

LEGISLATION NOTES

THE HUMAN TISSUES ACT, 1974 [ACT 130] A MUSLIM LAWYER'S POINT OF VIEW

There is a tradition of the Holy Prophet (Peace be upon him) which is recorded in the *Sabih Muslim*. On his arrival at Medina, the Prophet observed some of the people of Medina pollinating their palm trees. He made the remark "Perhaps it would be better if you did not do it". The people concerned took his remark as an order, and the result was not what he had expected. This being reported to him he said: "I am but a human being. Only when I order you something of your religious duties will you have to abide by it. But if I issue an instruction upon my personal opinion, then it is a mere guess and I am only a human being. Rather you may better know your worldly affairs".

Another important tradition is that relating to the appointment of Mu'adh ibn Jabal as Governor and Judge in Yaman. On the eve of his departure to assume his office there, the Prophet asked him "According to what will you judge?" He replied "According to the Book of God". "And if you find nought therein?" "According to the Sunnah of the Prophet of God." "And if you find nought therein?" "Then I will exert myself to form my own judgment". And thereupon the Prophet said "Praise be to God who has guided the Messenger of His Prophet to that which pleases his Prophet".

It is a principle of the Islamic law that in the absence of a clear ruling from the Holy Quran or the Sunnah of the Prophet, the jurist should use his best endeavours to find a solution using his judgment in the light of the teachings of the Holy Quran and the Sunnah. What is not clearly forbidden in the Holy Quran or the Sunnah is permissible and it is left to the Muslims to decide what action should be taken or what ruling should be adopted on the principle of "establishing what is good or right and avoiding what is evil or wrong".

There are many verses of the Holy Quran which show in the words of Dr. Said Ramadan that "Islamic law was not meant to paralyse people so that they might not move unless allowed to. Man on the contrary, is repeatedly called upon by the Holy Quran to consider the whole universe as a Divine grace meant for him and to exhaust all his means of wisdom and energy to get the best out of it."

"And He has made of service to you whatever is in the Heavens and whatsoever is in the earth; it is all from Him. So herein are signs for people who reflect" (XLV: 13)

"Say (O Muhammad): Who has forbidden the beautiful gifts of God, which he has produced for his servants and the good things of his providing" (VII: 32).

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"And God will not mislead a people after he has guided them and made clear to them what they should guard against — For God has knowledge of all things" (IX:115).

As Islam discouraged rigorous practices, such as monastic life, it also prohibited questions relating to the details on any points which would require this or that practice to be made obligatory or forbidden, and much was left to individual will or the circumstances of the time and place. The exercise of judgment occupies a very important place in Islam and this gives ample scope to different nations and communities to frame laws for themselves to meet new and changed conditions. In the Holy Quran we read —

"O you who believe! Ask not questions about things which if made plain to you may cause you trouble. But if you ask about things when the Quran is being revealed, they will be made plain to you. God will forgive this, for God is oft-Forgiving, Most Forbearing."
(V:104)

The Holy Prophet said "Leave me as long as I leave you. Too much questioning brought only disaster upon people before you. Only if I forbid your doing anything, then do not do it, and if I order you to do something, then try to do whatever you can of it".

And in another hadith "God has enjoined certain enjoinders, so do not abandon them. He has imposed certain limits, so do not transgress them. He has prohibited certain things, so do not fall into them. He has remained silent about many things, out of mercy and deliberateness, as He never forgets, so do not ask me about them".

"Behold, this religion is ease, and whoever goes against its nature and overdoes it, will be overwhelmed by it. So take the middle path, and approach perfection and be of good cheer".

Imam Shafii in his Kitab-al-Umm said —

"My revered and learned teachers would hesitate to give a ruling that something is forbidden unless the matter is clearly stated to be so in the Holy Quran or its interpretation".

Shaikh Rashid Rida in the Tafsir Al Manar said that a ruling cannot be made except on a verse of the Holy Quran or an explanation by the Holy Prophet on three matters only — (1) Akidah or belief; (2) fundamental religious practices or (3) Things which are clearly forbidden in the religion. In other matters a ruling can be made based on *ijtihad* or reasoning based on the principle of "establishing what is good or right and avoiding what is evil or wrong".

