

“Muslim” as a Condition in Handling Organ Transplant: The Juristic Views vs. the Practice in Malaysia

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Abstract: Organ transplantation is an operation which involves the replacement of defective organs and tissues with healthy ones from donors. The question whether only Muslim surgeon should handle organs transplant has been subjected to a heat debate over times among Muslim scholars. This study seeks to highlight different views posed by Muslim scholars pertaining to the permissibility of organ transplant in Islam and scrutinize the current practice on organ transplant in Malaysia. Based on a comparative analysis, it is concluded that the condition that the expert must be a Muslim is not suitable to be imposed in Malaysia.

Key words: Organ transplant, medical experts, juristic views, condition, Muslim

INTRODUCTION

Organ transplantation is the act of surgically removing an organ from one person and placing it into another person. It can be defined as replacing a diseased or non-functional organ in a person's body with a new organ from a donor whether the donor is alive or cadaveric. If the donor is alive, he must have consented and agreed to donate his particular organ to the recipient. On the other hand, an organ transplant can also be taken from dead people. This happens when people bequeath certain organs to be donated upon his death. The transplant treatment aims at saving a patient who can only be saved with the transplant treatment. It is undeniable fact that organ transplantation has become an effective treatment for many patients facing severe debility or premature death due to organ failure, especially for end stage heart, liver and kidney failure. A transplantation operation can only take place after few factors are considered thoroughly. The organ involves in organ donation and transplantation can be in the form of complete organ or in the form of tissue or cell. To date, the technical and knowledge for transplantation of other organs like lung and pancreas are being continuously developed.

Human organ transplant is a prevalent issue emerges in the 20th century. In the past two decades, Muslim scholars from around the world have convened to discuss the permissibility of organ donation. Majority of Muslim scholars and shariah councils have the opinion that organ

donation is allowed and indeed recommended in Islam based on the objectives of the shariah (maqasid shariah) that upholds human welfare and interests as well as preserves the human life (MoHM, 2011). However, earlier Muslim scholars never discussed the issue in detail on the related rules or law as the transplantation of organ is never practiced before.

Only recently, due to the emergence of major advances in the field of medical research achieved by modern science studies and many of which were translated into clinical applications, the issue of human organ transplant has been widely discussed and debated. While, there is a consensus among Muslim scholars on the permissibility of the process, in a modern and contemporary socieity, there are few issues arise and still subject to discussions among researchers especially from legal perspective (Lim, 1999; Bakari *et al.*, 2013) ethical (Concejero and Chen, 2009) as well as medical perspective (Bakari *et al.*, 2013).

Muslim scholars had imposed a condition that a medical surgeon must be a Muslim if the operation involves Muslim donor and receiver (Jad Al-Haq, 1992). Medical expert or surgeon is a person who is directly holds the responsibility to perform organ transplant. In organ transplantation practiced in Malaysia, this rule is not observed. This study seeks to discuss whether the condition that a medical expert must be a Muslim should be adopted and strictly followed in Malaysia. Opinions from Muslim jurists pertaining to the rules and conditions for the permissibility of organ transplant were analyzed.

As Malaysia follows the guiding principles laid down by World Health Organization in implementing organ transplant procedure, the related principles were analyzed in order to get the conclusion whether the requirement imposed by the Muslim jurists should be adhered to or not in the country.

Juristic views on the rules of organ transplant: Organ donation is subject to a great deal of controversy amongst Muslims and challenges several fundamental beliefs held by the faithful about the human body, including its inviolability and sacred nature (Ghannam and Ismail, 2012). Majority of scholars allow organ donation and transplantation, subject to certain rules and regulations. Previous scholars conclude that the issue of donating and transplanting organs directly involves human body which has its honor that must be respected and must not be intruded arbitrarily (Branden and Broeckaert, 2011). They have set stringent rules for the donor, recipient, organ, doctor who performs the organ transplant and also the objective of performing the organ transplant.

The rules of organ donation and transplantation can be divided into two sections; the first section is the general rules and the second section is the specific rules. Specific rules include a donor who is still alive, cadaveric donor, organ recipient, organ, purpose of donating and transplanting the organ as well as the expert who handles the surgery procedures. Yasin (1996) had laid down several guidelines regarding the main rule namely:

- The harm or illness to be cured is firmly evaluated. This means that if no proper evaluation is done, organ donation and transplantation is not allowed
- The harm from such procedure is fully known. If not, it will definitely bring harm to the donor
- The difference between the harm to be cured and the harm it may cause from the transplant operation can be identified clearly and firmly
- Both harms cannot be eliminated simultaneously

The experts who handle organ transplant also must have the skills and experience (Jad Al-Haq, 1992). The skills and experience can be obtained in the early level through practicing the surgery knowledge on human body. Corpse autopsy for the purpose of learning is allowed by scholars. A surgery knowledge is among the knowledge that must be learned by Muslims involved in medical world, until it enables the Muslims to perform what was compulsory for them to do by Allah SWT like treating sick people and others (Ashur, nd). Expert who is not skilled in treatment field, especially in organ

transplant surgery, must pay compensation, if they make mistakes in surgery performed. This is based on the Hadith narrated by Amru bin Shuaib:

