

**Living and Cadaveric Organ Donations – A comparative study of Islamic and South African Law – Consensus and Divergence**

**by**

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## Declaration

This mini-dissertation thesis represents original work by the author. Apart from assistance credited under Acknowledgements, it is based solely on my own unaided efforts.

This work has not been submitted previously in any form nor is it to be submitted to any other University.

This mini-dissertation thesis is supervised by Ms. Munirah Osman-Hyder, from the School of Law, University of KwaZulu-Natal, Durban, South Africa.



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8. Brain Death-Practical and Ethical Issues  
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## Glossary

<i>‘Ālim</i>	Muslim scholar of Islamic religious subjects.
<i>Allah</i>	God.
<i>Amānah</i>	Trust (from God).
Cadaver	Deceased person.
Donor	One who donates organ. May be living or dead (cadaveric).
<i>Ḍarūrah</i>	Principle of necessity.
<i>Fatwā</i>	Islamic legal opinion.
<i>Fiqh</i>	Islamic jurisprudence.
<i>Ḥadīth</i>	Recorded verbal and practice of the Prophet of Islam, Muḥammad.
<i>Ḥalāl</i>	Permissible (to consume in Islam).
<i>Ḥanbalī</i>	School of Islamic Jurisprudence initiated by Imam Ahmad ibn Hanbal: Baghdad (died 855 CE).
<i>Ḥanafī</i>	School of Islamic Jurisprudence initiated by Imam Abu Hanifah : Kufa, Iraq (died 767 CE).
<i>Ḥarām</i>	Forbidden in Islam.
<i>‘Ibādāt</i>	Acts of worship.
<i>Ijmā`</i>	Consensus of Muslim Jurists on legal issues.
<i>Ijtihād</i>	Legal reasoning through which a jurist rationalizes law based on the <i>Qur’ān</i> and <i>Sunnah</i> .
Islam	Muslim religion meaning submission to one God (Allah), and a way of life.
<i>Īthār</i>	Altruism.
<i>Madhhab</i>	Islamic school of law.

<i>Mālikī</i>	School of Islamic Jurisprudence initiated by Imam Malik: Baghdad, Iraq (died 801 CE).
<i>Maṣlahah</i>	Principle of public benefit.
<i>Mu'āmalāt</i>	relations between human beings (social transactions)..
Muslim	adherent of Islam. Literally means one who submits (to God).
Organ	Any part of the body adapted by its structure to perform any particular vital function.
<i>Qiyās</i>	Strict analogical deductions derived from the <i>Qur'ān</i> , <i>Sunnah</i> and <i>ijmā`</i> .
<i>Qur'ān</i>	Holy Book of Islam, revealed by God.
Recipient	One who receives an organ (from a donor).
<i>Ṣadaqah</i>	Optional charity.
<i>Shāfi'ī</i>	School of Islamic Jurisprudence initiated by <i>Imām</i> Shāfi'ī: Cairo, Egypt (died 820CE).
<i>Sharī'ah</i>	Islamic Laws based on the <i>Qur'ān</i> and <i>Sunnah</i> .
<i>Shī'ah</i>	Literally means “party” or “faction”. Technically means those who believe Ali, the son-in-law of the Prophet Muḥammad, should have succeeded as the first Caliph. They later developed the belief of 12 <i>Imāms</i> (leaders), Ali being the first <i>Imām</i> . The last (12 <sup>th</sup> <i>Imām</i> ), a boy of 6-7 years went into occultation in a cave in Samarra, Baghdad, Iraq in 940. He is known as the awaited ā. The <i>Shī'ah</i> government of Iran belongs to the <i>Imāmī</i> sect of the <i>Shī'ah</i> factions, and is the largest.
<i>Sunnah</i>	System of religious, legal and social obligations derived from the <i>ḥadīth</i> (verbal sayings and practices of Prophet Muḥammad).
<i>Sūrah</i>	Chapter of the <i>Qur'ān</i> are known as Surahs.
<i>Sunnī</i>	Largest main group of Muslims comprising almost 95%, and following the dictates of the Prophet Muḥammad ( <i>Sunnah</i> ).
Tissue	Human tissue and includes flesh, bone, a gland, an organ, skin, bone marrow or body fluid, but excludes blood or a gamete.
Transplantation	Transfer of organs from one person (donor) to another (recipient),
<i>Ulamā</i>	Muslim religious scholars.
<i>Ummah</i>	Muslim community.

## Abstract

A practicing Muslim (adherent of the Islamic Faith), is unlikely to consent to organ donation, if it is not in keeping with the tenets of Islamic law (*Sharī`ah*), even though it may be in accordance with South African law. This is because Muslims regard Islamic law as being immutable and God-ordained, as opposed to man-made (South African law). Although there is a wealth of information on organ donation with reference to both South African and Islamic law, there has not been a study comparing the two sets of law. Thus desk-top research provides a comparative analysis of Islamic and South African law with reference to living and cadaveric organ donation. The legal basis of living and cadaveric organ donation and bequeathing of organs is exposed in South African law and Islamic law (*Sharī`ah*). Muslims can be politically divided into two main groups; the majority of *Sunnī* Muslims, and a minority of *Shī`ah* Muslims. (Iran is the only *Shī`ah* Muslim country). There is startling consensus between South African law and *Sunnī* (mainstream) Islamic law, apart from minor differences inherent to each set of laws, on the issue of living and cadaveric organ donation. *Shī`ah* Islamic scholars hold a more liberal view, and were the first to sanction organ donation. *Shī`ah* Islamic jurists allow for the sale of organs in Iran through a state run compensated organ procurement system. They base their legal opinion on reason and logic, and the fact that human life is sacred, and that saving a life of a human being is a Divine obligation. Religion plays a pivotal role in people's attitude to organ donation. With regard to increasing organ donation rates amongst Muslims in South Africa, it is important to publicize the fact that Islamic law not only allows, but encourages, both living and cadaveric organ donation, and that there is broad consensus between South African law and *Sharī`ah*. A number of recommendations in this regard are made in the concluding chapter.

**Table of Contents**

	Page
Title page	i
Declaration	ii
Thesis related Publications/Presentations	iii
Acknowledgements	v
Glossary	vi
Abstract	viii
Chapter 1	
1.1 Introduction and Background	1
1.2 Organ donation in South Africa – a dire shortage of organs	2
1.3 General reluctance of South Africans to donate organs	4
1.4 Reluctance of South African Muslims to participate in organ donation	6
1.5 Rationale of the study	7
1.6 Research methodology	9

## Chapter 2

### South African law and organ donation

2.1 Legislation governing organ donation in South Africa	10
2.2 Opt-in versus Opt-out system	12
2.3 Organ trafficking in South Africa	13
2.4 Evaluation of the current South African legal system	15
2.5 Summary	17

## Chapter 3

### Islamic law and organ donation

3.1 Background	18
3.2 Principles and sources of Islamic law ( <i>Sharī`ah</i> )	
3.2.1 Background	19
3.2.2 Sources of <i>Sharī`ah</i>	20
3.3 Historical background of transplantations in Islam	22
3.4 Arguments for organ donation	23
3.5 Arguments against organ donation	27

3.6 Islamic organizational judicial resolutions ( <i>Qarārāt</i> ) on organ donation	28
3.7 Islamic law and opt-in and opt-out system	29
3.8 Islamic law and the sale of organs	30
3.9 Muslims in South Africa	31
3.10 Summary	32
Chapter 4	
Bequeathing of organs	
4.1 Definitions	33
4.2 South African law	33
4.3 Islamic law	34
4.4 Summary	35
Chapter 5	
Organ donations practices in other Muslim countries	
5.1 Iran	35
5.2 Pakistan	36
5.3 Countries where Muslims are minorities	37

5.4 Summary	38
Chapter 6	
Analytic comparison of Islamic and South African law	
6.1 Introduction	38
6.2 Areas of consensus	39
6.3 Areas of divergence	40
6.4 Summary	41
Chapter 7	
7.1 Conclusion	41
7.2 Recommendations	42
Bibliography	45

## Chapter 1

### 1.1 Introduction and Background

Organ donation is the process of surgically removing an organ or tissue from one person (the organ donor), and placing it into another person (the recipient).<sup>1</sup> It is also referred to as transplantation in the medical context. Transplantation is necessary because the recipient's organ has failed or has been damaged by disease or injury.<sup>2</sup> A donor of organs may be living (related or unrelated) or dead (cadaveric organ donation). Living organ donations occur when the tissues or organs are donated while the donor is alive.<sup>3</sup> Cadaveric organ donations occur once the donor is dead.<sup>4</sup>

Organ transplantation in South Africa is regulated by the National Health Act No. 61 of 2003 (hereafter referred to as the NHA) and its regulations as contained in the Government Gazette.<sup>5</sup> The term "tissue" as defined by the NHA means human tissue, and includes flesh, bone, a gland, an organ, skin, bone marrow or body fluid, but excludes blood or a gamete.<sup>6</sup> "Organ" as defined by the NHA means any part of the human body adapted by its structure to perform any particular vital function, including the eye and its accessories, but does not include skin and appendages, flesh, bone, bone marrow, body fluids, blood or a gamete.<sup>7</sup> Although organ is separately defined, it is also included in the definition of tissue.<sup>8</sup>

Living organ donations usually occur among family members or close friends.<sup>9</sup> There are two methods in which cadaveric organ donation can happen. In the first instance cadaveric organ donation occurs when organs are harvested from a deceased person who has been declared brain-dead. This situation usually arises in the Intensive Care Unit, when 2 medical doctors conduct tests, independent of each other, and confirm irreversible brain damage in a person whose breathing is supported by a ventilator, and whose circulation is supported by means of a beating heart.<sup>10</sup>

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<sup>1</sup> 'Organ Donation and Transplantation' available at <https://my.clevelandclinic.org/health/articles/11750-organ-donation-transplantation>, accessed 29 May 2019.

<sup>2</sup> Ibid.

<sup>3</sup> 'The Living Donation Process' available at <https://www.organdonor.gov/about/process/living-donation.html>, accessed 29 May 2019.

Ibid.

<sup>5</sup> GG 35099, 2/3/2012.

<sup>6</sup> National Health Act, No. 61 of 2003. Definitions.

<sup>7</sup> Ibid.

<sup>8</sup> DJ Mcquoid-Mason et al 'Tissue transplantation and the National Health Act' (2006) 24 (3) *CME* 128-130.

<sup>9</sup> 'The Living Donation Process' available at <https://www.organdonor.gov/about/process/living-donation.html>, accessed 29 May 2019.

<sup>10</sup> A Kleinsmidt et al 'Organ transplant ethics and law' in K Moodley (ed) *Medical ethics, law and human rights – a South African perspective* (2017) 315 – 326.

The Regulations stipulate that one of the two medical doctors must have been qualified for at least 5 years, and neither of whom may be related to the transplant team.<sup>11</sup> The NHA defines death as ‘brain-death’.<sup>12</sup> The second method that organs may be harvested from a deceased person is when a competent person bequeaths organs upon death in a will, document or oral statement.<sup>13</sup>

In South Africa, the most common solid organ transplant is the kidney<sup>14</sup> and cadaveric organ donation, including cadaveric kidney donation, is more common than living donation.<sup>15</sup>

## 1.2 Organ donation in South Africa – a dire shortage of organs

Organ transplantation remains amongst the most effective methods to treat a patient with end-stage organ disease.<sup>16</sup> Apart from saving lives, it drastically improves the quality of life of persons, and is also the most cost-effective means of treatment.<sup>17</sup> Thompson argues that whilst the South African Government’s health care policy is focused on primary health care interventions as a cost-effective strategy to improving the health of its population, transplantation should not be ignored.<sup>18</sup> Presently transplantation is not prioritized as an integral health need of the population, Thompson argues that transplantation rates are a reflection of the total health care system, and, therefore, organ donation rates should be used as a measurable indicator of the health care system of a country.<sup>19</sup>

The biggest limitation to organ transplantation, both in South Africa and globally is the shortage of organs.<sup>20</sup> There are about 6000 people awaiting kidney transplantations alone, in South

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<sup>11</sup> GG 35099, 2/3/2012; DJ Mcquoid-Mason ‘Human tissue and organ transplant provisions: chapter 8 of the National Health Act and its Regulations, in effect from March 2012 – what doctors must know’ (2012) 102 (9) *SAMJ* 734 – 735.

<sup>12</sup> National Health Act, No. 61 of 2003, (ch) 8; GN R180 of GG 35099, 2/3/2012.

<sup>13</sup> National Health Act, No. 61 of 2003, (5) 62 (1).

<sup>14</sup> ‘Organ Donation Foundation of South Africa. Transplant Statistics. South Africa; Organ Donor Foundation’ Available at: <http://www.odf.org.za/index.php/did-you-know/statistics.html> accessed on 14 March 2019; A Kleinsmidt et al ‘Organ transplant ethics and law’ in K Moodley (ed) *Medical ethics, law and human rights – a South African perspective* (2017) 315 – 326.

<sup>15</sup> A Kleinsmidt et al ‘Organ transplant ethics and law’ in K Moodley (ed) *Medical ethics, law and human rights – a South African perspective* (2017) 315 – 326.

<sup>16</sup> E Miller ‘Organ donation and transplantation in South Africa: an update’ (2013) 31 (6) *CME* 220 – 222; HR Etheridge et al ‘Public attitudes to organ donation among a sample of urban-dwelling South African adults: a 2012 study’ (2013) 27 (5) *Clinical transplantation* 684-692.

<sup>17</sup> A Sparaco ‘Increasing organ donation: is presumed consent the answer?’ (2017) 6 (1) *Transplantation News* 5.

<sup>18</sup> D Thompson ‘Organ donation in South Africa – a call to action’ (2017) 33 (2) *SAMJ* 36 – 37.

<sup>19</sup> *Ibid.*

<sup>20</sup> A Sparaco ‘Increasing organ donation: is presumed consent the answer?’ (2017) 6 (1) *Transplantation News* 5; HR Etheridge et al ‘Public attitudes to organ donation among a sample of urban-dwelling South African adults: a 2012 study’ (2013) 27 (5) *Clinical Transplantation* 684 – 692.

Africa.<sup>21</sup> This is thought to be an underestimate, and there are probably numerous people that would benefit from a transplant and yet are not on a transplant waiting list, as awareness of transplantation in South Africa is still poor.<sup>22</sup>

Often, the most common situation when the question of organ donation and transplantation arises is when a family loses a loved one, and only then is the question of organ harvesting and transplantation raised, and this is at a time when there is deep emotional conflict and a sense of loss.<sup>23</sup> In 2016, only 249 kidney transplants were performed in South Africa, with 512 organ transplants being performed in total, and this included corneal transplants. If one considers that there are approximately 6000 people awaiting kidney transplants, and that only 249 kidney transplants were performed in 2016, it is apparent that the number of organ transplants being performed in South Africa is woefully inadequate.<sup>24</sup>

South Africa made history when the first successful heart transplant was performed by Dr. Christian Barnard at Groote Schuur Hospital in Cape Town, South Africa, in 1967.<sup>25</sup> However, our organ donation rates, are extremely low and do not compare well with other countries. Our cadaveric organ donation rate is less than 3 per million population.<sup>26</sup> Spain, by comparison has a cadaveric organ donation rate approaching 40 per million population, and even Brazil, a country that is often compared to South Africa because of its similar socio-economic status, achieves a rate of 14 per million population.<sup>27</sup>

About 200 000 people in South Africa, out of 53 Million, have signed organ donation forms, and have indicated that they wish to be organ donors according to the Organ Donor Foundation of South Africa.<sup>28</sup> However, in South Africa the family will still make a final decision regarding organ donation. It has been shown that the best chance of obtaining a positive result from the bereaved family is when consent is obtained by specially trained individuals, and not simply by the treating clinician.<sup>29</sup>

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<sup>21</sup> A Sparaco 'Increasing organ donation: is presumed consent the answer?' (2017) 6 (1) *Transplantation News* 5.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> 'Organ Donation Foundation of South Africa. Transplant Statistics. South Africa; Organ Donor Foundation' Available at: <http://www.odf.org.za/index.php/did-you-know/statistics.html> accessed on 14 March 2019.

<sup>25</sup> CN Barnard 'Human cardiac transplant. An interim report of a successful operation performed in Groote Schuur Hospital, Cape Town' (1967) 41 (48) *SAMJ* 1271 – 1274.

<sup>26</sup> D Thompson 'Organ donation in South Africa – a call to action' (2017) 33 (2) *SAMJ* 36 – 37.

<sup>27</sup> Ibid.

<sup>28</sup> 'Organ Donation Foundation of South Africa. Transplant Statistics. South Africa; Organ Donor Foundation' Available at: <http://www.odf.org.za/index.php/did-you-know/statistics.html> accessed on 14 March 2019.

<sup>29</sup> W Hume 'Factors influencing the family consent rates for organ donation in the UK' (2016) 71 (9) *Anaesthesia* 1053 – 1063.

A significant number of kidney transplants in South Africa are from live donors, related to the recipient.<sup>30</sup> It has been thought that South Africa can increase donation rates by encouraging live organ donation (related or unrelated). However, this is only an option for certain category of organ transplants.<sup>31</sup> Furthermore, the harvesting of an organ from a live donor puts the donor at risk of complications which themselves can be fatal.

It is important to mention here that in South Africa, there is a divide in access to healthcare between the public and private sectors. South Africa has a two-tiered health system, where 16% of the population that are medically insured have access to excellent healthcare, whilst the majority (84%) that are uninsured, have to rely on state facilities, that are often under-resourced.<sup>32</sup> The 2015 South African Renal Registry Annual report revealed that there were 30 kidney dialysis units in the public sector, and 228 in the private sector.<sup>33</sup> Moosa, in a recent comprehensive report on the state of kidney transplantation in South Africa, reported that some public sector dialysis facilities only accepted 25% of patients with end-stage kidney disease.<sup>34</sup> When comparing the public and private sectors in South Africa, the rate of kidney transplantation is more than 10 times higher in the private sector.<sup>35</sup> Moosa also reports that there is a difference in kidney transplantation rates amongst the different provinces in South Africa, with Gauteng and the Western Cape performing three quarters of all kidney transplants in South Africa. Kwazulu-Natal, with the second highest population, performs amongst the lowest number of kidney transplants in South Africa.<sup>36</sup> Overall, the number of organ transplants being performed in South Africa is extremely low, and this is due to the dire shortage of organs available for donation.

