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TOPIC:

**Bio-Legal Dimensions of organ Transplantation:
The Shari'ah Response**

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Bio-Legal Dimensions of organ Transplantation: The Shari'ah Response

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ABSTRACT:

Ilm al-Abdan (medical science) has always been given utmost preference after Ilm al-Adyan (Religious science) in Islamic epistemology. The former takes care of physical well-being whereas the later satiates the spiritual and intellectual well-being of humanity. The reckless development and advanced achievements in the field of medical sciences have given rise to many legal and ethical issues and demands a clear response from the Shari'ah. Since Shari'ah or divinely ordained law encompasses all the domains of human activities hence addresses all upcoming or newly born issues according to basic legal framework of Islam. One of the basic objectives of Shari'ah is to make human life as comfortable as possible. 'Allah Almighty wishes ease for you not to put you in difficulty'. But the comfort should not be at expense of violating the commands of Shari'ah. Therefore, Ta'abbud element (devotional imperative) has to be prioritized other elements. Human organ transplantation procedures have gained an unprecedented pace in the Modern era. The procedures have been well-received in Muslim countries and a sizeable number of Muslims are going through these operational arrangements. These surgical procedures have evoked a much conflicting debate over the permissibility or impermissibility of the concept and seeks the response of Shari'ah law. There are two sets of opinions of scholars holding two opposite views of the procedures. This paper traces out the historical background of the process of organ transplantation along defining its various branches. There is no clear-cut verse in the Quran nor any of the Prophetic traditions regarding the ruling of organ transplantation or in legal jargon it doesn't fall under *Mansus Hukum* or defined law rather the procedure falls into the category of *Hukum Mustanbat* or derived law. Therefore, this research paper will examine the evidences of both the faction of scholars regarding permissibility or impermissibility of the procedure. The researchers will conclude the paper with further suggestions /regulations pertaining to the field in the light of Shar'ah law.

Keywords: Human organ transplant, Shari'ah law, legal framework, Hukum Shar'iy

Introduction

The reckless advancement in the field of medical technology has made certain things, which were impossible erstwhile, possible. The advanced medical and surgical procedures in certain fields have paved the way for determining the legal value and ruling of these procedures through Islamic legal framework. One of the burning issues for the past seven decades before the Muslim Jurists has been to find out the legal value of organ transplantation. Since there is no any evident verse in the Quran nor any Hadith which explicitly explain the legal position of the procedure. Therefore, the discourse in discussion does not fall into the category of *Hukum Mansus* (defined law on the basis

of fundamental legal texts i.e The Quran and Hadith) rather lands into the domain of Hukm Mustanbat (derived law through the process of Ijtihad or legal ratiocination). There is a well-knit and comprehensive methodology which enables the jurists or Fuqaha to exercise casuistry or Ijtihad in order to find out the legal position of an issue within the legal framework of Islamic legal tradition. It must be noted that such an Ijtihad is not an open-ended mental exercise rather has to be carried out under the well-defined legal maxims, rules, principles and legally charged methodologies.¹

Since the sanctity of human life is so indispensable that no human society can be conceived devoid of it. The preservation of life has been placed among five elements of Maqasid Shari'ah (objectives of Islamic law). It is strictly forbidden for a person to harm himself or anyone else. Ibn 'Abbas narrated that the Messenger of Allah said:

عَنْ ابْنِ عَبَّاسٍ. قَالَ قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ "لَا ضَرَرَ وَلَا ضِرَارَ".²

"There should be neither harming nor reciprocating harm."

There are a number of Quranic verses and Prophetic Hadith which highlight the importance of good and healthy life. Any measure or effort that can help ensuring the dignity of human life has been counted to be of immense importance in Shari'ah. It has to be protected against all ideological and physical ills. Seeking medical treatment has been highly encouraged in the hadith. The Prophet (saw) said: قَالَ عَنْ أَبِي الدَّرْدَاءِ قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «إِنَّ اللَّهَ أَنْزَلَ الدَّاءَ وَالذَّوَاءَ وَجَعَلَ لِكُلِّ دَاءٍ دَوَاءً فَتَدَاوُوا وَلَا تَدَاوُوا بِحِرَامٍ». رَوَاهُ أَبُو دَاوُدَ³

Abud Darda reported God's Messenger as saying, "God has sent down both the disease and the cure, and He has appointed a cure for every disease, so treat yourselves medically, but use nothing unlawful."

