

Our Bodies Belong to God, So What? God's Ownership vs. Human Rights in the Muslim Organ Transplantation Debate*

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Abstract

Organ transplantation is a morally challenging subject. It gives rise to several ethical dilemmas which question the very meaning of what it means to be a human being. For some Muslims, organ transplantation impinges on God's claim to ownership. Research reveals that proponents of organ transplantation focus on the benefits afforded to the recipient, while opponents highlight the situation of the donor. For them the entire focus on the health benefits to the recipient turns a blind eye to the dignity of the donor who is viewed as nothing more than a repository for organs, to be extracted and then forgotten. After a brief survey of the different opinions on organ transplantation, I present a translation and commentary of an article written by the former grand-mufti of Lebanon, Muḥammad Rashīd Qabbānī which attempts to research the issue of whether organ transplantation impinges on God's sovereignty over the human body or not.

Key words: Organ Transplantation, Fatwa, Islamic law, bioethics, Islamic theology

Introduction

Organ transplantation is a frustratingly eclectic and morally challenging subject which throws up several ethical dilemmas as a result of weighing up protected characteristics differently.¹ In this article, I present the translation of a response to one argument put forward by Muslim opponents of organ transplantation—our body belongs to God, how then can we donate it?²—by Muḥammad Rashīd Qabbānī (b. 1942), former grand-mufti of Leb-

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1 Manfred SING, "Sacred Law Reconsidered," *Journal of Religious Ethics*, 36.1 (2008).

2 Muḥammad Mitwallī al-SHA'RĀWĪ, "al-Insān lā yamlik jasadah fa-kayfa yatabarra' bi-ajzā'ih aw bay'ih," *Majallat al-Liwā' al-Islāmī*, 226 (1987). See the following references for further opposition to organ transplantation in Islam: 'Abdullāh al-GHUMĀRĪ, *Ta'rif ahl al-islām bi-anna naql al-'aḍw ḥarām*, Palestine: Wāḥat Ahl al-Bayt li-l-ḥyā' al-Turāth wa'l-'Ulūm, 2007; Muḥammad SHAFĪ', "A'ḍā' insānī kī pewandkārī," in *Jawāhir al-Fiqh*, ed. Muḥammad SHAFĪ', Karachi: Maktaba Darul Uloom, 2010, VII: 17-74; 'Abd al-Salām 'Abd al-Raḥīm al-SUKKARĪ, *Naql wa-zirā'at al-a'ḍā' al-ādamiyya min manzūr islāmī: dirāsa muqārana*, Cairo: Dār al-Manār, 1988; Kamāl al-Dīn BAKRŪ, "Madā mā yamlik al-insān

anon.³ The argument presented by opponents of organ transplantation is powerful. It demonstrates that organ transplantation encroaches on deeply held beliefs about bodily integrity, its relationship to the soul, attitude towards death, and more importantly God's ownership of the human person, body, warts and soul enshrined in the emphatic invocation: *Innā lillāhi wa-innā ilayhi rāji'un*, to God we belong and to him we return.⁴ However, prior to presenting the translation, I provide a brief survey of opinions on organ transplantation in Islam followed by a commentary of the counter-arguments presented by Qabbānī.⁵

Background information

Organ transplantation is a relatively new phenomenon. The modern era of transplantation started in the 1940s with an increased medical interest in cornea grafts.⁶ The successful

min jismih," part I: *Majallat al-Majma' al-Fiqhī al-Islāmī*, 7 (1992): 197-264, and part II: 8 (1995): 197-244; Burhān al-Dīn SANBHĀLĪ, "Ḥukm al-sharī'a al-islāmiyya fī zar' al-a'dā' al-insāniyya," *al-Ba'th al-Islāmī*, 23.2 (1987): 44-55; Sherine HAMDY, "Not Quite Dead: Why Egyptian doctors refuse the diagnosis of death by neurological criteria," *Theoretical Medicine and Bioethics*, 34.2 (2013): 147-160; Amjad MOHAMMED, "Harvesting the Human: Traditional Sunni Islamic Perspective," *IRTIS*, 2017, <<http://www.irtis.org.uk/images/organs.pdf>> (accessed January, 2018).

3 Muḥammad Rashīd Qabbānī, "Zirā'at al-a'dā' al-insāniyya fī jism al-insān," *Majallat al-Majma' al-Fiqhī al-Islāmī*, 1.1 (2003): 55-66.

4 Qur'ān 2:156.

5 See the following for more detailed discussions on organ transplantation in Islam: Abul Fadl Mohsin EBRAHIM, "Organ Transplantation: Contemporary Sunni Muslim Legal and Ethical Perspectives," *Bioethics*, 9.3 (1995): 291-302; Muḥammad 'Alī al-BĀR, *al-Mawqif al-fiqhī wa'l-akhlāqī min qaḍiyyat zar' al-a'dā'*, Damascus: Dār al-Qalam, 1994; Bakr ABŪ ZAYD, "al-Tashrīḥ al-juthmānī wa'l-naql wa'l-ta'wīd al-insānī," *Majallat al-Majma' al-Fiqhī al-Islāmī al-Duwalī*, 4.1 (1988): 146-85; Abdulaziz SACHEDINA, *Islamic Biomedical Ethics: Principles and Application*, Oxford: Oxford University Press, 2011: 173-95; Ibrāhīm YA'QŪBĪ, *Shifā' al-tabārīḥ wa'l-aḍwā' fī ḥukm al-tashrīḥ wa-naql al-a'dā'*, Damascus: Maṭba'at Khālid ibn al-Walīd, 1987; Muḥammad b. Muḥammad al-Mukhtār al-SHINQĪTĪ, *Aḥkām al-jirāḥa al-ṭibbiyya*, Jeddah: Maktabat al-Ṣaḥāba, 1994: 332-91; 'Alī Muḥyiddīn QARĀDĀGHĪ and 'Alī Yūsuf MUḤAMMADĪ, *Fiqh al-qaḍāyā al-ṭibbiyya al-mu'āṣira*, Beirut: Dār al-Bashā'ir al-Islāmiyya, 2006, I: 169-248; Ahmed Abdel Aziz YACOUB, *The Fiqh of Medicine: Responses in Islamic Jurisprudence to Development in Medical Science*, London: Ta-Ha Publishers Ltd, 2001: 254-80; 'Ārif 'Alī QARĀDĀGHĪ, *Qaḍāyā fiqhīyya fī naql al-a'dā' al-bashariyya*, Kuala Lumpur: IIUM Press, 2011; Mujāhidul Islām QASMI, *Jadīd fiqhī mabāḥith*, vol. 1, Karachi: Idārat al-Qur'ān, 1994; 'Abd al-Ghanī YAḤYĀWĪ, *al-Mawāzana bayn al-maṣāliḥ wa'l-mafāsīd fī 'l-tadāwī bi-naql al-a'dā' al-bashariyya*, London: al-Furqan Islamic Heritage Foundation, 2016; Mansur ALI, "Three British Muftis Understanding of Organ Transplantation," *Journal of the British Islamic Medical Association*, 2.1 (2019): 42-50; Mohammed Zubair BUTT, "Organ Donation and Transplantation in Islam: an opinion," 2019, <<https://nhsbtde.blob.core.windows.net/umbraco-assets-corp/16300/organ-donation-fatwa.pdf>>; Rafaqat RASHID, "Organ Transplantation: An Islamic Perspective to Human Bodily Dignity and Property in the Body," *al-Balagh Academy* 2018, <www.albalaghacademy.com>; Muḥammad Sa'īd Ramaḍān al-BŪTĪ, "Intifā' al-insān bi-a'dā' jism insān ākhar ḥayyan aw mayyitan," *Majallat al-Majma' al-Fiqhī al-Islāmī al-Duwalī*, 4.1 (1988): 187-213; 'Abdullāh al-BASSĀM, "Baḥṭh 'an zirā'at al-a'dā' al-insāniyya fī 'l-jism al-insānī," *Majallat al-Majma' al-Fiqhī al-Islāmī*, 1.1 (2003): 31-46; Khālid Sayfullāh RAḤMĀNĪ, *Jadīd fiqhī masā'il*, Karachi: Zamzam Publishers, 2010, v: 45-59.

