

THE PRINCIPLES OF FIQH AND ISSUES IN ADVANCED MEDICAL SCIENCE

– An Explanation from an Indian Perspective

*Furqan Ahmad**

Abstract

It is a cardinal principle of Quran, that, “whosoever saves a life would be as if he saved the life of all mankind”. Considering the last few decades which have witnessed and brought about a big leap in medical science bringing great benefits and skills which were unthinkable, such as organ transplant, IVF, genetic engineering, and so on, it is necessary to look into legal and ethical perspectives of these treatment measures as Islamic law is by majority based on the religious principles derived from the authorities. Although the majority of Muslim legal scholars have asserted the legal sanction of the advanced medical science and treatments, one of the firm principles of fiqh, that;”dire necessity permits even the prohibited” needs to be looked from the spectacles of technologically advanced current century and the centuries old principles of the religion, so as to reach an outcome of; ‘public good which do not conflict with Quran and Sunnah and enjoys legal sanction’ which itself is another principle of fiqh. The current paper tries to clarify these perspectives in the Indian context. The author desires to focus on the issues of autonomy, sacredness and necessity of human body in regard to the advanced medical science and the religious sanctions.

I Introduction

IT IS INDEED said that change is the need of time, and with change there are meant to be challenges. The same principle we can apply in regard to present world which is truly globalized in all contexts and the globalization has posed its share of problems in front of the human species that is always busy advancing itself and experimenting with natural set up as well as innovating new technologies for the betterment of human life on the earth.

According to social philosophy man is a social animal and loves to live in a society. Every society has its own rules and regulations which are termed to be laws in the civilized world. But the law changes from one society to other society and thus there is diversity among all the countries and their laws. Of course globalization has brought the world close yet the set of rules and principles which are being existent from centuries continue to govern the respective countries and societies therein.

Religion is deeply rooted in the evolution of human life and social setup. Although not individual countries but the world is divided by various religions and their beliefs, some of the principles of every religion have been transformed as laws. The situation differs from country to the country and its constitutional status in terms of religion. India is a secular country and it grants freedom of religion as a fundamental right

* Professor, Indian Law Institute, New Delhi.

which includes preaching and professing of one's own religion¹. Thus Indian population is divided into many religions. Islam is the second major religion of the Indian population and hence it is necessary to look into the religious practices of the Islamic population which heavily impact the legal and customary set up of the society.

II Advancemens in the field of medicine and challenges

The medical history has evolved parallel to human inception and various codes of ethics and medical practice rules are known to humanity. The Hippocratic Oath,² which is well known to all physicians, is a good example of the same. All such principles embodied in the code can be said to be enriched by religions and cultures. Arabic and Islamic oaths were also developed and are used in medical schools in the Eastern Mediterranean Region.

The value of a healing process that stresses humanity and generosity is well perceived in the following text, quoted from the 13th century physician Salahuddin Ibn YoussufAlKahhal³

You should know, son, that this vocation is a gift from God Almighty, donated by him to those who deserve it, as they will become intermediates between the patients and God's healing. In doing your best to elicit a cure for your patients until you restore health to them, you earn not only the confidence of people as a proficient and skilful man but also the reward and recompense from God in the hereafter, because the benefit that reaches out to human beings is very precious, particularly that which goes to the poor and powerless. Not to mention the integrity of character this is the nature of generosity and clemency. Hence you should put on the suit of virtue and chastity, purity and kindness, and fear God, especially when examining the family members, and keep their secrets, be philanthropic and pious, devoted to science and learning heedless of bodily desires, keeping close to scientists, caring for your patient, keen to cure him, attempting to bestow wellbeing on him ... even if you have to give the poor patient some of your own money, give it.

The kind of noble values which are emphasized above should be considered to be benchmarks for all the physicians who aim to serve the humanity and underprivileged ones.

Medical practice in both developing and developed countries is shaped by the level of growth in general and that of science and technology in particular. The advancements

1 The Constitution of India, art. 25.

2 Hippocrates was a Greek physician (460 – 377 BCE) and regarded as father of Medicine.

3 Nur Al Uyoun WaJam'i At Funoun.

in technology in life sciences and medicines have increased patients expectations to an extent which is becoming burdensome for the physicians and the medical fraternity. They fall prey to this burden and are compelled to adapt the changing treatment procedures to avoid any risks.

The associations of physicians and other paramedical professionals are making their organized efforts to defend their respective code of ethics. These organizations are quite powerful in many countries and dominate the regulatory process and other elements relating to codes of conduct honorarium and reimbursements as well. The code of conducts are mainly framed and administered by these associations. The code of ethics forms part of curricular in the medical schools in most of the countries⁴.