### 1.3 General reluctance of South Africans to donate organs.

The root cause of the shortage of organs in South Africa is the reluctance of people to bequeath their organs following their death, to donate an organ whilst alive (related or non-related living donor), or to consent to donation of an organ of a deceased family member (cadaveric organ donation). The consent rates and consequently the number of organ transplants taking place in

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<sup>30</sup> 'Organ Donation Foundation of South Africa. Transplant Statistics. South Africa; Organ Donor Foundation' Available at: <http://www.odf.org.za/index.php/did-you-know/statistics.html> accessed on 14 March 2019.

<sup>31</sup> D Thompson 'Organ donation in South Africa – a call to action' (2017) 33 (2) *SAMJ* 36 – 37.

<sup>32</sup> S Kevany et al 'Improving resource allocation decisions for health and HIV programmes in South Africa: Bioethical, cost-effectiveness and health diplomacy considerations' (2013) 8 (5) *Glob Public Health* 570 – 587.

<sup>33</sup> MR Davids 'South African Renal Registry Annual Report: 2015' (2017) 20 (1) *Afr. J Nephrol* 201 – 213.

<sup>34</sup> MR Moosa 'The state of kidney transplantation in South Africa' (2019) 109 (4) *SAMJ* 235 – 240; MR Moosa et al 'The dangers of rationing dialysis treatment: dilemma facing a developing country' (2006) 70 (6) *kidney Int* 1107 – 1114.

<sup>35</sup> MR Davids 'South African Renal Registry Annual Report: 2015' (2017) 20 (1) *Afr. J Nephrol* 201 – 213.

<sup>36</sup> MR Moosa 'The state of kidney transplantation in South Africa' (2019) 109 (4) *SAMJ* 235 – 240; MR Moosa et al 'The dangers of rationing dialysis treatment: dilemma facing a developing country' (2006) 70 (6) *kidney Int* 1107 – 1114.

South Africa is steadily declining.<sup>37</sup> There are myriads of reasons for this decline - lack of awareness, ignorance, fallacies and myths.<sup>38</sup> There are certain categories of people in South Africa that are particularly reluctant to consent to organ donation, these include people from lower socio-economic groups, Black African people, and people with strong religious beliefs.<sup>39</sup>

It is well known that organ donation rates from marginalized communities and those from lower socio-economic groups in South Africa have been very low.<sup>40</sup> It has also been well established that the need for organ transplantation in marginalized communities is the greatest. However, very few people from marginalized communities and those from lower socio-economic groups are registered as organ donors with the Organ Donation Foundation.<sup>41</sup> Recently the Organ Donor Foundation rolled out the Uluntu Project as a means to increase awareness of organ donation in marginalized and lower socio-economic communities. The Uluntu project commenced in 2016 in Gugulethu (Gauteng) and Khayalitsha (Western Cape) as a means to raise awareness of organ transplantation, building on existing knowledge, and dispelling misconceptions, the primary aim of the project being to raise the awareness of organ donation, so that if there is a referral in a hospital, the individual would at least have heard of organ transplantation before.<sup>42</sup>

The reluctance of Black South African population to consent to organ donation has been well established in a number of previous studies.<sup>43</sup> This trend has been found outside South Africa as

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<sup>37</sup> HR Etheridge et al 'Attitudes to organ donation among some urban South African populations remain unchanged: a cross-sectional study (1993 – 2013)' (2014) 184 (2) *SAMJ* 135 – 137; HR Etheridge et al 'Public attitudes to organ donation among a sample of urban-dwelling South African adults: a 2012 study' (2013) 27 (5) *Clinical transplantation* 684-692; A van Heerden et al 'Where do organs come from' (2016) 5 (1) *Transplantation News* 6 – 7; D Thompson 'Organ donation in South Africa – a call to action' (2017) 33 (2) *SAMJ* 36 – 37.

<sup>38</sup> Ibid.

<sup>39</sup> B Blignaut 'More people than expected in marginalized communities know about organ donation' (2017) 6 (2) *Transplantation News* 2; PM Dimo 'Organ donation behaviour: debates amongst black South African' (2018) 16 (3) *Gender and Behaviour* 12200 – 12210; RM Mphore 'Obliviousness, not disease, is what kills the nation' (2016) 15 (3) *Transplantation News* 6; D Thompson 'Organ donation in South Africa – a call to action' (2017) 33 (2) *SAMJ* 36 – 37.

<sup>40</sup> B Blignaut 'More people than expected in marginalized communities know about organ donation' (2017) 6 (2) *Transplantation News* 2.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> B Blignaut 'More people than expected in marginalized communities know about organ donation' (2017) 6 (2) *Transplantation News* 2; PM Dimo 'Organ donation behaviour: debates amongst black South African' (2018) 16 (3) *Gender and Behaviour* 12200 – 12210; HR Etheridge et al 'Attitudes to organ donation among some urban South African populations remain unchanged: a cross-sectional study (1993 – 2013)' (2014) 184 (2) *SAMJ* 135 – 137; HR Etheridge et al 'Public attitudes to organ donation among a sample of urban-dwelling South African adults: a 2012 study' (2013) 27 (5) *Clinical transplantation* 684-692; RM Mphore 'Obliviousness, not disease, is what kills the nation' (2016) 15 (3) *Transplantation News* 6.

well, and globally, most Africans are reluctant to donate their own organs, or that of a deceased family member. It is thought that Black African people are deeply religious and cultural people.<sup>44</sup> Also, given South Africa's past history of disempowerment, they are understandably suspicious of organ transplantation, and ignorance, fallacies and myths abound.<sup>45</sup>

#### 1.4 Reluctance of South African Muslims to participate in organ donation.

With regard to religion, it has been reported that adherents of Judaism and Islam are reluctant to participate in organ transplantation programmes.<sup>46</sup> Etheridge, studying attitudes to organ donation among urban-dwelling South African adults, reported that adherents of Islam (Muslims) people are least likely to either accept or donate organs.<sup>47</sup> And, yet Islamic Law is generally in favour of organ donation.<sup>48</sup> The reluctance of South African Muslims to donate organs, which may be on the basis of their cultural beliefs or simply ignorance of Islamic law, is not unique to

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<sup>44</sup> PM Dimo 'Organ donation behaviour: debates amongst black South Africans' (2018) 16 (3) *Gender and Behaviour* 12200 – 12210; HR Etheridge et al 'Attitudes to organ donation among some urban South African populations remain unchanged: a cross-sectional study (1993 – 2013)' (2014) 184 (2) *SAMJ* 135 – 137; HR Etheridge et al 'Public attitudes to organ donation among a sample of urban-dwelling South African adults: a 2012 study' (2013) 27 (5) *Clinical transplantation* 684-692; RM Mphore 'Obliviousness, not disease, is what kills the nation (2016) 15 (3) *Transplantation News* 6.

<sup>45</sup> PM Dimo 'Organ donation behaviour: debates amongst black South African' (2018) 16 (3) *Gender and Behaviour* 12200 – 12210; HR Etheridge et al 'Attitudes to organ donation among some urban South African populations remain unchanged: a cross-sectional study (1993 – 2013)' (2014) 184 (2) *SAMJ* 135 – 137; HR Etheridge et al 'Public attitudes to organ donation among a sample of urban-dwelling South African adults: a 2012 study' (2013) 27 (5) *Clinical transplantation* 684-692; RM Mphore 'Obliviousness, not disease, is what kills the nation (2016) 15 (3) *Transplantation News* 6; D Thompson 'Organ donation in South Africa – a call to action' (2017) 33 (2) *SAMJ* 36 – 37.

<sup>46</sup> D Thompson 'Organ donation in South Africa – a call to action' (2017) 33 (2) *SAMJ* 36 – 37.

<sup>47</sup> HR Etheridge et al 'Attitudes to organ donation among some urban South African populations remain unchanged: a cross-sectional study (1993 – 2013)' (2014) 184 (2) *SAMJ* 135 – 137; HR Etheridge et al 'Public attitudes to organ donation among a sample of urban-dwelling South African adults: a 2012 study' (2013) 27 (5) *Clinical transplantation* 684-692.

<sup>48</sup> D Thompson 'Organ donation in South Africa – a call to action' (2017) 33 (2) *SAMJ* 36 – 37; MY Rady et al 'Campaigning for organ donation at mosques' (2016) 28 *HEC Forum* 193 – 204; V Rispler Chaim et al 'Debates in Islamic bioethics on how to increase organ donation: between presumed consent and explicit consent' (2018) *Ethics Medicine and Public Health* 88 – 94; A Sharif 'Organ donation and Islam – challenges and opportunities' (2012) 94 (5) *Transportation Journal* 442 – 446; M Zahidul Islam 'Organ donation and transplantation issues in Islam and present situation' (2014) 22 *Journal of Law, Policy and Globalization* 99 – 103.

South African Muslims.<sup>49</sup> Harmanci Seren et al report a general reluctance of Muslims to participate in organ donation in Muslim majority countries.<sup>50</sup>

Interestingly, Padela et al found that higher levels of adherence to Islam did not negatively influence organ donation. In fact, people with lower levels of adherence to Islam, tended to donate organs less often.<sup>51</sup> Indeed, Najafizadeh et al have found that there is an increase in organ donation during the Muslim holy month of *Ramaḍān* (month of fasting, ninth month of the Islamic lunar calendar) due to increase in religious altruism.<sup>52</sup>

Although Muslims in South Africa comprise only 5% of the population, Islam is the fastest growing religion globally and locally.<sup>53</sup> Furthermore, Muslims in South Africa exercise a sphere of influence that belies their number. Islamic law takes precedence over any other law, as Muslims regard Islamic law as immutable and divinely inspired.<sup>54</sup> Therefore, in order to understand organ donation practices amongst Muslims in South Africa, one needs to understand the Islamic law (*Sharī`ah*) position on organ donation. This will be discussed in Chapter 3.

## 1.5 Rationale of the study

A practicing Muslim (adherent of the Islamic Faith), is unlikely to consent to organ donation, if it is not in keeping with the tenets of Islamic Law, even though it may be in accordance with South African law.<sup>55</sup> This is because Muslims regard Islamic Law as being immutable and God-ordained, as opposed to man-made (South African law).<sup>56</sup>

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<sup>49</sup> D Thompson 'Organ donation in South Africa – a call to action' (2017) 33 (2) *SAMJ* 36 – 37.

<sup>50</sup> AK Harmanci Seren et al 'Opinions and expectations of Muslim donor's relatives deciding organ donation: the sample of Istanbul (2018) 57 (6) *J Relig Health* 2512 – 2522.

<sup>51</sup> A Padela et al 'Relationship between Islamic religiosity and attitudes towards deceased organ donation among American Muslims: a pilot study' (2014) 97 (2) *Transplantation* 1292 – 1299.

<sup>52</sup> K Najafizadeh et al 'Holy month of Ramadan and increase in organ donation willingness' (2010) 21 (3) *Saudi J Kidney Dis Transplantation* 443 – 336.

<sup>53</sup> 'Islam in South Africa Wikipedia' <http://en.wikipedia.org/wiki/zolam> in South Africa, accessed on 16 March 2019; The Christian Science Monitor (10 January 2002) 'In South Africa many blacks convert to Islam' *The Christian Science Monitor* <http://www.csmonitor.com/world/africa#>, accessed on 16 March 2019.

<sup>54</sup> R Arbour et al 'Islam, brain death, and transplantation: culture, faith, and jurisprudence (2012) 23 (4) *Advanced Critical Care* 381 – 394; MY Rady et al 'Islam and end-of-life practices in organ donation for transplantation: new questions and serious sociocultural consequences' (2009) 21 (2) *HFC Forum* 175 – 205; RS Muliira et al 'A review of potential Muslim organ donors' perspective on solid organ donation: lessons for nurses in clinical practice (2014) *Nursing Forum* 49 (1) 59 – 70; S Sheikh 'Shariah: Law and ethics of organ donation in Islam' (2017) 13 (2) *J Int L Islamic L* 30 – 44; M Slabbert et al 'Law, religion and organ transplants' (2011) 76 (2) *Koers* 261 – 282.

<sup>55</sup> S Sheikh 'Shariah: Law and ethics of organ donation in Islam' (2017) 13 (2) *J Int L Islamic L* 30 – 44; D Thompson 'Organ donation in South Africa – a call to action' (2017) 33 (2) *SAMJ* 36 – 37.

<sup>56</sup> S Sheikh 'Shariah: Law and ethics of organ donation in Islam' (2017) 13 (2) *J Int L Islamic L* 30 – 44.

There has, as yet, been no study comparing Islamic law and South African law, with regard to living and cadaveric organ donation. The most prolific research on Islamic law and bioethical issues in South Africa has been conducted by Ebrahim.<sup>57</sup> Ebrahim has written exhaustively on a wide range of biomedical issues affecting Muslims in South Africa, including vaccination, reproductive health, ethical dilemmas in the intensive care unit, death and dying, euthanasia, and Islamic medical research.<sup>58</sup> More pertinent to this dissertation, Ebrahim has written extensively on Islamic law and organ donation and the validity of the living will in Islamic law.<sup>59</sup> However, Ebrahim writes from an Islamic law perspective, without reference to South African legislation. Slabbert has written extensively on organ donation and South African law, with little reference to Islamic law.<sup>60</sup> This mini-dissertation, therefore, attempts to close the gap in the literature, by a comparative study of Islamic and South African law, with reference to living and cadaveric organ donation. It is envisaged that there will be considerable overlap and consensus between the two laws, which will lead to a greater acceptance of organ donation amongst the Muslim community in South Africa. It is important for Healthcare Professionals involved in the care of Muslim families considering organ donation, to be aware of points of conflict between the two sets of laws. Furthermore, there is a possibility that Muslim personal law may be introduced into South African law in the recent future.<sup>61</sup> Although, at present, Muslim Personal Law is only concerned with Muslim marriages and divorce, it may, in time, extend to matters of inheritance and wills. In this eventuality, South African legislators should be aware of points of divergence between the two laws.

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<sup>57</sup> Professor Abul Fadl Mohsin Ebrahim is an emeritus Professor of Islamic Law at the University of KwaZulu-Natal.

<sup>58</sup> AFM Ebrahim *Islam and vaccination* (2013) 82; AFM Ebrahim 'Biomedical issues' *Islamic perspective* (1988) 164; AFM Ebrahim 'Reproductive Health and Islamic Values Ethical and Legal Insights' (2011) 107; AFM Ebrahim 'Intensive Care Unit (ICU) Ethical Dilemmas – *Guidelines for Muslim Families* (2014) 60; AFM Ebrahim et al 'Death and Dying': *Advising patient and family* (1995) 21; AFM Ebrahim et al 'Ethics of Medical Research' – *Some Islamic considerations* (1994) 13; AFM Ebrahim 'Euthanasia (Qatl al - alma)' (2007) 39 *Journal of the Islamic Medical Association of North America* 10 – 13.

<sup>59</sup> AFM Ebrahim 'Shariah and Organ Transplants' (1989) 67; AFM Ebrahim 'Organ Transplantation: contemporary Sunni Muslims legal and ethical perspectives' (1995) 9 (34) *Bioethics* 291 – 302; AFM Ebrahim 'Islamic perspective on Brain Death and Organ Transplantation: Current Issues and Challenges' in A Bagheri K Alali (eds) *Islamic Bioethics* (2017) 4; AFM Ebrahim 'Organ Transplantation contemporary Islamic legal and ethical perspectives' (1988) 146; AFM Ebrahim 'The Living Will (Wasiyat Al-Hayy) a study of its legality in the light of Islamic Jurisprudence' (2000) 19 *Med Law* 147 – 160.

<sup>60</sup> Professor Magda Slabbert is a Professor of Jurisprudence at the University of South Africa, and is the leading expert on organ donation and South African law.

<sup>61</sup> C Rautenbach 'Some comments on the current (and future) status of Muslims personal Law in South Africa' (2004) 1 (1) *Potchefstroom Electronic Law Journal* 1 – 34.

## 1.6 Research Methodology

This mini-dissertation involves desktop study of books, journals, theses and legislation from the UKZN libraries and from the electronic medium. Search tools such as Sabinet, Juta and Lexis-Nexis will be utilized to locate South African law, whilst Heinonline, Westlaw and Google Scholar will be employed to study Islamic law. In the first instance the research method utilized will be a black letter study of South African and Islamic law, in order to expose these laws with reference to organ donation. Thereafter a doctrinal research approach is employed in order to critically analyze the two laws. Organ donation practices are significantly impacted by social, cultural and religious factors. Therefore, there will be a socio-legal aspect to the mini-dissertation, but, again, research will involve only desktop study. Lastly, there will be a comparative research component to the dissertation, which will involve comparison of Islamic and South African law, as well as the study of International laws in Islamic countries, such as Iran and Pakistan. No empirical data will be collected, and all information can be found in the public domain. Ethical approval for the study was obtained from the University of KwaZulu-Natal Research Ethics Committee (Reference Number H55/0602/019M)

Chapter 2 involves a discussion of South African law and organ donation. Chapter 3 discusses Islamic law and organ donation. Chapter 4 is dedicated to bequeathing of organs, both in South African, and in Islamic law. Chapter 5 is a description of organ donation practices in other Muslim countries. Chapter 6 is an analytic comparison of Islamic and South African law, highlighting areas of consensus and divergence. For ease, a summary is provided at the end of each chapter. Chapter 7 is the final chapter, and ends with concluding remarks and recommendations, particularly to improve organ donation rates amongst the Muslim community in South Africa.

## Chapter 2

### South African law and organ donation

#### 2.1 Legislation governing organ donation in South Africa.

Organ transplantation in South Africa is regulated by the NHA<sup>62</sup> and its regulations in the Government Gazette of 2<sup>nd</sup> March 2012: Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes.<sup>63</sup> The NHA replaced the Human Tissue Act, which was repealed on the 1<sup>st</sup> March 2012.<sup>64</sup> Specifically chapter 8 of the NHA deals with aspects of organ donation.

