish. This does not prevent the saying that the human body belongs to ALLAH, so every creature belongs to ALLAH, and yet we are commanded to spend and rewarded for it. Although the dead, like the living, must be protected and honored by ALLAH, alive and dead. Taking action to save the living is more important than protecting the body of the dead (Wassel, 2009, p. 12).

In general, the disagreement cannot lead to extracting one belief and replacing it with another, because the matter may be due to individual convictions regarding the permissibility of disposing of organs for the living or the dead, even if the matter with regard to disposing of the living from a dead person while he is still alive by making a will to him is less severe, and all of this is due to the fact that the disposal there are calamities in the organs in which insight and the application of thought and reasoning are needed, and with differences in understandings, these differences emerge.

Second Requirement: The Right of Family Members to Dispose of their Dead Relative's Organs:

The behavior of family members is not an isolated behavior to begin with, but rather it is mostly a consequential behavior to the situation of the deceased that preceded it. We will address this requirement in two sections, dedicating the religious aspect and the legal aspect.

The Right of Members of the Deceased's Family to Dispose of their Relative's Organs from a Religious Standpoint:

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In the beginning, we must stop at the description of what specific members of the family enjoy as a right, and there is something to be said about it, because if it is said that it is a right, that is by analogy with the right of the dead person to dispose of his organs during his life and the transfer of that right to them based on a declared or unannounced will. This is on the one hand. On the other hand, and there is no disagreement in terminology, expresses, in what it expresses, the judgment and diligence of those who say it is permissible to dispose of organs. Otherwise, it is self-evident that it is not possible to build a branch (result) from a non-existent origin for those who say it is forbidden. What is also worth noting here is that it is more reliable for groups to take the lead. Jurisprudence for such calamities, we find the following: Regarding a person's use of the body parts of another person, living or dead (Resolution No.26(1/4), 1988).

The Council of the International Islamic Jurisprudence Academy held its fourth conference session in Jeddah in the Kingdom of Saudi Arabia from 18 to 23 Jumada al-Akhira 1409, corresponding to 6 to 11 February 1988.

After reviewing the jurisprudential and medical research received by the Council regarding the issue of a person's use of the body parts of another person, living or dead.

In light of the discussions that drew attention to the fact that this issue is a *fait accompli* imposed by scientific and medical progress, its positive and beneficial results have emerged, often tinged with psychological and social damage resulting from its practice without the legal controls and restrictions that protect human dignity. With the implementation of the objectives of Islamic law that ensure the achievement of everything that is good and in the overriding interest of the individual and the group. It calls for cooperation, compassion, and altruism.

After limiting this topic to the points in which the subject of the research is liberated and its divisions, forms, and cases are defined according to which the ruling differs.

Decide the following:

First: What is meant by “organ”?

Second: The benefit in question....

Third: forms of use....

The first form: the transfer of an organ from a living...

The second form: the transfer of an organ from a dead person:

It is noted that death includes two cases:

The first case: brain death when all its functions are permanently and medically irreversible.

The second case: complete and medically irreversible cessation of the heart and breathing. In both cases, the Council’s decision in its third session was taken into account.

The third form: embryo transfer ...

In terms of religious rulings:

First: It is permissible to transfer an organ from one place in the human ...

Second: It is permissible to transfer an organ from the body of one person to the body of another person ...

Third: It is permissible to benefit from a part of an organ that was removed from the body due to a medical condition ...

Fourth: It is forbidden to transfer an organ on which life depends...

Fifth: It is forbidden to transfer an organ from a living person whose removal would disrupt an essential function of his life ...

Sixth: It is permissible to transfer an organ from a dead person to a living person whose life depends on that organ, or the safety of an essential function in it depends on that, on the condition that the dead person gives permission before his death or his heirs after his death, or on the condition of the approval of the Muslim guardian if the deceased’s identity is unknown or he has no heirs...

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Seventh: It should be noted that the agreement on the permissibility of organ transfer in the cases mentioned is conditional on this not being done through the sale of the organ, as it is not permissible to subject human organs to sale under any circumstances.

Eighth: Everything other than the cases mentioned that enter into the core of the topic is subject to research and consideration, and must be presented for study and research in a future session in light of medical data and Sharia rulings. ALLAH knows.

We have included almost the full text because of its benefits related to this topic and others, and because of the interconnectedness of the points addressed in.

Sometimes we find ourselves obliged mentioning some cases in order to preserve the whole text without appearing interrupted.

The Right of Members of the Dead's Family to Dispose of their Relative's Organs from a Legal Standpoint:

The stipulation came about the possibility of performing organ removal and transplantation operations from the deceased to the living, based on what was included in the Health Law due to its jurisdiction over it in subject matter and organization, as Article 362 stipulated the following:

“Human organs or tissues may not be removed from deceased persons for the purpose of transplantation except after a medical and forensic examination of the death in accordance with scientific standards determined by the Minister in charge of health. In this case, the removal may be carried out if the deceased person did not express his refusal to the removal during his lifetime.