III Muslim jurisprudence and medicine

Islam has ordained an extraordinary respect to the value of human life. Islam has not only levied incumbent duties on mankind such as fasting, pilgrims, and hygiene teaching which has no harms to human life but has also ordained many commands and rules for preserving man's life and dignity. Human life is of the utmost value and murdering one is considered to be equivalent to killing of all the mankind. Contrary to it is saving someone's life is saving the people of whole world. Qur'an explicitly states this fact as: "Whoever slays a soul, unless it is for manslaughter or for mischief in the land, it is as though he slew all people; and whoever keeps it alive, it is as though he kept alive all people."⁵ The value attached to life can be perceived through this aforementioned eloquent verse. Not only life but other factors affecting human rights can be deduced from this verse such as unfair imprisonment, tortures and exiles.

According to Islamic jurisprudence one should not use any of the forbidden materials such as consumption of alcohol, forbidden meats and non-personal belongings only if they are helpful in preserving ones survivorship. The command is obligatory and exceptions in rare circumstances are only permissible.

Distinguished jurists (*fuqaha/mujtahids*) have also written down some chapters in their treatises on other issues of legal medicine. They have looked at problems of medicine from jurisprudence angle in detail, and deduced the judicial decision after researching the sources of jurisprudence exerting their menu faculties to the utmost in their *fatawa* (legal opinions). These topics can be briefly summarized as hunting, fishing, and slaughtering animals,⁶ foods and beverages, breast feeding childbearing and fostering

4 Ethics Of Medicine And Health , World Health Organization, EM/RC42/7, Aug 1995.

5 Qur'an, V:32.

6 J-Mufid, Mumammad b. Muhammad al-Nu'man. *aljawame' al-Fiqhijab*, 663-666 (Qum: Library of Ayatollah al-'UzmaMnr'shiai-Najafi Publications, 1404/ 1986); Khansari, Seyyed Ahmad Mousavi, *Jame' al- Madarek fi Sharh al-Mokhtasarai-Nari'* 93-135 (Tehran: Maktabah al-Saclu,

children, organ transplants, artificial insemination, dissection of cadavers, cosmetic surgery, doctor-patient relations, physician fees and liability of physicians and medical system,⁷ sexual functions and criminal abortion, birth control and family planning, and etc.⁸ All these materials constitute the body of medical jurisprudence under Islamic law but they need to be worked out and compiled independently. The ever developing branch of medicine is adding fuel to the existing picture, for example death and sexuality in the modern medicine context requires practicing *ijtihad* as per the competent jurists. It is the need of the hour that medical profession undertakes to understand medico-legal aspects of this subject.

The branch of Islamic Jurisprudence is so developed that many of its principles can be applied to health and medicine system of an Islamic state. They are competent to overcome the existing shortcomings and complications in an Islamic society by virtue of efficient administration with objective application of these principles.

Considering the importance of medicine in the lives of Muslims, Islamic Jurisprudence has the dynamism to consider the two factors of time and place while practicing *ijtihad* to solve all logical difficulties in an Islamic/Muslim Community. Islamic medical jurisprudence is a progressive science and has potential to pave way for health promotion and development of medicine if applied properly.

IV Principles of Islamic Jurisprudence

Few principles of Islamic Jurisprudence are briefly stated here,

Reasoning and divine law

Islamic jurisprudence offers a special place to reasoning and many jurists believe that there is an organic connection between the intellect and the divine call on laws. The concept is called as the inseparable or accompaniment rule (*Qa'edah Molazemah*). This rule states:⁹

Whatever commands the divine law is judged by reasoning and whatever commands reasoning are judged by the divine law.” In addition, there is recognition of a fundamental need of interpretation of the revelation by reason, all the more so when the authority invested with divine knowledge is in occultation. It can explore a law itself and can restrict a

1405/1985); al-Shiraz, Muhammad al Husayni. *al-Fiqh*. 199-329 (Beirut: Dar al 'Uloom, 1409/1988), as cited in *Medicine In Islamic Culture, Medical journal of the Islamic Republic of Iran*, Vol.7(2), 1993.

7 Ibid.

8 *Id.* at 127.

9 *Id.* at 128.

law or generalize it. It can be an efficient aid for inference from other sources. The validity of reasoning in the scope of religion in this respect is that the Islamic commands and rules touch the realities of life, and thus Islam has not put any unknown and non-resolvable mystery for its teachings.

Negation of foreign dominance

The fundamentals of Quran negate any kind of dominance of non-Muslims over Muslims. The jurists have elaborated the rule of negation of foreign dominance with inferences drawn from the Islamic teachings. According to this rule, every Muslim is under an obligation to work towards the autonomy of the Islamic countries in all respects and manner and makes the provision of self-sufficiency indispensable in all circumstances. It is extended to even include political relations of Islamic countries with that of the foreign countries, and any kind of such ties which make the Islamic country dependent in any aspect are to be treated unlawful and the contracts entered in to would be null and void. Of course, this issue does not contradict the proper use of their experiences, civilization, sciences, and techniques because the Qur'an teaches the Muslims to listen to all kind of speech and follow the best.¹⁰

This rule can be applied to the health and medic, system of Muslim countries. Various oppressors have succeeded in keeping the third world countries backward in terms of medical systems and health sciences, inefficient manpower, shortage of medicines thus making them dependent on the superpowers for this aspect. It has led to superiority of developed countries over the oppressed countries which has been proved to be the key for successful colonialism in recent times. The result is most of the developing countries are dependent and are importing medicines from foreign countries which is evident from the hospitals, pharmacies and clinics using these products sparingly. Sadly it has resulted in to dependency for scientific and technological dependency weakening the morality of people to strive for independent growth.

