

IN THE FEDERAL SHARIAT COURT
(Original Jurisdiction)



PRESENT

MR. JUSTICE HAZIQUK KHAIRI, CHIEF JUSTICE
MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MR. JUSTICE SALAHUDDIN MIRZA
MR. JUSTICE MUHAMMAD ZAFAR YASIN

SHARIAT PETITION NO. 1/I OF 2008

Society of Transplant and Surgeons --- Petitioner
Pakistan through President Col. (R)
Mukhtar Hamid Shah

Versus

1. Federation of Pakistan through --- Respondents
Ministry of Law, Justice &
Human Rights.
2. Ministry of Health through its
Secretary.
3. Pakistan Association of Urology
Surgeons through its President
4. Transplantation Society of Pakistan through its
President.
5. Pakistan Society of Nephrology through its
President.

For the Petitioner

--- Dr. M. Aslam Khaki, Advocate
A/w Dr. Col. (R) Mukhtar
Hamid Shah, petitioner
Mr. Yousaf Khosa, Barrister.

For the Federal Government

--- Sardar Abdul Majeed, Standing
Counsel.
Mr. Ibrar-ul-Hassan, Advocate.
Maj. Gen. (Retd.) Abdul Qadir
Usmani, Administrator,
Ministry of Health.
Dr. Nadeem, Assistant D.G.
Health.

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For the Intervener

--- Qazi Faiz Issa.

For the Expert

--- Dr. S. A. Adib-ul-Hassan Rizvi.

Dr. Ali Anwar Naqvi, Professor
of Urology.
Dr. Mrs. Farhat Moazzam,
Surgeon.
Dr. Nawaz Ahmad Chughtai.

As Amicus Curiae

--- Justice (Retd.) Majida Rizvi,
Advocate.
Syed Iqbal Haider, Advocate on
behalf of Human Rights
Commission.
Mr. Raza Hayat Hiraj,
Barrister.



Juris-consults

--- Dr. M. Hussain Akbar.
Dr. Hameedullah.
Prof. Noor Ahmad Shahtaz.
Peer Izhar Hussain Shah
Bokhari.
Mufti Muhammad Usman Yar
Khan.
Moulana Salahuddin Yousaf.
Mr. Muhyuddin Hashmi.

Mr. Shafqat Munir Malik, Additional A.G. Punjab.

Mr. Salahuddin Mengal, A. G. Balochistan.

M/s. Tariq Ali Tahir and Muhammad Azam Khattak Additional A. G's
Balochistan.

Mr. Fareed-ul-Hassan Assistant A. G. Sindh.

Mr. Aziz-ur-Rehman, Advocate for A. G. NWFP.

Date of Institution	---	26.01.2008
Date of Hearing	---	11.03.2008, 25.03.2008, 23.10.2008, 13.11.2008, 12.01.2009, 28.01.2009, 19.02.2009, 03.03.2009, 04.03.2009, 11.03.2009, 31.03.2009 and 01.04.2009.
Date of Decision	---	20-04-2009

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JUDGMENT:

HAZIQUL KHAIRI, CHIEF JUSTICE:- The petitioner M/S



Society of Transplant Physicians and Surgeons Pakistan registered under the Societies Act, 1860, through its President Col. (R) Mukhtar Hamid Shah has challenged Sections 3(1), 5(1), 7(1) and 11(b) and (c) read with Section 2(d) & (g) of the Transplantation of Human Organs and Tissues Ordinance, 2007 (hereinafter called the Ordinance), under Article 203-D of the Constitution of Islamic Republic of Pakistan being repugnant to the injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet (Peace Be Upon Him). Section 3(1) relates to 'Donation of organ or tissue by a living person', Section 5(1) is in respect of 'Composition of Evaluation Committee', Section 7(1) pertains to 'Effects etc. to the donor and the recipient' and Section 11 deals with 'Punishment for commercial dealings in human organ', Section 2(d) & (g) contains the definition of terms used in the Ordinance.

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2. The petitioner has made Federation of Pakistan through Ministry of Law, Justice and Human Rights, Islamabad, and Ministry of Health through its Secretary, Islamabad, as respondents.



3. The petition was fixed on 11.03.2008 and was admitted with notices to the respondents for 25-3-2008. In response Dr. Nadeem, Assistant D.G. Health Ministry, made appearance and after hearing the petitioner, keeping in view the importance of the subject matter, which deals in kidney transplantation, we deemed it necessary to hear Muslim scholars, ulema, jurisconsults, leading advocates, professors of medicine and eminent surgeons etc. with request to submit their views orally or in writing in respect of impugned sections of the Ordinance. On the adjourned date viz. 12.01.2009, this matter was fixed at Karachi and partly heard, during the course of which Dr. S. Adeebul Hassan Rizvi, a leading surgeon and Director, Institute of Urology & Transplantation (SIUT), Karachi addressed the Court and presented slide picture show on the subject and also filed his

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comments. The others who addressed the Court at length were Syed

Iqbal Haider, Secretary Human Rights Commission, Justice (R)

Majida Rizvi, Mr. Ibrar Hassan and Mr. Jawaid Ahmad Siddiqui,

Advocates, and Dr. Noor Ahmad Shahtaz, Assistant Professor,

Department of Islamic Studies, University of Karachi. Thereafter the

matter was fixed on 28.01.2009 at Islamabad, when an application

was moved by Qazi Faez Isa, Advocate for impleading (i) Pakistan

Association of Urology Surgeons, (ii) Transplantation Society of

Pakistan and (iii) Pakistan Society of Nephrology as parties to the

petition, as they were interested in the subject matter of the petition. In

view of the utmost public importance of the case, we allowed the

application and they were made parties to the petition. Subsequently

the matter was heard at Lahore on 19.02.2009, at Karachi on

03.03.2009, 04.03.2009, 11.03.2009 and at Lahore on 31.03.2009 and

01.04.2009. When the petition was last fixed at Lahore on 01.04.2009,

Dr. Aslam Khaki, learned Counsel for the petitioner, made a verbal

request that Section 11 (b) & (c) read with section 2(d) & (g) of the

Ordinance is also repugnant to Quran and Sunnah and has nexus with



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the pleas raised in the petition and the same may be allowed to be incorporated in the petition. Since the respondents had no objection to it and Section 11 (b) and (c) read with Section 2(d) and (g) of the Ordinance also relate to the pleas raised in the petition, we allowed incorporation thereof in the petition being repugnant to Quran and Sunnah as well.



4. The petitioner is stated to be a registered Association of Physicians and Surgeons qualified and experienced in transplant of the kidneys working for the last about 30 years in Pakistan and through the skill and devotion of its doctors has saved the lives of thousands of people which were suffering from kidney ailments and were on the verge of death. According to them, thousands of patients are suffering in Pakistan from kidney failure resulting into their death. The other course open to kidney patients is regular dialysis, which is not only painful and expensive but also a temporary arrangement. The best way is the transplant of the kidney, which is being medically

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accepted, respected and practiced in all the countries. It was contended that:-



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- (i) The impugned provisions namely, sections 3(1)(a), 5(1), 7(1) and 11(b) & (c) read with Section 2(d) & (g) of the Ordinance, are repugnant to Quran and Sunnah. It is the duty of every Muslim to save the life of a human being. God has blessed a man with two kidneys and if one is taken out, no harm would be done to the donor. There is a wide gap between the recipient patients and the donors of the organs. Quoting example from Trillium Gife of life Net Work, there are more than 1700 persons in Ontario waiting for kidney donation but there are only 152 living donors. It was also pointed out by the petitioner that European Hospitals charge about 1,50,000/- dollars (Rs.1,20,00,000/-) per patient for kidney transplant.
- (ii) The restriction of near relation of donors to the recipients as propounded in Section 3(a) of the impugned Ordinance delimits the scope of transplantation, firstly as the near relation may not be willing or available and secondly there may not be the compatibility of the recipient with the near relative donor data base. The volunteer donors are discouraged under the Ordinance.
- (iii) In developed countries the volunteer donors are not really donors but receive remuneration in the name of

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compensation which goes up to \$ 5,500 for the expenses of the donors. However, in under-developed countries, people are not moved for volunteer donation of kidneys or interested to take the risk of saving the lives of their brothers without guarantee of their life and without incentive or compensation.

- (iv) The complexity and gravity of the problem of huge gap between supply and demand of the kidneys is also manifested in report of World Health Organization (W.H.O) according to which at least 2,00,000 people are on waiting list for kidneys and many more have no access for transplantation or dialysis services.
- (v) In Iran, China and in many other countries there is no restriction of relationship of donor with the recipient. Dubai also approves transplant under Shariah Law.
- (vi) By putting ban on the donation by the "non close blood" volunteer donor, thousands of kidney patients specially those suffering from end stage renal failure will die off every year.
- (vii) Due to ban of donation of organ by unrelated volunteer donor, many patients from Pakistan moved to other countries like China and Iran. Most of such patients go on the expenses of the public exchequer. Last year more than one billion rupees were granted to influential

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persons to go abroad for transplantation. The said ban in Pakistan is resulting in wastage of foreign currency as well as public exchequer. Despite this expense the patients are waiting for death.