The definition of “tissue” and “organ”, as defined by the NHA, has been discussed in the introduction in chapter 1 above. For the purposes of this mini-dissertation organ refers to any solid vital organ, example, kidney, liver, heart. The regulations provide that an organ may be removed from a living person only with written consent of the donor themselves, if they are over 18 years of age, or by the parents or guardians of donors aged under 18 year.<sup>65</sup> In terms of the Act, persons under the age of 18 years may not donate tissue that is not replaceable by natural processes.<sup>66</sup>

Section 58 of the Act deals with the institutions which may perform transplants and the authorizations required.<sup>67</sup> Section 60 of the Act deals with issues of payment for organs and is very specific. It is an offence for an organ donor to receive financial or other reward for organ donation except for reimbursement of reasonable costs incurred (eg. travel costs, medical bills).<sup>68</sup> It is also an offence to sell or trade in organs, except as provided for in the Act. A person convicted of either of these offences may be fined or imprisoned up to 5 years or both.<sup>69</sup> However, a healthcare provider (transplant doctor) registered with a statutory health professional council, may receive remuneration for any professional service rendered.<sup>70</sup> According to the Act, it is illegal to transplant a human organ into a person who is not a South African citizen or permanent resident without the Minister’s written authorization.<sup>71</sup> Even though, a potential non-South African, non-permanent resident donor is genuinely related to the South African recipient, ministerial consent is still required. In genuine cases, it is likely that the Minister will consent.<sup>72</sup> Doctors who transplant organs into non-South African citizens or permanent residents without

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<sup>62</sup> National Health Act, No. 61 of 2003.

<sup>63</sup> GG 35099, 2/3/2012.

<sup>64</sup> Human Tissue Act, No. 65 of 1983.

<sup>65</sup> GM R180, GG No. 33099, 2/3/2012.

<sup>66</sup> National Health Act, No. 61 of 2003, S 56 (2).

<sup>67</sup> National Health Act, No. 61 of 2003, S 58.

<sup>68</sup> National Health Act, No. 61 of 2003, S 60 (4).

<sup>69</sup> National Health Act, No. 61 of 2003, S 60 (5).

<sup>70</sup> National Health Act, No. 61 of 2003, S 60 (3).

<sup>71</sup> National Health Act, No. 61 of 2003, S 61 (3).

<sup>72</sup> DJ Mcquoid-Mason ‘Human tissue and organ transplant provisions: chapter 8 of the National Health Act and its Regulations, in effect from March 2012 – what doctors must know’ (2012) 102 (9) *SAMJ*. 734 – 735.

ministerial consent, as occurred in the kidney organ trafficking saga in Durban, (to be discussed later), or who charge a fee for a human organ, as opposed to a fee for professional services, are guilty of an offence, and on conviction may be subject to a fine or imprisonment up to 5 years or both.<sup>73</sup>

The Act also regulates donation of organs by a living person after death (bequeathing of organs). However, as there are very specific guidelines both in South African and in Islamic law, this will be discussed separately in chapter 4.

It is an important development, that the NHA defines death as “brain-death”. This was not previously defined in the repealed Human Tissue Act. The regulations provide that in the case of organ transplantation, the death of the deceased has to be determined by two doctors, one of whom must have been qualified for at least 5 years, and neither of whom may be members of the transplant team.<sup>74</sup>

Where a deceased has not prohibited organ donation whilst alive, or has not bequeathed organs whilst alive, the Act provides a specific order for relatives to consent to organ donation, namely, the spouse, partner, major child, parent, guardian, major brother or major sister.<sup>75</sup> Partners take precedence over all family members other than spouses, in respect of donating the organs of the deceased. Mcquoid-Mason opines that should other family members approach the courts to override a partner’s decision, the courts are unlikely to interfere with a partner’s decision made in accordance with provisions of the Act.<sup>76</sup>

The Act also provides that where persons legally empowered to donate organs on behalf of a deceased person cannot be located, the Director-General of Health may donate such organs to a person or institution provided that all the prescribed steps have been taken to locate a person authorized to give consent.<sup>77</sup> In practical terms, this situation rarely arises. The Regulations provide that organs donated to an institution must be harvested within a period of 24 hours, after which the body may be claimed by the relatives in a specific order (spouse, partner, major child, parent, guardian, major brother or major sister).<sup>78</sup> The Regulations provide for confidentiality around the organ donation process. The Regulations prohibit the disclosure without the consent of the appropriate person, any information that may identify (i) the deceased person; (ii) the donor of an organ of a deceased person; (iii) living organ donor; (iv) the person who consented to organ donation; or (v) the organ recipient.<sup>79</sup> Except as provided in any other law, any person that acquires the organ of a deceased or living person, in any manner or for any purpose, other

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<sup>73</sup> National Health Act, No. 61 of 2003, S 61 (5).

<sup>74</sup> GN R180, GG No. 35099, 2/3/2012.

<sup>75</sup> National Health Act, No. 61 of 2003, S 62 (2).

<sup>76</sup> DJ Mcquoid-Mason ‘Human tissue and organ transplant provisions: chapter 8 of the National Health Act and its Regulations, in effect from March 2012 – what doctors must know’ (2012) 102 (9) *SAMJ* 734 – 735.

<sup>77</sup> National Health Act, No. 61 of 2003, S 62 (3).

<sup>78</sup> GN, GG 35099, 2/3/2012.

<sup>79</sup> *Ibid.*

than provided for in the Act or its Regulations, is guilty of an offence and liable to a fine or imprisonment for a period of 10 years or both.<sup>80</sup>

Slabbert, who has written extensively on South African legislation and organ donation, reflects that new statutes such as the Protection of Personal Information Act 4 of 2013, should not hinder the organ donation process.<sup>81</sup> Slabbert has also written on other interesting aspects of organ donation and the South African law including property rights and ownership of human organs, and whether donated human tissue is a medical device or just tissue.<sup>82</sup> These aspects, though extremely thought provoking, are, unfortunately, beyond the scope of my mini-dissertation.

## 2.2 Opt-in versus opt-out system

Currently South African organ donation is based on the opt-in system.<sup>83</sup> This means that once a person is declared brain dead, the bereaved family is approached with a request to harvest the organs of their loved ones. Often this is the first time that the family confronts the concept of organ donation and transplantation. Furthermore, it is a time of great emotional turmoil with a sense of loss being experienced by the family. Consent for organ donation, in the vast majority of cases is declined. There are an increasing number of countries that are adopting the opt-out system. This means that every person after death is presumed to be a potential organ donor unless the patient has indicated otherwise during his/her life time.

Many countries adopt “soft” opt-out systems, where the family members can decline organ donation on behalf of the deceased person, if they so wish. France is the latest country to adopt the opt-out system as from January 2017. Wales adopted the system in 2006 with the number of transplants increasing by one-third. It has generally been found that adopting the opt-out system increases organ donation by about 20%.<sup>84</sup>

Spain is the world leader with regard to the soft opt-out option. It is thought that Spain’s success with regard to organ donation and transplantation is not only due to the adoption of the soft opt out system, but as a result of the exceptional support, resources and education that have been put in place into every major hospital.<sup>85</sup>

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<sup>80</sup> GN, GG 35099, 2/3/2012.

<sup>81</sup> M Slabbert et al ‘The possible effect of the Protection of Personal Information Act 4 of 2013 on organ and tissue donations’ (2017) *Obiter* 662-640.

<sup>82</sup> M Slabbert “‘This is my kidney, I can do what I want with it” – property right and ownership of human organs’ (2009) *Obiter* 499-517; M Slabbert ‘Donated human tissue: is it a medical device or just tissue?’ (2016) *Obiter* 523-564.

<sup>83</sup> A Sparaco ‘Increasing organ donation: is presumed consent the answer?’ (2017) 6 (1) *Transplantation News* 5.

<sup>84</sup> A Sparaco ‘Increasing organ donation: is presumed consent the answer?’ (2017) 6 (1) *Transplantation News* 5.

<sup>85</sup> *Ibid.*

However, implementation of the opt-out systems does not always have the desired effect. In Chile there was a drastic decline in the number of organ donations when the opt-out system was adopted. It is thought that the Chilean population was not comfortable with the notion that the State could mandate involuntary organ donation. This decline in the number of organ donations has been the experience in a number of countries.<sup>86</sup> Etheridge and co-workers studying public attitudes to organ donation amongst urban dwelling South African adults felt that an opt-out system would have a negative effect on organ donation rates in South Africa.<sup>87</sup> Etheridge postulates that the opt-out system of presumed consent is not consistent with South African law, and in particular the Constitution.<sup>88</sup> Furthermore, the religious and cultural freedom as well as the concept of informed consent will also be compromised.<sup>89</sup>

Slabbert and Venter reiterate that it is not the opt-in organ procurement system in South Africa that is the problem, and, they emphasize that Spain even with its soft opt-out system still asks the relatives of the deceased for consent before proceeding to organ harvesting.<sup>90</sup> At present, the majority of researchers believe that given the nature of our population in South Africa, an opt-out system is not feasible, as the South African public lacks enough information about organ donation to make an informed decision.<sup>91</sup>

### 2.3 Organ trafficking in South Africa

The shortage of organs globally and in South Africa undoubtedly led to an international organ trafficking syndicate operating in South Africa.<sup>92</sup> In December 2003, South African police arrested two Israeli nationals and a Durban businessman suspected of being involved in an

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<sup>86</sup> A Sparaco 'Increasing organ donation: is presumed consent the answer?' (2017) 6 (1) *Transplantation News* 5.

<sup>87</sup> HR Etheridge et al 'Attitudes to organ donation among some urban South African populations remain unchanged: a cross-sectional study (1993 – 2013)' (2014) 184 (2) *SAMJ* 135 – 137; HR Etheridge et al 'Public attitudes to organ donation among a sample of urban-dwelling South African adults: a 2012 study' (2013) 27 (5) *Clinical transplantation* 684-692.

<sup>88</sup> *Ibid.*

<sup>89</sup> HR Etheridge et al 'Attitudes to organ donation among some urban South African populations remain unchanged: a cross-sectional study (1993 – 2013)' (2014) 184 (2) *SAMJ* 135 – 137; HR Etheridge et al 'Public attitudes to organ donation among a sample of urban-dwelling South African adults: a 2012 study' (2013) 27 (5) *Clinical transplantation* 684-692.

<sup>90</sup> M Slabbert, B Venter 'Routine referrals: a possible solution for transplantation shortages' (2017) 10 *S Afr J Bioethics Law* 15-19.

<sup>91</sup> I HR Etheridge et al 'Attitudes to organ donation among some urban South African populations remain unchanged: a cross-sectional study (1993 – 2013)' (2014) 184 (2) *SAMJ* 135 – 137; HR Etheridge et al 'Public attitudes to organ donation among a sample of urban-dwelling South African adults: a 2012 study' (2013) 27 (5) *Clinical transplantation* 684-692; M Slabbert, B Venter 'Routine referrals : a possible solution for transplantation shortages' (2017) 10 *S Afr J Bioethics Law* 15-19.

<sup>92</sup> D Bass 'Kidneys for cash and egg safaris – can we allow 'transplant tourism' to flourish in South Africa?' (2005) *SAMJ* 95 (1) 42-44; S. Khoza 'The human organ trade – the South African tragedy' (2009) *S Afr J – Bioethics Law* 2 (2) 46-47.

international organ trafficking syndicate operating between Israel, Brazil and South Africa.<sup>93</sup> Wealthy Israeli citizens with kidney diseases were obtaining organs from poor Brazilian people using fraudulent documentation. The Durban businessman paid an admission of guilt fine, and Netcare in KwaZulu-Natal (St. Augustine's Hospital) paid an admission of guilt fine of R4 Million, and a confiscation order of R3,8 Million.<sup>94</sup> A South African doctor and a Hebrew translator received suspended sentences.<sup>95</sup>

Organ trafficking is not unique to South Africa, and developing countries with a largely poor population are targets for exploitation by wealthy citizens from developed countries. In Pakistan, prior to passing of regulatory legislation 80% of transplants occurred in unrelated foreigners.<sup>96</sup> Since then, Pakistan has passed legislation that has eradicated “transplant tourism” and exploitation of its poor, vulnerable population.<sup>97</sup>

Scheeper-Hughes, of Organ Watch, documented that organ trafficking occurs in many parts of the world including Argentina, Brazil, Chile, Israel, Turkey, South Africa, United States of America, the United Kingdom and India.<sup>98</sup> Khoza writes that South Africa is targeted for organ sales because of the favourable exchange rate between the South African rand and the American dollar providing recipients with ‘value for their money’. More importantly, he states that due to the inappropriate application of legislation in South Africa, such as the Prevention of Organized Crime Act and the Preventing and Combating of Corrupt Activities Act, arrest for such criminal activities is rare.<sup>99</sup> This is evident by the fact that Magda Slabbert and Hennie Oosthuizen reported that the plea bargaining and admission of guilt fine on charges of trafficking in human organs by Netcare KwaZulu-Natal, St. Augustine's Hospital, Durban to the Commercial Crimes Court of the Kwazulu Regional Court (a specialized unit of the National Prosecuting Authority of South Africa) was the first of its kind.<sup>100</sup> Slabbert and Oosthuizen also point out that South

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<sup>93</sup> D Bass ‘Kidneys for cash and egg safaris – can we allow ‘transplant tourism’ to flourish in South Africa?’ (2005) 95 (1) *SAMJ* 42-44.

<sup>94</sup> D Bass ‘Kidneys for cash and egg safaris – can we allow ‘transplant tourism’ to flourish in South Africa?’ (2005) 95 (1) *SAMJ* 42-44; S Khoza ‘The human organ trade – the South African tragedy’ (2009) *S Afri J – Bioethics Law* 2 (2) 46-47.

<sup>95</sup> A Kleinsmidt et al ‘Organ transplant ethics and law’ in K Moodley (ed) *Medical ethics, law and human rights – a South African perspective* (2017) 315 – 326.

<sup>96</sup> M Ilyas et al ‘The Islamic perspective of organ donation in Pakistan’ (2009) *Saudi J Kidney D.S Transplantation* 20 (1) 154-156.

<sup>97</sup> M Ilyas et al ‘The Islamic perspective of organ donation in Pakistan’ (2009) *Saudi J Kidney D.S Transplantation* 20 (1) 154-156; S Sheikh ‘Shariah: Law and ethics of organ donation in Islam’ (2017) 13 (2) *J Int L Islamic L* 30 – 44.

<sup>98</sup> N Scheeper-Hughes ‘A grisly global trade: a taboo tumbles : the market for fresh human organs is expanding worldwide, with the poor providing the rich’ *Los Angeles Times* 3 August 2003 at 2. Nancy Scheeper-Hughes is the Head of Organ Watch, which is a non-governmental organization against the sale of human organs, based at the University of California.

<sup>99</sup> S Khoza ‘The human organ trade – the South African tragedy’ (2009) *S Afri J -Bioethics Law* 2 (2) 46-47.

<sup>100</sup> M Slabbert, H Oosthuizen ‘The payment for an organ and the admission of guilt by a South African Hospital. *The State v Netcare KwaZulu-Natal (Pty) Ltd – Agreement in terms of section 105A(1) of the*

Africa has no national organ register, in which every transplant is recorded. This then allows organ trafficking syndicates to facilitate illegal organ transplants particularly in private South African hospitals, furthermore, the Human Tissues Act stipulated that the donor should be a blood relative of the recipient or the recipient's spouse. Yet, in the Netcare case, few questions were asked, and the prospective "donor" (actually the seller) was coached by the organ trafficking syndicate to act as the relative of the recipient (actually the buyer).<sup>101</sup> However, some good can still be obtained from the learning experience in the Netcare, St. Augustine's Hospital human organ trafficking conviction. Slabbert and Oosthuizen maintain:

"The Netcare case is giving us a golden opportunity to revisit current and future laws and to re-think whether paying the donor is not the just way to go".<sup>102</sup>

## 2.4 Evaluation of the current South African legal system

Although, the primary aim of this mini-dissertation is a comparative analysis of South African and Islamic law, it is appropriate to make a few comments on the evaluation of the current South African legal system. Obviously, legislative reform is only one method of improving organ donation rates in South Africa, and the primary efforts should be focused on improving social awareness of organ donation and changing the perceptions of society. Healthcare personnel can also not remain indifferent particularly to the plight of indigent patients with terminal diseases that can be potentially cured by organ donation.<sup>103</sup> These recommendations will be elaborated in the last chapter.

The merits of the opt-in versus opt-out system in South Africa were discussed under 2.2 above. To combat organ trafficking in South Africa, Slabbert feels that organ trafficking should be made a specific crime or acts such as the Prevention of Organized Crime Act should be made directly applicable to illegal organ sales.<sup>104</sup> A major shortcoming in South Africa pointed out by both

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Criminal Procedure Act 51 of 1977, Netcare KwaZulu (Pty) Ltd and the State, Commercial Crime Court, Regional Court of KwaZulu-Natal, Durban – Case No. 41/1804/2010' (2011) *Obiter* 740-746.

<sup>101</sup> M Slabbert, H Oosthuizen 'The payment for an organ and the admission of guilt by a South African Hospital. *The State v Netcare KwaZulu-Natal (Pty) Ltd* – Agreement in terms of section 105A(1) of the Criminal Procedure Act 51 of 1977, Netcare KwaZulu (Pty) Ltd and the State, Commercial Crime Court, Regional Court of KwaZulu-Natal, Durban – Case No. 41/1804/2010' (2011) *Obiter* 740-746; The Human Tissues Act No. 65 of 1983 (s4.1.3).

<sup>102</sup> M Slabbert, H Oosthuizen 'The payment for an organ and the admission of guilt by a South African Hospital. *The State v Netcare KwaZulu-Natal (Pty) Ltd* – Agreement in terms of section 105A(1) of the Criminal Procedure Act 51 of 1977, Netcare KwaZulu (Pty) Ltd and the State, Commercial Crime Court, Regional Court of KwaZulu-Natal, Durban – Case No. 41/1804/2010' (2011) *Obiter* 740-746.

<sup>103</sup> F Mnyongani, M Slabbert 'The cost of indifference in a medical negligence case : *Lushaba v MEC for Health, Gauteng* (17077/2012 (2014) *ZAGP JHC* 407 (16 October 2014) (2018) *Obiter* 561-573.