The rule highlights requirement of efforts for improving promotion of preventive measures, public health education, propagating the Islamic hygiene culture, trained manpower etc.

Public benefit (*Maslaha*)

In Islam the commands (*abkam*) are functions of a set of real interests and mischiefs, and are declared to have hierarchy which led to open a chapter called "interruption" (*Tazahom*) and "important and most important" (*al-Hamm wa al- Ahamm*). This makes

10 Seyyed Mohammad Taghi Ayatollahi, "Islamic Medical Jurisprudence Part I: General aspects and Principles 7(2) *Medical Journal of the Islamic Republic of Iran* 128 (1993).

the task of the jurists in conformation with the situations in which the interests and mischiefs of the society are present. The Islamic scholars (*ulema*) are permitted to estimate the degree of importance of the interests on the basis of various hints and leading points in Islam and decide the preferences of more and less important interests to adhere solutions to the deadlocks.

For example various tools used in medical education like dissection of the cadaver are required for the development of medical needs of an Islamic society. This is an instance of jurisprudentially interrupted interest. It overreaches to the respect towards the dead body of a Muslim, and his burial rites which is an obligatory and on the other hand, medical education and researches which can be conducted only through dissection. Both contradict with each other but education and research has to be given priority over expedite burial rites. Thus use of dead body of a Muslim as a cadaver in an anatomical laboratory is permitted by this rule¹¹.

Public responsibility

In the Islamic culture, human being is said to be committed and its his commitment which leads him to enjoin good and prevent evil. “The Islamic jurisprudence obligates enjoining the good and preventing evil.

Overriding rules

Islamic jurisprudence contains sufficient flexibility in its rules and regulations necessary for dealing with life necessities and social affairs. This characteristic is the mystery of its permanency, the flexibility of the Islamic jurisprudence lies in a set of controlling rules that govern all commands and rules and overriding them. These rules are properly called overriding rules (*Qawa’ad al-Hakimal*). The overriding rules play the role of the high inspector of the laws, commands and the judgments and control them appropriately. Among them, are compelling or hard (*Hamj*) and damage or harm (*Zarar*) rules, on the mankind, In fact these rules have the right to veto others, damage or loss rule prohibits the cause of any kind of loss whether personal or public damages. Enjoyment of an individual or a group of people must not end with the loss or suffer of the others as one can learn from the Qur’an.

To run the country justly the Islamic states or communities are authorized by holy Prophet and his infallible successors. Also known as “investiture traditions” which is one of the three fundamental that were extrapolated for all comprehensive authority of the jurists. For example, population ceiling laws ordained in order to balance the population size and their needs and available resources. For proper application of

11 S. Aksoy and A. Elmali, “The Core Concepts of the ‘Four Principles’ of Bioethics as found in Islamic Tradition” *Med Law* 211–224 (2002).

divine laws and harmonizing the legislative, executive and judicial organs of system with the needs of time the discretionary authority of Islamic State has to be applied rationally and carefully in each era.

The religious basis attached to morality differentiates. The Islamic medical ethics principle-based medical ethics. Philosophical or secular ethics starts with ‘the psychological constitution of man’s nature and the obligation laid on him (like the “four principles” [of Beauchamp and Childress] as a social being, but in Islamic Ethics the basic assumption is faith in Allah (with other pillars of Islam) and morality is the attempt of each individual as well as society to approach Him as far as possible¹² This approach to Allah is derived through the *Shari’ah*. It is opined that States may propose the *Shari’ah*’s supreme legal authority as the only source of law and Islamic law be left to be followed by individuals in their personal lives. At present no country has taken step to do so.

In this latter realm the “*Shari’ah* as a moral code for Muslims is fully functional and is better understood as ‘the collective ethical subconscious of the Muslim community’¹³. With this opening definition it can be well followed that any discussion of Islamic Medical ethics must include analysis of the *Shari’ah*. Any difficult situation during care and treatment can be referred to the *Shari’ah* while discussing treatment options or seek assistance from an expert in Islamic law. The objective of the *Shari’ah* in finding the possible divine law is to protect five essentials of the person: life, religion, intellect, honour and integrity and property¹⁴. Furthermore, scholars have enumerated principles that aid in the formative process of legislation. Of these, five are known as the cardinal rules:

- i. Intent is all-important in action;
- ii. Do no harm: harm must be removed (by a lesser harm) or compensated;
- iii. The doctrine of legal presumption of continuance of life;
- iv. Hardship calls for license;
- v. Custom is the rule (is the absence of a ruling)

About the literary sources of Islamic Medical Ethics in particular the *fatwa* literature is a fertile ground which can be witnessed to have covered a variety of issues ranging from abortion to assisted reproductive technologies. The patients can refer to any of the specific *fatwa* if and when any ethical dilemma is encountered with. Interdisciplinary conferences between medical specialists and scholars of *Sharia’h* are being encouraged