This refusal can be expressed in every way, especially by registering in the refusal register maintained by the National Organ Transplantation Agency. The methods of registration in the rejection process are determined by regulation.

The medical team in charge of removal must review the refusal record in order to research the position of the deceased. In

the absence of registration in this registry, adult family members of the deceased are consulted in the following order of priority: father, mother, husband, children, sisters, or legal representative if the deceased had no family, in order to know his position on organ donation.

Adult family members of the deceased donor will be informed of the removal operations that have been performed.” (Law No.18- 11, 2018)

This section was entitled to describe the consultation for members of the family as a right by analogy to what was originally granted, to the deceased himself, and if it is, it is a permission from the law for specific individuals for the benefit that the legislator sees for the recipient patient, for the deceased himself, for the counseling individual, and for society according to the angle of the desired interest which is the healthy reassurance.

It is worth noting is that the legal permission is double. The first of its duality is that the law grants the ability to consult members of the deceased’s family to take position on organ donation, even if the specific wording is better than the general meaning of donating the organs of their deceased relative, and with reference to the repealed health law (Law No. 85- 05, 1985), its texts included the same permission through Article 164 if the position of the deceased was not clear and after obtaining the consent of an adult member of his family according to a stipulated order.

What was called consent in the repealed law is replaced by consultation in the new law, and the difference between the terms consent and consultation cannot be hidden or confused in principle, as consent is on a question that may be rejected or accepted, while consultation includes what is obligatory in standing, answering, and acting according to the answer, and what is optional in doing so, responding to it, and acting upon it, in the end. This is after the position of the deceased was not made clear, as there was no basis for written consent in the

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repealed law, which was replaced by the lack of proof that the deceased did not refuse to have his organs removed after his death by registering in the Refusal Record or otherwise.

The second dual permission is the permission of those authorized to express their consent to initiate the process of removal from their deceased relative, according to the same law.

Section II: Legal Permission from the Dead's Family Members to Begin the Process of Removing Organs from their Relative.

After the law permits family members to consult, they themselves, and the law itself, authorize them to initiate the process of expropriation, which expresses the second aspect of the duality of permission to expropriate. We will discuss the conditions before the consultation (first requirement) and the conditions for the advisors (second requirement).

First Requirement: Conditions Before Consultation:

The article 362 of the current Health Law referred to previously requires two conditions: a medical and forensic examination of the death and ensuring that the removal is not refused.

Medical and Forensic Examination of Death

It is not permissible to remove organs according to Islamic law unless it is confirmed that death has occurred beyond a reasonable doubt. As for Islamic law, IbnQudamah al-Hanbali said in Al-Mughni: If there is doubt about the deceased's condition, consider the appearance of signs of death, such as the relaxation of his legs, the separation of his shoulders, the tilt of his nose, the extension of the skin of his nose, and the depression of his temples. If he dies suddenly, wait for these signs until the certainty of his death (Wassel, 2009, p. 08). Approximately, Islamic jurists said, which are considered criteria for ruling on certain, unsuspected death and thus initiating the process of removal.

It is worth noting that there are two tendencies to consider death as a medical and legal accident and then build and arrange the effects on that: death in the traditional sense of cessation of the pulse, cessation of blood circulation and breathing, and death in the modern medical sense, that is, cerebral.

The brain consists of the cerebrum, cerebellum, and brainstem (which is the primary center for breathing, controlling the heart, and blood circulation). If the latter dies, doctors declare the person brain dead, and he is replaced with artificial respirators. (Walid, 2021, p. 03)

It appears that there are always supporters of the traditional criterion of death and the brain death criterion, whether among Muslim jurists, doctors, and jurists.

If we want to know the position of the Algerian legislator, the current health law is stated in the text of Article 362, which directs that removal and transplantation operations are not completed except after the medical and forensic examination of the death in accordance with scientific standards determined by the Minister in charge of health.

When the article was referred to the regulating, no regulatory decision was issued in this regard, and the article 449 of the same law had repealed the provisions of the Health Law of 1985, except for its regulatory texts, until regulatory texts specific to the current health law will be issued, and Resolution No. 34 was issued on November 19. 2002 regarding the criteria that must be adopted when determining a case of death, which included complete lack of consciousness, absence of organic brain activity, confirmation of complete lack of spontaneous ventilation by means of a hypercapnia test, confirmation of the death of brain cells using two electroencephalograms and the completion of two sworn doctors. (Walid, 2021, p. 10)

It is clear that the ministerial decision took brain death to determine the cause of death, even if it mentioned double verification, for example, from a brain cytometer. However, we believe that the matter is due to the conscience of the doctor,

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even if there are many of them, in making the decision to remove life support, by adopting brain death.

Ensure that the Removal is not Rejected:

The article 362 of the current Health Law states that it is possible to begin the process of removing organs, and as a preliminary condition after confirming death by applying the decision of the Ministry of Health to apply its standards, if the deceased person did not express his refusal to remove organs during his life, which he can express, especially by registering in the refusal registry. Registered with the National Organ Transplantation Agency.