<sup>104</sup> M Slabbert 'Combat organ trafficking – reward the donor or regulate sales' (2008) *Koers* 73 (1) 75-99.

the medical and legal fraternity, is that there is no national organ procurement or allocation organization, as there is in the United States and United Kingdom.<sup>105</sup>

Slabbert and Venter propose a South African National Organ Procurement Organization (SANPO), as a non-profit organization, much like the South African National Blood Service, to facilitate organ donation processes.<sup>106</sup> Such a company could charge a fixed service fee per transplant which could be recouped by reimbursements from medical schemes, government or individuals. A National Call Centre should be established and publicized to ensure an efficient and seamless organ transplant service in South Africa.<sup>107</sup>

At present, many brain-dead patients who could be potential organ donors are having their ventilators switched off by their treating doctors, without their relatives being given the option of organ donation. The South African government must mandate doctors to make routine referrals to a transplant co-ordinator for such patients.<sup>108</sup> At present the NHA recognizes death as brain death. However, legislation could be expanded to include mandated referral of patients who suffer circulatory death (donation after circulatory death).<sup>109</sup> Organ donation referrals should also be mandated in end-of-life decisions.<sup>110</sup>

Finally, a number of medical experts involved in organ transplantation have made a strong case for incentivizing the donor, either by prioritizing the donor in organ allocation if required or more simply, rewarding the donor under state regulated control.<sup>111</sup> These sentiments have been echoed by many in the legal fraternity as well. Slabbert and others have made compelling arguments for rewarding a kidney donor and establishing a state regulated compensation system for donors, as in Iran (discussed in chapter 5).<sup>112</sup> South African laws makers owe a debt of

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<sup>105</sup>MR Moosa 'The state of kidney transplantation in South Africa' (2019) 109 (4) *SAMJ* 235 – 240; MR Moosa et al 'The dangers of rationing dialysis treatment: dilemma facing a developing country' (2006) 70 (6) *kidney Int* 1107 – 1114; M. Slabbert 'One heart, two patients: who gets a donor organ?' (2009) *Stell L R* 1 124-138.

<sup>106</sup> M Slabbert 'Combat organ trafficking – reward the donor or regulate sales' (2008) *Koers* 73 (1) 75-99.

<sup>107</sup>*Ibid.*

<sup>108</sup> MR Moosa 'The state of kidney transplantation in South Africa' (2019) 109 (4) *SAMJ* 235 – 240; MR Moosa et al 'The dangers of rationing dialysis treatment: dilemma facing a developing country' (2006) 70 (6) *kidney Int* 1107 – 1114; M Slabbert 'Combat organ trafficking – reward the donor or regulate sales' (2008) *Koers* 73 (1) 75-99.

<sup>109</sup> M Slabbert, B Venter 'Routine referrals : a possible solution for transplantation shortages' (2017) 10 *S Afr J - Bioethics Law* 15-19.

<sup>110</sup> D Thompson 'Organ donation in South Africa – a call to action' (2017) 33 (2) *SAMJ* 36 – 37.

<sup>111</sup> D Bass 'Kidneys for cash and egg safaris – can we allow 'transplant tourism' to flourish in South Africa?' (2005) *SAMJ* 95 (1) 42-44; D Thompson 'Organ donation in South Africa – a call to action' (2017) 33 (2) *SAMJ* 36 – 37.

<sup>112</sup> B Venter, M Slabbert 'Rewarding a living kidney donor : a comparison between South Africa, Singapore and Iran' (2013) 34 *Obiter* 185-199; M Slabbert, H Oosthuizen 'Establishing a market for human organs in South Africa Part 1 : a proposal' (2007) *Obiter* 28 44-69; M Slabbert, H Oosthuizen 'Establishing a market for human organs in South Africa Part 2 : shortcomings in legislation and the current system of organ procurement' (2007) *Obiter* 28 304-323; M Slabbert ' The law as an obstacle in solid organ donations and transplantations' (2018) 8 (1) *THRHR* 70-84.

gratitude to scholars such as Slabbert and Venter who have done a lot of the groundwork for establishment of a state run compensated organ procurement system.<sup>113</sup>

Slabbert has provided compelling bioethical arguments in favour of regulated kidney sales in South Africa.<sup>114</sup> Some feel that there may be constitutional objections to human kidney sales in South Africa, however, Venter has provided a selection of constitutional perspectives that demonstrate that it is constitutionally acceptable to remunerate a kidney donor.<sup>115</sup> In fact, Slabbert and Oosthuizen have already published a ‘contract of sale’ as a proposed method of human organ sales in South Africa.<sup>116</sup>

## 2.5 Summary

Organ donation in South Africa is regulated by the NHA. South Africa requires explicit consent for organ donation, and follows an opt-in system. Sale of human organs in South Africa are illegal. South Africa has become the target of an organ trafficking syndicate, and this was mainly due to the failure of implementation of existing South African legislation.<sup>117</sup> However, in my view, South African legislation is fairly conservative and has many shortcomings.

Recommendations for a number of legislative reforms are made with a view to improving organ donation rates in South Africa. To quote Venter and Slabbert:

“Only the law can help with the dire need concerning the availability of kidneys for transplants. Taking this a step further, the law can develop and make the accessibility of kidneys easier by allowing the buying and selling of kidney in a regulated environment”.<sup>118</sup>

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<sup>113</sup> Ibid.

<sup>114</sup> M Slabbert ‘Ethics, justice, and the sale of kidney for transplantation purposes’ (2010) 13 (2) *PER/PELS* 77-105.

<sup>115</sup> B Venter ‘A selection of constitutional perspectives on human kidney sales’ (2013) 16 (1) *PER/PELJ* 352-403.

<sup>116</sup> M Slabbert, H Oosthuizen ‘Establishing a market for human organs in South Africa Part 1 : a proposal’ (2007) *Obiter* 28 44-69; M Slabbert, H Oosthuizen ‘Establishing a market for human organs in South Africa Part 2 : shortcomings in legislation and the current system of organ procurement’ (2007) *Obiter* 28 304-323; M Slabbert ‘The law as an obstacle in solid organ donations and transplantations’ (2018) 8 (1) *THRHR* 70-84.

<sup>117</sup> S. Khoza ‘The human organ trade – the South African tragedy’ (2009) *S Afri J – Bioethics Law* 2 (2) 46-47.

<sup>118</sup> B Venter, M Slabbert ‘Rewarding a living kidney donor : a comparison between South Africa, Singapore and Iran’ (2013) 34 *Obiter* 185-199; M Slabbert, H Oosthuizen ‘Establishing a market for human organs in South Africa Part 1 : a proposal’ (2007) *Obiter* 28 44-69; M Slabbert, H Oosthuizen ‘Establishing a market for human organs in South Africa Part 2 : shortcomings in legislation and the current system of organ procurement’ (2007) *Obiter* 28 304-323; M Slabbert ‘The law as an obstacle in solid organ donations and transplantations’ (2018) 8 (1) *THRHR* 70-84.

## Chapter 3

### Islamic law and organ donation

#### 3.1 Background

The Western interpretation of Islam is that Islam is a monotheistic religion and is the most recent of the Abrahamic (Semitic) faiths. As for Muslims, they believe that right from the first Prophets, Adam, and Mūsā (Moses) to Ibrāhīm (Abraham), to `Isā (Jesus) Islam was the religion with the belief that the Prophet Muḥammad was the last Prophet in the chain of the Prophets.<sup>119</sup> Muslims (adherents of Islam) believe that the *Qur'ān*, the divine word of God (Allah), was revealed to the Prophet Muḥammad (born 571, died 632), whom they believe is the last messenger of God.<sup>120</sup> Islam literally means submission to Allah (God), and a Muslim is one who submits to Allah.<sup>121</sup> Islam is the second largest religion in the world, with Muslims constituting over 1.6 billion in number, accounting for nearly a quarter of the world's population.<sup>122</sup> There is no such thing as a “typical Muslim”, with 40% Asian (eg from India, Pakistan, Afghanistan, Indonesia, Malaysia, Philippines and China); 30% from sub-Saharan Africa, 20% Arab from the Middle-East, 3% European and 1% from the Americans.<sup>123</sup> There are 5 million Muslims alone in the United State of America (roughly one third each Black, White and Asian), with Islam in the United Kingdom constituting the second largest religion, with Muslims forming the majority of the so-called black and minority ethnic (BME) population.<sup>124</sup>

Islam is different from other religions in that it is a complete way of life and encompasses the secular and spiritual with the mundane day to day activities of life.<sup>125</sup> Although their core

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<sup>119</sup> MY Rady et al 'Islam and end-of-life practices in organ donation for transplantation: new questions and serious sociocultural consequences' (2009) 21 (2) *HFC Forum* 175 – 205.

<sup>120</sup> M Ibid.

<sup>121</sup> M Ilyas et al 'The Islamic perspective of organ donation in Pakistan' (2009) *Saudi J Kidney D.S Transplantation* 20 (1) 154-156.

<sup>122</sup> P Goodarzi 'Tissue and organ donation and transplantation in Iran' (2015) 16 *Cell Tissue Bank* 295-301.

<sup>123</sup> MY Rady et al 'Islam and end-of-life practices in organ donation for transplantation: new questions and serious sociocultural consequences' (2009) 21 (2) *HFC Forum* 175 – 205.

<sup>124</sup> MY Rady et al 'Islam and end-of-life practices in organ donation for transplantation: new questions and serious sociocultural consequences' (2009) 21 (2) *HFC Forum* 175 – 205; A Sharif 'Organ donation and Islam – challenges and opportunities' (2012) 94 (5) *Transportation Journal* 442 – 446.

<sup>125</sup> M Albar 'Organ transplantation: a Sunni Islamic perspective' (2012) 23 *Saudi J Kidney Dis Transpl* 817-822.

beliefs are the same, Muslims, politically can be divided into two groups; the majority (about 95%) are *Sunni*, and the remainder are *Shī`ah*.<sup>126</sup>

The word, ‘*Shī`ah*’, literally means “Party”. The *Shī`ah* community is divided into several groups but the two main groups are the *Imāmī Shī`ah* (Iran) and the *Zaydiyyah* (Yemen). The *Imāmī Shi`ah* believe that after the Prophet Muḥammad’s demise, `Alī, the son-in-law of the Prophet, should have succeeded him as the first head of state (Caliph), and not Abū Bakr. As for the *Zaydiyyah*, they are closer to the *Sunnī* majority in Jurisprudence, and also accepting Abū Bakr as the first successor of the Prophet. Iran is the only *Shī`ah* Muslim country.<sup>127</sup> There are four schools of Islamic jurisprudence amongst *Sunni* Muslims; *Ḥanafī*, *Shāfi`ī*, *Ḥanbalī* and *Mālikī*.<sup>128</sup> For simplicity sake, in this mini-dissertation, the (*Imāmī*) *Shī`ah* (mainly in Iran) school of jurisprudence, will be regarded as a fifth school of Islamic jurisprudence, while the *Zaydiyyah* faction is closer to the *Sunnī Ḥanafī* school.

Religion plays a major role in peoples’ decisions in life, perhaps more so in Islam than in other religions.<sup>129</sup> Islamic law or *Sharī`ah* plays a pivotal role in all aspects of a Muslim’s life. In order to understand organ donation practices in a Muslim community, one needs to understand the concept and underlying principles of *Sharī`ah*.

## 3.2 Principles and sources of Islamic law (*shari`ah*)

### 3.2.1 Background

It is important for the reader to understand that Muslims regard Islamic law or *Sharī`ah* to be the ultimate, immutable God-given law. This is distinct from any other man-made law (eg South African law, which is subject to change. Muslims believe that the legal foundation or *Sharī`ah* is laid out in the *Qur`ān* (holy book of Muslims), revealed by God to Prophet Muḥammad), the *Sunnah* (Practices of Prophet Muhammad), and the *Ḥadīth* (verbal commands) of Prophet Muhammad).<sup>130</sup> Muslims believe that towards the end of Prophet Muḥammad’s life, Allah had perfected the religion of Islam in all aspects, and through Prophet Muḥammad, passed down to the Muslim community (*ummah*), a complete set of laws to govern all aspects of their lives.<sup>131</sup>

<sup>126</sup> P Goodarzi ‘Tissue and organ donation and transplantation in Iran’ (2015) 16 *Cell Tissue Bank* 295-301.

<sup>127</sup> Ibid.

<sup>128</sup> AFM Ebrahim ‘Organ Transplantation contemporary Islamic legal and ethical perspectives’ (1988) 146.

<sup>129</sup> RS Mulira et al ‘A review of potential Muslim organ donors’ perspective on solid organ donation: lessons for nurses in clinical practice (2014) *Nursing Forum* 49 (1) 59 – 70; M Slabbert et al ‘Law, religion and organ transplants’ (2011) 76 (2) *Koers* 261 – 282.

<sup>130</sup> ‘a hadith search engine’ available at <http://ahadith.co.uk/search>, accessed on 12 April 2019; S Sheikh ‘Shariah: Law and ethics of organ donation in Islam’ (2017) 13 (2) *J Int L Islamic L* 30 – 44.

<sup>131</sup> S Sheikh ‘Shariah: Law and ethics of organ donation in Islam’ (2017) 13 (2) *J Int L Islamic L* 30 – 44.

Muslims maintain that all laws are derived from careful study of these primary sources (*Qur'an*, *Sunnah* and *Hadīth*), and there can be no new addition to them, except in interpretation.<sup>132</sup>

*Sharī'ah* literally means “way to the source of water”, or “the path leading to the watering hole”.<sup>133</sup> *Sharī'ah* is a methodical and logical system of comprehensive guidelines that are based on widely accepted authenticated religious beliefs. A Muslim is one “who submits to God”, and the *Sharī'ah* is the practical guide that shows Muslims how this submission can be practiced and achieved.<sup>134</sup> Although there is no clergy in Islam, religious scholars (*ulamā*) and jurists play a central role in a Muslim community, and study Islam under renowned and established scholars, gaining the authority to interpret and apply the *Sharī'ah*.<sup>135</sup> Mastery of *Sharī'ah* is extremely difficult, intellectually intensive and time-consuming, and requires one to study under an established authentic Islamic scholar/ (*ālim*) and jurist. Firstly, one must gain qualification as an *ālim*. This requires intensive knowledge of Islam as well as the Arabic language. Thereafter, a further period of specialized study is required in order to gain mastery of *Sharī'ah* and Islamic jurisprudence.<sup>136</sup>

*Sharī'ah* denotes great importance to both language and context. Once this is established, it is determined whether an expression is used in a real or a metaphorical sense. Islamic jurisprudence is known as *fiqh*; and is the human understanding and interpretation of the *Sharī'ah*.<sup>137</sup> An Islamic jurisprudential scholar (*faqīh*) will need to determine whether the meaning of a word is clear, can be clarified by further research, or ambiguous. Ambiguous words, which cannot be clarified by any means, are not given legal significance, and are not sources of religious rulings (*fatāwā*). An Islamic jurist (*faqīh*) must also distinguish between general expressions and those that are specific to a certain context. Furthermore, the *faqīh* must distinguish between the imperative form of religious commands that obligate the individual to act, and the prohibitive commands that asks an individual to refrain from a certain activity. Depending upon the analysis of the above deliberations, activities can either be deemed lawful (*ḥalāl*) or unlawful (*ḥarām*).<sup>138</sup>

### 3.2.2 Sources of *Sharī'ah*

*Sharī'ah* can be divided into two broad categories. The first category consists of acts of worship (*ibadat*). These do not change and are not normally policed by the Islamic government, as they are considered inherently private affairs, which the individual will have to account to God in the hereafter.<sup>139</sup> However the Friday prayers and two prayers, one at the end of the annual fasting and the other on the eve of annual pilgrimage to Makkah fall in the domain of the Islamic government. The second category, are activities that govern relationships between individuals and social transactions in this world (*mu`āmalāt*). It is this second category of the *Sharī'ah* that I

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<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> S Sheikh ‘Shariah: Law and ethics of organ donation in Islam’ (2017) 13 (2) *J Int L Islamic L* 30 – 44.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

will focus on. The *mu`amalāt* category of *Sharī`ah* is based on two primary sources; the *Qur`ān* and *Sunnah/Hadīth* of Prophet Muḥammad; and two secondary sources; Islamic scholarly consensus (*ijmā`*) and legal reasoning by analogy (*qiyās*). *Ijmā`* and *qiyās* are components of *ijtihad* (process of legal reasoning through which a jurist rationalizes law based on the *Qur`ān* and *Sunnah*).<sup>140</sup> I will briefly explain the four sources of *Sharī`ah* below.

(i) *Qur`ān*

*Sharī`ah* is principally based on the Holy *Qur`ān*, which Muslims believe is the word of God and revealed verbatim to the Prophet Muḥammad.<sup>141</sup> Of 6666 verses in the *Qur`ān*, approximately 500 have legal content. These cover a broad range of issues including personal matters (charity, fasting, pilgrimages), family matters (marriage, divorce, paternity, child custody, inheritance), commercial transactions (sales, leases, loans, interest, mortgage etc.), crimes and penalties, justice, equality, evidence, citizen's rights and duties and consultations in government affairs, and economic affairs.<sup>142</sup> The *Qur`ān* expresses the law both in legal and ethical principles.<sup>143</sup>

(ii) *Sunnah* and *Hadīth*

*Sunnah* and *Hadīth* constitute the second primary source of *Sharī`ah*.<sup>144</sup> *Sunnah* (literally “well-trodden path”) are based on the practices of Prophet Muhammad and constitute Islamic traditions.<sup>145</sup> *Hadīth* (literally “to report”) are the collections of words and deeds of the Prophet Muhammad that were recorded both verbally and in writing by his companions.<sup>146</sup> *Hadīth* are based on Prophet Muḥammad's own life and are a biographical basis of *Sharī`ah*. The *Sunnah*, on the other hand, is the entire system of religious, legal and social obligations derived from the hadith.<sup>147</sup> The categorization and authentication of *Hadīth* is an arduous science which is beyond the scope of this mini-dissertation.

(iii) *Ijmā`*

The third source of legal principles followed by the Muslim community is *Ijmā`*. *Ijmā`* is the consensus of legal opinion by Jurists on religious and legal issues.<sup>148</sup> Legitimacy of scholarly decisions is achieved by consensus of the Muslim community. *Ijmā`* is an extremely important source of *Sharī`ah* in Islam. In a *Hadīth*, Prophet Muḥammad was reported to say “My people

<sup>140</sup> Ibid.

<sup>141</sup> AY Ali *The Holy Qur`an – Test, translation and commentary* (1984); ‘a hadith search engine’ available at <http://ahadith.co.uk/search>, accessed on 12 April 2019.