The question of organ-transplants has been discussed by Muslim jurists for some time. There is no clear ruling of the Holy Quran or the Sunnah on this matter and so it has been left to the jurists to form their individual opinions about the matter. There have been two views expressed — (a) One which states that it is permissible, (b) the other which states that it is

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forbidden. In this matter I am myself inclined to the view that it is permissible. There have been a number of *fatwas* declaring it to be permissible. Sheikh Muhamed Abdul Yusra' Abidin, the former Mufti of Syria has given a *fatwa* that the transplant of the eye or the heart is permissible and based on this *fatwa* the Government of Syria has enacted legislation to permit such transplants, subject to the existence of a gift in the will of the deceased or the permission of the deceased's relatives. On the 24th August 1967 the Mufti of Egypt Shaik Hassanien Maklouf also issued a *fatwa* ruling such transplants as permissible and this has also been acted on by the Government. Professor Mustafa Al-Zarka of the University of Kuwait has also issued a *fatwa* in which arguing from the analogy of blood transfusion and skin transplants he has ruled that transplants of the organs are also permissible.

Those who take the view that such transplants are forbidden base their arguments mainly on a hadith related by Syedina Ayesha, the wife of the Prophet, which in effect stated that it is forbidden to break the bones of a person who has died. The context of the hadith however shows that it was meant as an injunction not to show disrespect to the dead. One should not break the bones of a corpse or harm it for no purpose or to dishonour it, but it does not follow that that no operation can be performed on a corpse for a good purpose.

The Holy Quran says —

“He has created other things of which you have no knowledge” (XVI: 5). “Soon we will show them our signs in the furthest regions and in their own bodies, until it becomes manifest to them that this is the truth. Is it not enough that thy Lord witnesses all things?” (XLI: 53).

The Holy Prophet said — “God has not sent down a disease without sending down a remedy for it”. And again “There is a medicine for every disease and when the medicine is applied to the disease it is cured by God's permission”.

Thus we are enjoined to search for the medicine and cure the diseases and if the medical experts in our time have found that diseases can be cured by transplants, then such measures are permissible.

To forbid such transplants for Muslims would mean that Muslims will be deprived of the benefits of modern medical science. A Muslim who is blind or who is suffering from a diseased heart or kidney will be deprived of the means to get a cure for his ailment. Such an interpretation of Islam would (God forbid) make Islam a narrow-minded religion which does not help to bring about welfare for its followers. On the other hand the Holy Quran says —

“We have sent thee a Book explaining all things, a Guide, a Mercy, and Glad Tidings to Muslims”. (XVI: 89).

Can we also say that Islam forbids the Muslim to donate his eye or his liver

to others so that it can help such other person to see or to be cured of his disease? Again we read in the Holy Quran —

“God commands justice, the doing of good, and liberality to kith and kin and he forbids all shameful deeds, and injustice and rebellion. He instructs you that you may receive admonition” (XVI:90).

If a man willingly agrees to donate his eye or heart or liver after his death to help another person to see or to be cured of his illness, is it right to prevent him from doing so? If the human body is buried whole, it will only rot after a time. Is it really disrespectful to the person to take away a part of his body with his permission and that of his heirs so that it can be used for a good cause? There is indeed a saying of the Prophet to the effect that when a person dies, his deeds come to an end, except for three things: a charitable gift which continues to give benefit, knowledge which is of utility and a dutiful son who prays for him”. If a man were to donate his eye or his heart or his liver and this helps, with God’s Will, to enable another person to see or be cured of his disease, this can be regarded as *amal jariyah* or a charitable gift which continues to give benefit, and therefore is among the good deeds of a person which continues after his death.

It may perhaps be argued that such gifts of organs can only be made among Muslims or that it is wrong for a Muslim to make a gift, for example, of his eye to a non-Muslim. There is nothing however in the Muslim law which forbids a gift *inter vivos* or after a person’s death to a non-Muslim. Moreover in the context of Malaysia, the non-Muslim citizens must be regarded as the neighbours of the Muslims. In Islam we are enjoined to do good to our neighbours. In one hadith it is recorded that the Prophet said “The Angel Jibrail kept on commending the neighbour to me (that is enjoining me to have regard to him and do good to him) so that I thought he would make him an heir”.