(viii) The bar to transplantation of organs by Pakistani donor to foreign patient/donee is against Islam, standards of humanity and is a worse kind of discrimination in saving the life of a human being who is at the death bed. This bar will also deprive Pakistani hospitals from the income from the facilities which they would have provided to the foreigners (Muslims or Non-Muslims) and earned foreign currency for their country.

(ix) If a law is promulgated prohibiting the blood transfusion or receiving the payment or getting the prior approval of some Monitoring Authority, many lives will be taken away due to red tapism/delay in the approval. We are living in the society of bureaucracy which is known for red tapism and corruption, hence the situation cannot be equated with the western countries where the matters are disposed of quickly without delay and without bribe. The delay in the bureaucratic procedures will cause many deaths.

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5. In support, the petitioner has placed reliance on the following Verses from the Holy Quran:-

1. وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا —

(And that whoever saved a human life should be regarded
As though he had saved all mankind.)(5/32)



2 يا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلِ الْحُرُّ بِالْحُرِّ وَالْعَبْدُ
بِالْعَبْدِ وَالْأُنثَى بِالْأُنثَى فَمَنْ عَفِيَ لَهُ مِنْ أَخِيهِ شَيْءٌ فَاتَّبَاعَ بِالْمَعْرُوفِ
وَأَدَاءٍ إِلَيْهِ بِإِحْسَانٍ ذَلِكَ تَخْفِيفٌ مِّن رَّبِّكُمْ وَرَحْمَةٌ فَمَنْ اعْتَدَى بِعَدْوٍ ذَلِكَ فَلَهُ
عَذَابٌ أَلِيمٌ -

(O believers, retaliation is decreed for you in bloodshed: a free man for a free man, a slave for a slave, and a female for a female. He who is pardoned by his aggrieved brother shall be prosecuted according to usage and shall pay him a liberal fine. This is an alleviation from your Lord and mercy. He that transgresses thereafter shall have stern punishment.) (2: 178)

3 وَلَكُمْ فِي الْقِصَاصِ حَيَاةٌ يَا أُولِي الْأَلْبَابِ لَعَلَّكُمْ تَتَّقُونَ -

(In retaliation you have a safeguard for your lives O men of understanding. Perchance you will guard yourselves against evil.) (2:179)

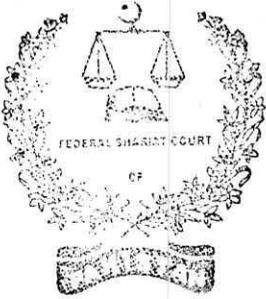
4 كُتِبَ عَلَيْكُمْ إِذَا حَضَرَ أَحَدَكُمُ الْمَوْتُ إِنْ تَرَكَ خَيْرًا الْوَصِيَّةَ لِلْوَالِدَيْنِ وَالْأَقْرَبِينَ
بِالْمَعْرُوفِ حَقًّا عَلَى الْمُتَّقِينَ -

(It is decreed that when death approaches those of you that leave wealth shall bequeath it equitably to parents and kindred. This is a duty incumbent on the righteous. (2:180)

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5. مَنْ خَافَ مِنْ مُوصِيٍّ جَنَفًا أَوْ إِثْمًا فَأَصْلَحَ بَيْنَهُمْ فَلَا إِثْمَ عَلَيْهِ إِنَّ اللَّهَ غَفُورٌ رَحِيمٌ -

(He that suspects an error or an injustice on the part of a testator and brings about a settlement among the parties incurs no guilt. Allah is Forgiving and Merciful.) (2:182)



6. وَلَا يَجْرِمَنَّكُمْ شَنَاَنُ قَوْمٍ أَنْ صَدُّوكُمْ عَنِ الْمَسْجِدِ الْحَرَامِ أَنْ تَعْتَدُوا وَتَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَى وَلَا تَعَاوَنُوا عَلَى الْإِثْمِ وَالْعُدْوَانِ وَاتَّقُوا اللَّهَ إِنَّ اللَّهَ شَدِيدُ الْعِقَابِ

(Do not allow your hatred for those who would debar you from the Holy Mosque to lead you into sin. Help one another in what is good and pious, not in what is wicked and sinful. Have fear of Allah, for He is stern in retribution. (5:2)

7. إِنَّمَا الْمُؤْمِنُونَ إِخْوَةٌ فَأَصْلِحُوا بَيْنَ أَخَوَيْكُمْ وَاتَّقُوا اللَّهَ لَعَلَّكُمْ تُرْحَمُونَ -

(The believers are brethren. Make peace among your brethren and fear Allah, so that you may be shown mercy. (49:10)

8. يَا أَيُّهَا الَّذِينَ آمَنُوا لَا يَسْخَرْ قَوْمٌ مِّنْ قَوْمٍ عَسَىٰ أَنْ يَكُونُوا خَيْرًا مِّنْهُمْ وَلَا نِسَاءٌ مِّنْ نِّسَاءٍ عَسَىٰ أَنْ يَكُنَّ خَيْرًا مِّنْهُنَّ وَلَا تَلْمِزُوا أَنْفُسَكُمْ وَلَا تَنَابَزُوا بِالْأَلْقَابِ بِئْسَ الْأَسْمُ الْفُسُوقُ بَعْدَ الْإِيمَانِ وَمَنْ لَّمْ يَتُبْ فَأُولَٰئِكَ هُمُ الظَّالِمُونَ -

(O Believers, let no man mock another man, who may perhaps be better than himself. Let no woman mock another woman, who may perhaps be better than herself. Do not defame one another, nor call one another by nicknames. It is an evil thing to be called by a bad name after embracing the true faith. Those that do not repent are wrongdoers. (49:11)

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9 وَالْمُؤْمِنُونَ وَالْمُؤْمِنَاتُ بَعْضُهُمْ أَوْلِيَاءُ بَعْضٍ يَأْمُرُونَ بِالْمَعْرُوفِ وَيَنْهَوْنَ
عَنِ الْمُنْكَرِ وَيُقِيمُونَ الصَّلَاةَ وَيُؤْتُونَ الزَّكَاةَ وَيُطِيعُونَ اللَّهَ وَرَسُولَهُ أُولَئِكَ
سَيَرْحَمُهُمُ اللَّهُ إِنَّ اللَّهَ عَزِيزٌ حَكِيمٌ

(The true believers, both men and women, are friends to each other. They enjoin what is just and forbid what is evil; they attend to their prayers and pay the alms-tax and obey Allah and His Apostle. On these Allah will have mercy. He is mighty, Wise. (9/71)



6. In order to fully comprehend and examine the grounds urged by the petitioner, it would be advantageous to refer to Sections 3(1), 5(1), 7(1) and 11 (b) & (c) read with Section 2(d) & (g) of the Ordinance which for the sake of convenience may be reproduced in full as under:-

Section 2(d).- "Evaluation Committee" means a committee appointed under section 5;

Section 2(g).- "payment" means payment in money or money's worth but does not include any payment for defraying or reimbursing.

Section 3: Donation of organ or tissue by a living person. --

(1) Notwithstanding anything contained in any other law for the time being in force, a living donor who is not less than eighteen years of age, may during his life-time voluntarily donate any, organ or tissue of his body to any other living person genetically and legally related, who is a close blood relative and the donation of organ or part or tissue by such person for therapeutic purpose shall be regulated in the manner as may be prescribed. In the case of regenerative tissue, i.e. stem cells, there is no restriction of age between siblings.

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Explanation. – For the purpose of this section –

- (a) the expression “close blood relative” means parent, son, daughter, sister, brother and includes spouse:

Provided that transplantation shall be voluntary, genuinely motivated and without any duress or coercion.



- (2) In case of non-availability of a donor as explained under sub-section (1), the Evaluation Committee may allow donation by a non “close blood relative”, after satisfying itself that such donation is voluntary.

Section 5: Evaluation Committee. – (1) As soon as may be after the commencement of this Ordinance the Federal Government may, by notification in the official Gazette, appoint as many Evaluation Committees as may be necessary which shall consist of a surgical specialist, a medical specialist, a transplant specialist, a nephrologists, and a neurophysician and an intensivist where available and two local notables having a good record of social service. The Evaluation Committee shall be established for every recognized medical institution and hospital where at least twenty five transplants are being carried out annually.

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- (2) The Evaluation Committee shall: -

- (a) ensure that no organ or tissue is received from non-related living donors without the prior approval of the Evaluation Committee;

- (b) determine brain death of a person;

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- (c) determine propriety of removal of a human organ from any living person using brain death protocol to be formulated; and
- (d) determine fitness or otherwise for transplantation of a human organ into any other body.