<sup>142</sup> MH Kamali ‘Law and society: the interplay of revelation and reason’ in Esposito (ed) *The Oxford History of Islam* (1999) 107.

<sup>143</sup> S Sheikh ‘Shariah: Law and ethics of organ donation in Islam’ (2017) 13 (2) *J Int L Islamic L* 30 – 44.

<sup>144</sup> AY Ali *The Holy Qur`an – Test, translation and commentary* (1984); ‘a hadith search engine’ available at <http://ahadith.co.uk/search>, accessed on 12 April 2019.

<sup>145</sup> ‘a hadith search engine’ available at <http://ahadith.co.uk/search>, accessed on 12 April 2019.

<sup>146</sup> S Sheikh ‘Shariah: Law and ethics of organ donation in Islam’ (2017) 13 (2) *J Int L Islamic L* 30 – 44.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid.

(the Muslim *ummah*) will never agree upon an error”.<sup>149</sup> *Ijmā`* of the companions of Prophet Muḥammad is regarded as infallible, but *ijmā`* of later generations could in theory, be overturned by another *ijmā`*.<sup>150</sup>

(iv) *Qiyās*

*Qiyās* are the last source of Islamic jurisprudence. *Qiyās* are strict analogical deductions derived from the *Qur`ān*, *Sunnah* and *Ḥadīth*, and *ijmā`*.<sup>151</sup> Islamic scholars use *qiyās* to formulate legal decisions on matters not directly addressed in the *Qur`an*, *Sunnah/Hadith* and by *ijmā`*. An example of such a matter is organ donation and transplantation. *Qiyās* allows Islamic scholars and jurists to make a decision on an issue, not decided earlier thus ensuring that *Sharī`ah* remains dynamic, and equally applicable to the present day.<sup>152</sup>

### 3.3 Historical background of transplantation in Islam

The concept of transplanting tissue into human was known at the time of Prophet Muḥammad (570 – 632). In fact, transplantation in some form was practiced in ancient times. Sushruta Samhita, an ancient Hindu medical document written in 700 BC described methods to repair defects in the nose and ears using skin autografts, a technique still used today.<sup>153</sup> Although, thought to be miracles, Prophet Muhammad is reported to have replaced the arm of Mu`awiya bin Arafah and the hand of Ḥabīb bin Yasaf in the battle of Badr (624 CE).<sup>154</sup> Similarly, Prophet Muḥammad is reported to have replanted the eye of Qatādah ibn Nu`mān in the battle of Uhud (625 AD), and it became the better of his two eyes.<sup>155</sup>

Muslim jurists allowed transplantation of teeth and bones. Imām Nawawī (1233-1272) described in detail the transplantation of teeth and bone in his reference textbook “Al Majmu”.<sup>156</sup> The bone to be transplanted could be from the same person (autograft), from another dead person (allograft) or from an animal (xenograft). In the case of an animal source, the animal could be slaughtered in accordance with Islamic rites (*Ḥalāl*), or a dead carcass, including a pig. (Not permissible or *ḥarām* for Muslims to consume). Tissue for transplantation into humans was allowed from a dead carcass including pigs only if there was no other alternative and it was deemed as essential necessity, having no other alternative. Zakariah Al Gazwini (Qazwini) a judge in Iraq (1203-1283) reported in his book “Wonders of Creatures” that porcine xenografts were the most effective.<sup>157</sup> Abū `Alī al-Ḥusayn Ibn Sinā (Avicenna 980-1037), the great Muslim

<sup>149</sup> ‘a hadith search engine’ available at <http://ahadith.co.uk/search>, accessed on 12 April 2019.

<sup>150</sup> S Sheikh ‘Shariah: Law and ethics of organ donation in Islam’ (2017) 13 (2) *J Int L Islamic L* 30 – 44.

<sup>151</sup> Ibid.

<sup>152</sup> S Sheikh ‘Shariah: Law and ethics of organ donation in Islam’ (2017) 13 (2) *J Int L Islamic L* 30 – 44.

<sup>153</sup> R Bollinger et al ‘Historical aspects of transplantation’ in D Sabiston (ed) *Textbook of Surgery* 13<sup>th</sup> ed (1986) 370-308.

<sup>154</sup> M Albar ‘Organ transplantation: a Sunni Islamic perspective’ (2012) 23 *Saudi J Kidney Dis Transpl* 817-822.

<sup>155</sup> Ibid.

<sup>156</sup> MS Al Nawawi ‘Al Majmu’ in M Al Mutteei (ed) *Al Majnoon Saren Almohzab* (1978) 293.

<sup>157</sup> Z Al Gazwini *Ajayib Al Makhlohat Wonders of Creatures* 3rd ed (1978) 422.

physician and polymath wrote 450 books, the most famous of which was “*Al Qanūn*” (The Canon of Medicine), which was the standard medical textbook in Europe and the Muslim world until 1650 more than 500 years.<sup>158</sup> In the Canon, Ibn Sinā describes the first nerve graft, as well as bone transplantation.<sup>159</sup> However, transplantation of solid vital organs was not being performed at the time of Prophet Muḥammad, and is a modern phenomenon.

### 3.4 Arguments for organ donation

As Ebrahim and others report, organ transplantation per se is not described in the two original sources of *Sharī`ah* (the *Qur`ān* and *Sunnah*).<sup>160</sup> Muslim jurists have deliberated based on the broad teachings of the two original sources of *Sharī`ah*. As human elements are involved, differences of opinion are inevitable.<sup>161</sup> The Islamic law arguments in favour of organ donation will be discussed below, and the opposing viewpoint will be discussed in the following section (3.5).

Muslim jurists in favour of organ donation advance the arguments of *Al Maṣlahah* (greater public welfare/interest) and *Al Iṭhār* (altruism). The seeking of treatment for a disease is also advanced as an argument in favour of organ donation. These arguments are discussed below:

(i) *Al Maṣlahah* (greater public welfare and interest).

The concept of greater public welfare is extremely important in the *Sharī`ah*, and is a principle component of Islamic jurisprudence.<sup>162</sup> The following Islamic judicial rules apply:<sup>163</sup>

- (a) The principle of necessity (*ḍarūrah*) (Necessity makes the unlawful permissible).
- (b) When two conflicting interests arise, the one which derives greater benefit take precedence.
- (c) Lesser of the two evils.

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<sup>158</sup> RD Smith ‘Avicenna and the Canon of Medicine: a millennial tribute’ (1980) 133 *Western Journal of Medicine* 367-370.

<sup>159</sup> P Goodarzi ‘Tissue and organ donation and transplantation in Iran’ (2015) 16 *Cell Tissue Bank* 295-301.

<sup>160</sup> AFM Ebrahim ‘Organ Transplantation contemporary Islamic legal and ethical perspectives’ (1988); S Sheikh ‘Shariah: Law and ethics of organ donation in Islam’ (2017) 13 (2) *J Int L Islamic L* 30 – 44; A Sharif ‘Organ donation and Islam – challenges and opportunities’ (2012) 94 (5) *Transportation Journal* 442 – 446.

<sup>161</sup> AFM Ebrahim ‘Organ Transplantation contemporary Islamic legal and ethical perspectives’ (1988).

<sup>162</sup> S Sheikh ‘Shariah: Law and ethics of organ donation in Islam’ (2017) 13 (2) *J Int L Islamic L* 30 – 44.

<sup>163</sup> AFM Ebrahim ‘Organ Transplantation contemporary Islamic legal and ethical perspectives’ (1988).

The concept of *Maṣlahah* is based on the doctrines of necessity and equitable consideration.<sup>164</sup> In terms of necessity, the *Qur'ān* says in *Sūrat Baqarah*, Chapter 2, verse 173 (2:173).<sup>165</sup>

*“He hath only forbidden you dead meat, and blood, and the flesh of swine, and that on which any other name hath been invoked besides that of Allah. But if one is forced by necessity, without willful disobedience, nor transgressing due limits, then is he guiltless. For Allah is Oft-forgiving Most Merciful.”*

Thus, in the face of necessity the unlawful becomes lawful.

Furthermore, Ebrahim explains that if the general gain outweighs the negative aspects of an action, the action would be allowed.<sup>166</sup> In this context, *Sharī'ah* would allow the cutting of the belly of a dead pregnant woman in order to save the life of the baby. Thus, the rights of the living supersede consideration of the dead.<sup>167</sup> Similarly, Ebrahim explains that *Sharī'ah* would allow the cutting of the belly of a deceased person who swallowed a valuable object (for example, a diamond or a piece of gold), in order that it may be returned to the rightful owner. The explanation for this is that even if the valuable object belonged to the deceased himself, his heirs would be in a position to benefit from it.<sup>168</sup> Ebrahim expounds that following the same line of reasoning, it would be justifiable to retrieve a deceased's organ, for the purposes of transplanting it into a living person, thereby benefiting the recipient. In fact, such an act would be commendable.<sup>169</sup>

Furthermore, in accordance with the principle of equity, lesser harm is tolerated if it leads to a greater good for the community. According to this principle, Sheikh believes that if one person dies because an organ cannot be found, all of society is harmed. The *Qur'ān* emphasizes the sanctity of human life in chapter 5, verse 32 (5:32).<sup>170</sup>

*“If anyone slays a human being unless it be (in punishment) for murder or for spreading corruption on earth – it shall be as if he had slain the whole of mankind; whereas if anyone saves a life, it shall be as if he had saved the life of all mankind.”*

<sup>164</sup> S Sheikh 'Shariah: Law and ethics of organ donation in Islam' (2017) 13 (2) *J Int L Islamic L* 30 – 44.

<sup>165</sup> AY Ali *The Holy Qur'an – Text, translation and commentary* (1984); 'a hadith search engine' available at <http://ahadith.co.uk/search>, accessed on 12 April 2019.

<sup>166</sup> AFM Ebrahim 'Organ Transplantation contemporary Islamic legal and ethical perspectives' (1988).

<sup>167</sup> Ibid.

<sup>168</sup> Ibid.

<sup>169</sup> Ibid.

<sup>170</sup> AY Ali *The Holy Qur'an – Text, translation and commentary* (1984); 'a hadith search engine' available at <http://ahadith.co.uk/search>, accessed on 12 April 2019.

However, Ebrahim and others caution that there are certain restrictions with regard to organ transplantation.<sup>171</sup>

- (a) Transplantation is the only means of treatment.
- (b) The degree of success of the procedure is relatively high.
- (c) The consent of the owner of the organ or the heirs has been obtained.
- (d) Death must have been fully established.
- (e) The recipient has been informed of the operation and its implications.

(ii) *Al Īhār* (Altruism)

The *Qur'ān* and the *Sunnah* both exhort Muslims to do good deeds, and to co-operate with one another in acts of kindness. The Qur'anic imperative in Chapter 5, verse 215 (5:215), is:<sup>172</sup>

*“Help you one another in righteousness and piety.”*

The *Qur'ān* states in chapter 59, verse 9 (59:9):<sup>173</sup>

*“show their affection to such as came to them for refuge, and entertain no desire in their hearts for things given to the (latter), but give them preference over themselves, even though poverty was their (own lot). And those save from the covetousness of their own souls, they are the ones that achieve prosperity.”*

Again in chapter 3, verse 92 (3:92):<sup>174</sup>

*“by no means shall ye attain righteousness unless ye give (freely) of that which ye love...”*

As for the *Sunnah*, Prophet Muhammad is reported to have said:

*“None of you truly believe till he wishes for his brother what he wishes for himself.”*<sup>175</sup>

and

*“whoever helps another, will be granted help in the hereafter.”*<sup>176</sup>

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<sup>171</sup> AFM Ebrahim ‘Organ Transplantation contemporary Islamic legal and ethical perspectives’ (1988); S Sheikh ‘Shariah: Law and ethics of organ donation in Islam’ (2017) 13 (2) *J Int L Islamic L* 30 – 44.

<sup>171</sup> Ibid.

<sup>172</sup> AY Ali *The Holy Qur'an – Test, translation and commentary* (1984); ‘a hadith search engine’ available at <http://ahadith.co.uk/search>, accessed on 12 April 2019.

<sup>173</sup> AY Ali *The Holy Qur'an – Test, translation and commentary* (1984); ‘a hadith search engine’ available at <http://ahadith.co.uk/search>, accessed on 12 April 2019.

<sup>174</sup> AY Ali *The Holy Qur'an – Test, translation and commentary* (1984); ‘a hadith search engine’ available at <http://ahadith.co.uk/search>, accessed on 12 April 2019.

<sup>175</sup> ‘a hadith search engine’ available at <http://ahadith.co.uk/search>, accessed on 12 April 2019.

The combination of the above authoritative directives from the *Qur'an* and the *Sunnah* are used by Islamic scholars to promote organ donation under the principle of altruism. Donation of an organ could be considered as an act of charity (*ṣadaqah*) which could be considered as an obligation upon the community fulfilled by an individual donor (*Fard al Kifāyah*), as well as an ongoing act of charity for as long as the donor benefits from the organ (*ṣ adaqat al-Jāriyah*).<sup>177</sup>

The acts of charity are not confined to Muslims only. Prophet Muḥammad exhorted his followers to love all humanity. Once when Prophet Muḥammad stood in veneration of the passing funeral of a Jewish man, at the time when Jews were waging war against him and Islam, one of his companions exclaimed “It is the funeral of a Jew”. The Prophet answered “Is it not a human soul.”<sup>178</sup>

The Prophet ordered Muslims to be compassionate to all human beings. He declared:

“All mankind is the family of Allah. Those who best serve his family are best loved by God.”<sup>179</sup>

However, even with the altruistic argument, Ebrahim cautions that certain restrictions apply:<sup>180</sup>

- (a) Consent of the donor must be obtained.
- (b) Transplantation is the only form of treatment possible.
- (c) No imminent danger to life of the donor.
- (d) The respective transplantation procedure has been proven successful in the past.

Furthermore, all scholars agree that a vital organ such as the heart cannot be donated by a living donor, as this would be tantamount to suicide.<sup>181</sup>

### (iii) Directive to seek medical treatment

Prophet Muḥammad has exhorted his followers to seek medical treatment.<sup>182</sup>

“Make use of medical treatment, for Allah has not made a disease without a remedy for it.”

Some Islamic scholars utilize the above and similar directives as an argument in favour of organ donation.

<sup>176</sup> ‘a hadith search engine’ available at <http://ahadith.co.uk/search>, accessed on 12 April 2019.

<sup>177</sup> M Zahidul Islam “Organ donation and transplantation issues in Islam and present situation’ (2014) 22 *Journal of Law, Policy and Globalization* 99 – 103.

<sup>178</sup> ‘a hadith search engine’ available at <http://ahadith.co.uk/search>, accessed on 12 April 2019.

<sup>179</sup> Ibid.

<sup>180</sup> AFM Ebrahim ‘Organ Transplantation contemporary Islamic legal and ethical perspectives’ (1988).

<sup>181</sup> Ibid.

<sup>182</sup> ‘a hadith search engine’ available at <http://ahadith.co.uk/search>, accessed on 12 April 2019.

### 3.5 Arguments against organ donation.

The majority of criticisms against organ donation are based on the doctrines below:

#### (i) Sacredness of human life and body.

The *Qur'ān* enjoins man to protect and preserve his own life, as well as others. In chapter 4, verse 29, (4:29) the *Qur'ān* says:

*“Do not kill or destroy yourselves. For verily Allah has been to you most merciful.”*<sup>183</sup>

and in chapter 2, verse 195,(2:195):

*“Make not your hands contribute to your own destruction.”*<sup>184</sup>

Furthermore in a *hadith*, Prophet Muhammad is reported to have said:

*“Breaking the bones of a dead person is equal (in sinfulness and aggression) to breaking it while a person is alive.”*<sup>185</sup>

Sheikh expresses doubt as to whether sacredness of human life and body is violated by organ donation and supposes that this would depend upon deliberation of the jurist.<sup>186</sup>

#### (ii) Human body as a trust (*Amānah*)

Both opponents and advocates of organ donation agree that the human body is a trust (*amānah*) from God.<sup>187</sup> Trusteeship begins at birth and extends beyond death. However, opponents of organ donation believe that the body should remain intact and unaltered.<sup>188</sup>

#### (iii) Subjecting the human body to a material end.

There is a *fatwā* (Religious decree) from the *Hanafi Madhhab* (school of jurisprudence) which states “a person owing to hunger finds himself on the verge of death and is unable to find

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<sup>183</sup> AY Ali *The Holy Qur'an – Text, translation and commentary* (1984); ‘a hadith search engine’ available at <http://ahadith.co.uk/search>, accessed on 12 April 2019.

<sup>184</sup> AY Ali *The Holy Qur'an – Text, translation and commentary* (1984); ‘a hadith search engine’ available at <http://ahadith.co.uk/search>, accessed on 12 April 2019.

<sup>185</sup> ‘a hadith search engine’ available at <http://ahadith.co.uk/search>, accessed on 12 April 2019.

<sup>186</sup> S Sheikh ‘Shariah: Law and ethics of organ donation in Islam’ (2017) 13 (2) *J Int L Islamic L* 30 – 44.

<sup>187</sup> Ibid.

<sup>188</sup> Ibid.

permissible food, even the meat of the dead animal in order to survive and save himself from dying, and at that instant if offered human flesh, it would not be permissible for him to partake of it.<sup>189</sup>

Opponents of organ donation argue that the human body was not created to be a means to anything other than the worship of God.<sup>190</sup>

(iv) Avoiding the doubtful.

There is a *Hadīth* of Prophet Muḥammad in which he is reported to have said:

“Both legal and illegal things are obvious, and in between them are (suspicious) doubtful matters, So whoever forsakes those doubtful things lest he may commit a sin, will definitely avoid what is clearly illegal, and whoever indulges in these (suspicious) doubtful things bravely, is likely to commit what is clearly illegal. Sins are Allah’s *hima* (i.e. private pasture) and whoever pastures (his sheep) near it, is likely to trespass in it at any moment.”<sup>191</sup>

If one considers organ donation to be in the doubtful category, the opponents of organ donation argue that it should be avoided.<sup>192</sup>

### 3.6 Islamic organizational judicial resolutions (*Qarārāt*) on organ donation.

A *qarar* is the religious collective resolution of Muslims scholars which is binding upon the Muslim community. *Shī`ah* scholars were the first to sanction organ donation.<sup>193</sup> The Council of the Islamic *Fiqh* Academy of the Muslim World League, Makkah, Saudi Arabia, in 1985 resolved that organ donation was permissible, that it does not violate the dignity of the body of the donor, and is a praiseworthy act, as long as the following conditions are met.<sup>194</sup>

- (a) Donor’s life is not harmed.
- (b) Donor voluntarily consents without coercion.
- (c) Procedure is the only medical means to alleviate the plight of the patient.
- (d) Success of transplantation is relatively high.