6 Russell SCOTT, *The Body as Property*, New York: The Viking Press, 1981: 19.

transplantation of a kidney in 1954 opened up new life-saving horizons hitherto deemed impossible. The first heart transplant was conducted by Christiaan Barnard in 1967 in South Africa, where the patient lived for 18 days and then died.⁷ The development of haemodialysis by the Dutch scientist Willem Kolff in 1943 paved the way for the 1954 kidney transplant. This was followed by liver transplant (1960), heart (1967), combined heart-and-lungs (1986), liver, pancreas and bowel triple transplant (1996), and combined kidney-pancreas transplant (1998).⁸ The first successful uterus transplant was registered as late as 2013, where a 35-year old woman with congenital absence of the womb underwent a uterus transplant donated by a 61 year old friend in Sweden.⁹ This medical breakthrough made headline news, with the media calling it a ‘medical marvel’ amidst two previous failed attempts by other doctors.¹⁰

The above-mentioned technological advances caught on very quickly in the Muslim-Arab world. The first successful renal transplantation took place in Jordan in 1972.¹¹ Egypt is seen as the ‘pioneering’ Muslim country in transplant medicine.¹² Egyptians pride themselves as the first Muslim doctors to have direct interaction with cornea grafts as early as the 1960s.¹³ A fatwa preserved from 1959 is evidence of this. A charitable organization for the blind called the ‘Light and Hope Foundation’ sought a religious verdict on founding an eye bank in Egypt. The then grand-mufti of Egypt, Shaykh Ḥasan Maʾmūn (d. 1973), responded to their query by extolling the virtues of such an initiative.¹⁴ However, he was careful not to offend people’s sensitivity towards honouring the dead whilst skilfully enumerating the religious and practical needs for a cornea-graft bank.

A survey of the different positions taken up by individual Muslim scholars as well as international research councils reveals that there are six major opinions on organ transplantation generally alongside discussions related to individual organs such as the reproductive system. Here I only posit the different opinions while reserving any detailed analysis of them for subsequent articles.

(1) The first can be deemed as a default position. This position suggests that the human body should be left naturally intact as far as possible without any intervention.¹⁵ Organ transplantation in both iterations: reception and donation, is prohibited according to this

7 Christiaan BARNARD, “Human Cardiac Transplant: An Interim Report of a Successful Operation Performed at Groote Schuur Hospital, Cape Town,” *South African Medical Journal* 41.48 (1967).

8 YACOUB 2001: 256.

9 Mats BRÄNNSTRÖM [et al.], “Live birth after uterus transplantation,” *The Lancet* 385.9968 (2015).

10 James GALLAGHER, “First womb-transplant baby born,” 2014, <<http://www.bbc.co.uk/news/health-29485996>> (accessed November 2017).

11 Mohammed Ali AL-BAR and Hassan CHAMSI-PASHA, *Contemporary Bioethics*, Heidelberg (etc.): Springer, 2015: 212.

12 Sherine HAMDY, *Our Bodies Belong to God: Organ transplants, Islam, and the struggle for human dignity in Egypt*, Berkeley: University of California Press, 2012: 2.

13 *Ibid.*

14 Ḥasan MAʾMŪN, “Naql ‘uyūn al-mawtā ilā ’l-aḥyā’,” in *al-Fatāwā al-islāmiyya min Dār al-Ifṭā’ al-Miṣriyya*, Cairo: Ministry of Religious Affairs, 1997: 2552; HAMDY 2012: 107.

15 See RASHID 2018 for a fuller discussion on different attitudes toward the body.

view. This is the opinion of Muḥammad Shafīʿ (d. 1976), former chief-mufti of Darul Uloom Deoband India,¹⁶ Akhtar Reza Khan Bareilwi (d. 2018),¹⁷ Muḥammad Mitwallī al-Shaʿrāwī,¹⁸ ʿAbdullāh Ṣiddīq al-Ghumārī (d. 1993)¹⁹ and ʿAbd al-Salām ʿAbd al-Raḥīm al-Sukkarī.²⁰

(2) Proponents of a second position maintain that although it is permissible to receive an organ, it is only allowed to donate while the donor is alive. This is the opinion of a sizeable number of scholars from the Indian subcontinent and is also the resolution of the Indian Islamic Fiqh Academy held in 1989.²¹

(3) The third opinion inverts the second position. It is permissible to receive an organ but only permissible for donation to be made post-mortem and not by a living donor. This is the opinion of Fahmī Abū Sunna from the Islamic Fiqh Council of Mecca²² and Muḥammad ʿAbd al-Raḥmān, former grand-mufti of Cameroon.²³

The issue of brain-death has been a linchpin argument in this debate.²⁴ Brain-death 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, heartbeat and breathing.²⁵ 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.

(4) Advocates of the fourth position argue that in addition to receiving an organ, all forms of organ donation are permissible except for a beating-heart dead donation (i.e. brain-dead patient). This is the opinion of the former grand-mufti of Egypt and one-time Shaykh al-Azhar, Gād al-Ḥaqq ʿAlī Gād al-Ḥaqq (d. 1996),²⁶ the opinion of Muḥammad Saʿīd

16 SHAFĪʿ 2010, although Shafīʿ is not against blood transfusions which renders some of the evidence for his position methodologically weak.

17 Mohammad Akhtar Raza KHAN, *Azharul Fatawa: a few English fatawa*, Durban: Habibi Darul Ifta, 1991.

18 AL-SHAʿRĀWĪ 1987.

19 AL-GHUMĀRĪ 2007.

20 AL-SUKKARĪ 1988. See footnote 2 for more references.

21 RAḤMĀNĪ 2010, v: 59.

22 Aḥmad Fahmī ABŪ SUNNA, “Ḥukm al-ʿilāj bi-naql dam al-insān aw naql al-a-ʿdāʾ aw al-ajzāʾ minhā,” *Majallat al-Majmaʿ al-Fiqhī al-Islāmī*, 1.1 (2003): 47-54.

23 Muḥammad ʿABDURRAḤMĀN, “Intifāʿ al-insān bi-a-ʿdāʾ jism insān ākhar ḥayyan aw mayyitan,” *Majallat al-Majmaʿ al-Fiqhī al-Islāmī al-Duwalī*, 4.1 (1988): 429-504.

24 HAMDY 2013; Aasim I. PADELA, Ahsan AROZULLAH, and Ebrahim MOOSA, “Brain Death in Islamic Ethico-Legal Deliberation: Challenges for Applied Islamic Bioethics,” *Bioethics*, 27.3 (2013); Aasim I. PADELA and Taha A. BASSER, “Brain death: the challenges of translating medical science into Islamic bioethical discourse,” *Medicine and Law*, 31.3 (2012): 433-450; Rafaqat RASHID, “The Intersection Between Science and Sunni Theological and Legal Discourse in Defining Medical Death,” scheduled for a collection of articles (title not decided yet), ed. Aasim PADELA and Afifi al-AKITI, Oxford & Chicago: TBC (forthcoming); Mansur ALI, “Brain-stem Death and Organ Donation: Theological Viewpoints. Islam,” *Amrita Journal of Medicine* (forthcoming).

25 HAMDY 2013.

26 Gād al-Ḥaqq ʿAlī GĀD AL-ḤAQQ, “Naql al-a-ʿdāʾ min insān ilā ākhar,” in *al-Fatāwā al-Islāmiyya min Dār al-Iftāʾ al-Miṣriyya*, Cairo: Ministry of Religious Affairs, 1997, x: 3700-3713.