Section 7: Effects etc., to the donor and the recipient. – (1)

No transplantation of a human organ and tissue from a donor other than defined in sub section (1) of section 3 shall be carried out without prior permission of the appropriate Evaluation Committee and only at such medical institutions and hospitals which have been notified under sub section (3) of section (6) provided that such donation by Pakistani citizens shall not be permissible to citizens of other countries.

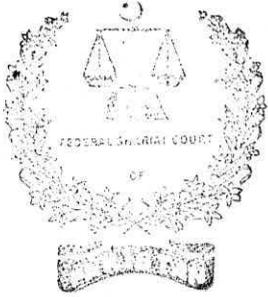
(2) No human organ or tissue shall be removed from the body of a living person except for the purposes of section 3 and no transplantation team of a recognized medical institution or hospital shall undertake the removal or transplantation of any human organ or tissue from a living donor unless they have explained the effects, complications and hazards connected with the removal of organ or tissue for transplantation to the donor and its outcome in the recipient respectively in such manner as may be prescribed.

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Section 11: Punishment for commercial dealings in human organ.-

Whoever--

- (a) makes or receive any payment for the supply of, or for an offer to supply, any human organ;
- (b) seeks to find a person willing to supply for payment of any human organ;
- (c) offers to supply any human organ for payment;
- (d) initiates or negotiates any arrangement involving the making of any payment for the supply of, or for an offer to supply any human organ;-



- (a) takes part in the management or control of a body of person, whether a society, firm, or company, whose activities consists of or include the initiation or negotiation of any arrangement referred to in clause (d); or

- (b) publishes or distributes or causes to be published or distributed any advertisement, -

- (i) inviting persons to supply for payment of any human organ;

- (ii) offering to supply any human organ for payment; or

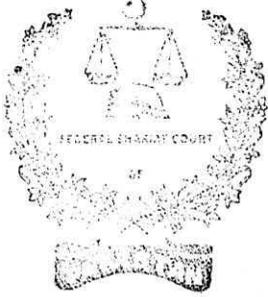
- (iii) indicating that the advertiser is willing to initiate or negotiate any arrangement referred to in clause (d),

shall be punished with imprisonment for a term which may extend to ten years and with fine which may extend to one million rupees.

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7. The Human Organ Transplantation Authority, Ministry of Health, Government of Pakistan, on receipt of notice from the Court, made appearance through Maj. Gen. (R) Dr. Abdul Qadir Usmani, its

Administrator and filed comments which briefly are as under:-



- (i) It is admitted that thousands of patients are suffering from kidney ailment and are vulnerable to total failure of vital functions which results in their death. The best way out for the problem is transplant of the kidney, which is medically well accepted and respected approach, and is practiced in all the Countries.
- (ii) It is submitted that Section 3(1) of the Ordinance cannot be read in isolation but in conjunction with Section 3(2) which clearly allows donation by a "non close blood relation" in case of non-availability of donor from within the close blood relatives. Further, under the Ordinance the Evaluation Committee shall be established for every recognized medical institution and hospital where at least twenty five transplants are being carried out annually.
- (iii) Section 7 of the Ordinance prohibits donation by Pakistani citizens to citizens of other countries whereby poor citizens of Pakistan are protected from exploitation at the hands of rich foreigners who find Pakistan a safe

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heaven for organ trade. It is a fact that world over organ trade is looked down upon.

(iv) It is denied that the donors received remuneration in the name of compensation in Canada Ontario State up to \$5,500 for the expenses which in fact are only cost to defray hospital stay expenses and is not cost or compensation for donation.



(v) It is emphatically denied that there is ban on donation by non close blood relatives but it is subject to the approval of the Evaluation Committee.

(vi) The petition has no merits and is liable to be dismissed.

(vii) The Government of Pakistan shall refrain from commenting as to whether in the light of Qur'anic Verses, the petition may be allowed or not but it would be worthwhile if the Court may take into consideration the views of a number of scholars, juris-consults, Islamic organizations etc. opposing free trade of transplantation of human organs, some of which are as under:-

(a) It was held by Professor Dr. Muhammad Sayed Tantawi, Mufti of Egypt, in his judgment "on sale or donation of human organs" that Shariah of Islam greatly honoured man and commanded to safeguard him against ruin or harm. It prohibited killing or harming man except for a legitimate cause and explicitly and evidently

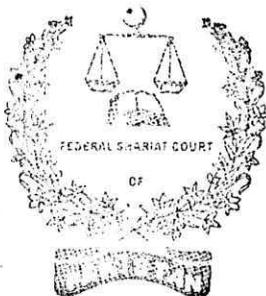
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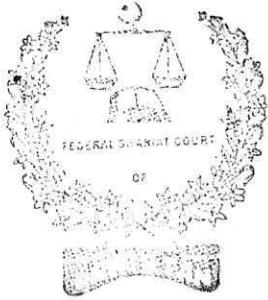


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demonstrated that it is not permissible for man to dispose of his body in a way which may ruin, damage or harm him. Though each man exercises his will as regards his body, yet his will is restricted by divine limits defined by Allah and within the purview of the Verses. Consequently, verifiers have unanimously agreed that man is not permitted to sell any organ of his body whatsoever for any reason. Firstly, man's body and organs are not subject to sale or purchase, and are not a commodity for commercial exchange. Man's body is an edifice built by Allah, honoured and elevated above sale and purchase. Allah has categorically prohibited trading in human organs, the sale of a free man or any organ of his body is lawfully invalid because of his honour and by virtue of the Qur'anic text.

- (b) Secondly, man's body is not owned by him, but by his Creator. Man is only guardian of his body. He is commanded to do what may benefit this trust or by no means harm it.
- (c) Thirdly, necessity knows no law and consequently man may dispose of his body when there is a necessity within the divine limits permitted by Allah.
- (d) The Grand Mufti of Egypt relied upon the following Verses of the Holy Quran and the Sunnah of the Holy Prophet (P.B.U.H.) in the formation of his judgment:-

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Holy Quran

1. وَالذِّينَ وَالزَّيْتُونَ -
2. وَطُورِ سِينِينَ -
3. وَهَذَا الْبَلَدِ الْأَمِينِ -
4. لَقَدْ خَلَقْنَا الْإِنْسَانَ فِي أَحْسَنِ تَقْوِيمٍ -

“By the fig, by the olive, by mount sanai, by the yonder secure city, assuredly we have created man in the goodliest mould.”(95:1-4)

5. يَا أَيُّهَا الْإِنْسَانُ مَا غَرَّبَكَ رَبِّكَ الْكَرِيمِ -
6. الَّذِي خَلَقَكَ فَسَوَّاكَ فَعَدَلَكَ -
7. فِي أَيِّ صُورَةٍ مَّا شَاءَ رَكَّبَكَ -

“O man! What hath beguiled thee concerning the lord, the bountiful, who created thee, then moulded thee, then proportioned thee. In whatsoever form he listed he constructed thee. (82:6-8)”

8. يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُم بَيْنَكُم بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِّنْكُمْ وَلَا تَقْتُلُوا أَنْفُسَكُمْ إِنَّ اللَّهَ كَانَ بِكُمْ رَحِيمًا -
9. وَمَنْ يَفْعَلْ ذَلِكَ عُدْوَانًا وَظُلْمًا فَسَوْفَ نُصَلِّيهِ نَارًا وَكَانَ ذَلِكَ عَلَى اللَّهِ يَسِيرًا -

“O ye who believe! Devour not your substance among yourselves unlawfully, but let it be a trading among you by mutual agreement. And slay not yourselves. Verily Allah is unto you every merciful. And whosoever doth that in transgression, presently we shall roast him in fire, and with Allah that is every easy” 4: 29-30”

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10 وَأَنْفِقُوا فِي سَبِيلِ اللَّهِ وَلَا تُلْقُوا بِأَيْدِيكُمْ إِلَى التَّهْلُكَةِ وَأَحْسِنُوا إِنَّ اللَّهَ يُحِبُّ الْمُحْسِنِينَ

“And expend in the way of Allah, and cast not yourselves with your hands into perdition, and do well, verily Allah loveth the well-doers 2:195”



Sunnah

“ومن قتل نفسه بحد يده عذب به في نار جهنم”

“And whoever commits suicide with piece of iron will be punished with the same piece of iron in the ‘Hell Fire.’”
(Bukhari Al Sahih, Chapter what is said about committing suicide, Vol: II, Page 251)

“قال النبي صلى الله عليه وآله وسلم : الذي يخنق نفسه يخنقها

في النار والذي يطعنها يطعنها في النار”

“Narrated Abu Huraira : The Prophet (صلى الله عليه وآله) said, “ He who commits suicide by throttling shall keep on throttling himself in the Hell Fire (forever) and he who commits suicide by stabbing himself shall keep on stabbing himself in the Hell-Fire”. (Bukhari Al Sahih, Chapter what is said about committing suicide, Vol: II, Page 252)

(viii) The Council of Muslim Scholars from major schools of law in Great Britain, with three distinguished lawyers,

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considered the issue of organ transplant and resolved that “The Council supports organ transplant as a means of alleviating pain or saving life on the basis of the rules of Shariah.”