12 A. van Bommel, “Medical Ethics from the Muslim perspective” *Acta Neurochir* 17-27 (1999).

13 A. Grubb (ed.), *Choices and Decisions in Health Care* 1-20 (John Wiley and Sons Ltd., 1993).

now a days to develop a consensus position. Increasing scientific and technological advances have forced the *Muftis* to consult medical scientists in order to better understand the science behind the technology or issue that they are asked to find an 'Islamic position' on. The Islamic Code of Medical Ethics states 'the medical profession has the right and owes the duty of effective participation in the formulation and issuing of religious verdicts (*fatwa*) concerning the lawfulness or otherwise of the unprecedented outcomes of current and future advances in biological science'. Thus it creates an obligation on the medical scientist for co-operation between law and medicines. Although the cooperation is still in its infancy, but the numerous Islamic medical conferences occurring each year, and the inclusion of both scholars of the *Shari'ah* and of medicine within them, is an encouraging sign¹⁵.

V Indian context

India as a secular and developing country has a variety of mixture in terms of populations, religions, religious beliefs and customary practices. They play an important role in law and governance of the country. Discussing hereto the advancements in medical sciences India has progressed equally to that of the developed countries and does not lag behind when it comes to technology, particularly medical field India has emerged as a favourite destination of medical tourism with easy availability of the resources and advanced treatments along with cheap prices as compared to that of the western countries. As already said with religious diversity India has the second largest population of the Muslim community impacted by the Islamic teachings. How the Islamic teachings and the advanced medical treatment collides and how there can be a balanced is discussed here with reference to certain prominent medical issues like euthanasia, organ transplant and surrogacy and assisted reproductive technologies.

Euthanasia

Any discussion on euthanasia is bound to raise complex questions of ethics, sanctity of human life *vis-a-vis* the loss of the patient over his/her body. Here is a brief account of Indian position.

The definitions of euthanasia are not precise and although some agreement is apparent. Most commentators restrict their description to direct or "active" euthanasia, which can be divided into three categories:¹⁶

14 Aasim I. Padela,, "Islamic Medical Ethics: A Primer" 21 (3) *Bioethics* 1467-8519 (2007).

15 Law Commission of India, 196th Report on Medical Treatment To Terminally Ill Patients (Protection Of Patients And Medical Practitioners) (March, 2006).

16 AIR 1996 SC 946.

- i. The intentional killing of those who have expressed a competent, freely-made wish to be killed;
- ii. Professionally-assisted suicide; and
- iii. The intentional killing of new-born infants who have congenital abnormalities that may or may not be threatening to life - often by withholding of nourishment.

In India also the debate on euthanasia has centred on the potential it carries for misuse and abuse. There have been landmark judgments which do not accord right to die on the Indian subjects. In the case of *Gian kaur v. State of Punjab*,¹⁷ it has been held that right to life does not include right to die. Time and again there have been demands to divorce euthanasia from attempt to suicide which is an offence under the Indian Penal Code, 1860 (S. 309 Attempt to Suicide).

There are two Law Commissions report which deals with euthanasia to some extent they are, the 196th report of the law commission on medical treatment to terminally ill patients (protection of patients and medical practitioners), released in 2006 The second was the 241th report in 2012, titled *Passive Euthanasia: A Relook*, that dealt with the same issue

In between the two reports the case of *Aruna Shanbaug v. Union of India*¹⁸ came in the Supreme Court. It was in the year 2011 that the Supreme Court of India discussed about passive euthanasia, in this case of Aruna Ramachandra Shanbaug who breathed her last at King Edward Memorial Hospital (KEM) after being in a vegetative state for over 40 years, after a brutal attack in 1973. Ever since, her name has become synonymous with the debate over the controversial issue of euthanasia (mercy killing) in India. There was no law in India that allowed Euthanasia and Aruna's case prompted the Supreme Court to examine this issue in detail when one Ms. Pinki Virani filed a writ petition in the Supreme Court with the prayer to stop feeding Aruna and let her die peacefully. The court passed a historic judgement in March 2011 allowing Passive Euthanasia (with guidelines). These guidelines for passive euthanasia *i.e.* the decision to withdraw treatment, nutrition, or water—establish that the decision to discontinue life support must be taken by parents, spouse, or other close relatives, or in the absence of them, by a “next friend”. And further that this decision requires approval from the concerned high court.

In its judgement, the court declined to recognize Virani as the “next friend” of Aruna Shanbaug, and instead treated the KEM hospital staff as the “next friend”. And since the KEM Hospital staff wished that Aruna Shanbaug be allowed to live, Virani's petition

17 (2011) 4 SCC 454

18 *Common Cause (A Regd. Society) v. Union of India*, Writ Petition (Civil) No. 114 of 2014.

to withdraw life support was declined. However, the court further stipulated that the KEM hospital staff, with the approval of the High Court of Bombay, had the option of withdrawing life support if they changed their mind.