Ramaḍān al-Būṭī (d. 2013),²⁷ of the former grand-mufti of Egypt, ‘Alī Gum‘a Muḥammad,²⁸ and the latest independent fatwa commissioned by the British National Health Service (NHS).²⁹

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. 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 off 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.³⁰ This latter decision, although not directly related to the organ retrieval process, must be read in tandem with the former cadaver organ donation position.

(5) The fifth position maintains that organ reception and all forms of organ donation (living, circulatory-death, brain-death) are permissible with certain caveats. This is the resolution of the International Islamic Fiqh Academy of Jeddah 1988,³¹ the opinion of most scholars in the world from Casablanca to Jakarta³²—with the exception of some scholars from the Indian subcontinent—, the opinion of Yūsuf al-Qaraḍāwī,³³ Khālīd Sayfullāh Raḥmānī,³⁴ the fatwa issued by Zaki Badawi in the UK in 1995,³⁵ the resolution of the European Council for Fatwa and Research in its sixth session in 2000,³⁶ and the position which is becoming most popular as people are becoming more aware of the need for transplantation.³⁷

27 AL-BŪṬĪ 1988.

28 Alī Goma MOHAMMED, “Organ Transplants,” Dar-Alifta Al-Misriyah 2003, <<http://www.dar-alifta.org/viewfatwa.aspx?id=3638&Home=1&LangID=2>> (accessed May 2019).

29 BUTT 2019. Butt’s understanding of heart-beating dead donation is still a work in progress. His is an eclectic position between positions four and five.

30 IFC, *Qarārāt al-Majma‘ al-Fiqhī al-Islāmī bi-Makka al-Mukarrama fī dawratih al-‘ishrīn*, Mecca: Rābiṭat al-‘Ālam al-Islāmī, 2010: 231-32.

31 IIFA, “Resolution on Organ Donation of the International Islamic Fiqh Academy in its 4th session (1988),” *Majallat al-Majma‘ al-Fiqhī al-Islāmī al-Duwalī*, 4.1 (1988).

32 Islamic Religious Council of Singapore, “Fatwa on Organ Transplant,” 2015, <<https://www.muis.gov.sg/officeofthemufti/Fatwa/English-HOTA>> (accessed November, 2017).

33 Yūsuf al-QARAḌĀWĪ, *Fatāwa Mu‘āṣira*, 4th edn, Kuwait: Dār al-Qalam, 2004, II: 530-40.

34 RAḤMĀNĪ 2010.

35 Zaki BADAWI, “Organ Transplant,” 1995, <<http://www.iol.ie/~afifi/Articles/organ.htm>> (accessed 1 December 2017).

36 ECFR, “Naql al-a‘dā’,” 2000, <<https://www.e-cfr.org/الأعضاء-نقل/>> (accessed 1 March, 2018).

37 Dr Rafaqat Rashid, a Muslim scholar and medical doctor from the UK, moves the debate to a slightly earlier time. He argues that death is the ‘permanent loss of capacity of higher brain functioning ... the rational soul has permanently lost its capacity of control of the critical human and rational components of the body’. However, Rashid argues that since there is no universal accurate anatomical criterion for a higher brain formulation of death, the brain-stem death criteria should be the closest and most accurate one to employ. See RASHID (forthcoming).

(6) A sixth position suspends judgment on the issue until further investigation. This is the opinion of the Pakistani scholar Muḥammad Taqī ‘Uthmānī, son of Muḥammad Shaḥī.³⁸ Despite his non-committed view, ‘Uthmānī allows people to take benefit from one of the permissive fatwas should a person require it.

(7) There is a seventh opinion which is popular amongst Muslims, but no scholarly references were found to support it. This opinion suggests that it is permissible to receive an organ but not to donate one. The opinion suffers from myopia and has been used by non-Muslim politicians as a tool to argue against Muslim integration into European society.³⁹ There are other peripheral issues associated with the discussion of organ transplantation: these relate to directed organ donation, inter-faith organ donation, the status of organs of criminals, the issue of consent and deemed consent. These will be discussed in subsequent articles.

Position	Reception	Living donor	Non-heart beating dead donor	Heart-beating dead donor	Advocates
1	No	No	No	No	Shaḥī, al-Sha’rāwī, al-Ghumārī
2	Yes	Yes	No	No	Islamic Fiqh Academy of India
3	Yes	No	Yes	Not mentioned	Abū Sunna, ‘Abd al-Raḥmān
4	Yes	Yes	Yes	No	Islamic Fiqh Council (Mecca), al-Būḥārī, Gād al-Ḥaqq, ‘Alī Gum’ā
5	Yes	Yes	Yes	Yes	International Islamic Fiqh Academy (Jeddah), al-Qaraḍāwī, Badawi
6	Suspend judgment, but one can resort to permissive fatwas in necessity	Suspend judgment	Suspend judgment	Suspend judgment	Taqī ‘Uthmānī
7	Yes	No	No	No	In circulation with no scholarly backing

Table 1: Different opinions on organ transplantation in Islam

38 Muhammad ibn Adam al-KAWTHARI, “Organ Donation & Transplantation,” 2004, <<http://www.daruliftaa.com/node/5896>> (accessed 1 December, 2017).

39 Mohammed GHALY, “Organ donation and Muslims in the Netherlands: a transnational fatwa in focus,” *Recht van de Islam*, 26 (2012).

Arguments against organ transplantation and its response

Opponents of organ transplantation present a number of arguments invoking scripture and the negative effects of organ transplantation on society. It has been argued that allowing organ transplantation will lead to a slippery slope, where a demand for organs coupled with poverty in Muslim countries will lead to the poor being either exploited or enticed for their organs.⁴⁰ However, the theological argument regarding the ownership of the body is an extremely simple and yet persuasive one against organ transplantation. This argument has been most famously and forcefully made by the celebrated Egyptian ‘Shaykh of the People’, Muḥammad Mitwallī al-Sha‘rāwī (d. 1998).⁴¹ Al-Sha‘rāwī’s argument was brilliant in its simplicity. It resonated with the sentiments of the lay public. ‘Our bodies do not belong to us; it is a trust endowed to us from God.’ Organ donation is deemed to be trespassing beyond acceptable boundaries of ethical mores. It is sacrilegious and a violation of this trust. Al-Sha‘rāwī used his position as a televangelical preacher to propagate his views and reach out to the uneducated working class of Egypt. He aptly entitles his article on the subject as *al-Insān lā yamlik jasadah fa-kayfa yatabarra‘ bi-ajzā’ih aw bay‘ih* [sic], that is, ‘Humans do not own their bodies; how then can they donate or sell their organs?’

Muḥammad Rashīd Qabbānī and the Islamic Fiqh Council

How do proponents of organ transplantation respond to this? How do they square the permissibility of organ transplantation with God’s ownership over people’s bodies? One response to this question was presented by Muḥammad Rashīd Qabbānī, a former grand-mufti of Lebanon, at a conference organised by the Islamic Fiqh Council held in Mecca in 1985. Qabbānī matriculated from al-Azhar University in Law. He later completed his post-graduate studies there. Since then he held various posts and offices including the office of grand-mufti of Lebanon from 1996 to 2014. He became a member of the Islamic Fiqh Council in 1971.⁴²

The Islamic Fiqh Council, *al-Majma‘ al-Fiqhī al-Islāmī* (IFC), is an affiliate of the Muslim World League (MWL)—a pan-Islamist, non-government organisation—founded in 1962 (funded by the late King Fahd, d. 2005, of Saudi Arabia) as a strategy to unite the Muslim *ummah* by tackling communism and President Gamal Abdel Nasser’s (d. 1970)

40 SHAFĪ 2010. Maulana Shams Pirzadah from Mumbai argues that organ transplantation diminishes the dignity of human beings for by allowing organ transplantation there will come a time when scientists will start developing medicines using human bones and skin. This will relegate the status of human beings as a means to an end and not an end in itself. Mufti Shakil Ahmad Sitarpuri argues that it will lead to child abduction. For more details on this see QASMĪ 1994: 1, 191, 224.

