



THE LEGALITY OR OTHERWISE OF ORGAN DONATION: AN ISLAMIC PERSPECTIVE

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ABSTRACT

Organ transplantation has been transformed from an experimental procedure at Western academic centers to an increasingly common procedure in private and public hospitals throughout the world. Attendant with advancements in organ harvesting, preservation, and transplantation come moral issues. Islam is a holistic religion that takes into account social affairs of man as well as spiritual ones. Islam has a long history of ethics literature including the subgenre of medical ethics. The issue of organ donation in Islam has been debated for decades, with most religious authorities sanctioning both living organ donation and cadaveric organ donation. However, disquiet among the Islamic community on the compatibility of organ donation with their faith remains, especially in relation to brain dead donation. This remains a topical, controversial, and challenging component of organ donation at both local and international levels. In this research, I will explore Islamic viewpoints both for and against organ donation, in the context of both living-donor, cadaveric, and brain dead donors. Historical considerations are discussed as to why Muslim thinkers were late to consider contemporary medical issues such as organ donation. Islam respects life and values the needs of the living over the dead, thus allowing organ donation to be considered in certain circumstances. The Islamic viewpoint, both Shiite and Sunni, is examined in relation to organ donation and its various sources. The advantages and disadvantages of brain dead and cadaveric donation is reviewed with technical and ethical considerations. The Islamic concept of brain death, donation to non-Muslims, and organ trade are also discussed.

KEYWORDS: Legality, Otherwise, Organ, Donation, Islamic.

I INTRODUCTION

Organ donation is the act of giving biological tissue or organs from a living or deceased person to a person in need of transplantation. Encyclopedia Britannica (2013) defines it as the altruistic provision of one or more organs for transplantation without compensation. Organ donation is a multifaceted decision, influenced by medical, legal, religious, cultural, and ethical considerations. In today's context, organ donation extends beyond major organs like the heart, intestines, kidneys, liver, lungs, and pancreas to include tissues such as corneas, bones, skin, and blood, among others.^[1]

Organ donation is a new method of treatment that can save many lives and improve the quality of life for many others. Any action carried out with good intention and which aims at helping others is respected and indeed encouraged in Islam provided no harm is inflicted. The human body is the property of Allah; however, man is entrusted with the body as well as other things. He should use it in a way and manner prescribed by Islam

and any misuse will be judged accordingly on the Day of Judgment.

There are two types of organ donation, the first is organ taken from a live donor and the second is cadaveric organ donation. Islamic scholars made permissible organ donations made permissible organ donations made permissible organ donations from a deceased person to a living one, if the deceased has consented to it while he was still alive, or if his next of kin has consented to it.

Donation of organs should not be considered as transgression against the body. On the contrary, it is an act of charity and benevolence to fellow humans, which Islam encourages. Human organs are not a commodity, they should be donated freely in response to an altruistic feeling of brotherhood and care for other Muslims.^[2]

II DEFINATION AND SCOPE OF ORGAN DONATION

Organ donation is the process of surgically removing an organ or tissue from one person (the organ donor) and placing it into another person (the recipient). Transplantation is necessary because the recipient's organ has failed or has been damaged by disease or injury. It is the removal of living, effective cells, tissues, or organs from the body to be transferred either back into a different body. It can also be defined as a surgical procedure that requires the removal of an organ, body parts or tissue from a person (donor) to another (donee or recipient) in order to replace a fail or missing organ.

Organ failure is incurable and once an organ is damaged, nothing can be done to reverse the process. Organ like kidneys and liver are considered as vital organs because their failure may cause death. Organs donated can either be from a deceased/cadaveric donor or living donor. Organ donors may either be living, or brain dead. For the donor to be brain dead, he must have received either a traumatic or pathological injury to the part of the brain in control of his heartbeat and breathing.

Organ transplantation is broadly classified based on the similarity between the sites of transplantation and also between the donor and the recipient; Auto transplants involve the transfer of tissue or organs from one part of an individual to another part of the same individual. Allotransplants involve transfer from one individual to a different individual of the same species – the most common scenario for most solid organ transplants performed today. Xeno transplantation involve transfer across species barriers.

Organs like kidney can be donated by a living donor or a testator to be retrieved from his cadaver, while some organs such as lungs, heart, liver and cornea can only be donated and retrieved from a person who has been certified clinically dead or declared brain dead. Brain death occurs when severe brain injury causes irreversible loss of the capacity for consciousness combined with the irreversible loss of the capacity for breathing.

In most countries, it is accepted that the condition of brain death equates in Medical, Legal and Religious terms with death of the patient. The patient must have suffered major brain damage of known aetiology, be deeply unconscious and require artificial ventilation. Particular care must be taken to ensure that muscle relaxants and drugs with known CNS depressant effects are not contributing to the clinical picture. Hypothermia, profound hypotension and metabolic or hormonal conditions that may contribute to CNS depression and confound the diagnosis of brain death must also be excluded. Clinical testing for brainstem death includes absence of cranial reflexes, motor response and spontaneous respiration.

Living transplantation is unique in the sense that surgeons operate on a healthy individual who has no medical disorders. Most living donor renal transplants are between genetically related individuals. Living donor transplantation between genetically unrelated individual give better results than well matched cadaveric allograft. In all cases of living organ donation, it is essential to ensure that the prospective donor is fully informed and is free from coercion to donate and has no risk to the donor.

III HISTORICAL BACKGROUD OF ORGAN DONATION

Organ donation is not a twentieth century novelty. Indeed, it was known in one form or another even in prehistoric times. Ancient Hindu surgeons described methods for repairing defects of the nose and ears using auto grafts from the neighboring skin, a technique that remains till date. Tooth transplantation was practiced in ancient Egypt, Greece, Rome, and pre-Colombian North and South America. Arab surgeons were adept at this technique one thousand years ago.^[3]

There was no record of organ donation during the lifetime of the Holy Prophet but there were records of different Auto transplants. It was reported that during the Battle of Uhud the eye of Qatada Ibn Nu'man (RA), a companion of the Holy Prophet was hit and one of his eyeball protruded. The Holy Prophet took the eye and auto transplanted it, by replacing the same eye to its normal position, and thereafter the eye became better than it was before.^[4]

During the Battle of Badr, Abu Jahl cut off the hand of Mu'awwidh ibn Afra (RA). Mu'awwidh took his severed hand to the Prophet, and the Prophet stuck the amputated hand onto Mu'awwidh's wrist and applied his saliva to it. It healed at once, and Mu'awwidh returned to the battle field and fought with both hands until he was martyred.

When we compare these Hadiths we find that in the case of Qatada it was the same eye of his that had been transplanted, while in the case of Mu'awwidh it was the same hand of his that had been transplanted to him. In both cases the prophet did not asked anybody to donate his organ to Qatada or Mu'awwidh, and none of them asked for organ donations too.

Imam Nawawi fully discussed the subject of bone and teeth transplantation in his voluminous reference textbook Al-Majmu^[5], and his conscience book Minhaj Attablin.^[6] Imam Asshirbini commented on the same subject in his book Muhqini Al-Muhtaj.^[7] Ibn Sina (Avicenna (607-687H/1210-1288AD), the greatest Muslim physician in his voluminous textbook "Canon" regarded bone transplantation as a hazardous operation that he would never attempt to perform.^[8] From the light of the above Hadiths, jurists concluded that there was only organ auto transplant during the lifetime of the

Prophet, but there was no report of organ donation by one person to another for the purpose of transplantation.

Over centuries ago many successive generation had attempted tissue or organ transplantation and various fantastic descriptions of such transplantation were recorded. In the 300 BC the Christian Arabs saints, Cosmas and Damian were said to have successfully transplanted the leg of a deceased person several days earlier to replace a disease leg of another person.^[9] In the early 1900s clinical organ transplantation was made more feasible to the surgeons after the development of safer and more effective immunosuppressive agents and Carrel description of a more reliable technique for vascular anastomoses. In 1962, Roy Calne developed Azathioprine and in 1978 he introduced cyclosporine immunosuppressant in to clinical practice. In 1966, anti-lymphocyte globulin was used by Tom Starzl and colleagues, and in 1981 Ben Cosimi and colleagues reported the first use of a therapeutic monoclonal antibody (OKT3) in transplantation.^[10]

Organ transplantation has become a rapidly expanding and important surgical specialty in the last 4 decades. It is a specialty that requires the close cooperation of several disciplines - Surgeons, anesthetists, immunologists and physicians. Transplantation of solid organs has become the treatment of choice for end stage renal, hepatic, cardiac and pulmonary disease.^[11] The greatest numbers of living donor kidney transplants on a yearly basis, were performed in the United States (6435), Brazil (1768), Iran (1615), Mexico (1459) and Japan (939). In the Arab world, Saudi Arabia had the highest reported living kidney donor transplant.^[12]

The concept of organ transplantation was first conceived in Nigeria in 1980 but due to gradual deterioration in the public health care system, the concept did not actualize until in 2000 when first renal transplant was done.^[13] Since then other centers begun to emerge in the country. In Nigeria, though no documented study was done, but it was estimated that end stage renal disease to be about 200-300 per million populations. ESRD patients in Nigeria have been managed largely on hemodialysis, which has not been good quality of life to the patient and more so, very few patients who would afford to be on regular prescribed hemodialysis because of the high cost of hemodialysis which is much higher than that of kidney transplant.