On February 25, 2014 while hearing a PIL filed by a NGO named Common Cause,¹⁹ for seeking robust system of certification for passive euthanasia and legal recognition for 'living -will' in India, a three-judge bench of the Supreme Court of India said that the prior opinion in the *Aruna Shanbaug's* case was based on a wrong interpretation of the Constitution Bench's opinion in *Gian Kaur v. State of Punjab*. The court also determined that the opinion was internally inconsistent because although it held that euthanasia can be allowed only by an act of the legislature, it then proceeded to judicially establish euthanasia guidelines. The court thus referred the issue to a larger Constitution Bench for resolution. The five judge constitution bench headed by Chief Justice of India on March 9, 2018 gave its recognition to passive euthanasia which is more popularly referred as mercy killing. Now, with the new order in place, a person under medical treatment can decide when to give-up life support.

This decision is in tune with Islamic teachings. For though Allah forbids active euthanasia in strong words, when he says:

“Nor kill (or destroy) yourselves: for verily Allah hath been to you Most Merciful!”²⁰

“...take not life, which Allah has made sacred, except by way of justice and law. Thus He does command you, that you may learn wisdom.”²¹

Yet Islam dictates that when a patient has reached terminal stage, when treatment holds no promise of a cure, it is not required to prolong life by excessive life-saving remedies. When it is clear that there is no treatment left available to aid a terminal patient, Islam advises only the continuation of basic care such as food and drink. It is not considered homicide to withdraw other treatments in order to allow the patient to die naturally

The contemporary scholar, Sheikh Yousuf Al Karadhawi²² was very clear when he discussed this subject'. He stated that treatment is advisable if the treatment holds promise of recovery. However, if recovery is not possible according then according to God's laws it can't be said that this kind of treatment is mandatory or even recommended. He further observes that exposing the patient to any kind of treatment,

19 The Quran IV:29

20 The Quran VI:151

21 Y. Al-Qardhawi, “Should euthanasia and physician assisted suicide be legal?”(2005). Available from: <http://www.IslamOnline.net> (Last accessed on 5th January 2017).

22 “Islamic Medical Ethics: The IMANA Perspective” available at <http://medind.nic.in>.

be it oral, parental, alimentionation by glucose or attaching the patients to devices which artificially support life functions, will prolong the period of his disease and maintain his/her suffering for a longer period, it is neither recommended nor mandatory. In such cases, the opposite would be mandatory or recommended. This kind of euthanasia, if the nomenclature is right, should not be classified with what is called “mercy-killing” as there is no active action undertaken by the physician, it is rather the abstention from a measure which is neither mandatory nor recommended. It is, therefore, permissible and legitimate though not favoured and the physician can practice it for the sake of the rest of the patient and his family without feeling guilty. As for the withdrawal of life-support systems from a patient who is considered according to the state of art as dead or practically dead, in consequence of the death of the brain stem, Sheikh A1Karadhawi believes that this should not be classified as active euthanasia, it is another form of what is called passive euthanasia, which is permissible and legitimate. As for the other forms of active euthanasia, they are a kind of intentional killing and are, therefore, illicit and prohibited.

As is mentioned in one of the publications of the Islamic Organization for Medical Sciences “human life is sacred, and should not be wilfully taken away except upon the indications specified in Islamic jurisprudence, all of which are outside the domain of medical profession” and “a doctor shall not take away life, even when motivated by mercy.”²³ This is prohibited because it is not one of the legitimate indications for killing’.

As Brian J. pollard²⁴ puts it,

the advocates of euthanasia are often adherents of utilitarian schools of thought. For them, the way to assess the morality of an action is to look at its outcome - if the outcome is deemed to be good, the action is good, and vice versa. What is “good” in any context is judged by differing and non-fixed standards, which often are subjective.

However, religion embeds morality in the intention of the one who does the act; the action is moral if good outcome was intended and anticipated. As per this benchmark, morality is tied up closely with the concept of God as the creator and law-giver, whose teachings should be followed by mortals. If one holds that morality of an act is ascertained through intention, then permitting a person to die (that is withdrawing treatment that is sustaining or prolonging life) and direct killing can be distinguished into two different categories of moral responsibility. Morally, allowing a person to die may be good, neutral or bad, depending on the circumstances; whereas killing with

23 *The Medical Journal of Australia* 317(September 1988).

24 Transplantation of Human Organs Act, 1994 (Act 42 of 1994).

intent is always morally impermissible. It must be remembered that laws employ the same benchmark of motive (that is, intention used in Islam) in ascertaining guilt or otherwise in its civil and criminal jurisdictions.

Organ transplantation

The guiding principles to human organ transplantation are advocated by WHO in 1991. Organ donation is when a person allows an organ of theirs to be removed, legally, either by consent while the donor is alive or after death with assent of the next of kin. The person who gives the organ is called the donor while the one who receives is called recipient. The most common transplantations include: kidneys, heart liver, pancreas, lungs, bones, bone marrow, skin and corneas.