“Muslims may carry donor cards. The next of kin of a dead person, in the absence of a donor card or an expressed wish of the dead person to donate his organs, may give permission to obtain organs from the body to save other people’s lives.”

“Organ donation must be given free and without reward. Trading in organs is prohibited. (M A Zaki Badawi, Chairman)”

The Council further resolved:

“It is permissible for a living person to donate part of the body such as the kidneys to save the life of another, provided that the organ donated would not endanger the donor’s life and that it might help the recipient.”

“The Council is of the opinion that human organs should be donated, and not sold. It is prohibited to receive a price for an organ.” (Islamic Voice, August 1998 Issue).

(ix) Dr. Khaja. H. Mujtaba Qadri, in his article on “Ethics of Organ Transplantation-An Islamic Perspective” is of the view:-

“This question is no longer an issue in the West and Several Muslim countries. Well documented consensus opinions from Islamic Fiqh Academy, Muslim World League, Makkah, 1985, Eighth Working Session State “it

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is permissible within the Shariah (Islamic Law) to remove the organ from one person's body and transplant it into another persons' body in order to save the life of that person or to assist in stabilizing the normal functioning of the basic organs of that person'.



The conditions to be met according to Islamic Fiqh Academy for organ transplant from an islamic point of view are:

- 1. Donor's Life is not harmed in any way.
- 2. Donor voluntarily donates without any form of coercion.
- 3. The procedure is the only medical means available to alleviate the plight of the patient.
- 4. The success rate of the procedure for removing and transplanting the organ is relatively high."

(x) The views of Organization of Islamic Conference (O.I.C.) Shariat Academy, the Grand 'Ulema Council of Saudi Arabia, the Iranian Religious Authority and Al-Azhar Academy of Egypt were published in an article entitled 'Islam and Organ Donation' and it was unanimously held by them as under:-

"The consent of those donated the organs must always be sought before the organ may be donated.

The removal of organs should be carried out with

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the greatest care and respect. Organ donation must be given freely without reward as trading the organs is prohibited in Islam. The sale of any part of human body is Haram. The sale of human organs violates the rules of dignity and honour of the human being and so it will be Haram in that case. The donor must be in a healthy condition and his life would not suffer. There must be a decision of competent doctors that without the organ transplantation the patient shall die. The donor before his/her immediate family must be agreed to donate the organ upon death."



8. Dr. S. Adibul Hassan Rizvi, Director, Sindh Institute of Urology and Transplantation (SIUT), Karachi, who addressed us several times, after giving the history of organ transplantation, stated that the Prophet Muhammad (Peace Be Upon Him) in the battle of Badar replaced the arm of His companion Muawath bin Arfa and also the hand of Habib bin Yousaf. (Source: Islamic Ethics of Organ Transplantation and Brain Death by MA Albar in Saudi Journal of Kidney Diseases 1996). However, the first kidney transplantation from living donor was performed in 1954 by Joseph Murray in Boston, U.S.A.

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So far 718904 kidney transplants have taken place in developed countries. Annual transplant rates vary from 25 to 70 per million population while in developing countries it ranges between 6-10 per million population and in some regions they are non existent. The figures of live related kidney transplantation show 95% kidney survival and 98% patient survival in a one year period. Renal transplantation started in 1979 from living related donors in public sector hospitals. These transplants were undertaken essentially on ethical principles. However, when India promulgated its transplant law and banned unrelated commercial transplants the market for foreigners was shifted to Pakistan. Due to the unscrupulous behavior of medical practitioners Pakistan became the largest bazaar of the cheap organs in the world. Rich buyers traveled to Pakistan from Europe, Middle East and India and transplant tourism became an industry as foreigners would pay Rs.12,00,000/- to 18,00,000/- for a transplant package. In 2006 out of 2000 transplants, 1500 were performed from unrelated donors. Among these 1500 transplants,



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foreign recipients constituted 66%, generating a business of Rs.1.2 billion in one year. Pakistan was thus known as organ bazaar of the world. A survey of Kidney vendors conducted by SIUT in District Sargodha, Punjab, revealed that 34% of the vendors lived below poverty line on 1 dollar a day, 90% were illiterate and 69% were bonded labourers who were virtually slaves to the landlords. Majority of the vendors (93%) sold kidneys to pay off debts. However post vending 88% had no economic benefits and remain in bondage. Inadequate evaluation and poor selection contributed to the inferior graft outcomes and complications in these transplant tourists and local recipients. This has brought disrespect to the medical profession and disgrace to the nation. However, transplantation activity gradually shifted from public sector to private sector due to high financial incentives and gains. The growing bazaar only benefited transplant tourists and the rich of the Society. Both international and local media

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highlighted the plight and exploitation of the poor of our society.

9. In this backdrop Dr. S. Adibul Hassan Rizvi urged that the related Ordinance was promulgated in 2007. Pakistan is a signatory to many International conventions pertaining to human rights and organ transplantation. The first U.N. Universal Declaration of Human Rights recognized the inherent dignity, equality, freedom and justice. The 57th World Health Assembly held in 2004 passed a resolution pertaining to human organ and Tissue Transplantation in which Clause 5 specifically states: "To take measures to protect the poorest and vulnerable groups from transplant tourism and the sale of tissues and organs, including attention to the wider problem of international trafficking in human tissues and organs". The Middle East Society of Organ Transplantation and W.H.O. sponsored Kuwait Declaration of 2006, which opposed the commercialization and transplant tourism. The transplant laws in Muslim countries including Saudi Arabia, Kuwait, Indonesia, Bangladesh, Malaysia, Lebanon and Turkey prescribe general provisions against any one who is involved in organ

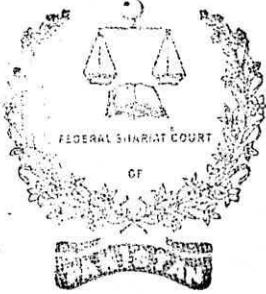
buying and selling. So far as Pakistan is concerned, there was



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complete silence in regard to sale and purchase of organs and transplant tourism in Pakistan had reached its peak in the year 2004.



This led the Supreme Court of Pakistan to take Suo Moto action on the exploitation of poor vendors. It was also on account of pressure from W.H.O, International Transplantation Society, Transplantation Society of Pakistan, Pakistan Society of Nephrology, Pakistan Association of Urological Surgeons, Press, Electronic Media, NGO's and other segments of the Society which finally pressurized the Government to promulgate the said "Transplantation of Human Tissues and Organs Ordinance, 2007", in September, 2007.

10. As regards impugned Sections 3(1), 5(1) and 7(1) of the Ordinance which were considered by the petitioner in violation of Quran and Sunnah, Dr. S. Adibul Hassan Rizvi stated:-

- (i) "The petitioner has ignored Section 3(2) which clearly complies with norms of natural justice that no body would be denied the transplantation of kidney available from his close relatives. All possibilities for availability of organ have been kept open where non close blood relatives can donate organ provided it is

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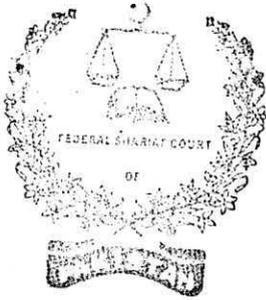
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voluntary and free of coercion and approved by an Evaluation Committee.

- (ii) Section 5 refers to the composition of the Evaluation Committee. The relief has been sought on the ground that the process is cumbersome and time consuming. This matter has also been raised without proper understanding of the facts and the legal procedure, firstly a serious patient with renal failure needs emergency dialyses and not emergency transplantation. Dialyses process may continue for weeks and months depending upon the clinical condition of the patient. The most serious the patient, the more prolonged be the dialysis to make the patient fit for transplantation. Secondly, the Evaluation Committee at every transplant centre shall have access to the services of a Surgical Specialist, a Medical Specialist, a Transplant Specialist, a Nephrology Specialist and a Neurophysician and an intensivist and two local notables having a good record of social service as prescribed under Section 5 of the Ordinance. The major role of Evaluation Committee is to act as watchdog representing the law in the process of transplantation.

- (iii) Under Section 7(1) not only no transplantation of human organ and tissue shall be carried out without prior permission of the appropriate Evaluation Committee at authorized medical institution/hospital but donation by Pakistani citizens shall not be permissible to citizens of other countries. This provision is in



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the national interest and purports to defuse the sentiments against organ trade being a national disgrace. No country in the world, Islamic or otherwise, permits the citizens to donate their organs to a foreigner.”