On one side, the preservation of human life has been described as if preserving the whole humanity. On the other hand, the Amanah discourse describes that whatever we possess including our body is trust bestowed upon us by Allah Almighty. Amid two apparently conflicting stand points, it is important to know the procedure and method of Islamic legal tradition and how the technically legal process of ratiocination and inference is exercised to determine the legal value of a particular action. The subject under discussion is human organ transplantation whether it is permissible or against the commandments of Shari'ah. Organ transplantation has a long history but the procedure has touched heights of advancements in recent decades.

HISTORICAL BACKGROUND

(a) Ancient procedures and myths in organ grafting

Human organ grafting or transplantation is among such medical and surgical procedures which, in technical terms, surfaced recently. But the impressions of the procedure could be traced back to mythology. The Chinese mythical surgeon Pien chi'ao successfully transplanted the hearts of the two men having opposite powers of will and spirit in order to strike a balance between them. Yet another Chinese physician Tsin yue-jen has been reported mythologically that he successfully switched the

hearts of two soldiers who survived after their transplantation procedure for around eight days. In popular Hinduism, one of the god's named Ganesh has been portrayed in a human physique with an elephants' transplanted head. The myth goes as the father Shiva had beheaded his son namely Ganesh in a fit of rage. He later repented for mistreatment of his son and transplanted the elephant's head to that of his son.⁴

Apart from myths and fiction, the applied teeth transplantation was carried out in parts of Greece, Rome, Ancient Egypt, south and north America millennia before. The famous historian surgeon, David Hamilton, suggests that: "The idea of replacing diseased or damaged body parts has been around for millennia".⁵

The medical scholarship in the field of organ transplantation disagree as to when did the technical journey of the procedure hit the road. D. Hamilton offers the opinion that organ transplantation transcends the modern epoch and can be traced back to ancient times.⁶ Thomas Schlich maintains that the technical journey of organ transplant doesn't date back to 1880s.⁷ He downplays almost the first hundred pages of D. Hamilton's voluminous book '*A History of Organ Transplantation: Ancient Legends to Modern Practice*'. Thomas Schlich. In his magnum opus '*The Origins of Organ Transplantation: Surgery and Laboratory Science, 1880-1930* traces the origin of organ transplantation from 1880 onwards and has practically traced the historical developments of this specialized field upto 1930.

(b) Modern journey in organ grafting

There is an unanimity of medical scholarship regarding the modern origins of procedures of organ grafting or transplantation that it technically surfaced in the nineteenth century⁸. There have been many serious and successful procedures in the field of organ transplantation in nineteenth century like successful discovery of 'Thiersch graft' in the field of skin transplantation by a renowned German surgeon Karl Thiersch. The procedure turned out to be a success in epidermal skin grafting and has been in practice even until the present era⁹. James Blundell, an English gynecologist, emerged out to be the first doctor who invented the blood transfusion machine. It was in 1829, most likely as other scholars suggest it to be in 1818, J. Blundell successfully performed human to human transfusion of blood or allotransplantation.¹⁰

Muslim Response to Organ Transplantation

The organ transplantation procedures saw a positive response among the Muslims. The successful strides in the field of organ transplantation were well received in the Muslim world. The first ever kidney transplantation was performed in Jordan in 1972.¹¹ In Muslim world, Egypt emerged as a strong advocate of the concept. Egypt is credited with having the earliest Muslim surgeons to deal with cornea grafting around 1960s.¹² However, the procedures evoked a debate whether or not the procedures are approved under the commandments of Shari'ah or not. The opinion of scholars appears to be split up into two broad sections. One group of the two holds the opinion of its impermissibility whereas the other group invokes many of the arguments in support of the procedure.