The subject of human transplants was discussed at the International Islamic Conference held in Kuala Lumpur from the 4th to 7th March 1969 and the Conference adopted the following resolution —

“The Conference having considered the matter concludes that the transfer of the eye or the heart from a dead person to a living person is allowed in Islam, if it is permitted by him. Consideration should be given to the following matters —

- (a) The circumstances should be such as to require the transfer to save the life of the person and there is a reasonable chance of the success of the transplant.
- (b) In the case of the transplant of the heart, the death of the donor is ascertained before the heart is removed.
- (c) Permission should be obtained from the donor or in case of death by accident from the relatives of the deceased.
- (d) Steps should be taken to ensure that there is no killing of any person or any dealing in such human parts.

The Human Tissues Act 1974 was enacted on the 8th March 1974 and brought into force with effect from 1st January 1976. It makes provision with respect to the use of parts of human bodies of deceased persons for therapeutic purposes and for purposes of medical education and research. Section 2 of the Act provides that if any person, either in writing at any time or orally in the presence of two or more witnesses during his last illness, has expressed a request that his body or any specified part of his body be used after his death for therapeutic purposes or for purposes of medical education or research, the person lawfully in possession of his body after his death may, unless he has reason to believe that the request was subsequently withdrawn, authorise the removal from the body of any part or, as the case may be, the specified part, for use in accordance with the request. The person in possession of the body of a deceased person may also authorise the removal of any part from the said body for therapeutic purposes or for purposes of medical education or research, if having made such reasonable enquiry as may be practicable, he has no reason to believe that the deceased had expressed an objection to his body being so dealt with after his death or that the surviving spouse or any surviving next of kin of the deceased objects to the body being so dealt with. No such authorization may be given by a person entrusted with the body for the purpose only of its interment or cremation; but in the case of unclaimed bodies lying in a hospital, the person having the control and management of the hospital or any other person authorised by him shall be deemed to be a person in lawful possession of the body.

Section 3 of the Act provides that the removal and use of any part of the body in accordance with an authorization shall be lawful. No such removal shall however be effected except by a fully registered medical practitioner who together with at least one other fully registered medical practitioner have satisfied themselves by personal examination of the body that life is extinct.

The Human Tissues Act, 1974, is based on the English Human Tissue Act, 1961. The English Act has been shown to be unsatisfactory in a number of respects. The publicity given to cardiac transplantation and the demand for more organs for medical use together with public concern over such matters as the definition of death resulted in demands for the entire law to be reviewed and to be brought up to date to meet the legitimate needs of modern society. Several guiding principles were put forward: first a reputable and in skilled hands proven technique of saving life should not be held back by obsolete laws; secondly the supply of organs for established forms of transplantation must be increased to serve the dual aims of enabling surgeons to treat more patients and improving the prospects of longer survival of the patient because a good match has been secured; thirdly the public has a right to know that there are safeguards.

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Demands to amend or replace the Human Tissue Act came from many sources. Sir Gerald Naboro M.P. unsuccessfully introduced Renal Transplant Bills in 1968 and 1969. The Minister of Health was sympathetic but was more concerned to deal with the whole question of transplantation. A Government Committee was set up and made various proposals in 1968 and then the Health Minister in 1969 set up an Advisory Group, the MacLennan Advisory Group, to advise on any problems arising in the field of transplantation which are of public concern. The first task was to consider any desirable amendments of the Human Tissue Act. The Advisory Committee reported in 1969 and more recently a Special Committee of Joint Consultants has stated its views.

The problems have also been examined in other jurisdictions notably in the United States, where a Committee of the American National Research Council has drafted a Uniform Anatomical Gift Act. This Act was approved by the National Conference of Commissioners on Uniform State Laws in July 1968 and has been enacted in many states in the U.S.A.

The main areas of possible reform relate to —

- (a) Who should have the power to authorise the use of organs?
- (b) Donees and the purposes for which donations can be made.
- (c) The manner of making the gift
- (d) Should there be a legal definition of death?
- (e) Legal protection.

(a) WHO SHOULD HAVE THE POWER TO AUTHORISE THE USE OF ORGANS

(i) *The "contracting out" Scheme*

A radical proposal for obtaining organs and avoiding all difficulties of obtaining authority under the present law, is to have a scheme of "contracting out". This means that surgeons would have power to remove organs from all persons save those who had expressly registered their unwillingness for their organs to be used after their death in transplant procedures.