In India the primary legislation related to organ donation *i.e.*, Transplantation of Human Organs Act²⁵ was passed in the year 1994. This act regulates removal, storage and transplantation of human organs for therapeutic purposes and prevents commercial dealings in human organs. The Act is now adopted by all states in India except Andhra and J&K, who have their own similar laws. Despite a regulatory framework, cases of commercial dealings in human organ remained in news. These issues came to be addressed in a Writ Petition before the High Court of Delhi, *Balbir Singh v. The Authorisation Committee*.²⁶ In its final order, the court ordered the setting up of a committee to review the functioning of the Act. Taking some of these recommendations into account, the government introduced the Transplantation of Human Organs (Amendment) Bill, 2009²⁷ in parliament. After being referred to the Standing Committee on Health and Family Welfare²⁸ the Transplantation of Human Organs (Amendment) Act, 2014 was passed on Sept. 27, 2011. However, it came into effect almost three years later in January 2014 and the Rules with respect to the amended Act was notified in March 2014.²⁹

With time and developments the principles of organ transplant are quite settled as per the juristic verdicts in the Muslim society as well. We find that the legislative exercise around organ transplant mirrors the view points of some of the Islamic legal scholars in India

25 AIR 2004 Delhi 413.

26 Bill No. 136 of 2009.

27 The Committee submitted its "Fourth Fourth Report on the Transplantation of Human Organs (Amendment) Bill, 2009" to the Rajya Sabha and Lok Sabha on 4 August 2010.

28 Vide G.S.R. 218(E), dated 27 March 2014, published in the Gazette of India.

29 See for details proceedings of symposium, 'Organ transplant-Euthanasia-Right to Die: Indian and Islamic responses, organized in 1987

The Islamic viewpoint was elegantly expressed by the Islamic Organization for Medical Sciences. The following is a quotation from the book, *Topics in Islamic Medicine* (1984), by Hassan Hathout;

“The individual patient is the collective responsibility of society, which has to ensure his health needs by any means, inflicting no harm on others. This comprises the donation of body fluids or organs such as providing blood transfusion to a bleeding person or a kidney transplant to a patient with lateral irreparable renal damage. This is another *fiard kei faya* duty that donors fulfil on behalf of society. Apart from the technical procedure, the onus of public education falls on the medical profession, which should also draw the procedural, organizational and technical regulations and the policy of priorities”.

Organ donation shall never be the outcome of compulsion, family embarrassment, and social or other pressure or exploitation of financial need. Donation shall not entail the exposure of the donor to harm. The medical profession bears the greatest portion of responsibility for laying down the laws, rules and regulations for organ donation during life or after death by a statement in the donor’s will or the consent of the family, as well as the establishment of tissue and organ banks for tissues amenable to storage. Cooperation with similar banks abroad should be established on the basis of reciprocal aid.

Umar ibn-al-Khattab, second Caliph, decreed that if a man living in a locality died of hunger being unable of self-sustenance, then the community should pay his money ransom (*fidiah*) as if they had killed him. The similitude of people dying because of lack of blood transfusion or a donated kidney is very close. Two traditions of the Prophet seem to be quite relevant in this respect the one is: ‘The faithful in their mutual love and compassion are like the body ... if one member complains of an ailment all other members will rally in response.’ The other tradition says: ‘The faithful to one another are like the blocks in a whole building ...they fortify one another.’

God described the Faithful in the Qur’an saying: “They give priority over themselves even though they are needy (Al Hashr Verse. 9). This is even a step further than donating a kidney, for the donor can dispense with one kidney and liver normally with the other as routinely ascertained medically prior to donation. If the living is able to donate, then the dead are even more so: and no harm will afflict the cadaver if heart, kidneys, *eyes* or arteries are taken to be put to good use in a living person. This is indeed a charity and directly fulfils.

A word of caution, however, is necessary. Donation should be voluntary by freewill or the dictatorships will confiscate people’s organs, thus violating two basic Islamic rights: the right of freedom and the right of ownership. In the society of the faithful donation should be in generous supply and should be the fruit of faith and love of God and His subjects. Other societies should not beat us to this.

The contribution of M.H. Babu of Singapore in his paper titled, “The Islamic point of view on Transplantation of Organs” cannot at all be ignored in this field. He has discussed long back the matters of organ transplant at great length after initiating various issues related to the problem. To him, almost all the above provisions are in consonance with Islamic law.³⁰

Surrogacy

Surrogacy is one of the famous and most common methods amongst assisted reproductive technology evolved in recent times. The practice of surrogacy is an arrangement where a surrogate rents her womb for bearing the child of the couple who is not able to procreate naturally. This practice has been a popular mode for procreation in recent times for those who are deprived of this blessing. But this form of commercial arrangements are posing number of challenges from parentage, lineage, risk of non acceptance, violation of rights of the parties involved and questions of morality.

Surrogacy is where a woman becomes pregnant with the intention of handing over the child to someone else after giving birth. Generally, she carries the baby for a couple or parent who cannot conceive a child themselves – they are known as “intended parents”.