“Whoever burdens himself with medical field and it is not known how far is his skills in that medical field then he must pay compensation (if he makes mistakes in the treatment done)” (Dawud and Sajastani, 2009)

Muslim scholars also had laid down the rules on the requirement of an expert who handles the transplant procedure. Among the requirements are the expert or surgeon must be of a religion of Islam, skilled and experienced. The rule that requires a surgeon to be a Muslim applies when the remains of which the organ is to be taken from is a Muslim remains. This is to avoid disrespecting the deceased honour while in the process of removing the organ from the deceased body (Jad Al-Haq, 1992). The expert also must be a person who is fair and trustworthy. A fair surgeon means that he is not *fasiq*. *Fasiq* is defined as doing activities that caused disobedience to Allah.

THE POSITION AND PRACTICE OF ORGAN TRANSPLANT IN MALAYSIA

In Malaysia, the permissibility of organ transplant has been decided by the Fatwa Committee of the National Council for Islamic Religious Affairs Malaysia in its conference on 23rd-24th June, 1970 (Jabatan Kemajuan Islam Malaysia, nd). The first organ transplant in the country was a kidney transplant in 1975 while the first heart transplant was in 1997 (Hooi and Mansor, 2005). The demand for the treatment has been increasing over the years. As for the current status, organ transplantation has become one of the many specialized, tertiary medical care provided by few hospitals in Malaysia. However, Malaysia still facing a problem of a low rate of organ donation (Makmor *et al.*, 2014).

The specialists who handle organ transplantation in Malaysia are bound to the guiding principles on human cell, tissue and organ transplantation drafted in 1991 by World Health Organization (WHO, 1991) and endorsed by the sixty-third World Health Assembly in May 2010, in Resolution WHA.63.22. The aims of the guiding principles are to provide an orderly, ethical and acceptable framework for the acquisition and transplantation of human cells, tissues and organ for therapeutic purpose (WHO, nd). Guiding principle 2 imposed a restriction on the physicians whereby those who determine that a potential donor has died should not be directly involved in cell, tissue or organ removal from the donor or subsequent transplantation procedures. They also should not be responsible for the care of any intended recipient

of such cells, tissues and organs. Organ must be donated with free consent from the donor. Giving or receiving payment including any compensation or gift for an organ is prohibited. Thus, guiding principle 7 laid down that the physicians and other health professionals should not engage in transplantation procedures and health insurers and other payers should not cover such procedures, if the cells, tissues or organs concerned have been obtained through exploitation or coercion of or payment to the donor or the next of kin of a deceased donor.

Comparing the WHO Guiding principles and the rules laid down by the Muslim jurists, it is observed that both Muslim jurists as well as the guiding principles are based on ethical aspects but none of the guiding principles has given a consideration to a religious factor. According to the guidelines, the operation of organ transplant process relies on the experts in charge, regardless of their religious background. Transferring of organ must be to the first recipient in the recipient name list, if it is obvious that the organ fits with the recipient (patient). If this rule is not followed, the expert or authority involved in the transplant handling process is considered as breaking the law. Any procedure in organ transplantation executed in Malaysia have to abide to the rules contained in the organ transplant principles set by World Health Organization. Therefore, it is the purpose of this article to analyze whether it is a need to consider and apply in Malaysia the condition prescribed by the Muslim jurists that the physician must be a Muslim.

THE DISCUSSION ON THE REQUIREMENT OF BEING A MUSLIM

In Islam, prerequisite is something that is very important. It means the obligation to bring into existence a matter that will affect shariah law as in the case of an ablution. Without ablution, solat cannot be performed. However, currently, the prerequisite that the expert who handles organ transplant must be a muslim, is not suitable for to be applied in the Malaysian society. To apply this condition means that if there is no muslim experts then organ transplant surgery cannot be performed, if the donor and the receiver are both muslims. It cannot be denied that this prerequisite is important for the muslims because Muslim physician will apply Islamic ethics and attitudes in exercising the transplant procedure. However, looking at the reality in our society, this rule is not practical to be applied. The reasons are discussed here.

To avoid difficulty: Imposing a condition that a physician or an expert who handles the organ transplant must be a muslim might cause difficulties to the hospital and medical experts. Applying the condition strictly means that the

operation could not be done unless the surgeon or the expert is of the religion of Islam. It is in contrast with the Islamic legal maxim which states “al-Mashaqqat tajlibu al-taisir” or the hardship begets ease. Between saving the life of the patient and upholding the requirement of being a muslim, the former should be given priority as Allah said:

“Allah intends for you ease and does not intend for you hardship” (al-Qur’an, 2: 185)

It is also related to a Hadith narrated by Abu Hurairah:

“A Bedouin stood up and started pissing in the mosque. The people caught him but the Prophet (PBUH) ordered them to leave him and to pour a bucket or a tumbler of water over the place where he had passed the urine. The Prophet (PBUH) then said: You have been sent to make things easy and not to make them difficult” (Al-Bukhari, 1998)

According to the current practice in Malaysia, the religion of the surgeon is immaterial. Those who have been appointed will take up their duty to serve the patients. This duty is determined by the appointment by the management of the hospitals.