Scholarly response to transplantation procedures

As mentioned earlier that there is no any verses or Prophetic traditions stating a clear position regarding the permissibility or impermissibility of human organ transplantation, hence it falls into the domain of Ijtihad or derived law. The nature of Ijtihad is flexible that it allows the actualization of reason within the set limits and boundaries of Shari'ah, which naturally culminates at diverse opinions and different stances.¹³ We shall summarize here some of the general opinions and stances held by various scholars so that we get a better understanding of their opinions. There are generally two sets of opinions which are as follows: (1) The first category of scholars is against hetero-transplant and does not allow the donation and its subsequent implantation into the body of other human being except in certain conditions and about specific organs.

(a) Human sanctity argument

The rule by default is that we don't have any legal authority to mutilate human body. The sanctity of human body has to be observed in all conditions whether living or dead. Any intervention that tends to violate such natural sanctity amounts to be a crime against humanity. Therefore, the procedure stands out to be impermissible. There are a number of arguments put forward by this group of Fuqaha or Jurists.

Allah (swt) created all mankind and bestowed honor upon them irrespective of their diverse beliefs and faiths. Allah (swt) says: Indeed, we venerated son of Adam.

The veneration of son of Adam is a default status of all human beings. It won't be affected by diversity of one's faith and belief system. Early scholars have a kind of unanimity upon the human sanctity argument. One the great Hanafi Jurist Imam Marghenani says: "It is not permissible to make sale of human hair or seeking any benefit thereof because the human being is 'venerated not degraded'. Therefore, it is not allowed to consider any of his parts degraded or made useable/saleable".

Ibn 'Abideen maintains the position of declaring any contract deed concerning sale of a human being as impermissible, he states:

والآدمي مكرم شرعاً وإن كان كافراً، فإيراد العقد عليه وابتذاله به وإحاقه بالجمادات إزلال له.¹⁴

Human being is legally venerated even if he is a disbeliever. Therefore, applying contract deeds upon him, making him saleable and considering him like inanimate object amounts to his disrespect and disregard.

Imam Sharbeeni al-Shafi'iy says: والآدمي يجرم الانتفاء به وبسائر أجزائه لكرامته.¹⁵

As for the human being, it is prohibited to take benefit of his body and all his organs due to his sanctity.

(b) Divine trust discourse

The second argument against the human transplantation discourse is based on 'divine trust discourse'. It states that our body including all that a human being possess is a trust given to us by our Creator. Therefore, we don't own our body part and hence can't make any decision of its donating to other parties.¹⁶ There is a wide range of bounties, prodigies and blessings endowed by Allah to human beings. He will ask about each bounty on the day of judgement. Of a multitude of blessings, our body organs

are deemed to be best of all after profession of faith. Allah (swt) says: Then, you shall be definitely questioned on that day about the blessing.¹⁷

Therefore, hetero-transplant of human organs is not permitted in Islam.

(c) Human organ trade: a heinous crime

There is another argument with this group of scholars that if organ transplantation is declared to be permissible, it will reduce the human being in to low-degree commercial commodity and hence will not only disrespect human dignity but also give rise to a systematic crime of human trafficking and trade. Majority population of the world tend to be poor and the necessities of life will surely push them to make sale of their precious organs.¹⁸ The affluent class of people will disadvantageously exploit the poverty and need of poor people for their own interests. The contempt and disdain of rich to that of poor will enhance social disparity and disharmony.

Based on the above arguments, the first group of scholars doesn't allow organ transplantation.

(2) The second opinion places their arguments in support of organ transplantation. Now we shall deal with the arguments of this group who don't find any difficulty in allowing organ transplantation.

(a) Maqasid approach to organ transplantation

Maqasid shari'ah is a comprehensive approach to understand the wisdom underneath the rulings or Ahkam in Islam.¹⁹ It seeks to establish all possible means of well-being within the framework of Shari'ah. One of the basic principles of Maqasid is to determine advantages and disadvantages underlying a particular ruling.²⁰ If a particular issue comprises of merits and advantages, it has to be adopted for the sake of realizing goodness. It is quite evident that Shari'ah endorses and motivates to achieve over-all well-being of mankind and depreciates any untoward adversity. Therefore, the underlying principle of organ transplantation is in accordance with the spirit of Shari'ah i.e ensuring the well-being of a human being.