41 See the excellent anthropological work by Sherine Hamdy (HAMDY 2012) for more on this.

42 Dār al-Fatwā Lebanon, “Samāḥat al-Shaykh Muḥammad Rashīd Rāghib Qabbānī,” 2018, <<http://www.darelfatwa.gov.lb/ا-حفظه-قباني-راغب-محمد-رشيد>> (accessed May, 2019).

Pan- Arabism.⁴³ The MWL initially comprised a constituent council (*al-majlis al-ta'sīsī*) which was headed by the then grand-mufti of Saudi Arabia Muḥammad b. Ibrāhīm Āl al-Shaykh (d. 1969). 'Abd al-'Azīz b. 'Abd Allāh b. Bāz (d. 1999), one-time grand-mufti of Saudi Arabia and former head of the MWL, head of its constituent council and IFC writes that the constituent council members felt the need for a jurisprudence council to cater for the sharia needs of Muslims all over the world.⁴⁴ The discussion to found such a council initiated in 1964 with council members being chosen from Muslim scholars all over the world. However, it was only in 1977 that the IFC really took off and has been since affiliated to the MWL.⁴⁵

The role of the IFC was to provide ethico-legal guidance to Muslims in an ever-changing world. This involved disseminating knowledge from the classical Islamic scholarly tradition, encourage research and publication, collate a database of fatwas and religious opinions in addition to defending the sharia from criticisms.⁴⁶ The IFC sought to fulfil its objectives through holding conferences and disseminating research articles as well as the proceedings and resolutions of conferences in its journal. The collective deliberations at such conferences lead to the birth of a novel mode of reasoning and a new way of arriving at religious verdicts known as *ijtihād jamā'ī* (collective legal reasoning).⁴⁷ From 1977 to 2010, 130 resolutions were passed within 20 conferences. The resolutions have now been translated into English, French and Urdu, thus fulfilling one of its core objectives of disseminating traditional Islamic knowledge. It started a journal in 1988 entitled *The Journal of the Islamic Fiqh Council* which included in its first issue the proceedings and resolutions of its 8th conference held in 1985.⁴⁸

The conference was a response to a question on organ transplantation addressed to the Council from its USA office. It took place on 9 January 1985 in Mecca. After 8 days of debate and deliberation, the Council concluded that the evidence for the permissibility of organ donation (both from living and cadaver donor) is more convincing.⁴⁹

Attention needs to be drawn to several salient points related to the signatories of the declaration. The aforementioned Ibn Bāz, who took a non-committed position (*tawaqquf*)

43 Reinhard SCHULZE and Gabriele TECCHIATO, "Muslim World League," in: *The Oxford Encyclopaedia of the Islamic World*, Oxford Islamic Studies Online, <<http://www.oxfordislamicstudies.com/article/opr/t236/e0570>> (accessed 31 December, 2019).

44 IFC, *Majallat al-Majma' al-Fiqhī al-Islāmī*, 1.1 (2003): 18.

45 IFC 2010: 20.

46 IFC, "About the IFC," <<https://ar.themwl.org/node/11>> (accessed May 2019).

47 Alexandre CAEIRO, "Facts, Values, and Institutions: Notes on Contemporary Islamic Legal Debate," *American Journal of Islamic Social Sciences*, 34.2 (2017); Mohammed GHALY, "The Beginning of Human Life: Islamic Bioethical Perspectives," *Zygon*, 47.1 (2012); SING 2008; Jakob SKOVGAARD-PETERSEN, "A Typology of Fatwas," *Die Welt des Islams*, 55.3-4 (2015); Šāliḥ 'ABDULLĀH, "al-Ijtihād al-jamā'ī wa-ahammiyyatuh fī nawāzil al-'aṣr," *Majallat al-Majma' al-Fiqhī al-Islāmī*, 25 (2010); IFC, *Qarārāt al-Majma' al-Fiqhī al-Islāmī bi-Makka al-Mukarrama, al-dawrāt min al-ūlā ilā al-sābi'a 'ashara*, Mecca: Rābiṭat al-'Ālam al-Islāmī, 2004: 8.

48 IFC 2003 : 31-80.

49 IFC, "Resolution of the Islamic Fiqh Council in its 8th Session (1985)," *Majallat al-Majma' al-Fiqhī al-Islāmī* 1.1 (2003): 75-80.

on organ transplantation in a 1982 Council of Saudi Senior Scholars' conference,⁵⁰ is now convinced of its permissibility and has signed the declaration without any reservations or conditions. Abū Sunna, who in his conference paper argued against live donation did not register any opposition to the declaration.⁵¹ The Saudi Scholar Ṣāliḥ b. Fawzān documented his unease with cadaveric donation. The Saudi Scholar Bakr Abū Zayd (d. 2008) remained non-committed in this conference. However, in another conference convened in February 1988, organized by the International Islamic Fiqh Academy (IIFA) of which Abū Zayd was the chair at the time, he changed his view.⁵² A few members were missing from the conference including Yūsuf al-Qaraḏāwī (b. 1926) and Abū 'l-Ḥasan 'Alī al-Nadwī (d. 1999). Al-Qaraḏāwī's support for organ transplantation is well known from his writings.⁵³ However, it is unfortunate that al-Nadwī was missing from the conference. I mention it is unfortunate because al-Nadwī was a pivotal figure in the Indian Muslim landscape. He yielded authority and commanded respect.⁵⁴ Any piece of writing from him would have been decisive for a large segment of the Muslim community hailing from the Indian subcontinent. Finally, the declaration does not draw any distinction in donating or receiving from non-Muslims.⁵⁵ This is probably due to the provenance of the original question (USA) arising in a context where Muslims are a sizable minority.

Commentary on the translation

One may question why this article was singled out for translation? In my reading of organ transplantation fatwas and discussions, I discovered that both proponents and opponents of organ transplantation are not talking on the same wavelength. The proponents of organ transplantation mainly tackle the issue from the point of view of the recipient. Thus, they extol the benefit that an organ will bring to the recipient. The scriptural references as well as the legal justification revolve around this point. On the other hand, opponents of organ transplantation mainly side with the donor. They argue that the gift of life is a 'seductive metaphor'⁵⁶ which only views the donor as a repository of organs without taking into consideration the physical, spiritual and psychological harm inflicted on the donor during the process of organ extraction. All scriptural and legal references are homed to exemplify this

50 Council of Senior Saudi Scholars, "Second Declaration of the Council of Saudi Senior Scholars Regarding Organ Transplantation, no. 99 (1982)," *Majallat al-Majma' al-Fiqhī al-Islāmī*, 1.1 (2003).

51 ABŪ SUNNA 2003: 47-54.

52 ABŪ ZAYD 1988: 146-85.

53 AL-QARAḌĀWĪ 2004, II: 530-40.

54 Mohammad Akram NADWI, *Shaykh Abū al-Ḥasan 'Alī Nadwī: His Life and Works*, Batley, UK: Nadwi Foundation, 2013.

55 For more on the topic of inter-faith organ transplantation, see Mohammed GHALY, "Religio-ethical discussions on organ donation among Muslims in Europe: an example of transnational Islamic bioethics," *Medicine, Health Care and Philosophy*, 15.2 (2012); GHALY 2012b.

56 Margaret M. LOCK, *Twice Dead: Organ transplants and the reinvention of death*, Berkeley: University of California Press, 2002.

point. Qabbānī's article is one of the few legally-rooted works which attempts to argue at a meso-level why organ donation is not Islamically prohibited.⁵⁷

A salient feature of Qabbānī's paper is the technical nature of his arguments. Implicit in his argument is the claim that the question of whether something is permissible or not is one that falls within the remit of Islamic law, as it is this that provides the guidelines for correct ethical behaviour. Organ transplantation clearly falls within the jurisdiction of Islamic law. Therefore, any discussions on this subject must employ the technical language and modes of reasoning developed within this discipline.