11. The interveners/respondents namely (a) Pakistan Association of Urology Surgeons, (b) Transplantation Society of Pakistan and (c) Pakistan Society of Nephrology vehemently opposed the petition and filed their counter affidavits through Professor S. Ali Anwar Naqvi, and Dr. Mirza Naqi Zafar, and in addition to the stand taken by Dr. S. Adibul Hassan Rizvi, they contended that:

- i) It is incorrect and denied that the members of the petitioner as social action have saved the life of thousands of people which were suffering from kidney ailment. The petitioner has not provided the details of single life that has been allegedly so saved, let alone the thousands of lives stated to have been saved by it.
- ii) The allegation of petitioner that Section 7 of the Ordinance was inserted on the purported behest of European hospitals is both false and absurd. It is deceptive to state that no harm is done to the donor if one kidney is taken out. The process of transplantation of kidney is to be carried out after careful examination of

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the donor and after having ensured that no harm will come to him or her.



- iii) There is wide spread abuse of kidney sale and purchase and exploitation of the poor and vulnerable members of the society. The restrictions are in accordance with Islam.
- iv) In the guise of this petition, the petitioner wants to perpetuate this horrendous and barbaric practice which is completely un-Islamic. Many donors and donees got infections and have died because they could not afford medical care.
- v) The kidney of human body needs to be maintained and may only be denoted to alleviate suffering of a near and dear one or after a thorough determination by the Evaluation Committee in case of voluntary donor. The petitioner has cited an example of a country where sale and purchase of kidney is being practiced but such a country does not abide by Islamic Injunctions.
- vi) It is submitted that commercialization and trade aspect of kidneys in Pakistan earned the country the "sobriquet kidney tourism". It is denied that there is any evidence of commercialization in kidney donations in Iran. In fact in order to prevent commercialization in the last three years, the Government started to compensate for the time and expenses of the donors. The petitioner has relied upon an

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article appearing in Emirates that organ transplant is allowed in United Arab Emirates freely without any restriction but have not submitted the law governing it. Similar is the position of China. The contention that influential patients get operated for transplantation in foreign countries is misuse of the funds of public exchequer which is a separate issue and has nothing to do with the matter of purported incompatibility of the Ordinance with the Injunctions of Quran and Sunah.

vii) In order to support their contention, the interveners/respondents cited the authoritative versions of eminent surgeons and doctors, jurists, Government, semi Government and autonomous bodies in Muslim and non-Muslim world as under:-

(a) Dr. Mokhtar Al-Mahdi, Chairman of Neurosurgery, Ibn Sina Hospital for Specialized Surgeries, Kuwait states:

“Allah has created the human organs and harnessed them for man’s benefit, therefore, held him accountable for his organs and will eventually call upon him to account for wasting away his health. Consequently, body organs are merely in the custody of man and at his disposal. If giving an organ is conditional on a financial return, and even though we do approve man’s ownership of his organs, we are against the principle of his right to dispose of what he owns.

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In the United States, offering of human organs has been prohibited if coupled with material benefit or benefit in kind. It has been contended in this regard that trading in human organs is originally an immoral principle and that permissibility of such trading is conducive to the emergence of markets for such needed commodities, the appearance of wholesalers and middlemen, in addition to newspaper advertisement for persons willing to sell or purchase human organs. This actually started in an Indian city, and in South America there were advertisements for the sale of kidneys or eyes from living people for a sum of money. Consequently, in 1984, the United States enacted a law providing for a punishment of five years imprisonment and/or fifteen thousand US dollars fine for whoever is involved in such acts of sale."

- (b) According to the International Islamic Code for Medical and Health Ethics (December 11-14, 2004, Cairo, Egypt):-

"The Islamic Jurisprudence (Fiqh) Academy in Jeddah issued, in its fourth session in the year 1408 H., Resolution No.(1)d4/08/88, which permits organ autografts and transports from a living individual, provided that it is willingly donated and the donor, who should be fully competent, is not harmed by the donation. The Academy permits transplants from dead people, provided that their consent has been given while still alive or permission is obtained from their heirs or from the ruler of Muslims in the case of a dead person whose identity is unknown or who has no heirs. This permission is on condition that no sale of organs takes place."

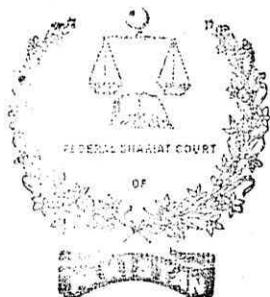
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- (c) The views of Supreme Council of Islamic Research are:-



“It is also absolutely forbidden to sell an organ for the body is a sacred creation of God, not for abuse or sale.

After the death has been confirmed by a qualified specialist, in case of an urgent specified need it is permissible to transfer one or more organs to a living person in grave need. This is allowed only if the deceased has agreed through consent before his death in writing or in the presence of two respectful, honest and trustworthy attendees. A responsible person may then give this permission.

It is understood that this donation should be voluntary and without any compensation. It should also be specified that no damage or harm is inflicted on the shape of the body and that this will not disturb the heritage.”

- (d) The Symposium on the Islamic Vision of some Medical Practices, Egypt held on Shaban 20, 1407 A.H. April, 18, 1987 A.D. was of the view:-

“Among the features of man’s honour in Islam is considering his body absolutely owned by Allah, Exalted be He, since he is the Creator who has moulded and proportioned his parts. It is not permissible for any one whosoever to dispose of human parts of others or even of oneself in a harmful or ruinous way.

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Heavenly religions and conventional laws have, therefore, prohibit body harming and self killing through suicide or any other means conducive thereto. Though each man exercises his will as regards his body, yet his will is restricted by divine limits defined by Allah, and within the purview of the verse.

(i) Man's body is an edifice built by Allah, honoured and elevated above sale and purchase. Allah has categorically prohibited trading in human organs, the sale of a free man or an organ of his body is lawfully invalid because of his 'honour' and by virtue of the Qur'anic text.

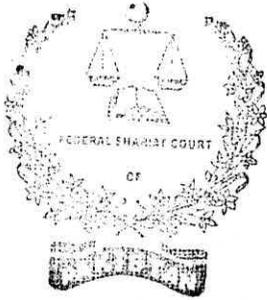
(ii) Man's body is not owned by him, but by his Creator. Man is only a guardian of his body. He is commanded to do what may benefit this trust and by no means harm it.

(iii) It is not admitted to say that among the lawful rules is the principle that 'necessity knows no law' and consequently that man may dispose of his body when there is a necessity."

(e) The Islamic Voice, Vol.12-08 No.140 August 1988/Rabbi ul Akhir 1419 H. referred to a Seminar on 'Organ transplant, Islam, Fiqh, Fatwa, Ruling, Shariah - A Juristic ruling regarding Organ Transplant' which was attended by 19 Ulema and Scholars from all over the World who approved the statement on Organ Transplant and held among others:-

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“The Council is of the opinion that human organs should be donated, and not sold. It is prohibited to receive a price for an organ”



- (f) The Islamic Fiqh Council at the fourth conference in Jeddah in the Kingdom of Saudi Arabia from 19-23 Safar 1408 AH/6-11 February, 1998 AD, after studying fiqhi and medical research on the issue of one person benefitting from the body parts of another, living or dead, settled it in the following words:-

“It should be noted that the agreement on the permissibility of organ transplants explained above is subject to the condition that this is not done by selling organs, because it is not permissible to subject human organs to sale under any circumstances.”

- (g) The preamble of the Human Organ Transplants Act 1989 of Great Britain is as follows:-

“An Act to prohibit commercial dealings in human organs intended for transplanting; to restrict the transplanting of such organs between persons who are not genetically related; and for supplementary purposes connected with those matters.”

- (h) The European Convention on Human Rights and Biomedicine under Article 21 states:-

“The human body and its parts shall not, as such, give rise to financial gain.”

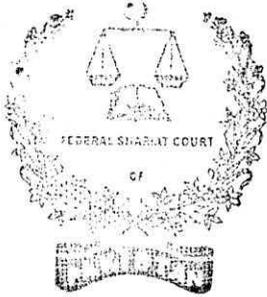
- (i) The World Medical Association Statement on Human Organ Donation and Transplantation adopted by the 52nd WMA General Assembly in

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Edinburgh, Scotland during October, 2000 and Revised by the WMA General Assembly, Pilanesberg, South Africa, October 2006 was of the view that:-



“In the case of living donors, special efforts should be made to ensure that the choice about donation is free of coercion. Financial incentives for providing or obtaining organs for transplantation can be coercive and should be prohibited.”

(j) The World Health Organization states that:-

“The human body and its parts cannot be the subject of commercial transactions. Accordingly, giving or receiving payment (including any other compensation or reward) for organs should be prohibited.

Advertising the need for or availability of organs, with a view to offering or seeking payment, should be prohibited.

It should be prohibited for physicians and other health professionals to engage in organ transplantation procedures if they have reason to believe that the organs concerned have been the subject of commercial transactions.”