The view put forward was that priority should be given to social and human needs rather than the feelings and wishes of the survivors. The Special Committee however felt that in the present climate of public opinion any attempt to legislate on the basis of contracting out would be premature and if pressed might well jeopardise the future of transplant surgery. The Special Committee said —

"Organ transplantation is by no means universally accepted by the public. The circumstances in which a transplant operation is most likely to take place — sudden or accidental death of a young and otherwise healthy person and the need for an immediate decision if use is to be made of any of his organs — are such as to give rise to a strong emotional reaction. Any attempt by a surgeon to carry out a transplant operation in the face of

opposition by bereaved relatives, even with the law on his side, would be likely to provoke a hostile public reaction".

The American Committee also proceeded on the same assumption.

(ii) *The right to donate one's body*

The Advisory Group were unanimously of the opinion that an individual's wishes as to the disposal of his own organs after death should have absolute priority and override all others. Under the English Act (and also the Malaysian Human Tissues Act, 1974) the person lawfully in possession of the body is not bound to carry out the deceased's wishes: he is empowered but not obliged to act. Thus if he has any reason for withholding permission, rational or not, he can do so. An amendment to the Act would therefore be necessary to provide that the deceased's wishes should override all others. The American Uniform Act provides that any individual of eighteen years of age or more may, before death donate all or any part of his body, the gift to take effect upon death. Here the relatives' wishes may be ignored legally. The Special Committee in England however questioned whether the wishes of a close relative should ever be overridden, even in the face of proof of willingness on the part of the donor, although it recognised that such proof might be valuable in influencing the views of a relative.

(iii) Until there is widespread public acceptance in practice as well as in theory of the need to make an express decision during one's life to donate organs, it will be true that in the majority of cases nothing will be known of the deceased's wishes. At present the question has to be resolved between "the person lawfully in possession of the body" and "the surviving spouse and any surviving relative of the deceased".

In *Williams v. Williams* (1882) 20 Ch.D. 659 it was held that the executors have a right to the possession of a corpse. If the deceased had died intestate, his administrators would have been entitled to possession. The case of *R. v. Feist* (1858) 169 E.R. 1132 recognised that persons other than executors and administrators might lawfully be in possession of the body.

In Canada it has been held that there is a general right to possession in the surviving spouse or next of kin (*Edmonds v. Armstrong Federal House Ltd.* (1931) 1 DLR 676. The Act implies that in the case of a death in a hospital, if the body is unclaimed, the manager of the hospital is in lawful possession. The Advisory Group in England has suggested that the Act should be clarified to confirm that the "person lawfully in possession of the body" is the hospital authority during the time between the death and the time when the next of kin or executors claim the body. This view has been dissented from by the Royal College of Pathologists who took the view that the hospital authority should only have that status if no relative can be traced.

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Under the present law, objections to the use of a body can be made by any relative, no matter how distant. The Advisory Group in England has suggested that the Act be amended so that the next-of-kin with a right to be consulted should be precisely defined. The American Uniform Act provides that after death (or in some cases immediately prior to death) the next-of-kin may donate the body and the next-of-kin are specified in order of priority: the spouse; an adult son or daughter; either parent; an adult brother or sister; a guardian; and last any other person authorised or under obligation to dispose of the body. The introduction of an order of priority of relatives seems a necessary measure from the point of view of the medical authorities who require certainty, although there is still the possibility in theory of clashes of view between relatives of different degrees of priority.

(b) DONEES AND PURPOSES FOR WHICH DONATIONS CAN BE MADE

The Act states that the body may be used "for therapeutic purposes or for purposes of medical education or research". The American Uniform Act spells this out in more detail. Donations may be made to any hospital or medical or dental school, surgeon or physician for education, research, advancement of medical or dental science, therapy or transplantation. Donations may also be made to any specified individual for therapy or transplantation needed by him. Provision is also made for the donee of all or part of a body to have a right to any examination necessary to assure medical acceptability of the gift for the purposes intended.

The Act does not deal with the question of whether it is possible for payment to be taken for a donation. The ethical and social problems which might arise, if a market in organs were permitted, has led some countries to prohibit the sale of parts of the body for such purposes.

(c) THE MANNER OF MAKING GIFTS

Under the Act the donation is not required to be in the form of a testamentary disposition; any written request, even though not witnessed, will be sufficient as also is a duly witnessed oral death-bed request. The American Uniform Act imposes stricter requirements. The deceased prior to his death may make a gift by will or any written instruction (including a card designed to be carried on the person) and if witnessed by two persons, such a gift becomes effective upon death. If probate of the will is not granted or if it declared invalid for testamentary purposes, the gift to the extent that it has been acted upon in good faith is nevertheless valid and effective.