A survey of organ transplantation writings by Muslim scholars reveals that they approach the topic from various disciplinary fields. Some, like al-Sha'rāwī, employ reasoning from the domain of Islamic theology and scripture. Others use Islamic legal philosophy (*maqāṣid al-sharī'a*) and legal maxims (*al-qawā'id al-fiqhiyya*) to argue their positions.⁵⁸ The contenders of this approach are scholars mainly from the Middle East and their followers in the Far East. Legal maxims such as 'necessity facilitates ease' are invoked to legitimise organ donation. Conversely, detractors of organ transplantation also use legal maxims such as 'harm cannot be reduced by another harm' as evidence that organ transplantation is impermissible since saving the life of the recipient will mean either violating the dignity of the deceased (which is a harm) or to physically put the donor in the way of harm through surgery.⁵⁹ The *maqāṣidī* approach functions at a macro and abstract level. The benefit of this approach is the ease with which pronouncement on issues not covered by scripture or classical Islamic law can be made. However, a downside of this approach is that without proper understanding of the *maqāṣid* and what constitutes benefit in Islam, one can easily fall into a utilitarianist mind-set where benefit is defined as what society values and not what God values.⁶⁰

Scholars from the Indian subcontinent—mainly from the Hanafi school—root their discussion in the positive law (*furū' al-fiqh*) found in the classical Hanafī law manuals. They then extend these discussions on to the ruling of organ transplantation by way of analogy (*qiyās*).⁶¹ Their approach can be described as a micro-approach since they root their arguments in historical precedent cases. A benefit in using this method is that it is based on precedents set by previous scholars. The mufti is in good company and does not need to

57 See below for a discussion of meso-level *fiqh*.

58 For an example of this see, YAḤYĀWĪ 2016. For discussions on *maqāṣid al-sharī'a*, see Muhammad Tahir IBN ASHUR, *Treatise on Maqasid al-Shariah*, translated by Mohamed el-Tahir MESAWI, London & Washington: The International Institute of Islamic Thought, 2006; Felicitas OPWIS, "Maslaha in Contemporary Islamic legal theory," *Islamic Law and Society*, 12.2 (2005); EAD., "New Trends in Islamic Legal Theory: Maqāṣid al-Sharī'a as a New Source of Law?," *Die Welt des Islams*, 57.1 (2017). For legal maxims see Imran NYAZEE, *Islamic Legal Maxims*, Islamabad: Centre for Excellence in Research, 2016; Shahrul HUSSAIN, *A Treasury of Sacred Maxims*, Markfield: Kube Publishing Ltd, 2016.

59 ABŪ ZAYD 1988: 167; Yassar MUSTAFA, "Islam and the Four Principles of Medical Ethics," *Journal of Medical Ethics*, 40.7 (2014).

60 See Muḥammad Sa'īd Ramaḍān al-BŪṬĪ, *Dawābiḥ al-maṣlaḥa fī 'l-sharī'a al-islāmiyya*, Beirut: Mu'assasat al-Risāla, 1973.

61 Ebrahim MOOSA, "Transacting the Body in the Law: Reading fatawa on organ transplantation," *Afrika Zamani: Revue Annuelle d'histoire Africaine*, 5-6 (1998).

venture into unchartered territory. However, a problem with this approach is that, in their zeal to venture closely to a text as far as possible, scholars may infer wrong analogical reasoning from the precedents resulting in an incorrect legal ruling for the issue at hand. By way of example, the Hanafī law books mention that it is not permissible for a person to benefit from someone else's body parts such as teeth, hair and bones. Al-Būṭī argues that the examples adduced in the medieval law books relate to cosmetic enhancement of the human (*taḥsīn*) and is not to be confused with modern invasive life-saving technology which falls under the degree of necessity (*darūra*). The examples are correct in that no one argues for the use of human remains in order for cosmetic enhancement, but they are not accurate legal precedent for organ transplantation.⁶² Qabbānī also argues from the point of view of the Hanafī tradition. However, unlike his South Asian counterparts, he employs a meso-approach which from one angle has some resemblance of the macro-approach of the legal philosophers whilst on the other, it is rooted in the textual tradition of the Hanafī school of law.

While al-Sha'rawī's argument is simple and relatable to the masses, its disciplinary location is not Islamic law but resides within the realm of theology and religious advice (*al-targhīb wa'l-tarhīb*). Therefore, one can argue that his conclusions are not based within a clear framework of Islamic ethical mores but rather an emotional appeal which simply wanted the poor religious people of Egypt to connect with God and have faith in Him in the face of misery, poverty and illness. In other words, from an Islamic-legal point of view, the question of whether God owns the human body or not *vis-à-vis* organ transplantation is not the correct question to ask as no one disputes God's ownership of the body. The real question is whether one has discretionary rights over their own bodies? This then relocates the discussion from the realm of theology to the province of Islamic law.

Qabbānī mines the Hanafī legal tradition known as *uṣūl al-fiqh* to make his case. More specifically he focuses on the authoritative works of 'Alā' al-Dīn 'Abd al-'Azīz al-Bukhārī (d. 1438) and 'Alā' al-Dīn Abū Bakr b. Mas'ūd al-Kāsānī (d. 1191). Being a classically trained mufti, his style of argument can be described as what Sherman Jackson calls 'legal scaffolding'.⁶³ Legal scaffolding is when an authority seeks authenticity for their opinion by hiding behind a superior authority (better from someone from the past) and uses the latter to speak for him. This has the double benefit of staving off any charges of innovation, which is deemed reprehensible as well giving the impression of being authentic. In this instance, Qabbānī is following in the footsteps of the Hanafī scholars of the Indian subcontinent. Qabbānī's conclusion, however, is different to the conclusion that the South Asian scholars arrived at. Qabbānī believes that people do have discretionary rights over their body as long as it does not lead to terminating of life.

Drawing upon the *uṣūl al-fiqh* tradition, Qabbānī maintains that there are four types of rights (of which he only discusses two):

62 Al-BŪṬĪ 1988.

63 Sherman A. JACKSON, "Taqlid, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory: Mutlaq and 'Amm in the Jurisprudence of Shihab al-Din al-Qarafi," *Islamic Law and Society*, 3.2 (1996); Mansur ALI, "Is the British weather anti-Islamic? Prayer times, the Ulama and application of the Shari'a," *Contemporary Islam*, 9.2 (2015).

- Rights which are purely God's.
- Rights which are solely people's.
- Rights which are shared by God and people, but people's right is dominant over God's.
- And rights which are shared by both and God's right is preponderate.

Rights over human life (*nafs*)

God's exclusive rights are those which are either pure ritual such as fasting and praying, or certain inviolable human rights, the sanctity and magnanimity of which are so awesome that a violation of these rights will lead to, or are perceived to lead to, an endemic harm and evil in society. Thus, God decides to attribute them to Himself. One such right is the duty to not engage in pre- or extra-marital sex. In Islam, fornication and adultery are seen as such heinous crimes that not only do they pollute society, they also shake the very foundation of the institution of marriage the preservation of which is one of the broader objectives of the sharia. Since the right is an inviolable human right, its punishment, in the form of *hudūd*, is also severe and cannot be forfeited once established beyond reasonable doubt.

Drawing upon al-Bukhārī, Qabbānī argues that the human body is the site of one of those rights which is shared by both God and people, but people's right is privileged over God's right. This is further divided into rights over human life (*nafs*) and rights over human limbs. The right that God has over the human is the right to be worshipped (*ḥaqq al-isti'bād*), whilst the right that people have over their body is the right to benefit from it through its continued existence (*ḥaqq al-istimtā' bi-baqā'ihā*). Implicit in this is that one is not allowed to kill themselves or others because it encroaches on God's right to be worshipped as well as violating the right of the person to benefit from life by staying alive.