12. The Intervenors/respondents placed reliance on the following

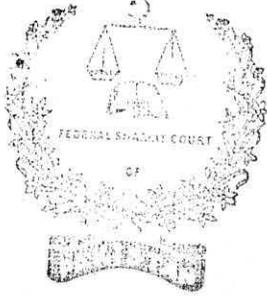
Qur’anic verses and traditions of the Holy Prophet in support of their

case:-

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وَأَنْفِقُوا فِي سَبِيلِ اللَّهِ وَلَا تُلْقُوا بِأَيْدِيكُمْ إِلَى التَّهْلُكَةِ وَأَحْسِنُوا إِنَّ اللَّهَ يُحِبُّ الْمُحْسِنِينَ -

“Spend your wealth for the cause of Allah, and don't throw yourself be into destruction with your own hands; and do good. Lo! Allah loveth the beneficent.” (Surah Al-Bakara, 2:195).



وَلَا تَقْتُلُوا أَنْفُسَكُمْ إِنَّ اللَّهَ كَانَ بِكُمْ رَحِيمًا -

“And kill not yourselves. Lo! Allah is ever Merciful unto you.”

(Surah An-Nisa, 4:29).

إِنَّ اللَّهَ يَأْمُرُ بِالْعَدْلِ وَالْإِحْسَانِ وَإِيتَاءِ ذِي الْقُرْبَىٰ وَيَنْهَىٰ عَنِ الْفَحْشَاءِ وَالْمُنْكَرِ وَالْبَغْيِ يَعِظُكُمْ لَعَلَّكُمْ تَذَكَّرُونَ -

“Lo! Allah enjoins justice and kindness, and giving to kinsfolk, and forbids lewdness and abomination and wickedness. He exhorts you in order that ye may take heed.” (Surah Al-Nahal, 16:90).

إِنَّ اللَّهَ اشْتَرَىٰ مِنَ الْمُؤْمِنِينَ أَنْفُسَهُمْ وَأَمْوَالَهُمْ بِأَنَّ لَهُمُ الْجَنَّةَ -

“Lo! Allah hath bought from the believers their lives and their wealth because the Garden will be theirs.” (Surah At-Tauba, 9:111).

Relevant Hadith:

“The sin is that which pokes into your chest (heart) and you don't like that people know it.”

13. Professor Maqsood Anwar Noorani, Consultant, General

Surgeon and Transplant Surgeon at Karachi National Hospital

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(Pvt.) Ltd. neither fully supported the petition nor entirely opposed it but took a middle course wherein his stand was:-

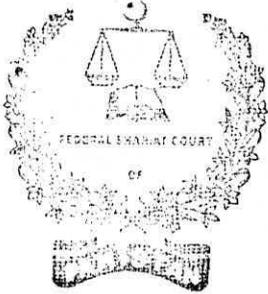


“The results of kidney transplantation have now improved to the extent that most of the transplant recipients can now live a normal life and the Transplantation Ordinance was brought in mainly to stop transplant tourism and blatant commercialization. Considering that Pakistan is a country where people have large extended families, traditionally living under one roof, it is surprising that this law does not include first cousins, nephews/nieces, uncles, aunts and grandparents as “close blood relatives” thus reducing the chances of the recipient to have a donor from within the family. Donation without any monetary gains is acceptable but selling through a middle man, exploitation of the under privileged, poor, destitute and Majboor men and women is against the very basics of Islam and its teaching. However, Government may start a controlled programme of compensation to volunteer donors in the form of some kind of help such as compensation for the lost wages, life insurance etc.”

14. Mufti Usman Yar Khan appeared on behalf of the petitioner and argued that “the transplantation of human organs and tissues can be

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declared permissible because when the nose of one of the companions of Holy Prophet (P.B.U.H.) was amputated during war it was



replaced by an artificial nose made of silver. As he felt uneasy, it was replaced by artificial nose made of gold. The Holy Prophet permitted the use of gold by a male as an exceptional case. The jurists of present era have declared blood transfusion as permissible. Ibn Qudama an eminent Humbli jurist declared the replacement of human body parts as permissible. For this purpose, the body parts of the non-Muslims can also be utilized. He also produced on our record the opinions of a number of Muftis supporting him, who, however, maintained that the provisions of law relating to restriction, control and streamlining the affairs of transplantation by establishing Evaluation Committee and prescribing the condition of relationship between donor and donee have no repugnancy to Qur'an and Sunnah of Holy Prophet (P.B.U.H.)

15. Maulana Salahuddin Yousaf who supported the petitioner stated that Transplantation cannot be restricted to relatives of the kidney patient only. Muslims are like single soul and they have been enjoined to cooperate with each other. In view of Qur'anic verse "Cooperate

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with each other in matter of piety (5:2 Al Quran)" section 3(1) of the Ordinance, 2007, is repugnant to the Injunctions of Islam.



16. Dr. Professor Noor Ahmed Shahtaz of Karachi University is of the view that a person cannot be made to donate his body organ by way of sacrifice and then suffer throughout his life for the sake of others. If in any act its benefits exceed the disadvantages, such act will be permissible. On this principle, the Holy Qur'an has declared wine as prohibited. However if conditions prescribed under section 3(1) of Transplantation Ordinance are removed, it would lead to spread of mischief on earth and bring bad name to the country. Another principle of Islamic jurisprudence is "Blocking the means" (سد الدرائع) which means that when an act itself is permissible but would lead to grave consequences, it should be abandoned. Hence open marketing of human body organs tantamount to dishonour human being and their dignity. The contention of the petitioner that the money received in lieu of body parts like kidney should be treated as compensation, and

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not price, is baseless. The establishment of Evaluation Committee is good law and necessary to check the affairs of transplantation.



According to him the Islamic Fiqah Academy Jeddah, examined this issue and held that "it is not permissible to run the business of Human Body parts for the purpose of transplantation. The act of transplantation must be supervised by the experts of any reliable institution". He next reproduced the view point of Mufti Zafiruddin of Darul Uloom Dioband regarding the sale and purchase of human body parts as follows:

"The parts of human body are treated as sacred trust and the human being is not considered as its owner. Illegal use of these human parts is against the commands of Allah. The dignity of human beings would be at stake when people would start selling and purchasing human body parts to earn money and to fulfil their need. Likewise those who do not believe on the day of judgment and the purpose of their life in this universe is only to earn money, they will start abducting people for the purpose of extracting their body parts and selling it to earn money. The legality of human milk and the transaction of human body parts are two different things".

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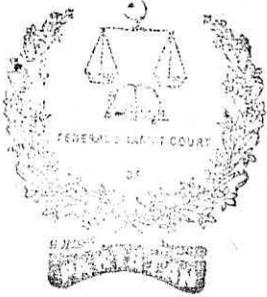
17. Mufti Ghulam Sarwar Qadri also appeared before the Court as jurisconsult. According to him, in a state of dire need and necessity, prohibited things become permissible. A living person can donate his organ for *bona fide* purposes. In Islam, it is necessary to use all means and resources to fight organ disorder and illness. Self-destruction is prohibited in Islam. The organ of animal can legally be implanted in human body and can be used for the purpose of treatment. Shafi'i and Hambli jurists approve transplantation of organs while Hanafi jurists do not, except in circumstances of dire need and necessity. According to Ibn Qudama, a transaction of all parts of the human body is permissible.

18. What emerged from the foregoing pleadings, assertions, allegations, pleas and contentions raised before us in writing as well as verbally by the contesting parties, covered a wide range of questions which may have direct or indirect nexus to the moot question as to whether section 3(1), 5(1), 7 (1) and 11(b) & (c) of the

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Ordinance are repugnant to Holy Qur'an and Sunnah of the Holy Prophet (P.B.U.H.) and may briefly be stated as under:-



1. Is it the duty of every Muslim to donate his kidney to save the life of a recipient patient as Allah has ordained?
2. Is the restriction of near relation of donor to the recipient as propounded under section 3(a) of the Ordinance delimits the scope of transplantation and discouraged the volunteer donors?
3. Whether there should be remuneration/compensation/consideration for volunteer donation of kidney?
4. What is the guarantee of life and post operation care to the donor and donee of kidney?
5. Whether by putting ban on the donation by non close blood relations and volunteer donors, thousands of kidney patients die of renal failures every year?
6. Whether foreign exchange of billions of rupees is wasted on patients going abroad for kidney transplantation?
7. Whether bar to transplantation of kidney by Pakistani donor to foreign donee is against Islam, humanity and is a worst kind of discrimination?

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8. Whether bar to transplantation deprives Pakistani hospitals from income from foreigners and also deprive the country of foreign exchange earning?
9. Whether prior approval of Evaluation Committee has resulted loss of many lives due to red tapism/delay?
10. Whether a man's body is owned by him and it is permissible in Islam that a man may dispose of his body without any restriction?
11. Whether kidney transplantation is a means of alleviating pain or saving life?
12. Whether organ donation be given freely without reward?
13. Whether the definition 'close blood relations' offering kidney should be extended to other relations?
14. Whether the donor/donee of kidney would lead a normal life?
15. What is the effect of Pakistan being a signatory to many international conventions pertaining to human rights and organ transplantation?
16. Whether the process of approval by the Evaluation Committee cumbersome and time consuming?
17. Whether the Evaluation Committee should act as watch dog in the process of kidney transplantation?