<sup>189</sup> AFM Ebrahim ‘Organ Transplantation contemporary Islamic legal and ethical perspectives’ (1988).

<sup>190</sup> S S Sheikh ‘Shariah: Law and ethics of organ donation in Islam’ (2017) 13 (2) *J Int L Islamic L* 30 – 44.

<sup>191</sup> ‘a hadith search engine’ available at <http://ahadith.co.uk/search>, accessed on 12 April 2019.

<sup>192</sup> AFM Ebrahim ‘Organ Transplantation contemporary Islamic legal and ethical perspectives’ (1988).

<sup>193</sup> P Goodarzi ‘Tissue and organ donation and transplantation in Iran’ (2015) 16 *Cell Tissue Bank* 295-301.

<sup>194</sup> AFM Ebrahim ‘Organ Transplantation contemporary Islamic legal and ethical perspectives’ (1988).

The Council of the *Fiqh* Academy of the Organization of Islamic Conference, Jeddah, Saudi Arabia, in 1988, concurred with the above *fatwa*.<sup>195</sup> The Islamic *Fiqh* Academy of India in 1989 concurred that both living and cadaveric organ donation was permissible in desperate and unavoidable situations.<sup>196</sup> The Supreme Council of 'Ulamā' in Riyadh, Saudi Arabia, sanctioned organ donation as did the Grand Mufti of Egypt, Dr. Sayyed Al-Tamtati.<sup>197</sup> Positive rulings on organ donation and transplantation were issued in Egypt (1966), Malaysia (1969), Algeria (1972), Jordan (1977), and Kuwait (1979).<sup>198</sup> In the United Kingdom, the Muslim Law Council encouraged Muslims to carry organ cards.<sup>199</sup> The approval of organ donation from unidentified cadavers, provided that there was no next of kin, was issued by the Grand Mufti of Egypt. However, approval from a Magistrate was required.<sup>200</sup> The Islamic *Fiqh* Academy of the Organization of Islamic Conference, Jeddah, Saudi Arabia, made a similar positive ruling on the harvesting of organs from unidentified cadavers or where relatives could not be found. In this case approval from the leaders of the Muslim community was required.<sup>201</sup>

All Islamic scholars, however, agree that certain restrictions apply to organ donation (discussed above). Furthermore, all scholars agree that a single vital organ, such as a heart, cannot be donated, even with consent of the donor, as this would be tantamount to suicide.<sup>202</sup>

Thus, approval for organ donation from both living and cadaveric donors has been issued by virtually all Islamic scholars and councils across the Muslim world (with some restrictions). As Goodarzi points out, *shari'ah* is a dynamic law, and, as medicine progresses, and more dilemmas come to light, it is not surprising that Islamic fatwas on the specific medical issue may have to be revised.<sup>203</sup> Currently issues such as harvesting of organs from anencephalic babies and embryonic stem cell transplants are being debated.<sup>204</sup>

### 3.7 Islamic law and opt-in verses opt-out system

The opt-in and opt-out systems were discussed in chapter 2 (section 2.2) above. Briefly, the opt-in system requires explicit positive consent from the living donor or from the deceased donors'

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<sup>195</sup> AFM Ebrahim 'Organ Transplantation contemporary Islamic legal and ethical perspectives' (1988).

<sup>196</sup> Ibid.

<sup>197</sup> S S Sheikh 'Shariah: Law and ethics of organ donation in Islam' (2017) 13 (2) *J Int L Islamic L* 30 – 44.

<sup>198</sup> A Sharif 'Organ donation and Islam – challenges and opportunities' (2012) 94 (5) *Transportation Journal* 442 – 446.

<sup>199</sup> Ibid.

<sup>200</sup> M Albar 'Organ transplantation: a Sunni Islamic perspective' (2012) 23 *Saudi J Kidney Dis Transpl* 817-822.

<sup>201</sup> M Zahidul Islam 'Organ donation and transplantation issues in Islam and present situation' (2014) 22 *Journal of Law, Policy and Globalization* 99 – 103.

<sup>202</sup> AFM Ebrahim 'Organ Transplantation contemporary Islamic legal and ethical perspectives' (1988).

<sup>203</sup> P Goodarzi 'Tissue and organ donation and transplantation in Iran' (2015) 16 *Cell Tissue Bank* 295-301.

<sup>204</sup> M Albar 'Organ transplantation: a Sunni Islamic perspective' (2012) 23 *Saudi J Kidney Dis Transpl* 817-822.

relatives.<sup>205</sup> The opt-out system works on the basis that every deceased donor is presumed to be an organ donor unless he/she expressly forbade this during his/her lifetime. Some countries, such as Spain follow a “soft” opt-out system which means that despite implied consent from the deceased potential donor, the relatives of the deceased can still refuse organ donation.<sup>206</sup> South Africa follows the opt-in system of positive explicit consent.<sup>207</sup>

As one can ascertain from reading section 3.6 above, on Islamic judicial resolutions (*Qarārā*), all Islamic scholars are agreed that explicit consent of the living donor or the deceased’s relatives is imperative.<sup>208</sup> There is no exception for this rule, unless the deceased is unidentified or relatives cannot be found, but in this case, consent will need to be obtained from a Magistrate or leaders of the Muslim community.<sup>209</sup>

The Council of the Islamic *Fiqh* Academy of the Muslim World League, Makkah, Saudi Arabia decreed that an integral component of the organ donation process is that the donor should voluntarily consent to donate his/her organs without coercion, and all Islamic scholars are in agreement.<sup>210</sup> Thus, *Sharī`ah* strictly adheres to the opt-in system of explicit consent, and the opt-out and even the soft opt-out options will not be consistent with the tenets of Islamic law.

### 3.8 Islamic law and the sale of organs

The vast majority of *Sunnī* Islamic jurists concur that the sale of organs is forbidden.<sup>211</sup> Such a sale would be deemed null and void (*bātil*), as one cannot sell that which one does not own (God is the owner of our body which is held by us as a trust or *amīnah* – see section 3.5 above). Furthermore selling of an organ is akin to selling a person. In support of this resolution, Islamic scholars quote the saying of Prophet Muḥammad who is reported to have said:

“There are three categories of people against whom I shall myself testify against on the day of judgement. Of those three, one is he who enslaves a free man, then sells him, and eats this money”.<sup>212</sup>

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<sup>205</sup> A Sparaco ‘Increasing organ donation: is presumed consent the answer?’ (2017) 6 (1). *Transplantation News* 5.

<sup>206</sup> Ibid.

<sup>207</sup> A Sparaco ‘Increasing organ donation: is presumed consent the answer?’ (2017) 6 (1). *Transplantation News* 5.

<sup>208</sup> AFM Ebrahim ‘Organ Transplantation contemporary Islamic legal and ethical perspectives’ (1988).

<sup>209</sup> M Albar ‘Organ transplantation: a Sunni Islamic perspective’ (2012) 23 *Saudi J Kidney Dis Transpl* 817-822; M Zahidul Islam ‘Organ donation and transplantation issues in Islam and present situation’ (2014) 22 *Journal of Law, Policy and Globalization* 99 – 103.

<sup>210</sup> AFM Ebrahim ‘Organ Transplantation contemporary Islamic legal and ethical perspectives’ (1988).

<sup>211</sup> Ibid); S S Sheikh ‘Shariah: Law and ethics of organ donation in Islam’ (2017) 13 (2) *J Int L Islamic L* 30 – 44; A Natour et al ‘Islamic Sunni mainstream opinions on compensation of organ donors’ (2011) 2 (2) *Rambam Maimonides Medical Journal* 46-59.

<sup>212</sup> ‘a hadith search engine’ available at <http://ahadith.co.uk/search>, accessed on 12 April 2019.

This strong warning by Prophet Muḥammad is regarded as pivotal in concluding that organ sales are not permissible in Islamic law. Sheikh, however, points out that some scholars do not agree with this conclusion if the sale serves a greater social good and promotes justice (saves a human life).<sup>213</sup>

*Shī`ah* Islamic scholars, however, support the sale of organs by a living donor or by the deceased donor's relatives by the concept of "Divine consent".<sup>214</sup> Divine consent requires that an act be done with a sincere intention, confirmed by reason and divine revelations that bring about peace, whilst preserving dignity and autonomy. In Iran, the only *Shī`ah* Muslim country, a *fatwā* by the Ayatollah, sanctioning the sale of organs, paved the way for legislation of a state-run compensated organ procurement system.<sup>215</sup>

### 3.9 Muslims in South Africa

Although social and cultural factors play an influential role in organ donation decision-making, religion plays a pivotal role in the so-called Black Minority Ethnic (BME) groups, perhaps more so in Muslims than in any other religious groups.<sup>216</sup> Although Islam is a minority religion in South Africa practiced by roughly 5% of the population, globally Muslims contribute nearly a quarter of the world's population and Islam is practiced by nearly half of the people on the African continent.<sup>217</sup> As Rady noted of the global Muslim population, there is no such thing as a "typical Muslim", this is true of South Africa as well, with Muslims being drawn from several diverse ethnic groups.<sup>218</sup> The earliest Muslims in South Africa were slaves, political prisoners and political exiles from Africa and Asia, (mainly from the Indonesian region). This occurred from about 1652 to the mid-1800s. The second phase of Muslim entry to South Africa was during the time of indentured labour by the British in the 1860s. Lastly, post-apartheid, there has been an influx of African Muslims from neighbouring countries, and recent figures of such

<sup>213</sup> P Goodarzi 'Tissue and organ donation and transplantation in Iran' (2015) 16 *Cell Tissue Bank* 295-301.

<sup>214</sup> B Larijani et al 'Ethical and legal aspects of organ transplantation in Iran' (2004) 3615 *Transplantation Proceedings* 1241-1244; S Sheikh 'Shariah: Law and ethics of organ donation in Islam' (2017) 13 (2) *J Int L Islamic L* 30 – 44.

<sup>215</sup> SR Denghan 'Ethical challenges of kidney sale: a review of three major assumptions based on the theories of Tabatabat (2019) 61 *J Forensic Leg Med* 27-33.

<sup>216</sup> A Sharif 'Organ donation and Islam – challenges and opportunities' (2012) 94 (5) *Transportation Journal* 442 – 446.

<sup>217</sup> 'Islam in South Africa Wikipedia' [hht://en.wikipedia.org/wiki/zolam\\_in\\_South\\_Africa](http://en.wikipedia.org/wiki/zolam_in_South_Africa), accessed on 16 March 2019; The Christian Science Monitor (10 January 2002). 'In South Africa many blacks convert to Islam' The Christian Science Monitor. [http://www.csmonitor.com/world/africa#\\_](http://www.csmonitor.com/world/africa#_) accessed on 16 March 2019.

<sup>218</sup> MY Rady et al 'Islam and end-of-life practices in organ donation for transplantation: new questions and serious sociocultural consequences' (2009) 21 (2) *HFC Forum* 175 – 205.

people are approximately 100 000, though this number is probably much higher due to illegal immigration.<sup>219</sup> Furthermore, despite Muslims being a small minority, they are economically very active, and are involved in all spheres of society.

Islam is the fastest growing religion in the world, and this holds true of South Africa as well, with many Black Africans converting to Islam.<sup>220</sup> According to the Christian Science Monitor, the biggest reason for the rise in Islamic conversion is that it offers a refuge from premarital sex, AIDS, alcoholism and domestic violence which is rampant in many black townships. It is in these townships where the greatest rates of conversion are noted.<sup>221</sup> Therefore, although Islam is a minority religion in South Africa, the increasing number of its adherents, with a sphere of influence that far exceeds its numbers, it is important to study organ donating practices among the Muslim community in South Africa. Muslims in South Africa are profoundly influenced by Islamic law. However, social and cultural factors are also known to affect organ donation practices.<sup>222</sup> It would be interesting to study organ donation practices amongst the various ethnic groups of Muslims in South Africa, such as Asians from the Indian/Pakistani subcontinent, Malay people from South-East Asia and Black African people.

### 3.10 Summary

Religion plays a pivotal role in the life of Muslims and profoundly affects their participation in organ donation practices. Muslims regard Islamic law (*Sharī`ah*) as the ultimate, immutable, God-given, divine law, giving it preference over man-made South African law. The two primary sources of *Sharī`ah* are the *Qur`an* (holy book of Muslims) and the *Sunnah* (practices) of Prophet Muḥammad. With subjects such as organ donation, which are not specifically discussed in the primary sources of *Sharī`ah*, Islamic scholars (*ulamā`/jurists*) use *ijmā`* (consensus of the Muslim community) and *Qiyās* (analogical deductions derived from the *Qur`ān* and *Sunnah*) to make judicial resolutions (*Qarārāt*). Living and cadaveric organ donation is permissible in Islamic law, as evidenced by the multitude of positive fatwas by various Islamic Organizations around the world. Organ donation is seen as a charitable act of altruism for the greater good of the community. However, there are certain restrictions on donation of organs, particularly the fact that explicit informed consent of the living donor or deceased donor's relative is a non-negotiable requirement. Islamic law is therefore not compatible with the opt-out system of implied consent. The vast majority of *sunni* Islamic scholars forbid the sale of organs, though this is sanctioned by *Shī`* scholars in Iran. Muslims in South Africa are drawn from diverse ethnic groups, however, *Sharī`ah* has a profound effect on all Muslims with regard to organ donation practices, making the study of *Sharī`ah* important, integral to the aspiration of increasing organ donation rates amongst Muslims in South Africa.

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<sup>219</sup> 'Islam in South Africa Wikipedia' [hht://en.wikipedia.org/wiki/zolam](http://en.wikipedia.org/wiki/zolam) in South Africa, accessed on 16 March 2019.

<sup>220</sup> 'Islam in South Africa Wikipedia' [hht://en.wikipedia.org/wiki/zolam](http://en.wikipedia.org/wiki/zolam) in South Africa, accessed on 16 March 2019.

<sup>221</sup> The Christian Science Monitor (10 January 2002). 'In South Africa many blacks convert to Islam' The Christian Science Monitor. [http://www.csmonitor.com/world/africa#\\_z](http://www.csmonitor.com/world/africa#_z) accessed on 16 March 2019.

<sup>222</sup> MY Rady et al 'Islam and end-of-life practices in organ donation for transplantation: new questions and serious sociocultural consequences' (2009) 21 (2) *HFC Forum* 175 – 205.

## Chapter 4

### Bequeathing of organs

#### 4.1 Definition

In the context of this mini-dissertation bequeathing of organ refers to a person during his/her lifetime indicating in a will, document or oral statement in the presence of competent witnesses that he/she wishes to donate their organ/s upon death, for the purpose of transplantation.

#### 4.2 South African law

Under the NHA, persons competent to make a will may donate their organ/s in a will or document signed by them and two competent witnesses, or in an oral statement in the presence of two competent witnesses.<sup>223</sup>

Persons have to be over the age of 16 years in order to be regarded as competent to make a will.<sup>224</sup> Competent witnesses must be older than 14 years.<sup>225</sup> The bequeathing of organs in a will, document or statement must be carried out in the prescribed manner and the donee (recipient) determined in accordance with the prescribed procedure.<sup>226</sup> Where no specific institution or donee is named, the regulations stipulate that the institution in the appropriate category that is nearest to the place where the donor's body is kept shall be deemed to be the donee.<sup>227</sup> Also, the regulations stipulate that if the donation is made to a specific recipient, who is not within easy reach at the time and place of the donor's death, the institution in the appropriate category that is nearest to the place of the donor's death shall be deemed to be the donee (recipient).<sup>228</sup> With regard to conflicting donations, effect shall be given to the donation made last.<sup>229</sup> Donation of organs in a will or document can be revoked by intentional destruction of the will or document, or by drawing up a new will or document.<sup>230</sup>

#### 4.3 Islamic law

*Al-Wasiyah* is the Arabic equivalent of the last will and testament.<sup>231</sup> Muslims are encouraged to draw up a will during their lifetime. In chapter 5, verse 106, (5:106), the *Qur'ān* says:

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<sup>223</sup> National Health Act, No. 61 of 2003, (5) 62 (1).

<sup>224</sup> Wills Act, No. 7 of 1953 (5) 1.

<sup>225</sup> Wills Act, No. 7 of 1953 (5) 4.

<sup>226</sup> National Health Act, No. 61 of 2003, No. 61 of 2003 (5) 62 (1) and (5) 61 (1), (2).

<sup>227</sup> DJ Mcquoid-Mason 'Human tissue and organ transplant provisions: chapter 8 of the National Health Act and its Regulations, in effect from March 2012 – what doctors must know' (2012) 102 (9) *SAMJ* 734 – 735); GN R180 of GG 35099, 2/3/2012.

<sup>228</sup> GN R180 of GG 35099, 2/3/2012.

<sup>229</sup> GN R180 of GG 35099, 2/3/2012.

<sup>230</sup> National Health Act, No. 61 of 2003, (5) 65.

<sup>231</sup> AFM Ebrahim 'The living will (Wasiyat Al-Hayy): a study of its legality in the light of Islamic Jurisprudence' (2000) 19 *Med Law* 147-160.

“O you who believe! When death approaches any of you, (take) witnesses among yourselves when making bequests—two just men of your own (brotherhood), or others from outside if you are on a journey when the affliction of death befalls you ....”<sup>232</sup>

Likewise, Prophet Muḥammad emphasized the importance of drawing up a will. He was reported to have said:

“It is not right for any Muslim person, who has anything to bequeath, that he may pass even two nights without having his last will and testament written and kept ready with him.”<sup>233</sup>

Despite the Islamic law (*Sharī`ah*) position, encouraging Muslims to draw up a will, Ebrahim cautions that there are certain restrictions in the *Sharī`ah* as to what one may will.<sup>234</sup> For example, one cannot will one’s wealth or possessions as one wishes, as these are governed by specific *Sharī`ah* directives that determine how one’s wealth and possessions are to be distributed after death.<sup>235</sup> Legal heirs will receive proportionate shares as laid down by *Sharī`ah*, and this is not dependent upon the will or any other instruction of the deceased.<sup>236</sup> A “Living will” which stipulates that life-saving measures should be withdrawn on severe illness has no legal status in the *Sharī`ah*, as it is considered a crime in Islam to hasten death.<sup>237</sup> The will in summary cannot contradict the broad teachings of the *Qur`ān* and *Sunnah*.