In 2008, there were four centers and more than 100 patients had successful renal transplant to date. Recently, University of Maiduguri Teaching Hospital in collaboration with other sister centers in the country for the first time successfully transplanted a kidney. Various collaborations with international transplant centers, especially in renal transplantation were made to train and improve the skills of the indigenous transplant team for sustainability of organ transplantation in Nigeria.

IV LEGALITY OF ORGAN DONATION IN ISLAM

Organ donation is subject to a great deal of controversy amongst Muslims, and challenges several fundamental beliefs held about the human body, including its inviolability and sacred nature. The transplantation of human organs, with its complex operations, impressive therapeutic benefits and ability to take organs from the dead to save the living, is a recent phenomenon that was not entirely predicated or discussed in traditional (classical) Islamic legal literature.^[14] As a consequence, modern scholars had to apply the classical framework of deriving legal rulings from the original sources to form a new context.

In Islam, religion encompasses all intellectual activities of man with scholastic theology (Kalam) being but one discipline and all fields of study, such as the physical sciences, medicine, and law referred to as 'sciences' in the sense that they require methodical study. Because all areas of intellectual endeavors impact the lives of the individual and society, every science inherently has an ethical dimension to it in Islam. For that reason, the science and philosophy of ethics has been to be of paramount importance in all Islamic schools of thoughts along with doctrines (Qaida) and legal rulings (Ahkam). The prophet defined his entire mission as the promulgator of Islam in an ethical light; "I was sent to ennoble man's ethics".^[15]

The majority of the Islamic jurists considered organ donation to be permissible, provided it does not harm the donor^[16], and on the basic of the principle that the needs of the living outweigh those of the dead. Saving a life is of paramount value in Islam as Allah says "...and if anyone sustains life, it would be as if he sustained the life of all mankind."^[17] Despite this position, Muslims are often uncertain about whether or not Islamic tradition considers organ donation to be forbidden. This uncertainty stems from ambiguity caused by conflicting opinions of the classical and contemporary jurists regarding this issue. There are two broad scholarly views on the subject; those who hold it to be permissible, given the fulfillment of a specific criteria, and those who deem it entirely impermissible in every circumstance.

Both viewpoints are valid to some extent, backed by supporting evidence and may be followed without fear of sin. Muslims are obliged to both respect each view and be consistent in following the one they choose.^[18] On the issue of legality of organ donation, the following juristic views were discernable.

A Organ Donation Is Not Permissible

The first position can be deemed as the default position on how human beings should be treated as far as bodily integrity is concerned. Proponents of this position argue that the human body should be left naturally intact as far as possible without any invasive intervention. This position stems from the Islamic understanding of the

‘primordial natural state (*fitra*) enshrined in the verse of the Holy Quran, “This is the natural disposition God instilled in mankind, there is no altering God’s creation”.^[19] Human beings have been entrusted to take care of their bodies. As such, we are strictly not allowed to sell or buy human organs for any reason whatsoever.

For proponents of this view, organ donation and transplantation in both iterations are forbidden. This opinion was held by Muhammad Shafi (d. 1976), former Chief Mufti of Darul Ulum Deoband India, Akhtar Reza Khan (d. 2018), Muhammad Mitwalli Al-Sharawi (d. 1998), Abdullahi Siddiq Al-Ghumari (d. 1993) and Abd Al-Salam Abd Al-Rahman, to name a few.^[20] These scholars resorted to four (4) types of sources to argue their position.

- Scripture
- Classical Islamic law
- Society
- Culture

Two main arguments are made by invoking scriptures;

- Allah’s ownership of the human body.
- Human dignity.

The Quran clearly places the sovereignty of everything within Allah’s domain, “Exalted is He who holds all control in His hands, who has power over everything”.^[21] The Quran further singles out human beings as the property of Allah, “Say, I seek refuge with the Lord of people, the Master of people, the God of people”.^[22] From such verses, it has been inferred that Allah is the true owner and master of the human body, while humans act as mere stewards and agents for it. Stewardship implies that humans do not have unlimited freedom over their bodies, this freedom has to be bridled with accountability and responsibility which includes a fair usage policy.^[23]

➤ The Ownership Argument

By using the above verses as a springboard, scholars from this camp develop rational arguments to prove that organ donation and transplantation is not permissible. The argument is that true ownership of a thing means that one has complete control and discretionary right over that thing. Once the definition is established, the next question is whether it applies to human beings vis-à-vis their organs and limbs.^[24]

To test this definition, scholars employ the case of voluntary and involuntary movements in the human body. Bakru posits that there are certain movements and functions in the human body which are out of a person’s control such as breathing, flowing of blood and vital fluids, and bowel movement.^[25]

Furthermore, even voluntary movements are predicated on God willing them to move, without which a person is not able to move an inch. By employing biological and theological reasoning, Bakru concludes that since human

beings fall short of the definition of ownership viz-a-viz their bodies, they do not have the right to transact with it. Numerous responses have been given to the ownership argument. Firstly, a corpus-based analysis of the Arabic verb ‘*yamlik*’ (to own) and its derivatives from the Qur’an reveal that, contrary to Bakru, one does not need to have full control over a thing to own it.^[26]

The former grand Mufti of Lebanon, Muhammad Rashid Qabbani, argues that to explore the issue from the angle of ownership is incorrect as no one disputes this fact. Qabbani maintains that the issue needs to be tackled from the point of view of discretionary rights and not ownership. By employing the rights argument, one is able to arrive at a decision on the extent of the discretion that humans have over their bodies. Qabbani maintains that the human body is a site where both God and humans share a claim on it and people’s right over their bodies is privileged over God’s right. While Qabbani’s argument does not neatly establish the permissibility of organ transplantation and donation, he manages to create a space to discuss bioethical issues related to the human body without having to discuss the ownership question.^[27]

For the Qatar based Egyptian scholar, Yusuf Al-Qaradawi, human organs and limbs are similar to wealth, since both of them have been given to humans by Allah, and therefore falls under the same ruling related to wealth. The only difference is that the restriction to donate organs is slightly stricter than donating wealth. Al-Qaradawi’s reading of the Prophetic statement ‘Every good is charity (*sadaqa*)’ goes beyond financial help and extends to any form of the ‘good’—one example of which is organ donation.

➤ The Dignity And Sanctity Argument

Stemming from the argument that the human body is a trust from God, who is the true owner of the body, is the issue of human dignity (*karama and hurma*). Organ transplantation violates this dignity and therefore it is impermissible. The Qur’an in numerous verses mentions that God has dignified and honoured the human being.^[28] Violation of this dignity is measured in two ways: (i) degradation (*ihana*) and (ii) mutilation (*muthla*). While retrieving organs, which prolongs the funeral is not in and of itself mutilation, however, since it prolongs what naturally should be done (i.e., burial), it is deemed to be an infraction of that dignity.^[29]

Furthermore, viewing the dying or dead person as a potential repository for organs relegates the value of the human to that of a means to an end. The degradation (*ihana*) intensifies when physical intervention into the body is involved. Any form of incision into the human body, dead or alive, without it having any physical benefit to the donor (*islah. al-badan*) is deemed mutilation. By way of evidence, a conversation in the Qur’an between God and Satan regarding how the latter will lead people astray is presented. According to the

Holy Qur'an, Satan announces to God that one of his major ploys to lead people astray from God's way is by seducing them to mutilate and change the creation of God.^[30]

The above verse, coupled with a Prophetic statement, 'breaking the bones of the dead is like breaking the bones of the living,' is the final nail in the coffin against organ transplantation (*Ibn Majah, Bab Fi Al-Nahyy Fi Kasr Izam Al-Mayyi*) cited in (Al-Bassam 2003).^[31]

For the proponents of the first position, organ transplantation is an evil anticipated by the Prophet and an instantiation of the self-fulfilling prophecy of the devil. Scholars have responded that while the Qur'an declares that humans have dignity and are honoured, it has not laid down concrete guidance as to how this dignity is to be actualised. Therefore, it is left on the Muslim society to decide how to define dignity.^[32]

Al-Bassam (d. 2002) mentions that mutilation (*Muthla*) has a specific understanding in Arabic relating particularly to the context of war. Mutilation in Arabia was used as a form of weapon employed to cause hurt to the living by desecrating their loved ones. Malignant intention is a prerequisite of mutilation. Al-Bassam argues that this understanding of mutilation cannot be transposed on to precise surgery carried out in a clinically sterile environment at the hands of a qualified surgeon for the sole purpose of saving someone else's life.^[33]

Furthermore, he argues that to deem organ transplantation as an example of the actualization of Satan's prophecy is misplaced and an incorrect stretching of the meaning of the verse. Thus, a close reading of the Qur'an reveals that mutilation in this context relates to certain occult practices involving cutting of animal organs (especially the male-born of the five-year-old camel) to ward off evil from the rest of the flock.

B Organ Donation Is Permissible

Organ transplantation surgery is routine practice today throughout the world. The procedure is viewed as one of the best technological advancements for the betterment of society. Proponents of the second position conform to this understand and have declared both organ reception and donation to be permissible in all iterations, living and dead, determined through circulatory and/or neurological criteria, with certain caveats.^[34]

As previously mentioned, the issue of organ transplantation falls within the domain of legal discretion (*ijtihad*), since there is no clear cut in Muslim scripture on the topic. Despite this, proponents of this position too believe that the spirit of the Qur'an and Hadith is conducive to organ transplantation and donation. These scholars arrive at this decision by joining numerous disparate themes found in the Qur'an and Hadith together. These include the necessity to save one's life,

the exhortation to save another's life, human dignity and honor, and charity.

The justification for receiving an organ in a life-threatening or life-enhancing situation is easily justifiable from multiple Qur'anic verses permitting the consumption of prohibited (*haram*) ingredients in dire necessity. A typical example of such verses is found in the second chapter of the Qur'an; "He has only forbidden you carrion, blood, pig's meat, and animals over which any name other than God's has been invoked. However, if anyone is forced to eat such things by hunger, rather than desire or excess, he commits no sin: God is most merciful and forgiving".^[35]

While opponents of organ transplantation circumscribe this verse to food products only, the proponents find no reason not to extend it to all cases of dire necessity. Hence, the proponents argue that such verses also extend to medical treatment using prohibited ingredients and methods.^[36] This is further exemplified through an incident involving one of the companions of the Prophet Arfajah ibn Sa'ad severely injured his nose in a battle. Per Arab medical practice at the time, he made a mould out of silver and fixed it in the place of his nose. After a while, it started to become putrid and the Prophet permitted him to make a mold out of Gold (Narrated by Abu Dawud, Imam Nasa'i And Tirmidhi).^[37]

Such guidance from the Qur'an and prophetic practices are further enshrined as legal maxims to facilitate scholars in arriving at decisions where the scripture is conspicuously silent such as: necessity permits the prohibited, hardship facilitates ease, needs (*haja*) shares the same legal ruling of necessity.^[38]

Where the justification for receiving an organ is easily demonstrated from the Qur'an and Hadith, the same cannot be said for organ donation. Here, the scholars employ numerous unrelated pieces of evidence organized logically, allowing them to arrive at the conclusion that organ donation is permissible. The first of these is the above verse read in tandem with the verse, "Do not contribute to your destruction with your own hand".^[39] These scholars argue that while it is necessary for a person in trouble to save themselves, it is a duty for others to facilitate this saving lest it results in the troubled person perishing. This is a collective duty (*fard kifaya*) where everyone will be sinful if no one carries it out. Furthermore, to save a life is one of the objectives of the Shariah which the Qur'an equates to saving the entire human race, "If anyone saves a life, it is as if he saves the lives of all mankind".^[40]

The issue of charity and altruism have been invoked as further evidence and encouragement for organ donation. Caring for the ill comes under the responsibility of society and organ donation may be considered as social obligation. Allah says '...they give them preference over themselves, even though they are in privation. And

whoever is protected from the stinginess of his soul- it is those who will be the successful.^[41] This verse has led to the justification of numerous actions which otherwise would have been prohibited such as a bystander putting themselves in way of danger to protect a drowning person or a burning person.^[42]

V ISLAMIC JURIDICAL RESOLUTIONS ON THE LEGALITY OF ORGAN DONATION (FATWAS)

➤ **Fatwa Of Mufti Of Egypt, Dr. Muhammad Syed Tantawi:** the learned mufti is of the view that live organ donations are permissible by consensus of jurists, whether the recipient be his relative or a stranger, as long as such a donation is considered to be of benefit by a trusted medical practitioner...Taking organs from the body of the dead person to transplant to someone who needs it, whether to save his life or to cure him, is permissible and this ruling is also based on consensus of jurists.^[43]

➤ **Fatwa committee of Kuwait:** if an organ to be transplanted is taken from a deceased person, the ruling is that such a transplant is permissible, no matter whether the intention for the transplant by the donor was made in the form of a will by the deceased or otherwise. This is based on exigency (*darurah*), such as saving a life that transforms what is originally forbidden into a state of permissibility. Thus, organ transplants are permissible, as long as there is an urgent need for it. If the donor is still alive and taking the organ is detrimental to his life, such as taking his heart and lungs, then it is forbidden, no matter whether the donor allows it or otherwise. If the organ or body part that is to be transplanted does not affect the donor's life, that is, the donor can continue living without it, then the ruling depends on several factors. If not having the organ will physically harm the donor, or prevent him from fulfilling his obligations, for example, donating a hand or leg, then it is not allowed. In the case where the life of the donor is not affected by the donation, such as that of kidneys, teeth or blood, a transplant is not permissible if it is done without the consent of the donor. [It is] permissible if it is done with the consent of the donor and if the rate of success of such an operation is high.^[44]

➤ **Fatwa of Dr Yusuf Al-Qaradhawi:** "Someone who wishes to alleviate another human's suffering, such as kidney disease, by donating one of his healthy kidneys, is allowed to do so in Islamic law. In fact, it is considered to be a good act and the donor will be duly rewarded. This is based on a Prophetic tradition in which the Prophet is reported to have said that those who show kindness on earth will receive God's mercy and kindness. On this, I am of the opinion that there is no prohibition from donating an organ or body part to someone who needs it to cure him/her, and to replace his/her non-functioning organ, such as the kidney or heart etc. with the intent of giving charity. And this is considered to be a continual (*jariah*) donation, and the

reward for the donor continues to be accrued for as long as there are those who benefit from it.^[45]

➤ **Fatwa of The National Fatwa Council of Malaysia:** "Cadaveric transplant of the eye and heart is permissible if the following conditions are observed:

- In the case of extreme need and exigency, in which the life of the receiver depends on that organ, and there is sufficient evidence that the transplant process will be successful.
- In the case of heart transplantation, the death of the donor must be determined before the transplant can be performed. Proper action must be undertaken to ensure that there is no killing and trading of organs involved.^[46]

➤ **Fatwas issued by the Islamic Religious Council of Singapore (MUIS)**

The MUIS Fatwa Committee has issued several Fatwas on this since 1973. In 1973, the Fatwa stated that a pledge (in the form of a will) to donate one's kidneys to a kidney patient is not permissible. This decision was based on the consideration that one does not own one's body, including one's kidneys, or other organs, and thus does not have the right to donate his/her kidneys. In addition, there was not enough information then on the seriousness of the kidney problem, and whether there was another way to cure it. Furthermore, the advancements in medical sciences and technology at that point were not reassuring as to the success of such transplants in curing the medical problem.

The Committee also ruled that any two male witnesses are sufficient for a pledge. Thus, the pledger no longer needs the next-of-kin to be witnesses. These Fatwas are in line with that of the common consensus (*Jumhur*) of contemporary scholars and international Fiqh councils, such as those quoted above. In summary, organ transplant from the deceased is permissible, as long as the transplant is to save the life of the recipient, and the deceased has given consent. Islam thus emphasizes on giving a Muslim an option to donate or otherwise, and to make the option known in his/her lifetime. In an opt-in system, such as in MTERA, consent can be given through voluntarily pledging. Whichever decision a Muslim has made, it is important to inform the next-of-kin and family members, so that the decision will be respected after his/her death.

➤ **1995 Fatwa Of The Muslim Law (Shariah) Council**

The 1995 fatwa of The Muslim Law (Shariah) Council was, despite a claim to the contrary, an opinion by a relative small network of individuals and did not include any obvious representation from the Deobandi School. The basic position of the fatwa was that organ transplantation is permissible, and brain-stem death is a proper definition of death. The Fatwa used the following premises for its opinion.

1. Personal legal authority/sovereignty: Scholars argued that the life and body of the individual combines both a

right of the individual and a right of God (in terms of public interest over which no one individual has an exclusive claim). The individual enjoys the right of disposal until such disposal conflicts with the right of God, in which case, the right of God is preponderate. As long as public interest is served and the benefits to the recipient outweigh the harms to the donor, organ transplantation cannot be deemed to be impermissible on account of a lack of self-ownership.

2. A person is forbidden from harming himself or others. I concur with this premise, which is sound and not a matter of dispute.
3. Necessity permits the prohibited.
4. Choosing the lesser of two evils.
5. Islam made it an obligation upon the sick to seek treatment. Muslim jurists argued that this is simply not true.

The majority opinion across all four Sunni schools of jurisprudence hovers around simple permissibility and preferability and is based upon treatment efficacy. Treatment can be mandatory only when the treatment efficacy is certain or a dominant presumption, and the probability of failure is disregarded. This is not the case for organ transplantation.

The Fatwa focused more on arguing brain stem death was an acceptable criterion of death but did not acknowledge whole brain or higher brain criteria. There was also no discussion as to what philosophical definition of death brain stem death satisfied, or whether human dignity was compromised by the process of organ retrieval.

➤ 2000 Fatwa of European Council for Fatwa and Research

The European Council for Fatwa and Research (ECFR), based in Dublin, Ireland, is an initiative of the Federation of Islamic Organizations in Europe (FIOE) with the stated aim of bringing together European Muslim scholars to unify their positions on jurisprudential issues with a particular focus on the European context. Recent developments have brought a more distinctly European face to the ECFR, but in the UK, the ECFR enjoys little traction amongst the Deobandi and Barelwi schools, which account for about 64.9% of the mosques and have their own ad hoc structures for arriving at legal opinions. Notwithstanding, the ECFR does represent a credible academic voice that is of interest to scholars not affiliated to the ECFR, even if the decisions of the ECFR are not quite met with ready acceptance.

In 2000, the ECFR declared its ratification of the resolutions of both the Islamic Fiqh Academy (IFA) of the Muslim World League and the International Islamic Fiqh Academy (IIFA) of the OIC simply quoting verbatim three resolutions of the IIFA. Resolution No. 26 (1/4) on “Organ transplant from the body (dead or alive) of a human being on to the body of another human being” permitted organ transplantation with conditions

and was passed by majority, but it remains unclear as to how the proposed resolution was first formulated and how the dissenting voices were satisfied. In relation to Deceased transplantation the resolution noted that death comprised two situations,

1. Death of the brain with the complete cessation of all of its functions in which, medically, there is no reversibility.
2. Complete cessation of cardio respiratory functions in which, medically, there is no reversibility.

Resolution No. 57 (8/6) concerning “Transplant of Genital Organs” prohibited the transplantation of the testicles and the ovaries but allowed transplantation of reproductive organs that did not transfer hereditary attributes but excluding the genitals.

Resolution No. 54 (5/6) concerning “Transplant of Brain Tissues and Nervous System” permitted, in principle, auto transplantation of tissues from the adrenal gland and transplantation of brain tissue from an animal foetus but prohibited the same from a living human foetus or a baby born with anencephaly. However, it permitted the same from a natural miscarriage, an abortion sanctioned in Islam or from brain cells cultured in a laboratory.

The ECFR opinion concluded with three additional points.

1. Directed Donation – Whilst live directed donation is the norm, deceased organ donation must, in principle, be unconditional under current legislation across the UK. However, a request for the allocation of a donor organ to a close family relative or friend can be considered. There is a valid discussion to be had as to whether Islam favors a personal autonomy model of distributary justice, an obligation model, or a combination of both.
2. A written instruction to donate posthumously will be governed by the laws on bequests and the heirs or other third parties could not alter the bequest. - However, jurist argued that an instruction, whether verbal or written, to donate body parts posthumously does not meet the legal requirement of a valid bequest in any of the four Sunni schools of jurisprudence, all of which require ownership, illicitness and admission to proprietary transfer. The life and body of the individual combines both a right of the individual and a right of God, and the individual enjoys the right of disposal until such disposal conflicts with the right of God. If the right of God is preponderate, that right cannot be waived, compensated for nor inherited. If the right of the individual is preponderate, such as in the right of requital, the individual may waive the right, accept compensation in the form of blood wit, and the right can also be inherited.

However, it cannot be made the object of bequest, as there is no ownership, and it does not admit to proprietary transfer. At best, it may be considered a bequest in the lexical sense only, and is rather a ceding of the donor’s right to posthumous bodily integrity for the benefit of the recipient in a manner that it is also

aligned with public interest. Although the heirs are not bound by such instruction, they cannot also prevent such instruction being carried out. It also follows that, as the right of God is preponderate in human bodily integrity, such right cannot be inherited by the heirs. Thus, in the absence of any living instruction by the deceased, the heirs cannot consent to organ donation as surrogates of the deceased

- **Fatwa of Grand Mufti Gad Al-Haq:** he sanctioned the donation of organs from the living provided no harm was done, and provided it was donated freely in good faith and for the love of god and the human fraternity. He also sanctioned cadaveric donors provided there was a will, testament or the consent of the relatives of the deceased.^[47]
- The Saudi Grand Ulama Fatwa No. 99, 1982, addressed the subject of auto grafts, which was unanimously sanctioned. It also sanctioned (by a majority) the donation of organs both by the living and by the dead, who made a will or testament, or by the consent of the relatives (who constitute the Islamic next of kin).^[48]
- The Kuwaiti Fatwa of the Ministry of Charitable Endowments No. 137/79, 1980 sanctioned live and cadaveric organ donation. The Kuwaiti law No. 7, 1983, reiterated the previous Fatwa and pointed out that living donors should be over the age of 21 years in order to give their consent.

VI CONDITIONS AND REQUIREMENTS OF ORGAN DONATION

There are certain conditions and requirements to be fulfilled when an organ is to be donated or received. The Penang fatwa committee which sat on December 30, 2009 issued a comprehensive fatwa regarding organ donation. The fatwa was gazetted on 9th December 2010, stating that the organ donation and transplantation are permissible under certain conditions.

For living donor, the conditions are as follows

- a. Careful and professional medical examinations must be conducted by medical specialists to guarantee the safety of the donor to continue his or her life, the benefits, the advantages and disadvantages, as well as the success and failures of the transplantation.
- b. The transplantation is performed with the willingness and consent from the donor without any kind of coercion from any parties.
- c. Organ donation or transplantation is the final resort in a critical and crucial situation, and there is an urgent need to save the life of other people especially those with family relationship.
- d. Written consent is obtained from the donor, and the donor is free to withdraw the consent at any time.
- e. The highest level of respect must be given to the bodies of the donor and the recipient. Islam sanctifies and affords immense dignity to human beings, as is clearly mentioned in the Quran.^[49] Current practice in UK would fulfil this requirement.

- f. There must be no buying and selling of organs.^[50] It carries the risk of coercion, exploitation of the poor, and potentially deprives the donor and recipient of proper aftercare.^[51] Human organs are not a commodity for sale.
- g. Medical practitioners should observe medical ethics.

For cadaveric donor, the conditions are as follows

- a. The death is not part of a pact or a plan to gain profit.
- b. The death of the donor should be carefully ascertained.
- c. It is performed under the donor's consent through a will or through his or her guardian and it must be witnessed by two witnesses.
- d. Medical experts have verified that the organ and tissue from the donor can be used for donation.
- e. There is a general consensus in Islam that the relatives of the deceased have the permission to allow an organ to be taken from the body of even if there is no will or donor instruction to that effect.^[52]
- f. The transplantation is performed with full discipline, knowledge, faith and piety, and respect should be accorded to the deceased following Islamic law, and humiliation should not take place.

VII GENERAL BIOETHICAL ISSUES RELATED TO ORGAN DONATION

Islam differs from many other religions in providing a complete code of life. It encompasses the secular with the spiritual and the mundane with the celestial. Man is the vicegerent of Allah on earth. "Behold the Lord says to Angels: I will create vicegerent on earth".^[53] He fashioned man in due proportion and breathed into him something of his spirit and not only Adam was honoured by Allah, but his progeny also, provided they followed the right path. "We honoured the progeny of Adam, provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favours above a great part of our creation".^[54]

Human life begins at the time of ensoulment, which is stated in the sayings of the Prophet to be the 120th day from the time of conception.^[55] Life ends with departure of the soul or spirit, a process that cannot be identified by mortals except by the accompanying signs; the most important of which is the cessation of respiration and circulation. Some jurists described weakening of vision, limpness of the feet, bending of the nose, whitening of the temples and the stretching of the face and loss of the ability to wrinkle as the signs of death.^[56]

The sanctity of the human body is not lessened by the departure of the soul and declaration of death. The human body, whether living or dead should be venerated likewise. The prophet rebuked a man who broke a bone of a corpse that he found in a cemetery. The prophet said, "The sin of breaking the bones of a dead man is equal to the sin of breaking the bones of a living man".^[57] The

dead body should be prepared for burial as soon as possible in order to avoid putrefaction (which occurs rapidly in hot climates). Cremation is not allowed. Due respect and reverence should be given to the funeral, as exemplified by the prophet Muhammad (PBUH) who stood in veneration for the passing funeral of a Jew, at a time when Jews were waging war against him. One of his companions exclaimed: "It is the funeral of a Jew"—the prophet answered, "Is it not a human soul"?^[58]

Islam considers disease as a natural phenomenon. It is not caused by demons, stars or evil spirit. Indeed, disease is not even caused by the wrath of God or any other celestial creature. Diseases and ailments are a type of tribulation by God and expiate sin. Those stoics who forbear and endure in dignity are rewarded in this world and on the Day of Judgment. However, man should seek remedy for his ailments. The Prophet Muhammad (PBUH) told Muslims to seek remedy and treatment. He ordered his cousin Saad ibn Abi Waqqas to seek the medical advice of Al Harith ibn Kaledah, a renowned physician of the time. He also declared that there is a cure for every illness, although we may not know it at the time. New methods of treatment should be searched for and applied if proven successful. The prophet ordered Muslims to be compassionate to every human being. He also said, "All mankind is the family of Allah. Those who best serve his family are best loved by God".^[59]

In the case of living donor, the principle of doing no harm *primus non nocere* is invoked. The donor cannot give one of his vital organs, which would end his life. It is an act of homicide or suicide, both of which are considered among the most detestable crimes in Islam. The donation of an organ whose loss would usually cause no harm, or a minimal increased risk to the health or life of the donor, is acceptable if the benefit to the recipient is greater than the harm. It invokes the principle of accepting the lesser harm when faced with two evils. The harm done by the disease, which can kill a human life, is not to be compared with the harm incurred by donation.

Organ transplantation is a new method of treatment that can save many human lives and improve the quality of life for many others. Islam encourages a search for a cure and invokes Muslims not to despair, for there is certainly a cure for every ailment, although we may not know of it at the present time. The donation of organs is an act of charity, benevolence, altruism and love for mankind. God loves those who love fellow humans and try to mitigate the agony and sorrow of others and relieve their misfortunes. Any action carried out with good intentions and which aims at helping others is respected and indeed encouraged, provided no harm is inflicted. The human body is the property of God; however, man is entrusted with the body as well as other things. He should use it in the way prescribed by God as revealed by His messengers. Any misuse will be judged by God on the Day of Judgment, and transgressors will be punished.

Suicide is equated, in Islam, with homicide. Even cremation of the corpse is not allowed. The only accepted and dignified way is burial of the corpse—which should be performed as soon as possible, but not immediately for medical certainty. Donation of organs should not be considered as acts of transgression against the body. On the contrary, they are acts of charity and benevolence to other fellow humans, which God loves and encourages. Human organs are not a commodity. They should be donated freely in response to an altruistic feeling of brotherhood and love for one's fellow beings. Encouraging donation by the government (by any means) is allowed by Islamic Jurists, and is practiced in Saudi Arabia, Gulf Countries, and Iran.

VIII THE CONCEPT OF DEATH IN ISLAM

The advent of new medical technologies has rendered the task of defining death the most pressing issue in the field of biomedical ethics. The formulation of a proper definition of death requires an understanding of the religious estimation of human life and an endeavor to unravel the secret of the soul (*nafs*) or the spirit (*ruh*) which, according to Muslim belief, is infused in the body and departs at the time of death.^[60]

Muslims believe that the determination of death cannot be based solely on medical or scientific evidence. While physicians can describe the physical changes that occur during the dying process, they cannot adequately address the complex religious, ethical, and legal questions surrounding the end of life. As such, the most significant factors in determining the time of death are religious and ethical considerations, rather than purely medical or scientific ones. Within the Muslim community, it is God who ultimately knows the time of death, as He is the giver of life and death. When death occurs, it is viewed as the separation of the soul from the body. Of course, this separation is not open to direct empirical observation, and this is the major source of ambiguity in determining the exact moment of death.^[61]

Today the traditional view of death, which focused upon the cessation of circulatory and respiratory functions as the criteria of departed spirit, has been overshadowed by the ability of the new medical technologies to intervene by artificially sustaining a patient's normal heartbeat, blood pressure, respiration, and liver functions.

Contemporary medical science has developed highly sophisticated techniques for determining the presence or absence of vital bodily functions. This possibility of restoring cardiovascular functioning even in the case of massive brain damage, when there is little likelihood of an individual recovering consciousness, has given rise to the problem of defining cerebral death.

Whether or not Muslim jurists accept the validity of irreversible coma as a new criterion of death, it is important to explore a host of Islamic and medical problems connected with defining death and

understanding the religious and cultural dimensions of accepting death as yet another chapter in human saga toward ultimate repatriation to humanity's origin in God. The Qur'an states this beautifully, emphasizing the need to prepare for this final leg of the journey in the presence of God: "Give thou good tidings unto the patient who, when he is visited by an affliction, says 'Surely we belong to God, and to him we return'".^[62]

The jurists continue to regard death as the cessation of vital functions in an integrated body rather than in a part of the organ. The difficulty in deriving the main criteria for determining death in jurisprudence is underscored by the fact that a definition of death was based on the physiological state described by such signs that indicate both the symptoms of death and the state of death itself. The distinction between the symptoms and the state of death requires further explanation about what exactly constitutes the state of death. The cessation of respiration as the definition of death is insufficient because it simply indicates a prior cessation of cardiac activity.

IX CRITERIA FOR ASCERTAINING DEATH IN ISLAM

Historically, the criterion for ascertaining the death of an individual coincided with the arrest of the cardio-respiratory functions. According to a classic version (dating back to Shafi'i) death could be identified by means of the progressive weakening of the sight, heaviness in the legs, pinching of the nose, the pallor of the temples, the loss of suppleness of the skin on the face and when breathing stopped, which indicates that the soul has left the body.^[63]

A person is pronounced legally dead and consequently all dispositions of Islamic law in case of death apply if one of the following conditions has been established.

- There is total cessation of cardiac and respiratory functions, and medical doctors have ruled that such cessation is irreversible.
- There is total cessation of all cerebral functions and experienced specialized medical doctors have ruled that such cessation is also irreversible, and the brain has started to disintegrate.

In Islam, death is defined as the departure of the soul from the body. The reality of the soul, however, has intentionally been left obscure as a demonstration of man's inability *a fortiori* to comprehend the reality of God. Its departure from the body is a metaphysical phenomenon that can be determined only through physical signs. Muslim jurists have used physical signs of death identified, on the whole, through observation, experience and rational enquiry. Dominant presumption, which connotes the preponderant outcome when the remaining outcomes are disregarded, normally suffices to determine death, but where there is a reason for doubt, the declaration of death will be delayed until the doubt is removed.^[64]

A BRAIN AND ORGAN DONATION

Brain death refers to the total and irreversible cessation of all functions of the brain. A person who is brain dead will not be able to breathe on his own and will need to be supported on a ventilator. Once the ventilator is switched off, all bodily functions including the beating of the heart will cease, since the brain has already stopped functioning. A person who is brain dead is truly and unequivocally dead. This is the scientific position of international medical communities. In determining death, medical professionals need to satisfy strict, internationally recognized conditions in order to determine brain death. This definition has also been accepted by the Fatwa Committee of MUIS.

Brain death is described as the irreversible loss of all functions of the brain, including the brainstem and its diagnosis is primarily clinical rather than religious. Before examining the Islamic rulings on these and related issues, the more relevant issue is the consideration of legality of brain death as "true death". "Brain death" as a type of medically and legally acceptable death was first considered in the early 1960's; with the 1968 Harvard report becoming the "standard" definition of brain death.^[65] In 1970 the United State President's Council on Bioethics recommended the Harvard report to the President and from then on the majority of countries and international professional associations have accepted it.

Brain death can be defined as follows; "When the brain is damaged, and its activities completely cease, brain death is present, even if it is possible for the patient to be kept alive in a vegetative state with artificial respiration and medications; event if the heart and liver are functioning. Brain death is indisputably established and is considered irreversible if, when artificial respirations are ceased, spontaneous respiratory effort ceases within five minutes.

B BRAIN DEAD DONORS

Most transplanted organs are taken from brain dead individuals. In most countries, it is accepted that the condition of brain death equates in Medical, Legal and Religious terms with death of the patient. The patient must have suffered major brain damage of known aetiology, be deeply unconscious and require artificial ventilation. Particular care must be taken to ensure that muscle relaxants and drugs with known CNS depressant effects are not contributing to the clinical picture. Hypothermia, profound hypotension and metabolic or hormonal conditions that may contribute to CNS depression and confound the diagnosis of brain death must also be excluded. Clinical testing for brainstem death includes absence of cranial reflexes, motor response and spontaneous respiration.

Against the brain death criteria, which are indispensable in order to perform a transplant from a corpse, Muslim jurists initially remained faithful to the classic criteria

deeming it shocking to consider deceased an individual who showed signs of life, even if induced by resuscitation, such as heartbeat, nutrition, excretion, the growth of hair and nails. The acceptance of the criteria of brain death has not been easy.^[66]

For example, according to the Council of the Islamic Jurisprudence Academy of the Muslim World League (Mecca, October 1987) life-support equipment can be switched off when three doctors ascertain the irreversible absence of any cerebral activity; it is added that the death of the person can be pronounced only after breathing and the heartbeat have stopped. In fact, this implies the impossibility of explanting organs as the absence of oxygen deteriorates them irremediably.^[67]

Similar uncertainties are reconfirmed by a study on the common positions on the subject by a sample of 50 doctors of the Law from Kuwait, Saudi Arabia, Iran, Egypt, Lebanon and Oman.

The jurists in favour of the brain death criteria can overcome the obstacle having recourse to the analogy with the “movements of the slain or slaughtered”.^[68] This old rule, often agreed with by Shafi’i scholars, states that if an assailant injures an individual causing fatal wounds, the movements of the dying victim are the “movements of the slain”. If a second assailant finishes off the victim, the accusation of murder concerns only the first assailant whilst the second may be prosecuted exclusively for aggression of the corpse. By analogy, the heartbeat the movement of the lungs, etc. that are supported mechanically accompanied by the condition of brain death may be considered equivalent to the “movements of the slain.

Today, in clinical situations suitable for transplants, the jurists seem more willing to accept the brain death criteria, especially against medical assurance. This has been a progressive acceptance, accompanied by a lively debate, although limited to the experts.

The first important juridical-religious recognition of the lawfulness of the new criteria is Resolution no. 17 (5–3) by the Council of the Islamic Fiqh Academy at the Third International Conference of Muslim Jurists (part of the Organization of the Islamic Conference – OIC) in Amman (Jordan) in 1986.

According to the Resolution a person is legally dead when there is one of the following signs: (1) complete cardiac arrest and breathing has stopped, and the doctors certify that this state is irreversible; (2) total cessation of all the functions of the brain, the doctors decide that this state is irreversible whilst the brain has begun to degenerate. Under these conditions it is lawful to disconnect the life-support treatment even if some organs continue to function automatically (e.g. the heart) under their effect.^[69]

C ORGAN RETRIEVAL AFTER BRAIN DEATH NOT ALLOWED

While majority of the Muslim jurists allow organ donations from living and circulatory death patients, some scholars have serious reservations when it comes to allowing organs to be retrieved when the death of the donor was determined using neurological criteria. For these scholars, it creates a peculiar situation a betwixt and between position where the patient is dead from one perspective and yet has signs of the living from another such as warmth, a heartbeat and breathing.

Some argue that the prognosis of death has been confused with its diagnosis, and the death of the organism is being conflated with the death of an organ. The fact that certain somatic activities such as breathing, albeit mechanically, is present, is an indication of the presence of the soul in the body. Termination of life at that moment is tantamount to killing a dying yet living human being.

Numerous high profile scholars hold this view including the former grand mufti of Egypt and one-time rector of al-Azhar, Gad al-Haqq (Al-gad al-Haqq (d. 1996) (1979); the Syrian scholar Muhammad Sa’id Ramadan al-Buti (d. 2013) (1988) and the opinion of another former grand mufti of Egypt, Ali Gomaa Mohammad. This position is also taken by the author of the latest independent fatwa commissioned by the NHS, Muhammad Zubair Butt.^[70]

While an international conference convened by the Islamic Fiqh Council (IFC) of Mecca in 1985 declared cadaver organ retrieval to be permissible, it did not deal with the thorny issue of organ procurement from brain-dead patients.^[71] In a later unrelated conference held on October 1987 deliberating on the legal status of removing artificial ventilation machine from a brain-dead patient the conference resolved that while it is permissible for doctors to switch of the life-support machine in such a situation, the person will not be declared Islamically dead until complete cessation of heartbeat and breathing has not taken place. This latter decision, although not directly related to the organ retrieval process must be read in tandem with the former cadaver organ donation position.

The issue of brain-dead organ retrieval is a deadlock situation borne out of competing worldviews and ontological understandings of what a human being is. While advocates of position two associate the soul and death with vital brain functions, proponents of the third position opt for a more traditional understanding of death, the complete cessation of vital fluids (breathing and circulation of blood).

Al-Buti calls this the common understanding of death which everyone recognizes. In his conference discussion, Al-Buti mentions that he does not dispute the medical diagnosis of death but argues that death is a single

occasion which is understood by all and not just the elite doctors. Al-Buti's barometer for ascertaining death is not a highly trained surgeon, but the common man. Death is what the average person understands it to be. Al-Buti writes; death is "the complete separation of the soul from the body", or to put it differently for those who do not recognize the soul, "it is the complete cessation of life from the body." We do not think that there is anyone who will disagree with this understanding of death.^[72]

For Al-Buti the only Islamically reliable indicator for the onset of death is the weakening of the pulse and the cessation of heartbeat. One can argue that this is not a correct Islamic indicator of death, since there is no association of the departure of the soul with the cessation of heartbeat in Muslim scripture. Al-Buti further argues that using the legal tool 'presumption of continuity' (Istishab Al-As.), the continuity of the life of the imminently dying person is certain while depending on which criteria one uses to diagnose death, his death is uncertain. The certainty of life cannot be removed by the uncertainty of death determination using neurological criteria. For Al-Buti, as long as the heartbeat remains, even if artificially, the person is alive and no declaration of death can be pronounced.

Finally, a quick word must be said about the recent NHS Fatwa on organ donation. While it is clear that the author, Zubair Butt, does not support a brain-based diagnosis of death, his position on circulatory death can easily be misunderstood. At first glance, it seems that Butt is a supporter of organ retrieval from circulatory death patients. However, on closer look, Butt is much more restrictive than what appears to be the case. Butt introduces two concepts into his position, concepts which are not a part of the Islamic discourse but taken from secular bioethicists such as Don Marquis, Miller and Trough.

These two terms are 'permanence' and 'irreversibility'. 'Permanence' is the irreversible loss of circulatory functions due to legal or moral reasons, for example, the decedent willed not to be resuscitated after cardiac arrest even if it is medically possible to do so. 'Irreversibility' is what is known as medical or biological irreversibility; the point at which no amount of medical intervention will kick start the heart. Butt writes "While contemporary Muslim scholars have recognized cardio respiratory arrest as a reliable sign of departure of the soul, they have also required it to be irreversible. This stipulation of irreversibility is to ensure that the soul has indeed departed and, while this stipulation is a recent introduction to the definition of death, it is arguable that it was always implied but had to be expressly stated only because we decided we would interfere with the body of the dying/deceased. Thus, DDCD (donation from circulatory death) is not permissible until the point of elective irreversibility has lapsed".^[73]

X CATEGORIES OF ORGAN DONATION

There are two (2) major categories of organ donation, categorized based on how the donation is done. Thus;

➤ **Living donors:** In the case of the living donor, the criteria for organ donation are two. First, the life of a living donor should not be put at risk, as they are already alive and healthy and they have a greater right to their continued health and a greater chance at extended life than a person that is already ill. Therefore, the donation of vital organs such as the heart is not allowed in Islam, nor should a person who is too unstable physically to tolerate the process of organ harvesting volunteer an organ. The second criterion is that the donor should donate of their own free will as there is no compulsion in non-obligatory acts in Islam.^[74]

The benefit of using living donors is that in non-urgent cases, more time can be spent finding organs that are compatible with respect to blood type and size (in case of pediatric recipients) and for the donor and recipient to become psychologically prepared for the long surgery, recovery and alteration to the physical appearance of their body. The drawback is that physical harm comes to one person for the benefit of another. However, this is considered an acceptable side effect because of the rule of choosing between the lesser of two maladies, i.e. one person dies and one lives, or two people live, both with physical deformities.^[75]

➤ **Cadaveric donors:** The underlying jurisprudential concepts for allowing donation and transplantation are that the needs of the living outweigh those of the dead and that extending the life of one is like extending the life of all mankind. The justification for using cadaveric donors is that their need for organs vital and non-vital has ceased, removing the conflict of interest presented by their personal right to the use of the organ(s) while alive. Ordinarily, the dead have a right in Islam to the sanctity and wholeness of their body,^[76] but as we have already noted, the need to save a life overrides this injunction as it has a prima facie importance in the mundane affairs of mankind. While saving a life is of paramount importance in Islam, the family of the deceased must consent and are in no way obliged to consent to organ donation even if it involves the death of another person who is alive but gravely ill.

The benefit of cadaveric transplantation is that no harm comes to the living in donating the organ and that multiple organs can be harvested at one session for maximal benefit to people. The drawbacks are that the organ(s) being transplanted is compromised to a certain extent by ischemia or infection, and that there is a limited time for subsequent transplantation depending on the organ in question. An important tangent to this point is that the main objection to organ transplantation by many jurists in the past had been this point of bodily mutilation (i.e. cutting the body for organ harvesting), which is forbidden in Islam.^[77]

The reason that the scholars had reversed their opinion was that the question of organ transplantation was rephrased in terms of prolonging life and not bodily mutilation, and that as the expertise became available in Muslim-majority countries, its benefits became self-evident. In addition, it has been reasoned that the “ownership” of organs, like that of property, is relative and subjective because God is the ultimate “owner” of the universe having created it. Therefore, it would be permissible to donate them because God has placed a great value on saving a life.

A ORGANS ALLOWED TO BE DONATED

In the classical juridical corpus, there was no attempt at categorizing bodily organs into vital and inconsequential or renewable and nonrenewable, even though the sections dealing with compensation for injury or destruction of bodily parts recognized a functional hierarchy and the attendant value attached to, for instance, eyes or limbs. Hence, some jurists had classified human parts into three types: those that were unique; those that were in pairs; and those of which there were four of a kind.

➤ The first kind included nose, tongue, penis, loins, bladder, and rectum. When any of these were destroyed they were irreplaceable; therefore, full blood money was due because not only had the destruction of the organ deprived the person of its vital functions, but there was also some likelihood of external deformity.^[78]

➤ The second kind included eyes, ears, lips, and eyebrows when no hair could grow, breasts and nipples, and limbs (hands, legs). If one or both of these pairs was destroyed, then the compensation was full blood money. The third kind included the edge of eyelid where eyelashes grow, which when destroyed deprived a person of the multiple functions of the eye and beauty; the eyelashes; a bodily part which remained in form (like a head injury) while losing its functions such as reasoning, sight, smell, taste, sexuality, and procreation. The destruction or injury to this multifunctional organ was the basis for fourfold compensation when, for instance, only the head was injured, because the victim lost the functions of the brain, the eye, the ears, and so on, which depended on the fully developed brain.^[79]

In more recent discussions, based on the questions submitted for religious responses, jurists have identified the need to at least distinguish between vital and inconsequential organs. However, the definition of *vital*, besides being consequential to the very survival of human person (e.g., heart, liver, and so on), is extended to include aesthetic considerations like maintaining one’s appearance. The assumption in such deliberations is that the donor is a living person motivated either by altruism or profit. As a rule, Shari’ah regards the inflicting of any physical deformation as tampering with nature’s gifts.^[80]

Since both eyes are vital for maintaining healthy vision and overall appearance, a person cannot decide to donate his/her eye even when he/she can continue to live with

the other. In contrast, donating a kidney is not a problem as long as no harm is done to the donor or the recipient. While it is admitted that both eyes and kidneys are vital organs, donating an eye would constitute a deformation of one’s appearance, whereas donating a kidney would not. In general, the principle of “No harm” encompasses a notion of physical well-being that includes cosmetic wholeness. Consequently, Muslim jurists have ruled that it is impermissible to cut any part of the body in order to consume it for survival, except under dire conditions.

➤ All renewable parts of the body, such as fluid and soft parts (*a’da’ sa’ila*) like hair, skin, nails, bone marrow, blood and so on form the second major category in the juridical opinions on organ donation. The term *inconsequential* simply conveys the meaning of being renewable (*mutjaddid*) body elements that could be donated without endangering one’s well-being.

B ORGAN DONATION TO A NON MUSLIM

The Shari’ah divides humanity into two categories, the faithful and the infidels. The former include Muslim believers whose specific city is sanctioned by the Qur’an when it says: “Ye are the best of Peoples, evolved for mankind.”^[81] The infidels, on the other hand, are divided into the People of the Book and idol-worshippers. The former are those who believe in a revealed book (Jews and Christians) and who are recognized, in Muslim territory, as having the juridical status of *dhimmi* i.e. “protected” although being partially discriminated against with respect to Muslims; the latter are the polytheists and idol-worshippers against whom there should only be a situation of war with the aim of their conversion or death.^[82] Similarly, the territory is also divided into Muslim territory (*dar al-Islam*) and the territory of war (*dar al-harb*).^[83]

On the subject of transplants, this classic juridical division of humanity into the faithful and infidels arouses considerable interest: some “scholars” have wondered whether donors and recipients of the organ have to belong to the same religion or if between Muslims themselves justified differences of treatment can be made on some juridical-religious categories (e.g. in the case of those guilty of very serious offences). In fact, whilst the criterion of choice of the organs is essentially clinical for a doctor, other types of evaluation may be followed by Muslim jurists. For example, a *fatwa* pronounced by the University of Al-Azhar in the early 1970s maintained that the transplant of cornea from a Muslim or from an infidel was allowed if the organ (although the cornea is actually tissue) was given to a Muslim but prohibited if taken from a Muslim to give to an infidel.^[84]

According to Iranian Ayatollah S. Makarem, it is lawful to donate organs to non-Muslims except when the recipient is at war with Muslims. In a *fatwa* of 24th June 2002, the authoritative Sunni Sheikh Yusuf Al-Qaradawi declared it was unlawful for the Muslim to donate organs to a non-Muslim that attacks Islam; similarly, it is

forbidden to donate organs to an apostate as he is a traitor to his religion and people, which is the reason why he deserves death.^[85] In addition, if both a Muslim and a non-Muslim require an organ or a blood donation, the Muslim has precedence according to the Qur'anic verse that states; "The Believers, men and women, are protectors one of another."

References to the distinction made by the *Shari'a* – Muslims, People of the Book (*dhimmis*) and infidels (*kafirs*) – can also be found in the Decision on transplants No. 99 of the Senior *Ulama* Commission (Saudi Arabia) of 25 August 1982 in which they unanimously maintain the lawfulness of self-transplantation for a Muslim or for a *dhimmi*; the majority accepted explantation from a corpse or from a living person but for the benefit of a Muslim.^[86] Regarding the trips to the USA by Saudi patients to receive organs from corpses, Otaibi and Khader stated that this implies a great economic cost as well as entailing considerable "social disruption".

A subsequent Saudi document introduces an ethical pre-selection of the beneficiary of a transplant. This is the case of resolution no. 26 (1/4) of the Council of the Academy of Islamic Law (Jeddah, IV Session, 6–11 February 1988) where point 2 of the "Definitions and classifications" requires the beneficiary of a transplant to be leading an honest existence in accordance with the *Shari'ah*.

According to the Algerian A. Ossoukine as well, the jurists demand that the people who can benefit from the explanted organ are those who have shown evidence of a worthy and exemplary life. Sheikh Al-Qaradawi specifies that, in the case of necessity of an organ, a good Muslim has precedence over a sinner who would use the divine gift (the organ) to disobey God and harm his brothers in religion. This "distinction" between the organs of Muslims with respect to those of infidels is the effect of a literal application of specific juridical principles of the *Shari'ah* to the donation of organ and could lead to discriminatory attitudes towards some patients.

In this regard, the account of the Saudi Sheikh Al-Qattan is interesting, in that he privileges the patient's belonging to the *Ummah* (the community of Muslims) over the consideration of the health of the patient, independently of his religious faith. More specifically, he states: "Muslim Law exhorts the members of the Muslim Nation to reinforce its bonds with love and charity so that they become similar to a single body. The donation of an organ of the body to save the life of one of your brothers without causing harm to yourself represents the apex of the unity of the nation and a good example of cooperation between its members." If we consider that altruism is one of the cornerstones of Muslim medical ethics, Al-Qattan applies this principle above all to the Muslim community.

The different behavior to be followed with Muslims and non-Muslims can also be seen in the Shi'ite context as shown by a collection of contemporary religious decrees.^[87] No. 784 states: It is licit to amputate the corpse of a non-Muslim or of someone of whom it is not known whether he is a Muslim or not, in order to transplant an organ or anything else into the body of a Muslim; this rule is similar to that which makes explantation from an impure animal (*najis*) to a person lawful. No. 781 forbids explantation from the corpse of a Muslim except to save the life of another Muslim but the person carrying out the operation, in order to remedy the violation of the corpse must pay the *diyya*, the monetary compensation.

All these different attitudes regarding Muslims as donors and recipients of transplants may have an influence on the behavior of Muslim immigrants to the West when the explanation of organs from a deceased Muslim is requested for transplant into non-Muslims. Amongst these immigrants there are those who consider donation as religiously licit or a duty. On the contrary, there are those who may refuse donation in order to protect the integrity of the corpse of a Muslim; or, out of mistrust of organ donation to infidels, on the real intentions of doctors or for unspecified reasons but, at least for a Muslim, which are almost always inseparable from the religious factor. However, the priority concern always appears to be that of being the victim of some form of "physical" exploitation by non-Muslim medical staff.

What is to be done when several patients with the same serious condition of the pathology urgently require a kidney transplant and there is only one organ available? The rule could be that of drawing lots for the patient who will benefit from the organ by analogy with the rule followed by Prophet Muhammad when he drew lots for the bride that was to accompany him on a journey.

XI LEGALITY OR OTHERWISE OF ORGAN SALE

Paying people to donate their organs is one of the most contentious ethical issues being debated at the moment. The most common arguments against this practice include:

- Donor safety;
- Unfair appeal of financial incentives to the economically disadvantaged;
- Turning the body into a money-making tool "commodity";
- Wealthy people would be able to access more readily.

The idea of non-financial incentives may be rising in popularity as a way to entice people to donate their organs. Financial incentives aimed at encouraging living donation have received much attention from bioethicists lately. Most experts argue that buying and selling human organs is an immoral and disrespectful practice.^[88]

The moral objection raised most, is that selling organs will appeal to the socio economically disadvantaged (poor, uneducated people) and these groups will be unfairly pressured to sell their organs by the promise of money. International trades in human organs, occur particularly in the developing countries of the world where cadaveric organs are not easily available and where there is marked disparity in wealth. As a consequence, a deplorable type of medical practice has emerged where human kidneys are bought from the poor for transplantation into the wealthy clientele with soaring profits for brokers, private hospitals and physician.^[89]

It is estimated that since 1980, over 2,000 kidneys are sold annually in India, Iraq, Philippines, Iran and elsewhere, to wealthy recipients from the Middle East, the Far East and Europe. Human organ (“Kidneys”) trade has shifted from India to Pakistan.^[90] Media had gone to the extent of labeling it as shifting of “Kidney Bazar,” “Bombay Bazar” from India to Karachi, Lahore and Islamabad.

In Saudi Arabia, the government controls the organ transplantation through SCOT (Saudi Center for Organ Transplantation). It gives incentives to the living donors and the families of the deceased donors. Undoubtedly, one cannot engage in a transaction for sale without first establishing one’s ownership on it. As pointed out earlier, there are a number of prominent jurists who maintain that human beings have no legitimate ownership over their body. Consequently, they cannot derive monetary advantage from its sale. In fact, if such an advantage occurs, then it is tantamount to illicit consumption. At the same time, some scholars acknowledge that an individual has discretion over one’s person (*malik li-nafsih*); but this discretion does not translate into ownership because it is elemental — that is, it establishes one’s essential identity as a person. In order to establish the right of disposal, one needs to prove legal and institutional discretion.^[91]

There is no argument among the jurists that human body is not a commodity (*mal*) that can be turned to commercial or other advantage. It is not an object whose use can be negotiated in other than exceptional and unavoidable conditions. Consequently, Muslim jurists have ruled that a human being, whether alive or dead, cannot be an object of a commercial transaction. Since human beings cannot be treated as a commodity, the Shari’ah has forbidden handling of a human person, who is endowed with dignity and honor, as merchandise in a commercial dealing.

XII FINDINGS, CONCLUSION AND RECOMMENDATION

A Findings/Suggestions

The researcher has interwoven medicine and religion to provide a sense of legalistic-ethical discourse on the issue of organ donation, and based on the research the

following findings were made as outcome of the research.

- a. Organ donation is permissible in Islam, despite the fact that it is a controversial issue, but the majority of the juristic views sanctioned its legality rather than its illegality.
- b. The Qur’an and Sunnah are not explicit on the issue of organ donation, hence the controversies. Similarly, the classical jurists were silent on the issue as well.
- c. Organ donation is subjected to analogical deductions of the Muslim jurists by way of Ijtihad (Ijma and Qiyas).
- d. In Nigeria, organ donation was first conceived in 1980. However, there is insufficient literature from Muslim scholars in Nigeria on the issue of organ donation. There is also lack of public awareness on the issue.
- e. It is clear that Islam enjoined Muslims to seek medical attention whenever sick.
- f. The definition of death in Islam differs from that of medical parlance.
- g. Based on the sources of organs, organ donation is divided into three; living donor, cadaveric donor, and brain dead donor.
- h. Living donor donation is where the transplantation is conducted between living persons.
- i. Cadaveric donor donation is where the transplantation is done between dead and living persons.
- j. Brain dead donation is where the donor is still alive but his brain was confirmed by medical experts to have stopped functioning.
- k. Consent is required in both cases, either directly from the donor, or from his closest relatives (cadaveric and brain dead donors).
- l. In all cases, the dignity and sanctity of the human body must be protected.
- m. The criteria for ascertaining death in Islam is the total cessation of cardiac, respiratory, and cerebral functions which is irreversible and must be confirmed by medical experts.
- n. By a majority view of the Muslim jurist, retrieving organ from a brain dead donor is not allowed.
- o. Muslim jurists have classified human organs into two broad category; vital organs, (organs which are vital to the survival of human person, such as liver, kidney, etc.) and inconsequential organs, (organs which are renewable, such as nails, hair, blood, etc.).
- p. Donating vital organs to non-Muslim who is at war with Islam is not permissible by a majority view of the jurist. However, some inconsequential organs can be donated to a non-Muslim, provided he is not in war with Islam.
- q. Islam prohibits organ donation based on moral and ethical grounds.
- r. Organ donation and transplantation must be regulated by bioethical principles like autonomy, beneficence, and justice.

B RECOMMENDATIONS

After conducting the research work, the researcher came up with the following recommendations:

- a. It is concluded that there is insufficient literature on the Islamic viewpoint of issue of organ donation in Nigeria. It is therefore recommended that our Muslim scholars engage in providing adequate rulings on the issue, in order to guide fellow Muslims; starting from the Faculty of Law, Bayero University Kano.
- b. The National Assembly should also make laws in order to regulate the issue of organ donation according to the dictates of Islamic law. Equally, a national transplant registry should be established in order to monitor the program.
- c. The Muslim community should also take measures in order to protect the poor and vulnerable from unjust sale of their organs. This should be done by creating more awareness on the legality or otherwise of doing so.
- d. Organ donation is a complex topic encompassing a variety of legal scenarios, and therefore, it is not subject to one blanket ruling within Islam. Every case must be considered individually, and a combination of medical and Islamic scholarship is required.
- e. There is a need for the government to adopt preventive measures of improving health, and reduce the number of transplantation by ensuring equitable access to transplantation and negating current financial constraints.
- f. It is further recommended that people should consult with their families, imams, doctors, and significant others to arrive at an informed decision about donation their organs.
- g. Muslim medical practitioners are encouraged to seek for knowledge of the Islamic biomedical ethics, and to advise patients on complex issues such as organ donation and transplantation.
- h. Wealthy Muslims in Nigeria are recommended to set up hospitals and clinics specifically for organ donation and transplantations.
- i. There is a need to improve the level of public media awareness on issues related to organ donation.

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