

On the Ottoman consent documents for medical interventions and the modern concept of informed consent

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ABSTRACT

Information for patients prior to medical intervention is one of the principles of modern medical practice. In this study, we looked at an earlier practice of this principle. Ottoman judges had record books called 'sicil'. One of the categories in sicils was the consent documents called 'riza senedi', which was a patient-physician contract approved by the courts. These contracts were especially for the protection of physicians from punishment if the patient dies. It is not clear whether patients were informed properly or not. Consent for minors was obtained from parents. However, a situation where an adult does not have the capacity to consent, was not clear in these documents. Any sign of free withdrawal of consent was not found in these records. Due to the legal system of Ottoman State, these contracts were related to Islamic law rather than modern civil law. We aim, in this paper, to present a legal practice, which is possible to consider as an early example of the informed consent practice.

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“Sicils” or record books contain data on the Ottoman social, economical, and political life covering 4 centuries (15th-19th), and are considered the main source of Ottoman history. They can be compared with Church records of the Western World in terms of their importance.¹

The main administrative part of the Ottoman State was “kaza” (kadi-ship), which is ruled by the “kadi” (judge). This was a system that the Ottoman State had inherited from the previous Islamic States. Kadis performed the duty of the judge in the name of the Sultan, and also maintained some other duties besides the connection between the center of state and periphery. The kadi was directly connected to the center of the state without any mediating unit.² Some of the responsibilities of the kadis were; to

hear civil and criminal cases, to inspect artisans and tradesmen, to take care of the substructure of the city, to inspect “vakifs” (foundations), and to present recommendations of assignments to the foundations, to approve contracts, to divide inheritances, to supervise marriage acts, to inspect trade of real estates, to inspect local tax incomes, to supervise public security affairs with ‘subasi’ (sheriff), and to present recommendations of assignments of the religious personnel.³

The kadis kept different data regularly in sicils. These were obligatory records. Sicils include records regarding lawsuits, written copies of court decisions, notarial documents, copies of imperial edicts (ferman), and so forth. Kadis also worked as a notary public.⁴ Keeping court records was a tradition, which was

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inherited from the previous Islamic states. The earliest sicils of the Ottoman State cannot be found today. The oldest existing sicil books are dated back to the 15th century. The latest sicil books are dated in the first quarter of the 20th century, but after “Tanzimat” (Reorganization) reforms, which had started in the first half of the 19th century, traditional courts had lost their importance, so, records which reflect social events are mainly from before this time.^{5,7}

There are 2 groups of records in a sicil book. The first group is the copies of the documents that come from central government (example, fermans). The second group is the kadis’ personal records (written copies of court decisions, notarial documents for example). Approved contracts were in this category.^{5,7}

Punishment of murder under the Islamic law.

The term ‘kisas’ in Islamic law is a word derived from the word ‘kass’, which means ‘to follow’, ‘to tell’ or ‘to cut’. As a term, kisas means a punishment because of a murder or hurting someone. In Islamic law, a murderer shall be executed, and if someone wounded another, he must be punished with an equal wound (“eye for eye, tooth for tooth”). Kisas can be accepted as a reflection of the individual’s right to life. Murder is a crime against God as well as a violation of fundamental individual human rights. Therefore, if the family of the deceased forgives the murderer, there will not be an execution, and the murderer will have to pay a ‘diyet’ (blood money) to the family of the murdered person. Diyet is a kind of indemnity. It must be an amount of 4250 grams of gold, or 32000 grams of silver, or a hundred camels, or 2 hundred cows, or 2 thousand sheep, or 2 hundred pieces of clothes.⁸ Kisas and diyet are also referred to in the Qur’an. It reads in the Qur’an; “And do not take life, which Allah has made sacred except for a just cause. And if anyone is slain wrongfully, We have given his heir the authority (to demand qisas [law of equality in punishment] or to forgive, or to take diyat [blood money]); but let him not exceed limits in the matter of taking life (example, he should not kill except the killer only). Verily, he is helped (by the Law)” (Al-Isra’ 17:33; Kisas is mentioned in Al-Bakara 2:178-179 and Al-Maide 5:45 also).⁹

According to Islamic law, medical operations and medications are accepted as professional services with payment. Due to the importance of human health, the responsibility of a health personnel is primarily important. Responsibility comes from acts, is a general rule in Islamic law, but controlling the results may be very hard in some medical interventions. Therefore, the avoidance of health care professionals from intervention by worrying about the result is not good for human health. For that, additional criteria

was available for health care professional in Islamic law. Health care professionals can be conditionally excused from the responsibility of the results of their acts. First of all, a physician (or any other health care professional) must be competent in his field. If any person applies a medical intervention despite of being an unqualified professional, he should be punished and should pay for the damage. Incompetent persons are prevented from health care services by the government. Knowledge and competency must be evaluated for every case separately; since they may vary case to case (for example, one may be competent for one application, but incompetent for another). Medical intervention must be acceptable according to contemporary medical knowledge, and common sense. Consent of the patient must also be obtained. Any possible contract before the intervention must be favorable according to the principles of Islamic law. The Riza Senedi (Consent Document) is an application of these principles.¹⁰⁻¹²