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18. Whether the unrestricted sale and purchase of kidneys shall perpetrate horrendous and barbaric practice which is un-Islamic may also cause death of donors and donees?

19. Whether there is dearth of dialysis centers in Pakistan? If so, how many more are required to meet the demands?

20. Whether punishment under section 11 of "the Ordinance" justifiable?



19. There are no two opinions that transplantation of kidneys has saved the lives of millions of people around the world. It is also an admitted position that regular dialysis is the alternate arrangement for kidney patients. The petitioners have pointed out how very expensive kidney transplantation is in European hospitals who charge about \$ 1,50,000/- equivalent to Rs.1,20,00,000/- (Rupees one crore twenty lac) per patient for kidney transplant. According to Dr. S. Adibul Hassan Rizvi, Pakistan became the largest bazaar of the cheap organs in the world where transplantation of kidneys would cost Rs.12,00,000/- (Rupees twelve lacs) to Rs.18,00,000/- (Rupees eighteen lacs) for a transplant package. The free sale and purchase through the agents and unscrupulous doctors resulted into inferior graft outcomes and complications to both the donor and donee and

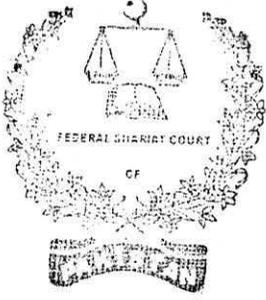
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brought disrespect to the medical profession and disgrace to the nation. The growing bazar of sale and purchase would only benefit transplant tourists and the rich but exploit the poor of our society.



20. The Core issue raised by the petitioner is that ban on transplantation of kidney is not only against humanity but also against the teachings of Qur'an and Sunnah which in unequivocal terms state that it is the duty of every Muslim to save the life of a human being.

مِنْ أَجْلِ ذَلِكَ كَتَبْنَا عَلَى بَنِي إِسْرَائِيلَ أَنَّهُ مَنْ قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِي الْأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا وَلَقَدْ جَاءَهُمْ رَسُولُنَا بِالْبَيِّنَاتِ ثُمَّ إِنَّ كَثِيرًا مِّنْهُمْ بَعْدَ ذَلِكَ فِي الْأَرْضِ لَمُسْرِفُونَ -

(For that cause we decreed for the children of Israel that whosoever killeth a human being for other than manslaughter or corruption in the earth, it shall be as if he had killed all mankind and whoso saveth the life of one, it shall be as if he had saved the life of all mankind. Our messengers came unto them of old with clear proofs (of Allah's sovereignty) but afterwards lo, many of them became prodigals in the earth.) (5:32)

21. According to Dr. Khaki in this Quranic verse, the word

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has been used in a general sense and applies to all the

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mankind. There is also no discrimination between Muslim and non-

Muslim. The Prophet (Peace be upon Him) had also in his last sermon



stated "An Arab has no superiority over a non-Arab, nor a non-Arab

has superiority over an Arab except in matter of piety". It was,

therefore, urged by him that the prohibition of transplanting an organ

to a foreigner as envisaged in section 7(1) of the Ordinance is

repugnant to Quran and Sunnah. What follows is how precious human

life is for Allah Subhanahu Wa Ta'ala and a Muslim cannot overlook

what Allah has ordained as it would tantamount to disobeying Him. It

is our duty as Muslims to save a human life whose creator is Allah.

Next Dr. Khaki referred to those Verses of Holy Quran which were

not mentioned in the petition as under:-

هَلْ جَزَاءُ الْإِحْسَانِ إِلَّا الْإِحْسَانُ-

(Is the reward of goodness aught save goodness?) (55:60)

فَمَنْ اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَلَا إِثْمَ عَلَيْهِ إِنَّ اللَّهَ غَفُورٌ رَحِيمٌ-

(But he who is driven by necessity, neither craving nor

transgressing, it is no sin for him. Lo! Allah is Forgiving,

Merciful.) (2:173)

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According to the Tradition of the Holy Prophet:-

"عن جرير بن عبد الله قال قال رسول الله صلى الله عليه وآله وسلم: من لم يرحم الناس لا يرحمه الله"



(The person who is merciless to the creature, Allah shall not do mercy with him)(Abu 'Essa Muhammad bin 'Essa Al-Tirmizi: Al Sunan Numani Kutub Khana, Lahore Vol.1 Page 693)

22. It was thus emphasized by Dr. Khaki that any prohibition to acquire a kidney under Section 7 of the Ordinance for a dying person or award of punishment to him under Section 11 thereof would be in flagrant violation of Quran and Sunnah, U. N. Charter of Human rights and the Constitution of the Islamic Republic of Pakistan.

23. It was further urged by Dr. Khaki frankly that the ban has deprived the Pakistani hospitals, donors and the Government of huge income from foreigners. If the bar is lifted the country will earn billions of dollars annually in foreign

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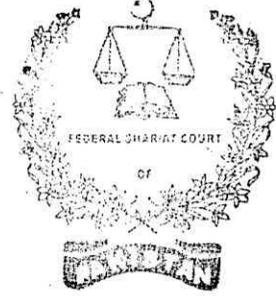
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exchange. In support, the petitioner placed reliance on the opinion of

Mufti Usman Yar Khan and Maulana Tahsin according to whom "it is permissible in Islam to save the life of any individual and to receive donation, gift or prize money in lieu of Kidney". Similar view was expressed by Muhammad Salahuddin Yousaf as according to him Allah Almighty has ordained that "Cooperate with each other in matter of Piety (5:2 Al Quran). These views were shared by Muhammad Hussain Akber a scholar of Faqah-e-Jaffaria who in his research note book had stated that compensation can be received for human organs where its transplantation is needed. Mufti Abdul Salam has also endorsed this view point in his book titled "اعضاء کی پیوندکاری" 198 صفحہ Mulana Mufti Muhammad Shafi' was of the view that to save the life of a person, compensation may be paid to donor of blood.

"اعضاء کی پیوندکاری شریعت کی روشنی میں" صفحہ 126

24. Mr. Faez Isa, learned Counsel for respondents contended before us that the Ordinance was promulgated in the best public interest as referred to by Dr. Adibul Hassan Rizvi.. The Ordinance under section 3 allows transplantation of kidney by a living person of



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at least 18 years old who should be a close blood relative of the donee within the meaning of sub-section (a) thereof and whose offer has to

be voluntary, genuinely motivated and without any duress or coercion.

As regards other donors, the donation of organ including kidney has to be voluntary. In either case donation of kidney is subject to scrutiny

by the Evaluation Committee under section 5 of the Ordinance. Any relaxation will lead to exploitation of poor by the rich and benefit the

persons with vested interest. Similar is the stand taken by Mr. Iqbal Haider, Justice (R) Majida Rizvi and Mr. Abrar Hassan, Advocates

who also addressed us on different dates. Mr. Faez Isa referred to the views of a number of organizations, jurists and scholars in the Muslim

world (supra) on the moot issues which may be summarized as under:-

(a) Ownership of the body.

(i) Dr. Mokhtar Al-Mahdi (Supra): Allah has created the human organs and harnessed them for man's benefit, therefore, held him accountable for his organs and will eventually call upon him to account for wasting away his health. Consequently

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body organs are merely in the custody of man and at his disposal.

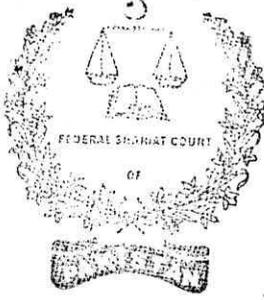
- (ii) Supreme Council of Islamic Research: The body is a sacred creation of God, not for abuse or sale.
- (iii) Symposium on Islamic vision: Man's body is not owned by him, but by his Creator. Man is only a guardian of his body.
- (iv) Prof. Tantawi: Man's body is an edifice built by Allah, honoured and elevated above sale. Man's body is not owned by him, but by his Creator.
- (v) Mufti Zafiruddin: The parts of human body are treated as a sacred trust and the human being is not considered as its owner.

(b) No Sale or reward of parts of body:

- (i) International Islamic Code for Medical and Health

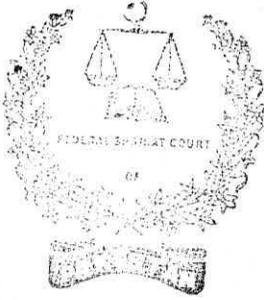
Ethics: Permits organ autographs and transports from a living individual provided it is willingly donated and the donor should be fully competent.

The permission is on the condition that no sale of organ takes place.