(b) Treatment discourse

One of the arguments put forward in support of organ transplantation is of treatment discourse. Protecting one's body from any kind of ailment and disease has highly been obligated in Islam. Man is bound to suffer through many a disease and curing thereof has been declared to be legal obligation. The Prophet (saw) is reported to have said: 'Every disease has a cure'. If a person's life can be saved by way of organ transplantation it is as if whole humanity has been saved. Allah (swt) says: 'And whoever saved one soul is as if he saved the whole mankind'. Hence, saving human lives or ensuring a better life through transplantation is by no way different than mode of treatment, which highly appreciated by the Shari'ah.

(c) Suffering alleviation discourse

According to this argument, Islam emphasizes upon alleviating human suffering whatsoever the nature of it happens to be. There are a number of Prophetic traditions which exhort upon alleviating the sufferings and miseries of our fellow-beings. The

Prophet (saw) is reported to have said: ‘Whoever alleviates any suffering from his Muslim brother, Allah (swt) will alleviate one of his sufferings of day of judgement’. He is also reported to have said: ‘Whoever is able to benefit his brother, let him do so’. There are many other traditions which encourage to bring ease to our fellow brothers.

Assessment of the arguments

The issue of human organ transplantation has evoked an incessant debate over its permissibility and impermissibility. The arguments of both the sides hold water with their respective stances. The issue is how to strike a balance between the two opinions so that the principles of Shari’ah are not compromised with and at the same time, the life of a person be saved or made much better? We have explained the position of those scholars who prohibit the procedure of transplantation. However, we need to be quite aware about the fact that their prohibition is not absolute rather there is a provision for transplantation procedures. The organs are divided into different categories. The vital, semi vital and easily auto-retrievable or replaceable. As far as the vital human organs like heart, lungs, brain etc are concerned, the first group of scholars strictly prohibit any transplantation of vital arguments and all their arguments are primarily meant for these kinds of procedures. Semi-vital organs are referred to those organs which are not as important as that of first category like kidney, eye, flesh etc. as far as second category is concerned, there is a flexible view under dire circumstances and we can conclude that the element of permissibility is evident. So far as the third category is concerned, there is a kind of unanimity about permissibility of procedures like blood transfusion, plasma infusion etc.

For the arguments of the second group of scholars, they do not make any distinction as to any type of procedure. The underlying value is to protect a human life or making life much better. Therefore, it allows any means of transplantation whether of vital, semi-vital or auto-retrievable parts.

Conclusion

Human being constitutes to be the cream and crown of creation of existence. The sum and substance of this universe has been declared to be set in motion in the service of mankind. The basic purpose of human existence is to offer his unconditional devotion prescribed by the Creator of all that exists. This unconditional devotion cannot reach to its climax without complete submission of ones’ will to the will of Allah Almighty. However, it is a religious imperative to preserve any means which help a person to offer his devotion in all walks of life including life. the two conflicting views of scholars, actually, exhibit a wide range of opinions without any absolutism which in turn makes the opinion flexible not the rigid one. There is a strong need to devise a holistic approach including both the sets of arguments to help observe the fundamentals of Shari’ah while rendering services to mankind to alleviate their sufferings. There are some of the regulations which need to be observed so that both the issues are taken care of in a comprehensive way. These important regulations are:

- (i) The donated organ must have been cut from donor due to some health hazard like eye had to be removed due to certain medical necessity. Such an eye can be used to fix cornea related issues.
- (ii) The donor must be legally eligible for making a decision. Therefore, minor or insane persons parts cannot be taken for transplantation.
- (iii) The procedure should not involve any monetary motivation rather should be undertaken purely on moral ground. The trade element has to be eradicated from the procedure otherwise it will open up a terrible door of exploitation.
- (iv) The procedure should not affect the donor physically to such an extent that his life will appear to be miserable. The donor must be able to carry out his day-to-day activities in a normal way.

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