The necessity of a health care professional to be competent can be found in the primary sources of Islamic law. A verse in the Qur’an says, “Verily! Allah commands that you should render back the trust to those, to whom they are due; ...” (An-Nisa’ 4:58).⁹ And the prophet Muhammad was reported to have said; “If someone who had not had a medical training, performs medical practice, he will pay for the damage.”¹³ The principle of public interest in Islamic law played an important role in the process of regulating the responsibility of health personnel. Sentences regarding this arrangement had taken place in the sections regarding penalties and debts in the Islamic law. Sentences regarding health personnel (physician, surgeon, oculist, midwife, circumcisionist, phlebotomist) are found in the kisas and diyet parts of penalty law, which are about unintentional killing, injuring, mutilation, and in the icare akdi (rental contracts) part of the debts law. Authorities and responsibilities of physicians are the same as merchants and artisans. Medical intervention was accepted as a duty agreement. However, there is a different situation regarding the results of duty, since physicians cannot guarantee the consequence, or cannot assure a perfect result. If the intervention is appropriate with customary measures and if there is not a faulty act, there will be no indemnity. If the health personnel who performs the medical intervention is a qualified professional, and if there is prior permission, which is taken from the patient or representative, there will not be criminal responsibility.

A charlatan, anybody who pretends to be a physician, but does not have any medical knowledge, pays for the damage without taking into consideration whether the intervention he performed is correct or not, due to

deception. But, if the patient had given permission, knowing that he was not a qualified physician, there would be no responsibility of indemnity.¹⁴ Preparing a written contract indicates that a physician would not be responsible for the consequences of the life threatening surgical operation, and continued until the 19th century.¹⁵

According to the records in the sicil books, (Figure 1) consent documents were mostly arranged before the operations of removing stones from the urinary bladder.¹⁶ Other operations included were amputation of gangrenous broken leg, excision of tumors in the neck and the treatment of hemorrhoids or hernia.^{15,16}

Sicils have a regular standard format. Documents of the 15th century are similar to the ones in the 19th century.⁶ A consent document had to be set in the presence of both parties, or their representatives. "In principle, a formal deed of the religious courts would be signed in the presence of witnesses. This would make the doctor exempt from the "blood money" (diyat) that was imposed by Islamic law in case of any unfortunate consequences of an operation. The practice of having patients signs the documents declaring their consent was applied without exception by all the empirical doctors who traveled within the borders of the Ottoman State and practiced medicine without a formal qualification."¹⁵

The text had a standard form. The patient was identified by name, profession, or residential address. The patient declared that because he had suffered from hernia or from any other operable illness that he was "handing himself over" for treatment to the particular physician. If, by the will of God, he was to die, then no legal action would be brought against the physician. In some cases a reference to "the blood money" was made. It is worth noting that in all the cases any negative results arising from the operation were attributed to the will of God. "If the patient was a slave, the consent was given before the religious magistrate by his master."¹⁵ These documents normally include the patient's name (or if the patient is a minor, parent's name/legal representative's name), physician's (or surgeon's) name, the illness, the feature of the operation (risk of death), date (sometimes only year), declaration that the physician who will not be legally responsible, and will not pay 'diyet' (blood money) in case of death. These documents also contain some other records such as the address of the patient, a record indicating both parties were present at the court, amount of the fee for the operation, a record of the competency of the physician, a record indicating the legal representative of the patient was present at the court instead of the patient himself, and the names of the witnesses, if present.¹²



Figure 1 - Record of the City of Ankara. Book number: 185. Document number: 57. Es-Seyid Ali bin Mahmud, who lives in Ankara, stated before the court that he agrees with the physician Anastas son of Yani from the town of Yanya on an operation. Anastas will operate upon Ali bin Mahmud's minor son Mahmud for his urinary bladder disease. If his son dies because of this operation Ali bin Mahmud will not go to the court for blood money. Year 1209 after the Hegira (1795 AD). Witnesses: Es-Seyid Ibrahim, Haseki Kor Mehmed Aga, Kucuk Mehmed Aga, Muhzirbasi El-Hacc Mehmed Aga and others.