To prevent emergency situation: Organ transplant surgery involves emergency situation and in such a situation, Islam allows a person to do something which is prohibited up to the the required extent. According to Islamic legal maxim “al-Dharurat tubihu al-Mahzurat” or the exigency allows the prohibited (Hamzah, nd). This maxim is taken from the verse of the Quran: “except under compulsion of necessity” (al-Qur’an, 6: 119).

The maxim explains that for a certain thing that is not allowed in normal situation, it is allowed in emergency situation, in fact it is compulsory to be done under emergency situation without a definable limit.

Applying the emergency principle, if there is no muslim expert capable of performing organ transplant surgery, it is permissible to use the expertise and skills of a non-Muslim specialist to handle the organ transplantation. Therefore, a non-Muslim expert is allowed to perform organ transplant surgery from a Muslim donor.

If the family members or the hospital should not refuse to undergo an organ transplant surgery from a donor into a patient, only on the reason that there is no Muslim expert because it can cause harm to the patient. Any action they may bring harm to a patient is strictly forbidden in Islam. Allah SWT commanded:

“Verily if any one saved a life, it would be as if he saved the life of the whole people” (al-Qur’an, 5:32)

The prerequisite of being a Muslim is still debated by scholars. The condition that only a Muslim expert can handles organ transplant procedure is still a debatable issue. Scholars who put such condition based their argument on the necessity to consider the opinion of Muslim specialist doctors in any treatment involving the Muslims.

Nizamuddin from Hanafi school of thought decided that the condition must be observed, whereas some other scholars of Hanafi, Shafi’i (Qalyubi and ‘Umairah, nd) and Hanbali decided otherwise. In fact, it is encouraged to obtain advice from non-Muslim experts. It is important that the doctor must be really skilled, trustworthy. Muslim scholar who permits a non-Muslim expert to perform organ transplant is because the procedure involves only worldly matter and due to the skills possessed by a non-Muslim professional.

The prophet (PBUH) had one dealt with Jews community of Bani Khaybar. He also had once rented a navigator and entrusted himself and his wealth to that navigator, when migrated to Madinah (Al-Muhammadi, 1991). The Quran itself admitted that among non-Muslim, there exist those who are trustworthy that allows the Muslim to deal with them. Allah said:

“Among the people of the Scripture (Jews and Christians) is he who, if entrusted with a Cantar (a great amount of wealth, etc.), will readily pay it back and among them there is he who, if entrusted with a single silver coin, will not repay it unless you constantly stand demanding” (al-Qur’an, 3: 75)

This proves that it is allowable for Muslims to received treatment from non-Muslim experts, if they can be trusted by the Muslims. This was adhered to by Taymiyyah and Ibn al-Qayyim al-Jawziyyah based on the fact that the prophet (PBUH) rented Abdullah bin Urayqit, who was still a disbeliever as a navigator during the time of hijrah, it has became a proof on the allowability to refer to non-Muslim doctors in the matter of getting medical treatment. The expert status of not being a Muslim is not a reason for him not to be trusted. There is not one task more dangerous than the task of navigating, especially navigating during hijrah.

The prophet (PBUH) had also once sent a spy from Bani Khuzaah who were still disbelievers and received news delivered by the spy about the development taken place in Makkah. This proves the encouragement to take

opinion and advice from non-Muslim experts on the condition of a disease and its treatment techniques, if the expert is trustworthy and there is no doubt on his skills.

When Saad bin Abi Waqqas fell ill in Makkah, the prophet (PBUH) invited al-Harith bin Kaldah who was still a disbeliever at that time, to treat Saad.

Another group of Muslim scholars decided that it is disapproved but not unlawful (makruh) to receive treatment from non-Muslim experts.

From the above opinions, it is obvious that the opinions of the majority of scholars are more suitable to be applied, because their opinions are supported by the verses of the Quran and also the act of the prophet (pbuh) himself.

Other than that, according to Shaykh Jad al-Haq receiving treatment from a non-Muslim doctor is allowed even though at that time there is a Muslim doctor.

CONCLUSION

Base on the above discussion, it is concluded that a surgeon who handle the transplantation of organ from a Muslim donor to another Muslim recipient need not be a Muslim. In fact a condition that he or she must be a Muslim should not become an important factor in organ transplant system. The safety of a patient’s life must be given a priority rather than considering from whom the organ is obtained and who are the experts who handle the organ transplant surgery. Furthermore, the prerequisite of being a Muslim itself is still subject to a debate among the scholars. In organ transplantation, the most important goal to achieve is to save the patient’s life. Therefore, imposing a condition that only a Muslim surgeon can handle the procedure will cause harm to the patient and difficulty to the nation as the whole.

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