The American Act also provides a means of speedy consent by authorising the specified relative to sign a document (with no requirement for it to be witnessed) or to make the donation by telegraphic, recorded telephonic or other recorded message.

(d) SHOULD THERE BE A LEGAL DEFINITION OF DEATH?

Considerable attention has been paid to the question whether or not a satisfactory definition of death is possible. For example in 1968 an Ad Hoc Committee of the Harvard Medical School suggested irreversible coma as a new criteria of death. Both the Advisory Group and the Special Committee in England have opposed the proposal that a suitable set of criteria of death be written into the Act, on the ground that determination of death is a clinical matter: there is no distinct group of clinical signs, which on each and every occasion, signify that death has occurred, without possibility of error; the determination of death must be a matter for the individual doctor's judgment.

The unreported case of *R. v. Potter* (Times 26/7/63) illustrates the difficulties that present inadequate definitions of death can pose for the would-be transplant surgeon. In that case a man was admitted to hospital with severe head injuries incurred in a fight with the accused. After fourteen hours the patient stopped breathing. He was then placed in an artificial respirator for twenty-four hours, at the end of which a kidney was removed for the purposes of transplantation. The victim's wife had consented to the transplantation. After this nephrectomy the respirator was shut off and spontaneous respiration and circulation ceased.

Under traditional definitions of death, the victim in Potter's case was not dead until his heart and breathing came to a complete halt. As this did not occur until nearly two days after his admission to hospital, when the respirator was finally turned off, was not the physician who removed the victim's kidney guilty of a crime (malicious wounding) and a civil wrong (battery)? — for the removal took place while the victim was still alive and was performed without his consent and was not for his benefit. Furthermore, it would seem that the physician, in turning off the respirator and allowing the patient-victim to die, broke the chain of causation between the original wrongful act (the assault by Potter) and the death that finally took place. It is submitted here that the physician's action probably constituted a new intervening act which had the effect of releasing the original wrongdoer from legal liability for homicide. This seems to receive some support from the fact that Potter was ultimately convicted of common assault only.

The Advisory Group has recommended a number of safeguards. First the doctor clinically responsible for the case of a potential donor should ways be different from the doctor clinically responsible for a prospective recipient. Secondly before organs are removed, death should be certified by two doctors, one of whom should be at least five years registered, each independent of the transplant team and without regard to the probability of a transplant. Thirdly in cases where resuscitation is being maintained by artificial means, the decision to continue or discontinue such support must be reached without regard to the possibility of a transplant. The fourth

recommendation advocates that a prospective donor should never be moved between hospitals merely in the interests of a prospective recipient. If there is need for a transfer, the recipient should be moved to the donor.

It may be noted that the Malaysian Act requires that two fully registered medical practitioners should be satisfied by personal examination of the body that life is extinct.

(e) LEGAL PROTECTION

The uncertainties in the Act mean that there are always possibilities of criminal or, more likely, civil proceedings being brought in connection with transplant procedures. Apart from clarifying the Act, it would be desirable to make express provision for the protection of the medical persons who do expose themselves to these risks and worries. The American Uniform Act provides that if the terms of the Act are complied with, a person who acts in good faith is not liable for damages in any civil actions or subject to criminal proceedings for his act.

Ahmad Ibrahim

EXTRA-TERRITORIAL OFFENCES, 1976

Act 163

This Act gives extra-territorial effect to the offences under the Official Secrets Act 1972 and the Sedition Act, 1948 which are the written laws specified in the Schedule and also offences under any other written law the commission of which is certified by the Attorney-General to affect the security of the Federation. The effect of section 2 of the Act is that any act done —

- (a) on the high seas on board any ship or on any aircraft registered in Malaysia;
- (b) by any citizen or an permanent resident on the high seas on board any ship or on any aircraft; or
- (c) by any citizen or permanent resident in any place without and beyond the limits of Malaysia.

contrary to any of the provisions of any of the said written laws would be treated as an offence punishable under any of those written laws as if such act were done within Malaysia.

The Yang di-Pertuan Agung is given power by order to amend or add to the Schedule, thereby enabling the provisions of any other, or any new written laws, which are not specified in the Schedule, to have extra-territorial effect, as and when the need arises.