With regard to bequeathing of one’s organ/s in a will whilst alive, there have been several fatwas sanctioning this. The Grand *Muftī* of Egypt, Gād Al Ḥaq sanctioned the bequeathing of organs in a will or testament in 1982.<sup>238</sup> The Saudi Grand `Ulamā’ *Fatwa* No. 99, 1982 also declared the permissibility of bequeathing organs in a will.<sup>239</sup> The *Fatwa* Committee of Kuwait issued a similar ruling.<sup>240</sup> Ebrahim, an eminent Islamic scholar, writing on the living will, in the light of Islamic jurisprudence, was also of the view that bequeathing ones organs in one’s will is permissible.<sup>241</sup>

<sup>232</sup> AY Ali *The Holy Qur`an – Text, translation and commentary* (1984); ‘a hadith search engine’ available at <http://ahadith.co.uk/search>, accessed on 12 April 2019.

<sup>233</sup> ‘a hadith search engine’ available at <http://ahadith.co.uk/search>, accessed on 12 April 2019.

<sup>234</sup> AFM Ebrahim ‘Organ Transplantation contemporary Islamic legal and ethical perspectives’ (1988).

<sup>235</sup> Ibid.

<sup>236</sup> Ibid.

<sup>237</sup> Ibid.

<sup>238</sup> M Albar ‘Organ transplantation: a Sunni Islamic perspective’ (2012) 23 *Saudi J Kidney Dis Transpl* 817-822.

<sup>239</sup> Ibid.

<sup>240</sup> M Zahidul Islam ‘Organ donation and transplantation issues in Islam and present situation’ (2014) 22 *Journal of Law, Policy and Globalization* 99 – 103.

<sup>241</sup> AFM Ebrahim ‘The living will (Waṣīyat al-Ḥayy): a study of its legality in the light of Islamic Jurisprudence’ (2000) 19 *Med Law* 147-160.

#### 4.4 Summary

Bequeathing one's organs in a will, testament or document is permissible both in South African and Islamic law. In fact, in *Sharī`ah*, drawing up a will whilst alive is both divinely inspired as well as enjoined by Prophet Muhammad. Although an oral statement in the presence of competent witnesses is acceptable, both South African and Islamic law encourage a written document signed in the presence of appropriate witnesses. Thus, there is complete consensus with regard to bequeathing of organs, between South African and Islamic law.

### Chapter 5

#### Organ donation practices in other Muslim countries

##### 5.1 Iran

Iran is the only *Shī`ah* Muslim country. The sources of *Sharī`ah* in the *Shī`ah* school of law are the same as among the *Sunnī* Muslims, namely the two original sources (the *Qur`ān* and *Sunnah*), and, as organ donation is not specifically discussed in the original sources, *Ijmā`* (judicial consensus) and *Qiyās* (analogical deduction) are utilized to formulate a religious judicial resolution (*Qarar*). *Shī`ah* scholars were the first to sanction organ donation.<sup>242</sup> Goodarzi opines that this was due to the fact that from the onset, the founder of the Islamic Republic of Iran, Imām Khomeini, supported organ transplantation.<sup>243</sup> Thereafter, subsequent Jurist scholars (Ayatollahs) were quick to sanction organ donation, using the principles of logic and reason, the most important criterion being to save a human life, which is sacred in Islam.<sup>244</sup> These positive fatwas paved the way for legislation that created the world's first state-run compensated organ procurement system.<sup>245</sup> In the year 2000 the Organ Transplantation and Brain Death Act was passed. Currently there are four tissue banks in Iran, and Iran is in the enviable position of being the only country in the world that has no waiting list for kidney transplantation.<sup>246</sup> The management and funding of Iranian tissue and organ procurement and transplantation is performed by the "Management Centre for Transplantation and Special Diseases" (MCTSD), which is affiliated to the Ministry of Health.<sup>247</sup>

The following is a very brief description of a typical kidney procurement and transplantation procedure in Iran. A potential donor applies to a governmental agency, the Association for

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<sup>242</sup>B Larijani et al 'Ethical and legal aspects of organ transplantation in Iran' (2004) 3615) *Transplantation Proceedings* 1241-1244.

<sup>243</sup> P Goodarzi 'Tissue and organ donation and transplantation in Iran' (2015) 16 *Cell Tissue Bank* 295-301.

<sup>244</sup> Ibid.

<sup>245</sup> Ibid.

<sup>246</sup> Ibid.

<sup>247</sup> M Mahdavi-Mazdeh et al 'Renal replacement therapy in Iran' (2007) 5 (2) *Urology Journal* 66-70.

Supporting Renal Patients (ASRP), and signs a pledge, and a notarized document consenting and waiving the right for future claims of compensation.<sup>248</sup> ASRP then conducts detailed medical and psychological tests on the donor, ascertaining their suitability.<sup>249</sup> Once suitability is confirmed, the donor is paired with a suitable anonymous recipient.<sup>250</sup> Once ASRP procures the donor's kidney, the donor collects a fixed amount of compensation (roughly \$6000) from a non-governmental organization called Charitable Foundation of Special Disease (CFSD).<sup>251</sup> CFSD is funded by wealthy individuals and businesses. The government funds the cost of the transplant procedure for both the donor and recipient. The donor, in addition receives free post-transplant care. There is no broker and the entire system is run by the state and all compensation is paid to the donor by the non-governmental organization, CFSD.<sup>252</sup>

## 5.2 Pakistan

Pakistan is a typical *Sunni* majority Muslim country. Prior to 2007, transplant tourism was rife, and more unrelated foreigners were undergoing kidney transplants, then local related donors and recipients.<sup>253</sup> According to Ilyas and co-workers, "transplant packages" were being offered to foreign recipients for \$13 000 to \$25 000, with the transplant tourism business amounting to \$15 million annually.<sup>254</sup>

On the 5<sup>th</sup> of September 2007, the government of Pakistan passed the "Transplantation of Human Organs and Tissue Ordinance". This effectively banned "transplant tourism", with no foreigner being allowed to have organ transplants in Pakistan.<sup>255</sup> Whilst the law permitted organ donation, it placed stringent conditions on the transplantation of organs between living related persons.<sup>256</sup> The passage of the 2007 legislation, has put Pakistan in line with the vast majority of Muslim countries, with regard to organ transplantation.<sup>257</sup>

## 5.3 Countries where Muslims are minorities

The United States of America (USA) and the United Kingdom (UK) are examples of countries where Muslims live as minorities, as in South Africa.

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<sup>248</sup> S Sheikh 'Shariah: Law and ethics of organ donation in Islam' (2017) 13 (2) *J Int L Islamic L* 30 – 44.

<sup>249</sup> Ibid.

<sup>250</sup> Ibid.

<sup>251</sup> Ibid.

<sup>252</sup> Ibid.

<sup>253</sup> M Ilyas et al 'The Islamic perspective of organ donation in Pakistan' (2009) *Saudi J Kidney D.S Transplantation* 20 (1) 154-156.

<sup>254</sup> Ibid.

<sup>255</sup> S Sheikh 'Shariah: Law and ethics of organ donation in Islam' (2017) 13 (2) *J Int L Islamic L* 30 – 44.

<sup>256</sup> Ibid.

<sup>257</sup> Ibid.

In the UK, the Muslim Law Council approved organ donation as being in accordance with Islamic principles in 1996. Furthermore, brain-death was recognized as death, and Muslims were encouraged to carry organ donor cards.<sup>258</sup> Similarly, the Islamic Medical Association of North America (IMANA) made equivalent pronouncements.<sup>259</sup>

Muslims in the USA and UK, as the rest of the so called Black Minority Ethnic (BME) grouping, generally have a negative attitude to organ donation, despite its permissibility in Islamic law.<sup>260</sup> Padela and Zagarijof studying the relationships between Islamic religiosity and attitude towards organ donation amongst American Muslims found that higher levels of intrinsic religiosity and adherence to Islamic ethics did not appear to associate with negative attitudes to organ donation.<sup>261</sup> In fact, they found that less religious Muslims, tended to donate organs less frequently.<sup>262</sup>

Al Khawari and workers in the UK survey of Muslims found that Muslims in the UK were strongly opposed to presumed consent (the opt-out) system for organ donation.<sup>263</sup> Rady et al, reported a similar finding amongst Muslims in the USA.<sup>264</sup>

#### 5.4 Summary

Organ donation and transplantation has been judged to be permissible in Islamic law and has been legislated in Muslim majority countries. The sale of organs and compensation of donors is banned in all Muslim countries, except for Iran, the only *Shī'ah* Muslim country, which allows state-controlled compensation of donors. In countries where Muslims live as minorities such as the USA and UK, National Muslim Organizations have sanctioned organ donation. Though, not legally enforceable, these national organizations have encouraged their respective Muslim minorities to become more involved in organ donation practices.

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<sup>258</sup> A Sharif 'Organ donation and Islam – challenges and opportunities' (2012) 94 (5) *Transportation Journal* 442 – 446.

<sup>259</sup> S Athar et al 'Islamic Medical Ethics: the IMANA perspective' (2005) 37 (1) *Journal of Islamic Medical Association of North America* 32-41.

<sup>260</sup> MY Rady et al 'Islam and end-of-life practices in organ donation for transplantation: new questions and serious sociocultural consequences' (2009) 21 (2) *HFC Forum* 175 – 205; A Sharif 'Organ donation and Islam – challenges and opportunities' (2012) 94 (5) *Transportation Journal* 442 – 446.

<sup>261</sup> A Padela et al 'Relationship between Islamic religiosity and attitudes towards decreased organ donation among American Muslims: a pilot study' (2014) 97 (2) *Transplantation* 1292 – 1299.

<sup>262</sup> Ibid.

<sup>263</sup> FS Al Khawari et al 'Attitudes towards transplantation in UK: Muslim Indo-Asians in West London' (2005) 5 (6) *American Journal of Transplantation* 1326-1331.

<sup>264</sup> MY Rady et al 'Islam and end-of-life practices in organ donation for transplantation: new questions and serious sociocultural consequences' (2009) 21 (2) *HFC Forum* 175 – 205.

## Chapter 6

### Analytic comparison of Islamic and South African law

#### 6.1 Introduction

Before delving into the areas of consensus and divergence between Islamic and South African law, one has to understand that there are fundamental differences between the two laws that are inherent in each law.

Firstly, Muslims regard Islamic law as the ultimate, God-given, immutable law that is not subject to change, unlike South African law that is open to change.<sup>265</sup> Secondly, Islamic law is all-encompassing, and concerns itself not only with legal matters, but also with moral, spiritual and personal matters, including mundane day-to-day activities such as grooming, dressing, eating, business and interaction with other people. This is unlike South African law that is confined to legal matters.<sup>266</sup> Thirdly, unlike South African law which is drafted in Parliament, presently Islamic law is not as structured and codified, and is compiled by Muslim Jurists under the supervision of each Muslim country. (Under the Ottoman / Turkish Caliphate, Islamic Law was methodically codified, and was applicable to the entire Muslim world, but this ceased with the abolishment of the Caliphate in 1924).<sup>267</sup> Lastly, and perhaps most importantly, Ebrahim *Sunnah*), strictly speaking, are not legal documents, but offer a set of Islamic legal principles, and moral and ethical guidelines, from which legal principles and specifics can be inferred.<sup>268</sup>

From the above discussion it is apparent that there will be many minor differences between South African and Islamic law which are inherent within each legal system. For example, the age of consent that one may donate organs is stipulated in South African law as being 18 years, whilst the age of consent to donate organs is not mentioned in Islamic law, leaving this to the discretion of the Islamic jurist (individual or committee).<sup>269</sup> In the discussion below, I will ignore such minor differences between the two laws, instead focusing on broad general areas of consensus and divergence.

#### 6.2 Areas of consensus

The broad consensus between Islamic and South African law is startling. Both laws permit living and cadaveric organ donation. Both laws recognize brain-death as death. In South African law,

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<sup>265</sup> S Sheikh 'Shariah: Law and ethics of organ donation in Islam' (2017) 13 (2) *J Int L Islamic L* 30 – 44.

<sup>266</sup> Ibid.

<sup>267</sup> Ibid.

<sup>268</sup> AFM Ebrahim 'The living will (Wasiyat Al-Hayy): a study of its legality in the light of Islamic Jurisprudence' (2000) 19 *Med Law* 147-160.

<sup>269</sup> National Health Act, No. 61 of 2003, S 58.

the NHA has defined brain-death as death.<sup>270</sup> In Islamic law, the judicial religious decrees (*fatāwā*) that permitted cadaveric organ donation eventually recognized brain-death as death. In the third International Conference of Islamic Jurists (Amman, Jordan, 1986) *Fatwā* No. 5 equated brain-death with cardiac and respiratory death.<sup>271</sup> Death in Islam is the departure of the soul, however as this cannot be identified, the signs of death are acceptable.<sup>272</sup> Both the Muslim Law Council of UK, and the Islamic Medical Association of North America from the USA equated brain-death with death.<sup>273</sup> Both Islamic and South African law stipulate that brain-death (death) needs to be confirmed by medical practitioners. South African law is more specific in this regard and regulations stipulate that the diagnosis of brain-death needs to be made by two doctors, one of whom must have been qualified for more than 5 years, and neither of whom may be members of the transplant team.<sup>274</sup> In Islamic law death should be confirmed by doctors of “upright character”.<sup>275</sup>

Both laws forbid the donation of a single vital organ from a living donor. South African law stipulates that a person under the age of 18 years may not donate tissue that is not replaceable by natural means, whilst Islamic law directs that there must be no imminent danger to the life of the donor.<sup>276</sup> Both laws allow for the harvesting of organs from an unidentified cadaver or where the relatives cannot be found. In South African law this must be approved by the Director-General of Health, and in Islamic law, by a Magistrate or Leaders of the Muslim Community.<sup>277</sup> Both South African and Islamic law permit the bequeathing of organs in a will, testament or document. Both South African and Islamic law require explicit positive consent from the living donor for organ donation, or from the relatives of the deceased in the case of cadaveric organ donation. Indeed, all Islamic scholars concur that explicit informed consent is a non-negotiable requirement for organ donation.<sup>278</sup> Both South African and the *Sunni* Islamic law forbid the sale of organs or compensation of the donor (other than medical expenses, travel costs).

Organ trafficking has been a problem both in South Africa and in Muslim countries such as Pakistan. The NHA in South Africa and the Transplantation of Human Organs and Tissue

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<sup>270</sup> National Health Act, No. 61 of 2003, Definitions.

<sup>271</sup> M Albar ‘Organ transplantation: a Sunni Islamic perspective’ (2012) 23 *Saudi J Kidney Dis Transpl* 817-822.

<sup>272</sup> M Albar ‘Organ transplantation: a Sunni Islamic perspective’ (2012) 23 *Saudi J Kidney Dis Transpl* 817-822.

<sup>273</sup> S Athar et al (Islamic Medical Ethics: the IMANA perspective’ (2005) 37 (1) *Journal of Islamic Medical Association of North America* 32-41; A Sharif ‘Organ donation and Islam – challenges and opportunities’ (2012) 94 (5) *Transportation Journal* 442 – 446.

<sup>274</sup> GN R180, GG NO. 35099, 2/3/2012.

<sup>275</sup> AFM Ebrahim ‘Organ Transplantation contemporary Islamic legal and ethical perspectives’ (1988).

<sup>276</sup> National Health A, No. 61 of 2003, 56 (2); AFM Ebrahim ‘Organ Transplantation contemporary Islamic legal and ethical perspectives’ (1988).

<sup>277</sup> National Health Act, No. 61 of 2003, 56 (3); M Albar ‘Organ transplantation: a Sunni Islamic perspective’ (2012) 23 *Saudi J Kidney Dis Transpl* 817-822; M Zahidul Islam ‘Organ donation and transplantation issues in Islam and present situation’ (2014) 22 *Journal of Law, Policy and Globalization* 99 – 103.

<sup>278</sup> AFM Ebrahim ‘Organ Transplantation contemporary Islamic legal and ethical perspectives’ (1988).

Ordinance of Pakistan ban organ transplantation in foreigners.<sup>279</sup> (An exception to this in South Africa would be by Ministerial approval). Iran also bans foreigners from receiving organ transplants in Iran.<sup>280</sup> Neither South African nor Islamic law has a mandated referral system for organ donation.

### 6.3 Areas of divergence

The striking difference between *Shi'ah* Islamic law and South African law, is that the sale of organs and compensation of the donor is permitted by *Shi'ah* Islamic scholars, whilst, this would be considered an offence in South African law.<sup>281</sup> Iran thus has a national organ procurement agency, the “Management Centre for Transplantation and Special Diseases” (MCTSD), whilst South Africa does not.<sup>282</sup>

### 6.4 Summary

There is near-total consensus between South African and Sunni Islamic law in virtually all aspects relating to living and cadaveric organ donation and the bequeathing of organs. South African law, inherent to its nature, is very specific, and lays down specific guidelines regarding organ donation, whilst Islamic law provides moral and ethical guidelines from which general legal principles can be deduced. The striking area of divergence between South African law and *Shi'ah* Islamic law (Iran), is that *Shi'ah* Islamic law allows for the sale of organs and compensation of the donor by a state-run system, whilst this is illegal in current South African law.

## Chapter 7

### 7.1 Conclusion

Apart from very minor differences inherent to South African and mainstream Islamic law (*Shari'ah*), there is near-total consensus between the two laws with regard to living and cadaveric organ donation and bequeathing of organs. Iran, which is the sole *Shi'ah* Muslim

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<sup>279</sup> National Health Act, No. 61 of 2003, 5 61 (3); S Sheikh ‘Shariah: Law and ethics of organ donation in Islam’ (2017) 13 (2) *J Int L Islamic L* 30 – 44.

<sup>280</sup> P Goodarzi ‘Tissue and organ donation and transplantation in Iran’ (2015) 16 *Cell Tissue Bank* 295-301.

<sup>281</sup> National Health Act, No. 61 of 2003, 5 58; P Goodarzi ‘Tissue and organ donation and transplantation in Iran’ (2015) 16 *Cell Tissue Bank* 295-301.

<sup>282</sup> M Mahdavi-Mazdeh et al ‘Renal replacement therapy in Iran’ (2007) 5 (2) *Urology Journal* 66-70.

country, diverges from South African law in allowing the sale of organs and compensation of donors.

Religion plays a pivotal role in people's attitudes to organ donation.<sup>283</sup> Many Muslims believe that organ donation is forbidden in Islamic law.<sup>284</sup> On the contrary, *Sharī`ah* not only permits living and cadaveric organ donation, but encourages it as an altruistic act of charity and a commendable gesture for the benefit of the greater community.<sup>285</sup> To quote Mohammed Albar, from the Medical Ethics Centre, Jeddah, Saudi Arabia:

“The donation of organs (in *Sharī`ah*) is an act of charity, benevolence, altruism and love for mankind. God loves those who love fellow humans and try to mitigate the agony and sorrow of others and relieve their misfortunes. Any action carried out with good intentions and which aims at helping others is respected and indeed encouraged, provided no harm is inflicted.”<sup>286</sup>

With regard to increasing organ donation rates amongst Muslims in South Africa, it is important to publicize the fact that Islamic law, not only allows, but encourages both living and cadaveric organ donation, and that there is broad consensus between South African law and *Sharī`ah*. A number of recommendations in this regard are made in the following section.

## 2. Recommendations

In order to improve organ donation rates in South Africa a number of interventions aimed at different levels need to be employed. A number of legislative reforms suggested by Slabbert and other scholars have been discussed in Chapter 2 (section 2.4) above. These include making organ trafficking a specific crime, creation of a National organ procurement and allocation organization with a National call centre, mandated referrals of brain-dead patients, mandatory organ donation consultation in end-of-life decisions, consideration of organ donation after circulatory death, and lastly, incentivizing the donor and allowing state-regulated sale of organs.<sup>287</sup> The merits of the

<sup>283</sup> M Albar ‘Organ transplantation: a Sunni Islamic perspective’ (2012) 23 *Saudi J Kidney Dis Transpl* 817-822; S Sheikh ‘Shariah: Law and ethics of organ donation in Islam’ (2017) 13 (2) *J Int L Islamic L* 30 – 44.

<sup>284</sup> M Tumin et al ‘Organ donation in Muslim countries: the case of Malaysia’ (2013) 18 *Annals of Transplantation* 671-676.

<sup>285</sup> M Zahidul Islam ‘Organ donation and transplantation issues in Islam and present situation’ (2014) 22 *Journal of Law, Policy and Globalization* 99 – 103.

<sup>286</sup> M Albar ‘Organ transplantation: a Sunni Islamic perspective’ (2012) 23 *Saudi J Kidney Dis Transpl* 817-822.

<sup>287</sup> M Slabbert ‘Combat organ trafficking – reward the donor or regulate sales’ (2008) *Koers* 73 (1) 75-99; M Slabbert, B Venter ‘Routine referrals : a possible solution for transplantation shortages’ (2017) 10 *S Afr J Bioethics Law* 15-19; B Venter, M Slabbert ‘Rewarding a living kidney donor : a comparison between South Africa, Singapore and Iran’(2013) 34 *Obiter* 185-199; M Slabbert, H Oosthuizen

South African opt-in system of consent were discussed in chapter 2 (section 2.2 above). The majority of researchers believe that given the current nature of our South African population, an opt-out system of implied consent is not feasible at the present time.<sup>288</sup>

At present, Thompson notes that the South African government's healthcare policy does not prioritize organ donation.<sup>289</sup> Moosa believes that the South African government should be encouraged to promote organ donation.<sup>290</sup> Apart from legislative reforms discussed above, Moosa advises improving resources for organ transplantation (increased facilities for the care of brain-dead donors, dedicated theatre time, improving the skills pools, extending the role of the transplant co-ordinator and promoting organ donation amongst healthcare professionals).<sup>291</sup> South Africa has a two-tiered health system, a robust private healthcare sector and an ailing

public sector with limited resources and long waiting lists.<sup>292</sup> Moosa emphasizes the role of public-private collaborative initiatives to promote organ donation.<sup>293</sup>

Perhaps the most beneficial initiative to improve organ donation rates in South Africa is to change attitudes to organ donation. Dialogue in civil society need to be promoted.<sup>294</sup> Many South African researchers have confirmed that there is a high level of awareness about organ donation, even amongst marginalized and lower socioeconomic groups, however, myths and fallacies surrounding organ donation are prevalent.<sup>295</sup> Public campaigns to provide accurate

'Establishing a market for human organs in South Africa Part 1 : a proposal' (2007) *Obiter* 28 44-69; M Slabbert, H Oosthuizen 'Establishing a market for human organs in South Africa Part 2 : shortcomings in legislation and the current system of organ procurement' (2007) *Obiter* 28 304-323; M Slabbert 'The law as an obstacle in solid organ donations and transplantations' (2018) 8 (1) *THRHR* 70-84; M. Slabbert 'One heart, two patients : who gets a donor organ?' (2009) *Stell L R* 1 124-138; M Slabbert 'Ethics, justice, and the sale of kidney for transplantation purposes' (2010) 13 (2) *PER/PELS* 77-105; B Venter 'A selection of constitutional perspectives on human kidney sales' (2013) 16 (1) *PER/PELJ* 352-403.

<sup>288</sup> HR Etheridge et al 'Public attitudes to organ donation among a sample of urban-dwelling South African adults: a 2012 study' (2013) 27 (5) *Clinical transplantation* 684-692; HR Etheridge et al 'Attitudes to organ donation among some urban South African populations remain unchanged: a cross-sectional study (1993 – 2013)' (2014) 184 (2) *SAMJ* 135 – 137; M Slabbert, B Venter 'Routine referrals : a possible solution for transplantation shortages' (2017) 10 *S Afr J Bioethics Law* 15-19.

<sup>289</sup> D Thompson 'Organ donation in South Africa – a call to action' (2017) 33 (2) *SAMJ* 36 – 37.

<sup>290</sup> MR Moosa 'The state of kidney transplantation in South Africa' (2019) 109 (4) *SAMJ* 235 – 240.

Ibid.

<sup>292</sup> R Harrichandparsad, SS Nadvi et al ' "A tale of two cities" A snapshot survey of neurosurgical procedures performed in public and private sectors in Ethekewini' (2019) 57 (2) *South African Journal of Surgery* 61-64.

<sup>293</sup> MR Moosa 'The state of kidney transplantation in South Africa' (2019) 109 (4) *SAMJ* 235 – 240.

<sup>294</sup> Ibid.

<sup>295</sup> B Blignaut 'More people than expected in marginalized communities know about organ donation' (2017) 6 (2) *Transplantation News 2*'. PM Dimo 'Organ donation behaviour: debates amongst Black South Africans' (2018) 16 (3) *Gender and Behaviour* 12200-12210; HR Etheridge et al 'Attitudes to organ donation among some urban South African populations remain unchanged: a cross-sectional study (1993 – 2013)' (2014) 184 (2) *SAMJ* 135 – 137; HR Etheridge et al 'Public attitudes to organ donation

information on living and cadaveric organ donation need to be employed; both for the general South African public, and specifically amongst the Muslim community.

Although, locally several reports have been published in the *Journal of the Islamic Medical Association of South Africa*, in an effort to educate Muslim healthcare professionals regarding organ donation, this is not sufficient, and, campaigns have to be directed at the broader Muslim community at large.<sup>296</sup> Mohammed Albar, from the Mayo Clinic Hospital, Phoenix, Arizona, USA writes compellingly on the need for campaigning for organ donation at Mosques.<sup>297</sup> He believes that Muslims have not received sufficient information to allay their fears and anxiety regarding organ donation.<sup>298</sup> He believes that the moral code of Islam (as sourced from the original primary sources of *Sharī`ah*, the *Qur`ān* and *Sunnah*), encourages organ donation, and campaigns should be directed at Muslims attending Mosques.<sup>299</sup> The role of the mosques in promoting organ donation amongst Muslims is also emphasized by Tumin and co-workers.<sup>300</sup> Shaif believes that the majority of Muslims are in favour of organ donation and he states that:

“a vocal minority should not deafen the silent majority that approves organ donation in Islam”<sup>301</sup>

It is hoped that this mini-dissertation, which has determined that there is broad consensus between South African and Islamic law on the issues of living and cadaveric organ donation, encourages Muslims in South Africa to actively participate in such ventures.

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among a sample of urban-dwelling South African adults: a 2012 study’ (2013) 27 (5) *Clinical transplantation* 684-692.

<sup>296</sup> SS Nadvi, M Osman-Hyder ‘Organ donation in South Africa – socio-legal challenges’ (2019) in press *Journal of Islamic Medical Association of South Africa*; SS Nadvi et al ‘Islamic law and organ donation’ (2020) in press *Journal of Islamic Medical Association of South Africa*; SS Nadvi et al ‘Analytic comparison of Islamic and South African law’ (2020) in press *Journal of Islamic Medical Association of South Africa*.

<sup>297</sup> M Albar ‘Organ transplantation: a Sunni Islamic perspective’ (2012) 23 *Saudi J Kidney Dis Transpl* 817-822.

<sup>298</sup> Ibid.

<sup>299</sup> Ibid.

<sup>300</sup> M Tumin et al ‘Organ donation among Malaysian Muslims: the role of the Mosques’ (2015) 20 *Transplantation* 206-210.

<sup>301</sup> A Sharif ‘Organ donation and Islam – challenges and opportunities’ (2012) 94 (5) *Transportation Journal* 442 – 446.

## Bibliography

### Online Sources

1. Ali, AY 'The Holy Qur'an – Text, translation and commentary' (1984); available at <http://ahadith.co.uk/search>, accessed on 12 April 2019.
2. 'In South Africa many blacks convert to Islam' *The Christian Science Monitor* (2002) available at <http://www.csmonitor.com/world/africa#> accessed on 16 March 2019.
3. 'Islam in South Africa Wikipedia' available at <http://en.wikipedia.org/wiki/zolam> in South Africa, accessed on 16 March 2019;
4. 'Organ Donation and Transplantation' in *clevelandclinic.org* available at <https://my.clevelandclinic.org/health/articles/11750-organ-donation-transplantation>, accessed 29 May 2019.
5. 'Organ Donation Foundation of South Africa. Transplant Statistics. South Africa; Organ Donor Foundation' in available at: <http://www.odf.org.za/index.php/did-you-know/statistics.html> accessed on 14 March 2019.
6. 'The Living Donation Process' in *organdonor.gov* available at <https://www.organdonor.gov/about/process/living-donation.html>, accessed 29 May 2019.

### Books

1. Al Gazwini, Z *Ajayib Al Makhlohat Wonders of Creatures* 3 ed (1978).
2. Al Nawawi, MS 'Al Majumu' in M Al Mutteei (ed) *Al Majnoon Saren Almohzab* (1978).
3. Bollinger, R et al 'Historical aspects of transplantation' in D Sabiston (ed) *Textbook of Surgery* 13 ed (1986).
4. Ebrahim, AFM 'Shariah and Organ Transplants' (1989) 67
5. Ebrahim, AFM *Organ Transplantation: contemporary Sunni Muslims legal and ethical perspectives*, (1995).
6. Ebrahim, AFM 'Islamic perspective on Brain Death and Organ Transplantation: Current Issues and Challenges' in A Bagheri K Alali (eds) *Islamic Bioethics* (2017) 4.
7. Ebrahim, AFM *Organ Transplantation contemporary Islamic legal and ethical perspectives* Kuala Lumpur: A.S Noordeen, (1988).

8. Ebrahim, AFM *Death and Dying: Advising patient and family* Qualbert: Islamic Medical Association of South Africa, (1995).
9. Ebrahim, AFM *Ethics of Medical Research – Some Islamic considerations* Qualbert: Islamic Medical Association of South Africa, (1994).
10. Ebrahim, AFM *Islam and vaccination* Durban: Islamic Medical Association of South Africa, (2013).
11. Ebrahim, AFM *Biomedical Issues - Islamic perspective* Mobeni: Islamic Medical Association of South Africa, (1988).
12. Ebrahim, AFM *Reproductive Health and Islamic Values Ethical and Legal Insights* Durban: Islamic Medical Association of South Africa, (2011).
13. Ebrahim, AFM *Intensive Care Unit (ICU) Ethical Dilemmas – Guidelines for Muslim Families* Durban: Islamic Medical Association of South Africa, (2014).
14. Kamali, MH 'Law and society: the interplay of revelation and reason' in Esposito (ed) *The Oxford History of Islam* (1999).
15. Kleinsmidt, A et al 'Organ transplant ethics and law' in K Moodley (ed) *Medical ethics, law and human rights – a South African perspective* (2017) 315 – 326.

## Journal Articles

1. Albar, M 'Organ transplantation: a Sunni Islamic perspective' (2012) 23 *Saudi J Kidney Dis Transpl* 817-822.
2. Al Khawari, FS; Stimson, GV; Warrens, AN 'Attitudes towards transplantation in UK: Muslim Indo-Asians in West London' (2005) 5 (6) *American Journal of Transplantation* 1326-1331.
3. Arbour, R; Peters, L 'Islam, brain death, and transplantation: culture, faith, and jurisprudence' (2012) 23 (4) *Advanced Critical Care* 381 – 394.
4. Athar, S; Fadel, HE 'Islamic Medical Ethics: the IMANA perspective' (2005) 37 (1) *Journal of Islamic Medical Association of North America* 32-41.
5. Barnard, CN 'Human cardiac transplant. An interim report of a successful operation performed in Groote Schuur Hospital, Cape Town' (1967) 41 (48) *SAMJ* 1271 – 1274.

6. Bass, D 'Kidneys for cash and egg safaris – can we allow 'transplant tourism' to flourish in South Africa?' (2005) *SAMJ* 95 (1) 42-44.
7. Blignaut, B 'More people than expected in marginalized communities know about organ donation' (2017) 6 (2) *Transplantation News* 2.
8. Chaim, VR; Duguet, AM 'Debates in Islamic bioethics on how to increase organ donation: between presumed consent and explicit consent' (2018) *Ethics Medicine and Public Health* 88 – 94.
9. Davids, MR 'South African Renal Registry Annual Report: 2015' (2017) 20 (1) *Afr. J Nephrol* 201 – 213.
10. Denghan, SR 'Ethical challenges of kidney sale: a review of three major assumptions based on the theories of Tabatabat (2019) 61 *J Forensic Leg Med* 27-33.
11. Dimo, PM 'Organ donation behaviour: debates amongst black South African' (2018) 16 (3) *Gender and Behaviour* 12200 – 12210.
12. Ebrahim, AFM 'Euthanasia (Qatl al - alma)' (2007) 39 *Journal of the Islamic Medical Association of North America* 10 – 13.
13. Ebrahim, AFM *The Living Will (Wasiyat Al-Hayy) a study of its legality in the light of Islamic Jurisprudence*, (2000) Vol 19, *Med Law*, 147 – 160.
14. Etheridge, HR; Turner, RE; Kahn, D 'Public attitudes to organ donation among a sample of urban-dwelling South African adults: a 2012 study' (2013) 27 (5) *Clinical transplantation* 684-692.
15. Etheridge, HR; Turner, RE; Kahn, D. 'Attitudes to organ donation among some urban South African populations remain unchanged: a cross-sectional study (1993 – 2013)' (2014) 184 (2) *SAMJ* 135 – 137.
17. Goodarzi, P 'Tissue and organ donation and transplantation in Iran' (2015) 16 *Cell Tissue Bank* 295-301.
18. Harmanci Seren, AK, Horoz, A; Yavuz, H, Yildiz, M 'Opinions and expectations of Muslim donor's relatives deciding organ donation: the sample of Istanbul (2018) 57 (6) *J Relig Health* 2512 – 2522.
19. Harrichandparsad, R; Nadvi, SS; Naidoo, A; Mohamed, O "'A tale of two cities" A snapshot survey of neurosurgical procedures performed in public and private sectors in Ethekwini' (2019) 57 (2) *South African Journal of Surgery* 61-64.

20. Ilyas, M; Alam, M; Ahmad, H 'The Islamic perspective of organ donation in Pakistan' (2009) *Saudi J Kidney D.S Transplantation* 20 (1) 154-156.
21. Islam, MZ 'Organ donation and transplantation issues in Islam and present situation' (2014) *22 Journal of Law, Policy and Globalization* 99 – 103.
22. Kevany, S; Benatar, SR; Fleischer, T 'Improving resource allocation decisions for health and HIV programmes in South Africa: Bioethical, cost-effectiveness and health diplomacy considerations' (2013) 8 (5) *Global Public Health* 570 – 587.
23. Khoza, S 'The human organ trade – the South African tragedy' (2009) *S. Afri J – Bioethics Law* 2 (2) 46-47.
24. Larijani, B; Zahedi, F; Taheri, E 'Ethical and legal aspects of organ transplantation in Iran' (2004) 3615) *Transplantation Proceedings* 1241-1244.
25. Mahdavi-Mazdeh, M; Rouchi, AH; Norouzi, S 'Renal replacement therapy in Iran' (2007) 5 (2) *Urology Journal* 66-70.
26. Mcquoid-Mason DJ 'Human tissue and organ transplant provisions: chapter 8 of the National Health Act and its Regulations, in effect from March 2012 – what doctors must know' (2012) 102 (9) *SAMJ* 734 – 735
26. McQuoid-Mason, DJ; Dada MA 'Tissue transplantation and the National Health Act' (2006) 24 (3) *CME* 128-130.
27. Miller,E 'Organ donation and transplantation in South Africa: an update' (2013) 31 (6) *CME* 220 – 222.
28. Moosa, MR 'The state of kidney transplantation in South Africa' (2019) 109 (4) *SAMJ* 235 – 240.
29. Moosa, MR; Kidd, M 'The dangers of rationing dialysis treatment: dilemma facing a developing country' (2006) 70 (6) *Kidney Int* 1107 – 1114.
30. Mnyongani, F; Slabbert, M 'The cost of indifference in a medical negligence case: Lushaba v MEC for Health, Gauteng (17077/2012 (2014) *ZAGP JHC* 407 (16 October 2014) (2018) *Obiter* 561-573.
31. Mphore, RM 'Obliviousness, not disease, is what kills the nation' (2016) 15 (3) *Transplantation News* 6.
32. