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**AN APPRAISAL OF ORGAN TRANSPLANT LEGALITY
AND ITS ACCEPTABILITY: THE MEDICAL AND
ISLAMIC LAW PERSPECTIVES REVISITED**

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ABSTRACT

In contemporary days and as a result of advancement in science and technology, greater achievements and landmark breakthroughs have been made in medicine, particularly in the area of organ transplant to save precious life in deserving cases. Notwithstanding the success recorded, a lot of concern have been raised medically, religiously, morally and ethically as to the legality or otherwise of organ transplant. One other concern is in the area of illegal organ harvest that had shrouded the transparency of organ transplant; and by necessary implication, begging for lasting solution for the preservation of human life. This paper thus adopts the doctrinal method to provide answer to some of the questions raised while at the same time adopts analytical and comparative analysis in answering the questions on issues in organ transplant. The focus of the paper is on organ transplantation legality and its acceptability from the medical and Islamic perspectives, it is found that as useful and life saving organ transplant is, it must be done in conformity with the laid down conditions stipulated under Islamic Law, Medical ethics and other laws to avoid commercialization / trade in organ or illegal harvest of human parts/organs. Ultimately organ transplant must be done in such a lawful way to be in consonance with the objectives of Islamic law (*Maqasid al-Shariah*)

Keywords: Organ Transplant, Illegal Organ Harvest / Trade, Medicine, Islamic Law and Organ Acceptability

1. INTRODUCTION

Medicine is as old as human history. Like inquiry is the father of invention, human beings came about knowledge of medicine and medication as a means of ameliorating or getting rid of pain or illness. There is no doubt that the processes and procedures followed to seek relief from pain brought about knowledge of medicine in the history of human race.¹ Ibn-Khaldun shared the same view and submitted that:

“Medicine was part of human existence. In the beginning, it was based on experience only, not on a special training or rule. The knowledge then passed through generations and developed according to civilization and advancement in knowledge”²

In the same vein, modern science and technology brought about rapid development both to the field of medicine and to all facets of human lives. Many people embraced and are still embracing medical and technological developments to solve their various medical problems. To this end, legal, ethical and religious issues arise and become imperative³ for consideration among scholars, particularly with regard to its adoption and acceptability.

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¹ Al-Sarjaniy R., History of Medicine in Islamic Civilization, 1st Ed (Iqra House of Translation and Publication, Cairo, 2009), 10

² Ibn-Khaldun A., Al ibaru fi Deewanu Muhtadah Wal Khabar, 4thEd (Daru Ihyahut -Turath Al Arabiy, Beirut) Vol.1, 650

³ Abu-Khail S. A., Contemporary Medical Issues a foreword to report of Second Islamic Medical Conference organized by Assembly of Islamic Jurisprudence (King Su'ud University Press, Riyadh, 2010) Vol. 1, 4.

In the same vein, organ transplant, as one of the contemporary issues in global development in medicine happens to be a trend to put an end to failure of human organ. This is a situation where surgical operation becomes imperative by an expert in this area of medicine, to take an organ from living or dead person and transplant it into the body of a sick or needy patient to replace the failing or failed organ(s). The natural and normal question that arise include whether human being is legally fit to donate any part of his body whether alive or otherwise? If he is fit, can he sell any part of his organ? And issue regarding the legality of the source of the organ. This paper attempts a critique of the legality of source, acceptability of organ transplantation among other things, from the medical and Islamic law perspectives.

There is no doubt that organ transplant is one of the breakthrough in the field of medicine to confront the medical challenges facing humanity. It is expected to be done when it is necessary and under reasonable preparation and availability of the relevant equipments by medical expert, with the greater possibility of success. However, due to the sanctity of human life, it should be controlled by an effective legal framework in order to avoid unlawful commercialization / trade in organ or illegal harvest of human parts/organs.

2. ORGAN TRANSPLANT AND ILLEGAL ORGAN HARVEST / TRADE

Transplantation has been described as an act of surgically removing an organ from one person, dead or living, animal or nonliving material and placing it into another person.⁴

According to Kassim, organ transplantation is a medical procedure whereby living tissue from a human body is removed from that body and transferred to another part of that body or to another person.⁵

Organ transplantation is viewed as an alternative medical response

⁴Zahidul-Islam M., 'Organ Donation and Transplantation: Issues in Islam and Present Situation' in *Journal of Law, Policies and Globalization*, 2014) Vol. 2 2, 99, available at www.iiste.org accessed on 15/05/2015.

⁵Kassim Puteri Nemie Jahn, 'Law and Ethics Relating to Medical Profession, (International Law Book Series Publication, Malaysia, 2007), 227

to organ failure and other related issues in medicine which has to do with organ and it became popular in the middle of twentieth century. Modern Muslim scholars have therefore deliberated extensively on it since the 1950s when cornea began to be transplanted.⁶ The discussion and examination was on the development and its process and procedure on the basis of relevant Islamic law principles and *Maqosid al-Shariah* since then.⁷

On the other hand, illegal organ trade is as well on the rise globally, which had generated a lot of concerns. In fact, China, US and Libya are thought to be leading the table. Illegal organ trade according to WHO occurs when organs are removed from a person's body with the purpose of commercial financial transactions.⁸ On the other hand, while illegal organ harvesting is the illegal practice of removing organs from persons either dead or alive without their prior consent.⁹ One of such concern was in fact seen in 2013 when a young girl was trafficked from Somalia to UK for the purpose of harvesting her organs illegally. The relevant authorities became aware of it and the news generated international outcry and condemnation thus exposing the level at which the crime was perpetrated silently.¹⁰ It is pertinent to note that illegal organ trade/trafficking usually involve cajoling/coercion of the owner to surrender their organ. Acute shortage and increase in demand by patients in need globally is responsible for the illegal removal of vital and essential organs of the body.¹¹

The racketeering seems to involve business class, politician, doctors, nurses and even security personnel. The WHO gave an estimate of \$1billion dollars every year of illegal organ trade

⁶ Saifuddeen S. M., Law and Ethical Framework to Tackle Scientific and Technological Dilemma in Dharmaram Journal of Religions and Philosophies (Dharmaram Vidya Kshetram, Bangalore, 2013), Vol. 4 No. 38, 380

⁷ Ministry of Health, Malaysia, 'Islam and Organ Transplantation, Fd. Dat O. M.in Organ Transplantation From Islamic Perspective (Publication of Organ Transplant Unit, Ministry of Health ,Malaysia, 2011), 11, available at www.moh.gov.my accessed on 21/05/2015

⁸ available at, <https://en.m.wikipedia.org> accessed 28th May, 2019

⁹ Ewelina Ochab, Organ Harvesting in China And the Many Questions to be Answered, available at <https://www.forbes.com/sites/ewelinao> accessed 28th May, 2019

¹⁰ available at <https://www.fairplanet.org/story/a-pennyforakidney> accessed 28th May, 2019

¹¹ Ibid

otherwise known as the red market' where human heart, kidney, liver are traded unchecked due to poverty, porous border and lack of strict enforcement of the relevant laws.¹² All these have afforded international buyers like Brazil, Israel and Eastern Europe to have a lucrative market. In this market kidney is believed to top the ladder of demand with an estimate of 7,000 harvested and illegally trafficked from Africa (Egypt, South Africa and Libya) every year.¹³ Ambitious and poverty stricken migrants Africans to Europe continue to keep the red market alive and active despite the enactment of the Transplantation of Human Organs and Tissue Act 2010¹⁴ prohibiting commercial exchange of organs which is enacted to discourage the trade.¹⁵ For example just in three years of 2001 to 2003, it was stated that one St. Augustine Hospital in Durban conducted over 100 illegal kidney transplant according to police records.¹⁶ The same practice is believed to have found its way into Mozambique as well as the graves discovered in Nigeria and Lake Chad Basin comprising of bodies with missing various organs which suggests illegal organ harvest. In fact, the said report¹⁷ titled *Excavating the Organ Trade: An Empirical Study of Organ Trading Network in Cairo, Egypt* is instructive on the illegality pervading the world on organ trafficking like a plague.¹⁸

¹² Ibid

¹³ Ibid

¹⁴ WHO, A63_24-en.pdf; A63/24 25 March 2010, see also Sean Columb, *Excavating the Organ Trade: An Empirical Study of Organ Trading Network in Cairo, Egypt*, British Journal of Criminology, Vol. 57 (6), 2017, 1301-1321

¹⁵ WHO, A63_24-en.pdf; A63/24 25 March 2010. See also Resolution WHA57.18 <https://www.who.int/transplantation/organ/en>.

¹⁶ Koigi B., *Discussion on Excavating the Organ Trade: An Empirical Study of Organ Trading Network in Cairo, Egypt*, available at <https://www.fairplanet.org/story/a-pennyforakidney> accessed 28th May, 2019

¹⁷ Koigi B., *Discussion on Excavating the Organ Trade: An Empirical Study of Organ Trading Network in Cairo, Egypt*, available at <https://www.fairplanet.org/story/a-pennyforakidney> accessed 28th May, 2019; see also Sean Columb, *Excavating the Organ Trade: An Empirical Study of Organ Trading Network in Cairo, Egypt*, British Journal of Criminology, Vol. 57 (6), 2017, 1301-1321, available at <https://academic.oup.com/bjc/article/57/6/1301/2623947> accessed 15th January, 2020

¹⁸ Ibid.

3. GLOBAL CONCERNS ON ORGAN TRANSPLANT

In recent times, certain emerging facts on dealings in organ in parts of the world appeared disturbing particularly to the dignity and sanctity of life. Irrespective of the fact that organ transplant is a legal as well as a medical procedure that is regulated by law and certain medical ethics, rules and regulation. The WHO published the Guiding Principles on Human Cell, Tissue and Organ Transplantation” to ensure compliance with international standard in relation to organ transplantation.¹⁹

A legal researcher and Human Right activist, Ochab²⁰, shows that on 16th Oct., 2018, the UK parliament hosted an event on practice of organ harvest in China. It was argued that Principle 1 of the WHO Guiding Principles requires consent of the donor to organ removal for the purpose of transplant. In addition Principle 10 requires traceability of organ transplants while Principle 11 is to the effect that the donation activities should be transparent and open to scrutiny. One of the concerns addressed in the event is the notorious claim that the Chinese government is in the habit of killing prisoners of conscience. These are religious minorities, the Falun; Gong, Tibetan; Buddhists, Urghur Muslims and Unregistered House Church Christians to satisfy the organ harvesting industry.²¹ It is argued that as unrealistic as the claim appears, it was subjected to investigations and hearings at the US Congress and the European Parliament.²² It is pertinent to state that the US House of Representatives and the European Parliament both passed resolutions condemning the “systematic; state sanctioned organ harvesting from non-consenting prisoners of conscience.”²³ However, weighty evidence was shown by the 2016 report titled “Bloody Harvest/The Slaughter: An Update²⁴” which was presented at the hearings of the committee on Foreign Affairs, House of Representatives on June 23, 2016, in UK Parliament and at many other hearing. The said report brought two major issues to

¹⁹ WHO, A63_24-en.pdf; A63/24 25 March 2010.

²⁰ Ewelina Ochab, Organ Harvesting... n. 9 ...

²¹ Ibid

²² Ibid

²³ Ibid

²⁴ David K., David M. and Ethan G., 2016 Report titled Bloody Harvest/The Slaughter: An Update, available at <https://www.forbes.com/sites/ewelinao> accessed 28th May, 2019

the limelight on organ harvested in China. One; that the volume of organs harvested in China is larger than the number identified, while China placed the number at 10,000 per year, it was discovered that it is within the range of 60-100,000 per year. Two; that the report shows that prisoners of conscience together with Falun Gong, Urghurs Muslims, Tibetans and House Christians are specifically targeted for the purposes of organ harvesting. The object of the harvest is to serve as an instrument of persecution against the Falun Gong and specifically to sustain the red market.²⁵ Although, steps have been taken globally to put an end to this life threatening practices.

The major concern is in the area of drawing a clear distinction between legal and illegal sourcing as well as transplantation. However, apart from the Transplantation of Human Organs and Tissue Act 2010 prohibiting commercial exchange of organs, there are also some instruments in countries (like UK, Malaysia, UN Protocol on Trafficking) put in place to regulate organ transplantation practice.

4. ORGAN TRANSPLANT: OVERVIEW OF SOME REGULATORY FRAMEWORKS)

Although the purpose of organ transplants is to rescue human being from medical challenges, leaving it unregulated shall endanger the sanctity of human life. There are laws put in place by various countries that regulate transplantation of human organ to curtail illegal and unsafe steps that medical practitioner may take that will be detrimental to the wellbeing of human beings. Some of these laws include the UK Human Tissue Act 2004, in UK, this law is put in place to regulate organ transplants and any doctor that is involved in organ selling will have his name struck off the medical register.²⁶

In the same vein, in Malaysia, Human Tissue Act 1974 is primarily one of the enabling statutes that allow the removal of tissues for therapeutic, medical education and research purposes.²⁷ However, the removal of *cadavers* tissue is only permitted under two major

²⁵ Ewelina Ochab, Organ Harvesting ...n. 9...

²⁶ Jonathan H., Medical Law and Ethics, 2nd Ed (Oxford University Press, New York, 2008), 413

²⁷ Kassim P. N., Law and Ethic Relating to... n.5, 231

circumstances; the first one is at the express request of the donor.²⁸ And the second one is absence of objection from the deceased and with the consent of the next-of-kin.²⁹

In Nigeria, the National Health Act 2014 does not consider all necessary issues involved in organ transplants in detail. Its provisions are nevertheless on general health issues. It makes reference to some issues relating to organ transplants in section 48 (1) to the effect that subject to the provision of section 53, a person shall not remove tissue, blood or blood product from the body of another living person for any purpose except with informed consent of the person from whom the tissue, blood or blood product is grafted is prescribed. Likewise, the consent clause may be waived for medical investigations and treatment in emergency cases in accordance with prescribed protocol by appropriate authority.

The waiver of the consent appears controversial, apart from the controversy created by the exception in issue of consent of patient which is one of the fundamental principles in medical ethics. It also seems to be in conflicts with Articles 4, 16 and 19 of Africa Charter of Human and Peoples Right Ratification and Enforcement Act Cap A9 LFN 2004. Sokefun argued that taking organs from living or dead person is more of a global practice which is often justified on ground of its benefit to patients but in Nigeria the legal framework for the process is weak.³⁰

It is deducible from the above therefore, that organ transplants is allowed in UK, Malaysia and in Nigeria among others as a means of giving succour to those that are seriously in need of a functional organ to replace the failed ones.

It is therefore important to note that though organ transplants generally allowed. However, there are laws put in place to regulate the process and the procedure involved to ensure that it is done purposely for what it is meant for and in tandem with law. This is likely to protect the poor from the rich in term of inducement due

²⁸ Section 2 (1) Human Tissue Act 1974, Malaysia

²⁹ Ibid, section 2 (2)

³⁰ Sokefun J. A., Towards a Legal Regime for the Transplantation of Human Organ in Nigeria, 7th Inaugural Lecture of National Open University of Nigeria (NOUN), available in abridged form at www.nigerianbar.com accessed on 1st July, 2015

to poverty, to sell out his organ which may endanger his wellbeing and to also curtail criminality.

5. ETHICAL / MEDICAL ISSUES IN ORGAN TRANSPLANTS

Ethic has been described as moral principles that control or influence a person's behaviours.³¹ It also means whatever that relates to moral obligations that one person owes another or what is in conformity with moral norms or standard of professional conduct.³²

Medical ethic can be said to be the duty a medical professional owes, in the course of his duty, to the patient and the society. This means that a medical professional is expected to perform his duty in a manner not contrary to the laid down rule of his profession.³³

Contemporary bioethics lists four principles that represent a common morality. These are respect for autonomy; beneficence; non-maleficence and justice.³⁴

Autonomy of patient with regards to organ transplantation means the donor and receiver's consent is very important and the contrary will be a breach of medical ethic. Thus, autonomy of patient has to be respected and it is never right for a doctor to impose treatment upon a patient without the patient's consent, unless it is necessary to prevent harm to others.³⁵ Autonomy does not include respect for every choice, but only for the choices which are competent.³⁶

Moreover, beneficence is to the effect that in organ transplantation, it is expected of medical professionals to put their patient's interest first³⁷.

³¹ Hornby A. S., Oxford Advanced Learner's Dictionary, 7th Ed. (Oxford University Press, 2005), 498

³² Bryan G., Black's Law Dictionary, 8th Ed. (U.S.A, Thomson Reuters Business, 2004), 592

³³ Jonathan H., Medical Law and Ethics, 2nd Ed (Oxford University Press, New York, 2008), 413

³⁴ Islamic Ethical Framework to Tackle Scientific and Technological Dilemmas', 377

³⁵ Jonathan H., Medical Law and Ethics, n. 26

³⁶ Ibid

³⁷ Ibid, 24

The principle of non-maleficence entails that one should not do harm to other.³⁸ A medical professional who is to transplant an organ is highly expected to observe this important medical ethic. This is a well established ethical principle in medicine as seen in the oath taken when one is to become medical practitioner (Hippocratic Oath), that:

*I will use treatment to help the sick according to my ability and judgment, but, I will never use it to injure or wrong them*³⁹

Justice is all about equality, reasonability and fairness to patients in the context of health care to decide those to be treated first based on their conditions.⁴⁰

Although organ transplanting is embraced as a technological advancement which came to rescue human from organ failure, ethical issues are very important due to the nature and dignity of human life. The major players in transplants must observe ethical principles in order to achieve the desired result of preservation of life and humanity.

However, the other ethical question, apart from that of the practitioner, has always been to ask whether a person has a right to do as he likes with his organ? To quickly make deduction from the pronouncement of the court in USA by Justice Benjamin Cardozo in Scheloendorff decision that:

Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages. This is true except in cases of emergency where the patient is unconscious

³⁸ Ibid

³⁹ Ibid, 23, see also Hippocratic Oath, https://en.m.wikipedia.org/wiki/Hippocratic_Oath accessed 15 January, 2020

⁴⁰ Ibid

and where it is necessary to operate before consent can be obtained."⁴¹

The above statement is instructive. However, in striking balance between potential harm to human person and the rights of an individual, the said autonomy reasonably requires check by the government to avoid abuse of the right.

Having considered the above, it is imperative to look at the Islamic perspectives on organ transplant.

6. ISLAMIC LAW PERSPECTIVE ON ORGAN TRANSPLANT

Generally speaking, there is no direct verse from the Quran that specifically captures organ transplantation. The permissibility of Organ transplantation is based on *Ijtihad*. On this premise, Al – Qaradawi is of the view that:

*"..Organ Transplant is based on Ijtihad; and that is why it is open for argument like any other issues. This is; particularly because it is a contemporary issue that early Jurists did not express their views on."*⁴²

However, since it is believed that knowledge of medicine is a gift from God to human race, and its purpose is to preserve human life and to protect their health for their good and not otherwise.⁴³ When Jurists examine the available texts in *Quran* and *Sunnah* in relation to an act, and find a nexus to the objective of Islamic law *Maqosidu Shariah*, permissibility will be based on such act. This prompted 'Izzu Deento posit that:

⁴¹ Mary E., *Schloendorff v. Society of New York Hospital*, 105 N.E.92 (N.Y. 1914). See also Farnell (April 1914) "New York State Hospital Bulletin The Journal of Nervous and Mental Diseases" 41(4) 261-263

⁴² Al-Qaradawi Y., *Fataawa Musirat*, 3rd Ed (Darul Wafaa Publication, Cairo 1994) Vol. 2, 530

⁴³ AbdulAziz A. F., *Al- Hukums Shari'i fi 'Adadz- Zaa'id fil Ajiniat*, in *Contemporary Medical Issues a report of Second Islamic Medical Conference organized by Assembly of Islamic Jurisprudence* (King Suud University Press, Riyadh, 2010) Vol. 3, 2087

“Medicine, like Islamic law, is purposely to bring about peace and tranquillity and to prevent unrest, danger and disease”⁴⁴

This might have been a basis upon which its acceptance and practice in Islam is not out rightly outlawed in the Islamic world.

7. BASIS FOR PERMISSIBILITY OF ORGAN TRANSPLANT

Advancement in science and technology has shown that new inventions are not mirage. However, it is obligatory upon the Muslims to ensure they conform to Islamic principles so as not to be against the injunctions Allah. It is therefore permissible to take advantage of new inventions and scientific discoveries if it found basis in the framework laid down by the Quran and *Sunnah* and the teachings of *Sahaba* (the Companions of Prophet).⁴⁵

The objective of Islamic law as in the Protection of religion; Protection of life; Protection of progeny; Protection of property; and Protection of intellect are very important and must be jealously and zealously protected, lack of which the life of human being may be meaningless.⁴⁶

It is a necessity to protect life in Islam as one of the objective of Islamic law. This account for why forbidden food and meat are permitted for consumption to save life when there is no other lawful food available and life is patently in danger.⁴⁷

Since organ transplant is to save the life of a patient, it therefore becomes a necessity to use functional human organ to replace failed ones. Necessity is the basis of the permission under Islamic law. The description of necessity by *Zuhaily* is apt in this regard:

⁴⁴Izzu-Deen A., *Qowaidul Ahkaam li Masolihul Anaam*, 1st Edn., (Darul Qolam Publishing House, Damaacus, 2000), 8

⁴⁵Safirudeen M. M., *Transplantation of Organ in The Light of Quran and Sunnah* in Agwan A.R. Ed. *Contemporary Medical Issues in Islamic Jurisprudence*, 2nd Ed (Publication of Islamic Fiqh Academy, India, 2006), 41, also available at www.ifa.india.org accessed 2/07/2015

⁴⁶As-Shaatiby A. I., *Al Muwafaqoot fi Usool Shari'ah* (Al 'Asriyyah Publishing House, Beirut, 2003) Vol. 2, 7-8

⁴⁷See commentary on Quran 5 v 3 in Al-Qurtobiy A.A., *Al-Jaamiu li Ahkaam li Quran*, 1st Ed (Bayanu Arabiy Publication House, Cairo, 2008) Vol. 4, 27

*Necessity in this wise is a right to protect human life from danger of disease / death, either based on certainty or with strong possibility on certain knowledge. We should not unnecessarily delay till a life is lost.*⁴⁸

8. ORGAN TRANSPLANT IN THE LIGHT OF QUR'AN AND SUNNAH

Basically, organ transplantation and donation are permissible in Islam, although there are different opinions expressed by Muslim Scholars. This is because organ transplantation and donation should fulfil the requirement of the preservation of human life, which is one of the five necessities - *al daruriyyat al khamsah* *maqasidu al-shariah* (objectives of Islamic law).⁴⁹

In the Quran, there are verses that lay emphasis on how sacred and important life is.

Like Quran 4 V 32:

and if anyone saves a life, it would be as if he saves the life of all mankind....”

This verse vividly explains how important it is to save a life. On this basis, since the purpose and intention in transplantation of organ is to save life, Jurists have found the nexus and basis on permissibility of organ transplantation.

Reliance is placed on the *Hadith* narrated by Usamah bn Sharik:

The desert Arabs then came from here and there. They asked: Apostle of Allah, should we make use of medical treatment? He replied: Make use of medical treatment, for Allah has not made a disease without

⁴⁸ Al- Zuhaily W., *Al Fiqhl Islamiy Wa Adillatuh*, (Fikir Mu'asira Publication House, 2012) Vol. 3, 512

⁴⁹ Islam and Organ Transplantation, Fd. Dat O.M.in Organ Transplantation from Islamic Perspective, 10 available at www.moh.gov.my accessed on 21/05/2015

appointing a remedy for it with the exception of one disease, namely old age."⁵⁰

We are encouraged to take medical treatment and organ transplant is one that should be done within the confines of Islam.

It is pertinent to note that an Hadith suggests that transplantation was done during the time of the prophet, and the prophet indeed, was the one who gave recommendation to go for such surgical work to address a medical problem.

*"Abdur-rahman Ibn Tarfah, from Arfajah reported that Arfajah ibn Asad was seriously injured in his nose and same was cut off in Kulaab tribes war during Jahiliyyah (before Islam), and he replaced it with skin. When it was badly smelling, the Prophet advised him to replaced it with golden nose (such could not decay and smell)"*⁵¹

This indicates something more of a plastic surgery was done with a non-living thing, and it was allowed to save the life of a patient being the only available option then.

From the above, it can be summarised that the basis for the acceptability / permissibility of organ transplant is for: the purpose to save the life of a patient; on the basis that, Islam encourages us to take medical treatment. Islam even allows taking forbidden food in order to save life in deserving circumstance.⁵² This is because Allah does not want to put us to difficulties⁵³ and the Islamic law maxims are also relevant on permissibility of organ transplant.⁵⁴

On the other hand, some jurists however held contrary view that organ transplantation is not permitted. They relied on some verses of Quran and Hadith.

⁵⁰ Al-Tirmidzi M. I., *Sunan al-Tirmidzi* (Mustafa al-Babi al-Halabi, Cairo, 1975) Vol. 4, 383

⁵¹ Muhammad A. A., *Tuhfatul Ahwaziyy*, Commentary on Sunnan Trimizh (Darul Fikri, Beirut) Vol.5, 464 Hadith No. 1826

⁵² Q 2 V 173 and Q 5 V 32

⁵³ Q 2 V 185

⁵⁴ For example, Difficulties should be removed whenever is possible, Avoid greater harm by accommodating the lesser one"

Their views can be summarized as follows: that Quran says we should not expose ourselves to danger. Thus, giving out an organ means one is exposing his health to danger.⁵⁵ That human dignity will not be upheld in severing part of human body, living or dead.⁵⁶ Human being is neither the owner nor has absolute control over his body.⁵⁷ The Prophet prohibits the cutting body of dead body, and any part of organ severed has become impure. This impurity will also be a basis for non-permissibility of organ transplant.⁵⁸

9. VALIDITY OR OTHERWISE OF ARGUMENT IN SUPPORT AND AGAINST ORGAN TRANSPLANT

An attempt is made to look at the argument in favour or against organ transplant and to consider questions like: whether human being has control over his body? If he has, can he give it to others or sell it? Based on available authorities, it is contended that one can. This is premised on the fact that Allah is the one who created human being and all what he has, but he gives him certain control over it, provided it is used in line with His dictates.

In the case of property, Allah commands us to give out from what He has given human control over. Q 24 V 33

give them something yourselves out of what Allah has given you...”

Deduction is made from the issue of *diyah* (compensation) is also a clear example of the fact that human being has control over part of his body. He can pardon the offender, but he cannot do this in case of hudud that is pure right of Allah (like *Zina*) when it has been reported. On this point, Ibn- Rush is of the view that:

“In the case of where right of Allah and Right of individual exist but right of individual supersedes. Examples are in law of retaliation when harm is

⁵⁵ See Q 2 V 195

⁵⁶ See Q 17 V 70

⁵⁷ See Q 31 V 26

⁵⁸ See Trimizi M. I., If some flesh is severed from a live body then it should be regarded as dead/impure. And Q 5 V 3- Forbidden to you (for food) are: Dead meat, blood, the flesh of swine.”

*inflicted on any part of the body. This is the basis that human has control over his body. He can waive retaliation and chose to collect compensation (Diyah).*⁵⁹

It is also a principle of Islamic law that difficulties should be removed as much as we can.⁶⁰ On this premise, we are urged to assist those that are suffering, to give first aid to those who are affected by accident or calamity, feed the needy, treat the sick, and protect those that are in danger of death or great injury. It is not proper for Muslim to see difficulties befalling people near him without taking step to remove those difficulties. It is argued that Islam does not restrict the meaning of alms (*Sadaqah*) to monetary.⁶¹

10. SALE OF HUMAN ORGAN AND CONSIDERATION ON COMPENSATION

Generally, sale of human organ is not permitted under Islamic law. However some Jurists are of the view that it can be permitted if it becomes necessary to do so but human dignity must be strictly adhered to and should be under strict rule.⁶²

Since human can donate his organ to save others life during his life time, he may also do through his will. Family of dead person (who are entitle to inherit him) can also give consent for the use of organ of dead person because they are entitle to *diyah* and hold discussion⁶³ which is one of the right human being has over his body.⁶⁴ However, the dignity of human, dead or alive is protected in Islam.⁶⁵ But in situation where two individual right are in

⁵⁹ Ibn-Rusd Abul Waleed Ahmad, *Bidayatu Mujthid Wanihayatul Muqtasid*, Vol. 2, 23--231

⁶⁰ Q 22:78, see also Thameem U., *Is Islam a Religion of Ease or Hardship? An Analysis of the Muslim Scripture and Patterns of Prophet Muhammad* (PBUH), Asian Social Sciences, 11(1) 51-66

⁶¹ Fataawa Muasirah, 532

⁶² Al-Fiqhul Islamiy Wa Adillatuhu, Vol. 8, 817

⁶³ See Q 16 V 33 and Q 2 V 178

⁶⁴ Al-Kaasaniy A. A., *Badaiu Sonaaiu fi Terteebi Sharaiu*, 3rd Ed (Darul Kuto obl 'Ilmiyyah, Beirut, 1986) Vol. 7, 243

⁶⁵ Al-Dawoody A., *Respect for the Dead Under Islamic Law: Considerations for Humanitarian Law and Policy*, Humanitarian Law and Policy, 2018; <https://blogs.icrc.org/law-and-policy-/2018/11/01/respect-for-the-under->

conflict, (right of dying person to be rescued and that of the dead), where danger or difficulty involved. The following arguments were proffered by Jurists as to which right should prevail. It is contended that:

“When there are two difficulties, the lesser difficulty can be accommodated to avert/ prevent the greater one”⁶⁶

Imam I-zzu-Deen argues that:

“But where is not possible to attain Maslah without allowing some difficulties, like cutting ones injured and rotten hand to save his life. It is permitted to do so because protection of life takes preference over that of an organ.”⁶⁷

It is deducible that saving a life is given preference over dignity of dead person and pain experienced by a living donor. This is based on the principle of *Shariah* that when there are two difficulties, lesser one should be accommodated to prevent greater one.

Another important issue is whether a Muslim receives organ from non-Muslim and vice versa? This question is important because of Q 17 V 28 which provides that:

“O who you believe, the non-believers (pagans) are unclean, so let them not, after this year, approach the sacred mosque”

The above notwithstanding, this verse does not include (Christian and Jew) because Muslims are allowed to eat their food and to marry their women.⁶⁸ Kaasaniy is of the view that:

[islamic-law-considerations-for-humanitarian-forensics/&hl=en](#). Accessed 15th January, 2020

⁶⁶ Azzam A. M., *Al-Qowaid Al-Fiqhiyyah* (Darul Hadith Publication, 2005), 144

⁶⁷ *Qowaidul Ahkam fi Masolihul Anam*, Vol. 1, 87

⁶⁸ See Q 5 V 5

“It is allowed to use impure item/ substance in the absence of pure (particularly when life is involved), because, good in saving life over rides the evil in impurity”⁶⁹

In the circumstance, if transplant is the only option available to save life, it is allowed to be used. This can be subsumed under necessity as forbidden food allowed in the situation in Q 5 V 3.

However sound the above argument may appear, it is relevant to look at the other way round on sale, legality and compensation in some countries. Al-Qarafi observed that there is right to enjoy or use (*haqq al-intifa*) and prohibition of selling it. This is similar to man's organ which he enjoys but cannot exchange for consideration.⁷⁰ It is established that as at March 2019, more than 113,000 patients are waiting for various organ transplant in the US.⁷¹ This is basically ascribed to the global shortage and scarcity of voluntarily willing donor. Although commercial trade in human organ is illegal in countries all over the world except in Iran in view of their Legalized Living Non-Related Donation (LNRD) of Kidneys in 1988.⁷² In Iran, donors are given or take benefit of Tax Credit; compensation from government, free health care insurance, and also direct payment from the recipient with donor being paid on the average up to \$1,200 and may as well be given employment opportunities.⁷³ Notwithstanding the foregoing, Iran placed restriction on commercial organ trade to discourage transplant tourism. Thus, the opportunity is restricted to Iranian and not opened to foreigners. That is, Iranian to Iranian and not to other nationals. Religious practices in Iran have made organ donation culture to seem as taboo. However, consent in respect of organ transplant is sacrosanct. The practice in Iran has been criticised by some as being coercive that some Iranian donors are believed to have experienced negative outcomes in terms of non satisfactory

⁶⁹ Qowaidul Ahkam fi Terteebi Sharaiu, Vol. 1, 90

⁷⁰ Al-Qarafi S., Al-Dhakhirah, Vol.4, 157

⁷¹ See <https://optn.transplant.hrsa.gov/data> accessed 30th May, 2019

⁷² Major R., Payin Kidney Donors: Time to Follow Iran? MCGill Journal of Medicine, January 2008, MJM 11(1) 67-69

⁷³ Ibid

health and emotional well-being.⁷⁴

In the same vein, in Australia and Singapore monetary compensation for living donor has recently been legalized. This is particularly to reasonably compensate for cost in relation to donation of organ.⁷⁵ A similar practice obtains in America, notwithstanding the prohibition of sale of organ by the federal law. The state of Wisconsin State government allows for the compensation of Donors for travel and medical related expenses to the donor.⁷⁶

However, in Brazil by a law passed in 1998, every adult Brazilian is considered an organ donor at death except in case of special exemption. The donation is made subject to the consent of the relative. In the same vein, in Israel the law proposed compensation for a kidney donor.⁷⁷ In South Africa, the law seems to allow a hospital medical director as well as pathologist the right to remove organs and tissue without consent in situation where the identity of the deceased is unknown and the relatives have not claim the body within the specified time within which organ retrieval is medically possible.⁷⁸

11. CONDITION ATTACHED TO ORGAN TRANSPLANTATION UNDER ISLAMIC LAW

Though organ transplantation is permitted, however, some conditions are attached to its permissibility. The conditions are as follow:

- Donation of organ should be based on kindness and love between human beings.
- When donation is between livings, the donor must be

⁷⁴ Scheper-Hughes N., *The Last Commodity: Post Ethics, Global (M) Justice, and The Traffic in Organs*, (Penang: Multiversity and Citizens International, 2008)

⁷⁵ Delmonica M., et al, *Living and Deceased Organ Donation Should be Financially Neutral Acts*” *American Journal of Transplantation* 2015, 15(5), 1187-1191

⁷⁶ Sheera F., *Organ Trafficking Laws in Key Countries*, *Christian Science Monitor*. Available at <https://www.csmonitor.com> accessed 30th May, 2019

⁷⁷ Ibid

⁷⁸ Ibid

medically competent and his health should not be compromised.

- Transplantation should not be left without proper laws in place to protect poor from the rich from exploitation to the detriment of their health.
- Organ should not be for sale or exchange for monetary gain unless a special occasion arises, e.g. where it cannot be gotten without payment and the sick is dying.⁷⁹
- Donor must consent freely, or make a will to that effect or his heirs consented in the case of dead person.
- Surgery must be performed by expert in the field.⁸⁰
- Where it is possible, plastic or its nature is preferred than dead person's organ
- There must be assurance of success or strong possibility of success.⁸¹

The above conditions are deduced from the conclusions drawn from the various Islamic medical conferences and literatures.

It is pertinent to briefly look at the conditions attached to organ transplantation at common law. Where organ transplantation is allowed and governed under common law, these major conditions should be met before removal of organ from a competent donor. They are: the patient must give full, free and informed consent; the operation must be therapeutic; there must be lawful justification; the operation must be performed by a doctor with the appropriate medical skill in the area.⁸²

12. OPINION OF ISLAMIC JURISTS ON ORGAN

⁷⁹ Al-Fiqhul Islaamiy Wa Adillatuhu" Vol. 8, 816, 817

⁸⁰ Bassam A. A., Transplantation of Human Organ in Contemporary Medical Issues, report of Second Islamic Medical Conference organized by Assembly of Islamic Jurisprudence (King Suud University Press, Riyad, 2010) Vol. 1, 43

⁸¹ Abu-Sunnat A. F., Shariyyah Ruling on blood Transfusion and Organ Transplantation in Contemporary Medical Issues report of Second Islamic Medical Conference organized by Assembly of Islamic Jurisprudence (King Suud University Press, Riyad, 2010) Vol. 1, 53

⁸² Law and Ethics Relating to Medical Profession., 236

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The Classical jurists expressed their views on human and animal organ. Their views are not however directed to medical questions. The reason was that issues on organ transplantation was not known then; and as such was not subject of their discussion. They all agreed that an organ dismembered from living has become impure.⁸³ They were, however not unanimous on bone and hair.

Imam Shafih was of the view that bone and hair are both impure and cannot be used for any purpose. Abu Hanifah on the other hand opined that both bone and hair are not impure; while imam Malik drew a line of distinction between bone and hair. He opined that bone is impure because it grows but hair is not impure and cannot grow when severed.⁸⁴

They also expressed their views on the usage of animal skin. Abu Hanifah and Shafih opined that when skin had been tanned it has become pure. Shafih added that animal has to be Islamically slaughtered before its skin can be pure, while *Abu Hanifah* held that, whether slaughtered or not are pure except where it is pork. Imam Daud Zahiry held that the skin of pork is inclusive when it has been tanned it has become pure⁸⁵

The basis of their argument was on their understanding of two hadiths: one was narrated by Maimunah

“The prophet passed through a dead animal and he said why don't you make use of it skin”⁸⁶

The prophet on another occasion passed through a dead animal and he was reported to have said as it was reported by Ibn Ukaym thus:

Do not make used of dead animal's skin”⁸⁷

⁸³ Bidayatul Mujtahid Wa Nihayat Muqtasid... Vol. 1, 117

⁸⁴ Ibid

⁸⁵ Ibid, 118

⁸⁶ A-Naisaburi A. M., Sohihul Muslim, 1st Edn. (Darul Mugniy Publication, Saudi Arabia, 1998), 193 Hadith 365

⁸⁷ An-Nasai A. S., Sunanu An-Nasai Daru Tahseel Publication, Riyadh, 2012) Vol. 7 1st Ed., 38 Hadith No. 4287

Jurists explained these two hadith by drawing distinction between them that, one is referring to when it has been tanned and other one is when it has not been tanned.

From the foregoing opinions of classical jurist, they were not confronted with issues of severed organ in relation to medicine, but they examined the purity or impurity of severed organ of animal or human being in relation to worship *Ibadat*. But it is clear from the comment of modern jurists that classical jurist did not allow mutilation of pregnant woman in an attempt to bring her baby out. *Al- Saadiy* put it thus:

*I am very sure that if early jurists can witness the modern development in medicine, they would have different view and allowed the dead pregnant woman to be operated and save the child if is alive*⁸⁸

Since the classical jurists did not have advantage of been confronted with issues relating to transplantation of human and animal organ, we do not have full opportunity of knowing their view on such issues and as such, we have to make do with the available modern contemporary view.

13. ISLAMIC ETHICAL ISSUES IN ORGAN TRANSPLANT

The door of Ijtihad is still opened even after the death of the four righteous companions of the prophet. However, what necessitates Ijtihad is the emergence of new issues due to the development in knowledge and civilization.⁸⁹ This gives modern jurists an opportunity to examine organ in relation to medicine been a burning topical issue which needs the opinion of jurists according to *Shariah*

Ethic is what is known in Arabic as *Adab* or *Akhalaq* (etiquettes). Islamic ethic is a set of rules or principles associated with a field of work which is in line with the Islamic law.

Islamic medical ethic is described as a study of how Islamic law evaluates and expects the character of a medical professional to be in research or medical activities from process, products and

⁸⁸Quoted in Transplantation of Human Organ', 43

⁸⁹ Aqqod A.. M., Aqoiqul Islam (Al Maktabatl Asriyyah, Beirut, 1957), 265

outcome.⁹⁰

The Islamic medical ethic can be best examined in relation to the objectives of Islamic law. This must be the guide for medical professional in order for his activities to be in line with Islamic law. Any act which directly or indirectly negates the *Maqasid al-shariah* will not be accepted by *Shariah*.

Saifudeen put it thus:

*We argue that maqasid al-shariah is the best and most practical framework for Islamic ethics for science and technology. As such, in discussing matters pertaining to science and technology ethics from the Islamic perspective, the five higher objectives or essentials of maqasid al shar'iah would become the focal point for deliberation which could act as a pragmatic ethical checklist. If any one of the five higher objectives or essentials are at risk, then from the perspective of Islam, the research activities, processes, products, and outcomes in question would be deemed unethical and by consequence, would not be permissible.*⁹¹

Thus, upholding *maqasid al-shariah* framework (because its violation attracts liability and makes them legal issues) as a basis for Islamic medical ethic is much more holistic compared to the four bioethical principles (autonomy, beneficence, non-maleficence and Justice).

Any process, action, product and outcome of medical activities which is not to protect the objective of Islamic law (religion, life, progeny, intellect and property) are unethical and may raise legal issues that attract liability under Islamic law

14. CONCLUSION

In conclusion, this works has appraised the legality and acceptability of organ transplants in Islamic medical law perspectives. The paper has shown some general global concern on

⁹⁰Saifudeen S. M., *Islamic Framework to Tackle Scientific and Technological Dilemmas*, 376

⁹¹ *Ibid*, 378

organ transplant and its practice in the world.

This paper discussed issues involved in organ transplantation and the basis for permissibility of organ transplantation is also examined in the light of available verses of Quran and the Sunnah of the prophet. The views of Islamic jurists were also considered as well as available regulation of organ transplantation in some countries like UK, Malaysia and Nigeria in relation to organ transplantation.

This paper also looks at ethical issues generally and Islamic medical ethic and relates it to *Maqasida al-Shariah* (objectives of Islamic law) and relevant reference was made to the importance of *Al-Qawaidu As- Shariah* (what can be termed in the modern time as Islamic law maxims). It is shown that where any medical activities is in violation of the objective of law, it will not be accepted in Islamic law and as such, is null and void and of no effect whatsoever. Thus the need to conform with Islamic principles is sacrosanct.

It is found that throughout the totality of the discussion herein, the idea of consent appears to be a reoccurring issue that should be sought and obtained in relation to organ transplant except in exceptional circumstance as shown in the paper. However, permissibility in Islam is based on necessity. In fact the WHO has provided some guiding principle on organ transplant that include "consent, traceability and transparency, to satisfy the legal, moral and ethical issues surrounding organ transplant.

This paper finally found that though organ transplantation is permitted, but same has to be in line with the available and relevant laws, and should not be performed contrary to Islamic medical principles. The medical practitioners also have roles to play in ensuring compliance with medical ethics in protecting and preserving the sanctity of human life. Thus, sale of organ is seriously discouraged so as not to sustain the red market of illegal organ harvest and sale, particularly in this era of organ trafficking. However, organ may be voluntarily and freely given to save life or the donor may be compensated particularly to take care of the associated treatment and expenses connected with the donation. The paper further found that the regulation and the laws relating to organ transplantation are purposely to save life of dying patients, and as well to protect the dignity and sanctity of human life.