According to the records in sicil books, if the patient died after the operation, relatives of the patient could apply to the court with a demand of punishment. However, if there was a riza senedi (consent document) prior to the operation, the judge would refuse the case. But if there was a doubt regarding the competency of the surgeon, he might be questioned. The judge also might demand a testimony from the witnesses, if needed.^{17,18}

Apparently the major aim of this application is to protect the physicians from blood money.¹⁵ But it also protects the rights of the patients. As it has been argued, informed consent documents of our time are also to secure physicians from a file suit by the patients. Even if the riza senets are for this purpose, it still considered as an indication of the importance given by Islam to justice and coherence within the society. We could not find any document, showing this kind of practice that took place in Europe during the concerned period in the recent literature.

Is Riza Senedi an informed consent document?

In this section 'the Convention on Human Rights and Biomedicine of Council of Europe' is taken as a reference text for informed consent process and compared this with the Ottoman Riza Senets.¹⁹ According to the 'Convention on Human Rights and Biomedicine of Council of Europe', an intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.¹⁹ This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks. When we look at the Ottoman Riza Senets we cannot find any clear statement regarding the process of informing the patients. But, the possibility of death as a consequence of the medical intervention had always been mentioned, so patients were aware of the risks of the operation. From that, it is possible to consider this as a kind of informing process.

The Convention on Human Rights and Biomedicine says, "the person concerned may freely withdraw consent at any time." While the Riza Senets however, do not contain any indication regarding free withdrawal. According to the Convention, "a minor does not have the capacity to consent to an intervention, the intervention may only be carried out with the authorizations of his or her representative or an authority or a person or body provided for by law." In Riza Senets however, that consent for minors was obtained from their parents.

The Convention says, "an adult does not have the capacity to consent to an intervention due to mental disability, a disease or for similar reasons, the intervention may only be carried out with the authorization of his or her representative or an authority or a person or body provided for by law." Whereas, there is little clear information on an adult who does not have the capacity to consent in the Riza Senets.¹⁹

One of the major aims of obtaining informed consent is related to the principle of respect for autonomy. Under Islamic law, obtaining permission before any intervention to an individual's body is obligatory. If a patient gives permission for an intervention to an unskillful person knowing that he is not capable for this intervention, there will be no responsibility regarding the consequence.¹⁴ Therefore, it is possible to argue that "free consent" (of patient) is more important than the "capability" (of the physician) in Islamic law, which is parallel to Sugarman's suggestion.²⁰

The informed consent process must include that the person has an adequate decision-making capacity, sufficient information regarding the risks, benefits and

alternatives of the intervention, and a consent stage, such as preparing an agreement form and signing this document. The informed consent process is comprised of 3 steps. These are threshold, information, and consent. The threshold step requires that the person have adequate decision-making capacity, or competency, to provide informed consent, and that he or she be in a position to make a voluntary choice. The information step requires that the individual obtain information regarding the proposed intervention - its risks, benefits, and alternatives. The key to this step is that the information be provided in a manner that is understandable. In the consent step, once the individual has had an opportunity to consider this information and any questions are answered, he or she may authorize the agreement to proceed, typically by completing a consent document that summarizes the information provided during the disclosure. This final step is clearly stated in the Sicils, and the first step can also be found or quite related to the consent of minors. However, the second step is suspicious.²⁰

Sicils are mostly related to invasive procedures and life threatening interventions. Despite the references point regarding the respect for autonomy in Islamic law,²¹ this application can be considered as the protection of physicians from blood money, rather than protection for patients. However, this is similar to the current trend, since it was suggested that; "Perhaps because of the legal cases that articulated the need for informed consent, in the therapeutic setting formal and written informed consent is typically obtained for invasive procedures and other medical interventions that are new or pose substantial risk (such as cancer chemotherapy), but not for most routine clinical interactions."²⁰

In conclusion, it was stated in a recent article, Islam, as a religion that governs every aspects of life, shall make regulations and draw up legislation even under conditions of uncertainty.²² Islamic law leaves the decision to the family of the deceased whether a murderer will be executed or not. The family can forgive the guilty person with a payment of blood money (diyat). Consequences of medical interventions are not a matter of responsibility, if the physician is competent and the application is scientifically accurate. A riza senedi (consent document) is a confirmation of this principle with a contract, and also a document by which the physician can defend himself against a murder case or paying blood money. These contracts can also be considered as an indication of the patient's consent. Apparently this application benefits the physician rather than the patient. There are similar points between the riza senedi and the modern concept of informed

consent, as well as some differences. Islamic law protects patients from unauthorized interventions to their health. Riza senedi is a record regarding the physician, followed by the rule of obtaining consent of the patient prior to the operation. So, a riza senedi has a similar function to the modern informed consent documents. However, the method of obtaining the consent is not as detailed as the modern concept, and does not contain a structured procedure on informing the patient. As a result, we can say that both of the concepts are similar as a way of protecting the patient from unauthorized interventions, but they are not exactly the same due to the differences in the concept of informing the patients.

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