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- (ii) Supreme Council for Islamic Research: Donation should be voluntary and without any compensation.
- (iii) Symposium on the Islamic Vision: Allah has categorically prohibited trading in human organs, the sale of a free man or an organ of his body is lawfully invalid because of his 'honour' and by virtue of the Quranic text.
- (iv) Mufti of Egypt Dr. Tantawi: Allah has categorically prohibited trading in human organs.
- (v) The Islamic Vision: Human organs shall be donated and not sold. It is prohibited to receive a price for an organ.
- (vi) The European Convention on Human Rights: The human body and its parts shall not give rise to financial gain.
- (vii) The World Medical Association: Financial incentives for providing or obtaining organs for transplantation can be coercive and should be prohibited.
- (viii) The World Health Organization: The human body and its parts cannot be the subject of commercial transactions and giving or receiving payment

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including any other compensation or reward for organs should be prohibited.



(ix) The Council of Muslim Scholars Great Britain (supra): Organ denoted not be given freely without reward. Trading in organs is prohibited.

(x) Dr. Khaja H. Mujtaba Qadari: Donor voluntarily donates without any form of coercion.

(xi) Organization of Islamic Conference: The consent of those donated the organs must always be sought before the organ may be donated. The sale of any part of human body is Haram.

(xii) Mufti Zafiruddin: The dignity of human beings would be at stake when people would start selling and purchasing human body parts to earn money and fulfill their need.

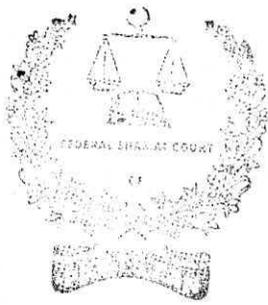
(xiii) Professor Maqsood Anwar Noorani: Donation without any monetary gain is acceptable but selling through middle men, exploitation of the under privileged, poor, destitute and Majboor men and women is against the very basics of Islam and its teaching.

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(c) Duty of a donor to donate his kidney:

- (i) The Islamic Jurisprudence Academy, Jeddah: A person shall be fully competent to donate his organ if he is not harmed by the donation.
- (ii) The Supreme Council of Islamic Research: No damage or harm is inflicted on the shape of the body.
- (iii) Symposium on Islamic Vision: Heavenly religious and Conventional laws prohibit body harming and self killing.
- (iv) Intervenors/respondents 2, 3 and 4 through Professor S. Ali Anwar Naqvi and Dr. Mirza Naqi Zafar: It is deceptive to state that no harm is done to the donor if one kidney is taken out. Many donors and donees got infections and had died because they could not afford medical care.
- (v) Dr. Professor Noor Ali Shahtaz: A person cannot be made to donate his body organ by way of sacrifice and then suffer throughout his life for the sake of others.



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25. In short, there is consensus of opinion among Muslim Jurist and scholars that man's body is not owned by him but by his Creator. Man

is not permitted to sell any organ of his body as it is not a commodity subject to sale or purchase. Selling body parts to earn money is a

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crime. "And kill not yourselves. Lo! Allah is ever merciful unto you."

Surra Al-Nisa 4:29.



26. There is no iota of doubt that there cannot be a greater service to mankind than to save the life of a human being: Those who save the life of one (human beings) it should be as if he had saved the life of all mankind (5:32). This verse is of general nature inasmuch as the life of a man is most precious and those who save it obey the commands of Almighty Allah. However, the said verse of the Quran cannot be read in isolation but in conjunction with other verses of the Holy Quran referred to above, by the respondents and also in conjunction with the views expressed by the learned scholars and ulema of the Muslim world (Supra) based on the text of Quran and Sunnah. Nowhere the Quran or Sunnah ordains that one should risk his own life to save the life of another. Allah has said in Sura Al-Nisa "And kill not yourselves. Allah is ever merciful unto you." To illustrate this

position, a man not knowing swimming, may not jump into water to save a drowning person. Similarly, one should not plunge himself into

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fire, to save a human being, when death is imminent. It is our considered view that the body of a man is a sacred creation of Almighty Allah and is His trust, not owned by man, therefore, any sale or purchase of any body organ will tantamount to His disobedience. However, payment as defined in section 2(g) of "the Ordinance" shall not amount to sale or purchase.



27. Dr. M. Aslam Khaki, learned counsel for the petitioner, has conceded that transplantation of kidney may result into the death of the donor or the donee or both. Under section 7(2) of the Ordinance, "No human organ or tissue shall be removed from the body of a living person except for the purposes of section 3 and no transplantation team of a recognized medical institution of any organ or tissue from a living donor unless they are explained the effects, complications or hazards connected with the removal of organ or tissue for transplantation to the donor and its outcome, in the recipient

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respectively in such manner as may be prescribed." Instances are not wanting when a bonded labour or others engaged in manual labour



have greatly suffered on account of "hazards connected with the removal of kidney, whereas the donee has suffered on account of inadequate evaluation and poor selection to the inferior graft outcomes". Many donors and donees have died due to infection as they could not afford proper medical care at various stages of transplantation. The contention of petitioner that by putting ban thousand of kidney patients suffering from end stage renal failure will die every year is not correct, as such serious patients with renal failure need emergency dialysis and not emergency transplantation. However, due to shortage of urology and transplantation hospitals, it is the duty of the Government, to provide more and more such hospitals across the country, to meet the suffering of kidney patients at nominal cost and expense. Having said so, we hold that although sale and purchase of kidneys are against the teaching of Quran and Sunnah, a man can voluntarily donate his kidney provided he does not bodily ruin, damage or harm himself. Further in view of the foregoing, the punishment prescribed under section 11 of "the Ordinance", to those

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engaged in commercial dealings in human organs including kidneys,
is not repugnant to Quran and Sunnah.



28. Dr. M. Aslam Khaki, has failed to bring to our notice even a single instance when Evaluation Committee anywhere in Pakistan had acted negligently or arbitrarily causing loss of life to any kidney patient. We will therefore, refrain from commenting adversely against Evaluation Committee when there is nothing on record against it. The contention that the ban on transplantation of kidney to foreigners is also repugnant to Quran and Sunnah is not correct. The object of the Ordinance is to protect and safeguard the poverty stricken people of the country from the clutches of rich foreigners who find Pakistan a safe heaven for kidney trade. The Charter of Madina contains a number of Articles where the State of Madina had undertaken to safeguard its citizens from foreigners, some of which may be reproduced as under:-

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"16- The protection of God is one; the least of them may grant neighbourly protection on their behalf, the

Believers are protectors of one another to the exclusion of other people.

21- No Polytheist shall give neighbourly protection to the property and life of the Quraysh, nor shall intervene in such matters against a Believer.



45- No neighbourly protection shall be granted to the Quraysh nor to those who shall help them.

46- They shall mutually help one another against whoever shall attack Yathrib.”(Dr. Muhammad Yousuf Guraya: Judicial System under the Holy Prophet, Lahore Pages 86, 87, and 90).

Besides, the Constitution of Islamic Republic of Pakistan under Chapter I of Part-II provides Fundamental Rights to its citizens, which may not necessarily be extended to foreigners.

29. No doubt, Pakistan is a signatory to International Conventions, reference of which has been made above. These International Conventions inter-alia include the resolution passed at the 57th World Health Assembly held in 2004, relating to Human Organ and Tissue Transplantation, wherein the signatory States undertook “to take measures to protect the poorest and vulnerable groups from transplant tourism and the sale of tissues and organs, including wider problem of International Trafficking in human tissues and organs”. In our suo

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in toto action on gender equality, we discussed this* aspect in our judgment reported in PLD 2008 Federal Shariat Court 1, wherein we had held:-

“Holy Prophet (Peace be upon him) had made many treaties with States/tribes and fully adhered to its terms and conditions. However, treaties with the entire mankind such as above were not in the field in the days of Holy Prophet (Peace be upon him) of Islam which certainly stand to a higher pedestal than a treaty with a State, tribe or individual to which the Holy Prophet attached great sanctity and importance. The Holy Quran attaches utmost importance to treaties, covenants, pledges and promises and enjoins its followers to fully adhere to its terms and conditions.”

30. As a result, we are of the view that there is nothing in sections 3(1), 5(1), 7(1) and 11^{(b) + (c)} read with section 2(d) & (g) of the Transplantation of Human Organs Tissues Ordinance, 2007, which is repugnant to Quran and Sunnah. The petition is accordingly dismissed.

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 [Redacted Signature]
 JUSTICE HAZIQUL KHAIRI
 Chief Justice

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 JUSTICE DR. FIDA MUHAMMAD KHAN

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 JUSTICE SALAHUDDIN MIRZA

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 JUSTICE MUHAMMAD ZAFAR YASIN

Approved in reporting
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Announced at Karachi
 on 20-4-2009
 Imran/*

Certified to be True Copy
Atul Ahmed
 14/5/2009
 Superintendent
 Federal Shariat Court
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