What evidence is there to claim that God has a right over human life? Al-Bukhārī presents two pieces of evidence based on an analogy with *hudūd* punishment. Capital punishment, known as *hudūd*, is purely within the domain of God's right. It is repercussion for violating a right of God or more precisely an inalienable human right such as the right to marital fidelity and loyalty. Adultery not only pollutes the public sphere but destroys a vital objective of the sharia: family and lineage. Once the crime has been established beyond reasonable doubt, the *hudūd* punishment has to be executed without the scope to forfeit it.⁶⁴ The punishment for murder, known as *qiṣās*, i.e. a like-for-like retaliation, is not a part of the *hudūd* punishment but has a resemblance to it from this angle. This similarity with the *hudūd* punishment is what makes it a right of God.

However, the main purpose of the *hudūd* punishment is preventative and not necessarily to be applied to the extent that the minutest of doubt in establishing the infraction immediately cancels the *hudūd* punishment. This is captured in a Prophetic dictum, 'Prevent the *hudūd* punishments because of ambivalences.'⁶⁵ The *qiṣās* punishment for murder, similar

⁶⁴ Abdur Rahman DOI, *Shari'ah: Islamic Law*, 2nd edn, edited by Abdassamad CLARKE, London: Ta-Ha Publishers Ltd., 2013: 342-43.

⁶⁵ DOI 2013: 346.

to the *hudūd* punishment, is rendered void because of the presence of doubts or ambivalences either in the evidence or the victim. For al-Bukhārī, such similarities between the two categories of punishment are evidence enough that God has certain rights over the human body/life.

Despite viewing the human body as a site for God's rights to be implemented, for al-Bukhārī (and by extension Qabbānī) people's right over their body is more strongly present than God's right. He believes this to be the case because of the following arguments: In the case of a murdered person, his next of kin have full discretion to settle on a financial compensation (*diya*) rather than implementing the *qiṣāṣ* on the perpetrator. Furthermore, should they wish to, they can also forgive the murderer without demanding *qiṣāṣ* or *diya*. Finally, the burden of making such choices fall upon the next of kin and not the State.⁶⁶

The above set of evidences demonstrate that not only do people have a right over themselves, but their right is to be privileged over God's right because if the *nafs* was exclusively under God's domain: (1) the next of kin would not have had the right to accept financial compensation or the right to forgive over *qiṣāṣ*; and (2) they also would not have been the sole executors of these decisions. What al-Bukhārī tries to establish from this is that humans do have discretionary rights over themselves for the very fact that they can accept or forgive any harm done to them or their beloved. Had it been solely God's right, for example in the case of *hudūd* law, humans would not have had the right to forgive such a crime.

The above discussion was from the point of view of human life. What does Qabbānī say about human body parts and organs? Who has discretionary rights over human body parts, limbs and organs? Qabbānī is quite clear that where God has full rights over human life itself, the right over organs is shared with humans who have a greater right than Him. Thus, whilst people do have limited discretionary rights over their organs and limbs, there are also some prohibitions such as tattooing, self-inflicted harm and improper disposal of limbs and organs. Obviously, by default one accepts that the discretionary right was given to humans by God in the first place.

To establish people's rights over their limbs, Qabbānī relies on the early Hanafī scholar 'Alā' al-Dīn al-Kāsānī who maintains that grievous bodily harm which results in either the entire physical loss of an organ, or the loss of its utility warrants a full compensation. In the case where a person cuts off another person's nose, tongue or penis, a full *diya* is required. The reason for this is as al-Kāsānī explains:

The perpetrator has ruined the primary function of those organs, as well as [ruining] the cosmetic appearances of some. The primary [function] of the nose is to smell and to look beautiful. [The primary function] of the tongue is to speak, and the penis to facilitate sexual intercourse. The function of ejaculation is connected to the glans penis. All of these [benefits] disappear by severing [them].⁶⁷

Both al-Kāsānī and al-Bukhārī, and other Hanafī scholars go into pedantic details on harms inflicted on individual body parts, but they are clear that any harm inflicted would require financial compensation and not *qiṣāṣ*. However, the fact that the victim is allowed to for-

⁶⁶ The state in normal circumstances is the primary dispenser of God's right.

⁶⁷ al-KĀSĀNĪ 1986, VII: 311, quoted in QABBĀNĪ 2003: 60.

give the perpetrator and not take any compensation from them, leads scholars to concede that humans have full discretionary rights over their bodies. From this, al-Kāsānī draws out two principles:

1. In the human body, anything short of life follows the ruling of wealth, since both wealth and body parts have been created to preserve and facilitate life.
2. The sanctity (*iṣma*) afforded to body parts is not absolute and at times this sanctity can be suspended, for example in the case where it is lawful to do so (*ibāḥa*), like the *hudūd* punishment, or where a person gives consent to others over his body.⁶⁸ Al-Kāsānī writes,

If a person said, ‘cut my hand off, and the other person cut it, there is no repercussion on the other person by consensus. This is because body parts follow the ruling of wealth, the protection of which is his right. It can be suspended either through making lawful or through consent similar to if the person said, ‘destroy my wealth, and the other person destroyed it.’⁶⁹

Conclusion

Qabbānī’s discussion on bodily rights ends here. However, a number of questions arise from this discussion. Can one really extend this medieval understanding of bodily rights to organ transplantation? Qabbānī thinks so. But it’s not a direct correlation. He merely wishes to demarcate the distribution of labour between what is God’s right and what is the right of humans as far as the human body is concerned. He wrestles the ownership of rights over the human body from being exclusively within the domain of God and places it on equal footing with humans. Once this is established, a space opens up to discuss, amongst other things, organ transplantation without having to worry about pitching God’s sovereignty against human autonomy over their bodies.

Be that the case, Qabbānī’s argument suffers from certain methodological flaws. Where I criticised al-Sha’rāwī for disciplinary confusion, the same criticism can be levelled against Qabbānī. It is quickly realised that Qabbānī’s entire discussion on rights was focussed in the area of criminal law and bodily offences known as *jināyāt*. It can be questioned whether this is an appropriate part of the law to discuss an action which is deemed as a donation or better an act of charity and a gift of life? It is ironic to have this discussion in this area of the law (criminal law) given that a number of arguments put forward against organ transplantation anticipates criminal activities associated with organ transplantation such as illegal health tourism and the explosion of trade in human organs on the black market should organ transplantation be legalised.

A further ethical dilemma arising out of Qabbānī’s argument is the possible commodification of the human body. If, in line with al-Kāsānī’s understanding, the human body is relegated to the level of wealth, would not this lead to its commodification? Marion Katz,

⁶⁸ For example, a patient consenting to a doctor or a customer consenting to a barber. QABBĀNĪ 2003: 62.

⁶⁹ QABBĀNĪ 2003: 62. Cf. al-KĀSĀNĪ 1986 VII: 236.

in her study on abortion in classical Islamic law argues that the rules related to financial compensation for damages to a pregnancy, which is a *ghurra* (1/20th of a full *diyya*), address the loss of the foetus only after the fact. Is it then permissible for a woman, she questions, to terminate a pregnancy by paying the financial compensation? Can the financial compensation be waived if the pregnancy is terminated with the permission of those to whom the *ghurra* is due?⁷⁰ Using the same logic, would buying organs be permissible if the receiver was to pay the *diyya* for the organ to the donor? It is well known that historically Islam sanctioned the buying and selling of slaves. There are also contemporary ulama, such as Khālid Sayfullāh Raḥmānī from the Indian Fiqh Academy who allows buying organs in dire necessity only, but not selling.⁷¹ Would not making such arguments open the doors to a legitimate call for organ transaction?