It must be ensured by all possible means that the deceased does not refuse the removal of his organs, especially by reviewing the record of refusal by the medical team in charge of the removal. Law 85-05 required the express and written consent of the deceased to begin the process of removing his organs.

Although the process of removal and transplantation takes place in a short time, the process of ensuring that the deceased has not refused in the current law or his written consent in the repealed law is not an easy matter, and we wonder about the possibility of the two circles of consent, even if it is not written, matching the non-rejection, and also about the effectiveness of the Refusal Record and the possibility of its activation is realistic, it is held by the National Agency established in the city of Algiers, and the possibility of establishing regional centers if its effectiveness is proven.

Second Requirement: Conditions for Advisors:

From the text of the article itself and through its third paragraph, from which it can be understood that there are conditions for the advisors from the family of the deceased to initiate the removal process, which are majority (puberty) and the order of priority.

Majority:

The previous Article 362 stated that adult members of the deceased's family be consulted, and it refers to children, brothers, or sisters. Otherwise, the father, mother, or husband must be adults. The age of puberty in Algerian law (Order No. 75- 58, 1975) is nineteen full years as mentioned in the 40th article "Every person who has reached the age of majority enjoys his mental faculties and has not been subject of interdiction shall have full capacity to exercise his civil rights and the age of majority shall be nineteen full years", and it is excluded from that. Who has not reached this age and who is considered to lack capacity, such as the imbecile, the insane, or the fool. Therefore, ensuring that the consultants are qualified to carry out the transplant operation is required by law, even though the matter is subject to evaluation by the medical team who consults, by all available means.

Priority Order:

The article 362 of the Health Law mentioned that members of the deceased's family be consulted in priority or order, starting with the father, mother, husband, children, brothers, sisters, or legal representative if the deceased had no family, in order to know his position on organ donation.

The Islamic Jurisprudence Academy, held in Saudi Arabia, as we mentioned previously, used the word "heirs" but it was not stipulated in the Algerian health law, in a way that might be understood to mean that the corpse is part of the estate and the sum of what the deceased left behind, which the heirs have the right to dispose of. The truth is that the word came with the predominance of the word heirs, not considering the corpse of the estate, but in terms of describing them as heirs because they are the general successor of the deceased, and if this is our interpretation, we would prefer if the decision came with another wording to ward off the illusion that could arise in the mind, and the understandings have differed.

The question arises about the criterion for distinguishing between advisors if there are more than one individual, as in the

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case of brothers. Then the arrangement results from the inability to find or reach the individual advisor, so it passes to the next person. This is what we believe, or is it the search for the compatible, and therefore whenever it is possible to reach a specific individual. In the stated order, and if he rejects the operation, then it goes to the next one until the approval is reached until the end of the arrangement, or is the matter determined by arriving and consulting the first, then the first, if his opinion is for approval, it will be done, otherwise not, then what to do if there is someone who agrees and other rejects the operation, and in that case, will the rejection take precedence or approval? although these are just assumptions, they can happen.

It is noteworthy in the end that the law requires introducing the family of the deceased after they did not reject or accept the process of removing organs from the deceased, by establishing confidence in the health system that performed the operation in particular and the health system and country's agencies in general, and that what was approved by those authorized to express it was done in reality according to their permission. This did not happen outside their free will.

Conclusion:

The safety of the body is one of the rights enshrined in all societies because it is the essence of life, and the individual's enjoyment of the safety of his body fulfills his role in order to fulfill himself and achieve the goals of his society. The penal laws, for example, are only evidence in what they contain of the legislator's interest in the safety of the body. The health law came to strengthen this legislative aspect in two aspects: The safety of the body for the individual in general, then for the donor and the recipient in particular, with the guarantees stipulated.

Part of the health of the body is to spread hope to patients for whom transplant is the last solution to their health problem, to enjoy a healthy body to the fullest extent and thus enjoy a happy life in its material aspect.

Therefore, in the event of uncertainty about the position of the deceased by not rejecting the transplant, the law stipulates consulting members of his family, which is the first permission, then their permission to expropriate is considered a second permission on their part and also a second authorization by the law for its occurrence and possibility, and in this way we considered it to be double permission.

Finally, what can be avoided is to exercise great caution in determining the criteria for death determined by the Minister, and not to give priority to one side over another, whether related to traditional or modern criteria for death.

- Creating new, more effective and less expensive means to clarify the position of the deceased other than the Refusal Record, such as including this in the identity card, for example, so as not to require permission from some relatives to carry out the removal operations.

- The stipulation of the permission of the advisor from the family members must be in writing. The stipulation on the consultation is to take the position of the first and then take priority, and it does not matter whether he agrees or rejects it in order to exclude any misinterpretation or understanding. Then the process of removal cannot be carried out unless the first agrees, then the first to be consulted in the exclusive order. If he refuses, the advisor is from the family and does not go to anyone else.

- Change the term consultation by communication or any other term because the target is to know the opinion of deceased about the donation of his organ after his death, although there is no any evidence that the consulted one expresses the deceased non refusal or not.

- If there is no other solution but a record, we suggest that it will be Consent Record and not Refusal Record.

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