There are two forms of surrogacy depending upon the arrangements used for having a baby - Traditional, Gestational and Donor surrogacy. In *traditional surrogacy*, the surrogate mother's egg is used, making her the genetic mother. In *gestational surrogacy*, the intended mother or a donor provides the egg. The egg is fertilized through in vitro fertilization (IVF) and then placed inside the surrogate mother. In this, there is no biological connection between the child and the surrogate.

Surrogacy can also be categorised into commercial or altruistic depending on whether the surrogate receives financial reward for her pregnancy or the relinquishment of the child, or not. In commercial surrogacy, the gestational carrier (surrogate mother) is paid to carry a child of the intended parents in her womb. In altruistic surrogacy, the surrogate does not receive compensation for her services beyond reimbursement for medical costs and other reasonable pregnancy-related expenses.

Various reports on the issue reveal that India is emerging as a major destination for surrogacy as childless couples from US and Europe are lured by the prospect of a surrogate child. No wonders, India has become a favourite spot for medical tourism

30 See for details proceedings of symposium, ‘Organ transplant-Euthanasia-Right to Die: Indian and Islamic.

If we talk from Indian legal perspective, then it would not be wrong to state that India has witnessed a vast change in the attitude of legislature and judiciary. In 2008, the Supreme Court of India in, *Manji Yamada's* case³¹ “declared surrogacy to be a medical procedure legal in several countries including India”. The A.R.T. (Assisted Reproductive Technologies Regulations) Bill 2010 was introduced in Indian Parliament but could not see the light. Till 2015 where the same Hon’ble Supreme Court stated “Commercial surrogacy should not be allowed but it is going on in our country. You are allowing trading of human embryos .It is becoming a business and has evolved surrogacy tourism”.³² Finally, the legislature is proposing to impose a complete ban on surrogacy for the foreign nationals, while allowing only limited Altruistic Surrogacy to Indian married couples, through Surrogacy (Regulation) Bill, 2016³³. The said Bill was sent for recommendations of the Parliamentary Panel. And the recommendations³⁴ are such that if accepted then it will result into turning the Surrogacy (Regulation) Bill, 2016 upside down and 2016 Bill too will meet the fate of the rest of the Bill’s on surrogacy. As of now, in the absence of any law by the parliament, at present, surrogacy contract between the parties and the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005³⁵, are the guiding force.

Mythologically speaking, surrogacy in India is known and practiced since time immemorial. There are many stories in Hindu mythology which talk about the use of this practice. One such being the birth Balaram, the seventh child of Krishna’s parents Devaki and Vasudev, where the embryo was transferred to the womb of Rohini (Vasudev’s first wife), to prevent the baby being killed by Devaki’s brother Kamsa. Reference of surrogacy is also evident in Mahabharat at many places, such as the birth of Draupadi and her twin brother, birth of Kauravas, *etc.*

However, in Islam, the second largest followed religion in India, Surrogate motherhood is not allowed because many evils may arise from this procedure. Islam considers it illegal and immoral to introduce into a woman the sperm of any man other than her husband’s. It will be *Haraam* (forbidden) to form the embryo by the fusion of a woman’s ovum with the sperm of a man other than her husband. It is also not lawful to implant into a woman sperm or/and an embryo into other woman’s womb.

31 (2008) 13 SCC 518.

32 PTI, “Supreme Court asks centre to bring surrogacy within ambit of law” *The Indian Express*, Oct. 15, 2015.

33 Surrogacy (Regulation) Bill 2016 (Draft), Ministry of Health & Family Welfare Government of India & Indian Council of Medical Research.

34 Parliamentary Standing Committee on Health and Family Welfare, 102 ndReport on Surrogacy (Regulation) Bill, 2016 (August, 2017).

35 National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, ICMR, 2005.

According to ‘Abd al-‘Azeem al-Mat’ani of al-Azhar University: ‘Renting wombs is one of the innovations of western civilization, which is a purely materialistic civilization which does not give any weight to moral values and principles. The issue is not things that may affect inherited characteristics or confuse lineage; that is not the point of the *shar’i* ruling. Whether that leads to any effect on inherited characteristics or not, whether that results in confusion of lineage or not, it does not matter, because the *shar’i* ruling forbidding this innovation is based on something else, which is that the womb is a part of a woman’s private parts and the private parts (i.e., sexual relations) are not permissible except through the *shar’i* contract whose conditions are fully met. So the womb is exclusively for the husband who is married to that woman according to a valid marriage contract, and no one else has any right to use it for an alien pregnancy. If the woman who rents out her womb is not married to that husband, then she is permitting her private parts and her womb to a man who is a stranger to her; she is not permissible for him and he is not permissible for her. Even if this is not full-scale *zina* (adultery), it is still definitely *haram* because it is enabling a man who is a stranger to her (i.e., not married to her) to put his semen in her womb.’

Perhaps, the most compelling evidence supporting this view is the ayah (verse) in Surah al-Mujadalah where the Holy Qura’n says:³⁶

“...their mothers are only those who conceived them and gave birth to them (Waladna hum).”

Despite prohibition, if surrogacy is carried out, Islam regards the surrogate mother to be biological mother of the child.

Besides, surrogacy has got various socio-psychological problems. During the period of pregnancy the woman goes through peculiar situations and undergoes sufferings. It is a well-known scientific fact that the woman who bears a child for nine long months gets emotionally attached to the child who remains in her womb for such a long period. In the case of surrogacy, the women have to suppress the feelings of motherhood for good and miss the company of the baby which results in severe psychological and biological problems. To bear a child for another woman is nothing, but exploitation of a poor woman by tempting into ‘leasing’ their wombs for monetary benefits. Which, in turn, undermine the very institution of marriage and family life, thus makes surrogate mothers a ‘baby-maker’ and a child a ‘commodity’. The above teaching of Quran not only considers the problems of paternity and lineage, but also highlights the various socio-psychological problems on the health of mother and the child born of such arrangement. We find that Islam takes into consideration the human rights of the surrogate mothers.

36 Quran LVIII: 2.

Many countries of the world have put a ban on the practice of surrogacy owing to the cases of exploitation of women however, India still has no specific legislation governing the practice of surrogacy until the bill is passed.

Treatment and its legal sanctity in Islam

Though there is no as such Islamic law is enforced in India and general laws relating to health and its improvement are equally applicable to Muslims also. However, Indian jurists and legal scholars also contributed to the importance of health and emphasize towards its protection and improvement from Islamic legal perspective. One of the south Indian scholars Jalaludin Umri contributed a book on the subject of health and diseases *في* Islamic teachings.

In the beginning commenting upon the viewpoint of Islam, the author did not only expresses his opinion rather he furnished basic Islamic legal sources in this regard for example in one of the tradition of the Prophet which he quoted, thus, "that if there is any disease then its remedy also exists"³⁷

In another tradition it is said that every disease can be cured with proper medications. At the same time the writer emphasized that under Islamic teachings research and investigation on medical sciences is also overemphasized. In this regard quoting a renowned progressive jurist Ibn Qayim, who says "Prophet says *har bimari ki dawa hai* (There is a cure for every disease)." After citing this writer opines that the traditions as well as juristic opinions are directing to both patients as well as physicians and emphasize over the research on the medicines. In one way it will not disappoint the patient when he is under hope that his treatment is possible, on the other hand physician would also remain in the search of medicines and medical development if he knows that every disease has cure³⁸.

VI Conclusion

The foregoing discussion reveals that Islamic legal teachings like, the contemporary laws of the east and west also did not leave any stone unturned to provide medical facilities to cure from ailments and to adopt the measures of maintaining health. It did not only provide the norms to maintain good health rather it cope-up with the contemporary developments of medical jurisprudence. The confusion between the killing and cure of patient and providing him relief is clearly distinguished from the above views expressed by various Islamic scholars in the light of leading sources of Islamic law as well as juristic opinions.

37 Bukhari, KitabAltib As Cited in Jallaudin Umri, *Sebat WaMarz Aur Islami Talimat*, 226 (New Delhi, 2015).

38 *Id* at 225 - 242.

Like modern jurisprudence it is not just to say Islamic jurisprudence is not dynamic and it forces to strictly adhere to a particular school of law without understanding the contemporary problems of the society and its members. Throughout the Islamic history Islamic jurists change their opinion according to the prevalent circumstances and issued *fatwas* according to the needs of the time following the doctrines of *takehyyur* (eclectic choice) and *talfiq* (a legal term that is putting together of a rule based upon diverse opinions from various schools of juristic thoughts in Islam.).

Many recent developments in the field of medicine demands rather challenge the Islamic jurisprudence to find out the solution of that problem, for example Organ transplant, surrogacy and similar other newly developed treatments. And Islamic jurists are not reluctant to issue the verdict in order to resolve the contemporary problems. Islamic law is a jurist made law and not a judge made law. That is why Islamic jurists from time to time change their earlier verdicts according to scientific development and issue a new one, keeping in view the contemporary challenges before them. This is the reason that all these advanced medical developments are being enjoyed by almost all the

Islamic countries. In India too, such type of jurists are found and their thoughts have ample scope to resolve these problems but some time due to lack of *fatwas* like theirs contemporary Islamic countries, Muslims in India have been suffering and they are under a dilemma that how they should act, so that they would get the benefit of all these contemporary developments along with their association with Islamic law and jurisprudence.

To conclude with the position can be summarized as Indian legal position and Islamic jurisprudence coincides at various points. As far as organ transplant is concerned the principles of *fiqh* are congruent with Indian legal position. There are certain differences in the line of thoughts when it comes to euthanasia and surrogacy practices. As Islam clearly prohibits right to die and there is no clear demarcation between euthanasia and attempt to suicide. In case of surrogacy the human rights point of view is equally concerned under Islamic point of view and Indian legal position as the matters relating to paternity, lineage, and surrogate mothers rights are still left undecided to certain extent.