Finally, I come full circle. Where I believe Qabbānī has done a good job in creating a space to talk about organ transplantation without having to impinge on God's domain, the language of *uṣūl al-fiqh* that he employs is technical, dry and long-winded. It cannot compete with the simple pronouncement of al-Sha'rāwī, 'Our bodies belong to God, how can we donate or sell that which does not belong to us?' The challenge now remains for proponents of organ transplantation to communicate this sophisticated knowledge to people, using a Sha'rāwīan style, a style which is brilliant in its simplicity, simple in its brilliance.⁷²

Translation

Muḥammad Rashīd Qabbānī, *Transplanting Human Organs into Another Human*

Praise is for God the Lord of the worlds. Greetings and salutations on our liege-lord Muḥammad the seal of the Prophets, on his family, his Companions and on those who have loyally followed them till the Day of Judgment.

The issue of transplanting human organs into another person is a subject that has engaged many physicians working in this field. [As a result of which] they are asking about the correct Islamic ruling on this matter. Despite conceding our inability and shortcoming [to answer their questions], we rely on God who has created everything in due proportion, who measured things [accurately] and guided. We seek His help and Providence. He is the best of Provider and the best Helper. We are presenting this study as an attempt to research

70 Marion KATZ, "The Problem of Abortion in Classical Sunni Fiqh," in *Islamic Ethics of Life: Abortion, War and Euthanasia*, ed. Jonathan BROCKOPP, Columbia: University of South Carolina Press, 2003: 29-30. See Abū Dāwūd al-SIJISTĀNĪ, *Sunan Abī Dāwūd, Kitāb al-diyāt, bāb diyat al-janīn*, for hadith reference.

71 RAḤMĀNĪ 2010: 5.

72 One proposal for effective communication has been suggested by Rasheed and Padela. By employing theoretical concepts from the 'theory of planned behaviour', they identify that for Muslims there are two main behaviour changing imperatives which they call the *Ilmi* imperative and *Islahi* imperative. They argue that to have a successful intervention model for organ transplant, scholars need to adopt an *islahi* model, as opposed to an *ilmi* one. See Shoaib A. RASHEED and Aasim I. PADELA, "The Interplay Between Religious Leaders and Organ Donation Among Muslims," *Zygon*, 48.3 (2013).

the topic from the point of view of Sacred law (*al-qawā'id al-shar'yya*) in order to learn the extent of its permissibility or impermissibility. God is a support for our endeavours.

There are two main stages of organ transplantation

The First Stage: The first stage is to procure the organ, i.e. to retrieve it from the body during the life [of the donor] or after the [donor's] death. The [ethical] questions that arise here are whether it is permissible for a person to donate one of his organs to another person while he is alive or after his death; or to request another person to donate his organs after the [requestor's] death? Furthermore, does the sanctity accorded to organs facilitate any discretion (*ibāḥa*), or is their sanctity similar to the value of life, which does not tolerate any form of discretion?

The Second Stage: The stage of transplanting the retrieved organ into a person who requires it. The question that arises at this stage is whether it is permissible or not to transplant a retrieved organ into another person?

In trying to discuss this topic, we mention that jurists have classified rights into four categories:

1. Rights which are solely God's
2. Rights which solely belong to people⁷³
3. Where two rights are juxtaposed, and God's right is privileged
4. Where two rights are juxtaposed, and the right of people is dominant

God's right includes benefits enjoyed by the entire world. It is not confined to any one person and is attributed to God out of respect so that no tyrants can lay claim to it for themselves. The sanctity of the Mosque in the *Haram* is one example. Its benefits encompass all since it is deemed as the *qibla* for their prayers and a resort to get their sins pardoned. Another example is the prohibition of *zinā* since it relates to a common benefit in preservation of the human race and protecting the marital bed. This right is attributed to God only in order to amplify the extent of its seriousness.

People's rights are those benefits which specifically relate to them such as the prohibition of [usurping] someone else's wealth. This is a person's right related to the preservation of his wealth. It is on this basis that it is permissible to [consume] someone else's wealth with the consent of the owner. However, it is not permissible to commit *zinā* with the consent of a woman or with her husband's permission.⁷⁴

Do people have discretionary rights over their body parts?

In the right's discourse, where two rights are combined—that of God and that of people, and people's right is preponderant—discussions ensue whether people have discretionary rights over their body parts or not. An example of [the right of people being privileged] is retaliation (*qiṣās*) in crimes (*jināyāt*) on the body, life and body parts; and the necessary

73 The Arabic text says *al-ibād* which literally means 'the servants (of God)'. Here I am translating it as 'people' in order to make it inclusive (which is intended in the Arabic) to include the rights of people who do not acknowledge the existence of or worship God.

74 A person is able to forfeit his own rights but cannot forfeit an inalienable right since it's a right which belongs to God.

action to be taken, either like-for-like retaliation (*qiṣāṣ*) or blood-money (*diyya*). The necessary requital for criminal damage to life or bodily-harm is either a like-for-like retaliation (*qiṣāṣ*) or the payment of blood-money known as *diyya*. It is an established fact that in the case of such crimes, the heir (*walī*) has the right to forfeit *qiṣāṣ* and settle on monetary compensation (*diyya*).

The discussion on whether a person has discretionary rights over his body parts or not will become clearer after we present some legal texts elucidating God's and people's rights, in relation to *qiṣāṣ* and *diyya* in cases of murder and bodily harm. We will study this issue from both angles: crime against life and crime against body parts.

Crime against life (Murder)

Imam 'Abd al-'Azīz al-Bukhārī wrote in his book *Kashf al-asrār 'an uṣūl fakhr al-islām al-bazdawī*,

Murder is a crime against life (*nafs*). The right that God possesses over life is the right to be worshipped (*haqq al-isti'bād*). While the right that a person has over the self (*nafs*) is the right to benefit from its continued existence (*haqq al-istimtā'*). For this reason, the necessary punishment due for murder encompasses both rights even though the right of the person is unanimously more prominent. The evidence that *qiṣāṣ* is a right of God is that it becomes suspended due to the presence of doubts similar to the *hudūd* punishment. [A further evidence] is that the default requirement for the [punishment] of murder is like-for-like retribution, i.e. *qiṣāṣ*, and not the payment of blood-money [for the loss of life], i.e. *diyya*.

Nevertheless, such cases—i.e. requiring like-for-like (*mumāthala*) *qiṣāṣ*—do bespeak of some form of requital, since from this point of view, it has some semblance of compensating the victim. It is therefore understood that the right of the person is privileged.

Similarly, passing the responsibility to discharge the *qiṣāṣ* on to the heir of the victim (*waliyy*), for him to inherit from [the victim], and the appropriateness of receiving financial compensation [instead of *qiṣāṣ*] through reconciliation are evidence that the person's right is dominant [over God's].⁷⁵

The financial compensation (*diyya*) achieved through reconciliation (*sulh*) is not [to be understood] as any form of payment whatsoever. The sole reason why the *diyya* was obligated is to preserve life from destruction. The validity for taking financial compensation for life [lost] as *diyya*, and similarly forgiveness with no substitute are due to the person's rights being predominant in crimes committed against his life. This is what 'Abd al-'Azīz al-Bukhārī refers to in his book *Kashf al-Asrār 'an Uṣūl Fakhr al-Islām al-Bazdawī*, namely that

The right that God possesses over life (*nafs*) is the right to be worshipped. While the right that a person has over the self is the right to benefit from its continued existence ... and the right of the servant is predominant. For him to inherit from [the vic-

75 'Alā al-Dīn 'Abd al-'Azīz al-BUKHĀRĪ, *Kashf al-asrār 'an uṣūl fakhr al-islām al-bazdawī*, Beirut: Dār al-Kutub al-'Ilmiyya, 1997, IV: 229.

tim], and the validity of taking financial compensation [instead of *qiṣās*] through reconciliation are also evidence that the person's right is dominant.⁷⁶

Furthermore, the sharia has established financial substitution for life lost through manslaughter (*al-qatl al-khaṭa'*), similar to how there is recourse to *diyya* and forgiveness in the case of crimes against life through intentional killing. [The evidence for] this is in the Word of God, 'Never should a believer kill another believer, except by mistake. If anyone kills a believer by mistake, he must free one Muslim slave and pay compensation to the victim's relatives, unless they charitably forgo it.'⁷⁷

Injury to body parts

We have mentioned a moment ago that similar to murder, payment of financial compensation is also liable on injury to body parts. The jurists have mentioned that full financial compensation is due on single limbs, which have no multiple parts in the body. A partial compensation is due on limbs with multiple parts in the body.

Al-Kāsānī explored the reasons for *diyya* being necessary on harm (*jināya*) inflicted on body parts. He writes, 'A full compensation (*al-ḍiyya al-kāmila*) is necessary because of the complete loss of the intended function of an organ.'⁷⁸

Al-Kāsānī further mentions that the complete loss of the intended utility of an organ primarily happens in two cases, 'either through separating the organ [from the body] or by way of eliminating the function of the organ while it remains in form.'⁷⁹

Al-Kāsānī further expanded on both cases with the following:

As for the first case:

There are three types of body parts whose loss is associated with a full payment of the *diyya*.

1. That which has no equivalence in the body
2. There are two of those in the body
3. There are four of those in the body

As for the type that has not equivalence in the body, these are six organs:

1. Nose
2. Tongue
3. Penis. It has been reported that the Prophet (peace be upon him) wrote in a letter which he sent with 'Amr b. Ḥazm,⁸⁰ 'there is *diyya* for life, there is *diyya* for the nose, and there is *diyya* for the tongue.'⁸¹ This is because the perpetrator has ruined the primary function of these organs, as well as [ruining] the

⁷⁶ *Ibid.*

⁷⁷ Qur'ān 4:92.

⁷⁸ Al-KĀSĀNĪ 1986, VII: 311.

⁷⁹ *Ibid.*

⁸⁰ A letter written by Muḥammad addressed to the people of Yemen and delivered by 'Amr b. Ḥazm.

⁸¹ Aḥmad b. Shu'ayb al-NASĀ'Ī, *Sunan al-Nasā'ī*, section (*kitāb*) "al-Qasāma", chapter (*bāb*) "Dhikr ḥadīth 'Amr b. Ḥazm fī 'l-'uqūl wa-'khtilāf al-nāqilīn lah."

cosmetic appearance of some. The primary [function] of the nose is to smell and look beautiful. [The primary function] of the tongue is to speak, and the penis to have sexual intercourse. The function of ejaculation is connected to the glans penis. All of these [benefits] disappear by severing [them].

In the case of cutting the tongue which results in parts of the speech disappearing, an appropriate requital (*ḥukūmat al-ʿadl*) is required.⁸² This is because the entire function [of the tongue] is not lost. Some argued that payment of the *diyya* is liable according to the letters of the alphabet. Hence, *diyya* is required in proportion to the amount of the letters of the alphabet lost [in pronunciation].

4. A full payment of the *diyya* [is necessary] in the case where the spinal cord becomes crooked due to being struck and the water, which is semen, ceases [to flow]. It is because the function of engaging in sexual intercourse is lost.⁸³
5. Urethra
6. Full *diyya* is liable if a person ruptures a woman's rectum to the extent that she can no longer retain [either] urine or excrement. If she cannot retain either of them, then the perpetrator is liable to pay full *diyya* for each [organ] because he has completely destroyed the primary functions of those organs.

As for organs in the body which are double: they are the eyes, ears, lips, eyebrows—when they lose their hair and it doesn't grow back—breasts, nipples, testicles, hands and feet. [The scriptural basis for *diyya* for paired organs] is what has been reported from Ibn al-Musayyib that the Prophet said, 'Payment of *diyya* is liable for two ears, and there is payment of *diyya* for two feet.' Furthermore, [*diyya* is liable] because cutting off one of the pair is to lose the collective utility [of the limbs], which is its desired function, or to completely lose its aesthetic nature. Examples [of loss of utility or aesthetic] include sight in a pair of eyes; grasp in a pair of hands; walking in a pair of feet; beauty in a pair of ears, a pair of eyebrows—when they can no longer grow—and a pair of lips. Furthermore, the task of holding saliva is the function of the bottom lip; the breasts are receptacles for milk; the nipples for breast-feeding and the testicles are repositories for semen.

Those organs of the body that have four parts are two types:

82 *Ḥukūmat al-ʿadl* is a technical legal term sometimes synonymously used for the word *arsh*. It is payment that is made by adjusting the difference between a non-defective merchandise and a defective one. Traditionally the slave was used as a base for calculating the *ḥukūmat al-ʿadl*, for example a slave free from any defect costs £1000 and a slave with fingers chopped off is £800. The difference is 20%. This is then applied to the situation of a free person. If someone chops off the fingers of a free person, they will need to pay a penalty of 20% to the victim. The concept is known as *ḥukūmat al-ʿadl* because the price is not stipulated by the sharia. It is left on the government (*ḥukūma* or *ḥākim*) to determine this price. See *Encyclopedia of Islamic Jurisprudence*, Kuwait: Ministry of Islamic Affairs, 1988-2006, XIII: 178, XVIII: 69-73. IBN ʿĀBIDĪN mentions that *ḥukūmat al-ʿadl* can also include compensation for pain as well as the cost of surgery. See *Radd al-muḥtār ḥāshiya ʿalā durr al-mukhtār*, 6 vols., Beirut: Dār al-Fikr, 1992, VI: 553. Nowadays actuarial calculations can be used to determine the cost of compensation.

83 Spinal cord injury has a strong connection with infertility and impotency in men. See Prasad PATKI (et al.), "Effects of spinal cord injury on semen parameters," *Journal of Spinal Cord Medicine*, 31.1 (2008).

1. Eyelids. They are the base for eyelashes. When eyelashes no longer grow, a quarter *diyya* is due for each eyelid. The reason for this [penalty] is that [with the loss of eyelids] there is a loss in the function of the sight as well as a complete loss of aesthetics.
2. Eyelashes, when they no longer grow.

As for the second case...

which is to lose the function of the organ while its form remains, such as sanity (*'aql*), eyesight, smell, taste, sexual appetite and procreation—for example when a person's back is struck resulting in the disappearance of water from his loins.⁸⁴ [The scriptural basis for *diyya* in these instances] is what has been transmitted from 'Umar that he ruled in favour of a person that four times *diyya* is paid to him. The person was struck on the head as a result of which he lost his mind, speech, eyesight and the function in his penis. He lost the entire functionality in these organs.⁸⁵

From this we realise that financial compensation also applies to injury inflicted on the limbs similar to murder; even though *qiṣāṣ* is the default punishment in murder due to it being the right of God, and not requital as *diyya*. However, the jurists have mentioned that in the case of any injury to the limbs, they should be treated the same way as wealth is treated.

Al-Kāsānī said, 'It is reasonable [to say] that anything short of life follows the ruling of wealth, because it has been created to preserve life like wealth.'⁸⁶

Muḥammad b. al-Ḥasan said, 'The ruling of wealth applies to anything less than life itself because it has been created for the benefit of life like wealth.'⁸⁷

Al-Kāsānī also mentioned that the integrity (*'iṣma*) of body parts is suspended when made lawful (*ibāḥa*) or consent (*idhn*) is given. He said, The integrity of life is such that it can never allow licentiousness (*ibāḥa*), contrary to body parts, which accommodate, among other things, permission (*ibāḥa*) ... If a person said, 'Cut my hand off!' and the other person cut it, there is no repercussion on the other person by consensus. This is because body parts follow the ruling of wealth, the protection of which is his right. It can be suspended either through making lawful or through consent similar to if the person said, 'Destroy my wealth!' and the other person destroyed it.⁸⁸

⁸⁴ I.e., semen.

⁸⁵ Al-KĀSĀNĪ 1986, VII: 311-12.

⁸⁶ *Ibid.*, VII: 297.

⁸⁷ *Ibid.*, VII: 313.

⁸⁸ *Ibid.*, VII: 236.

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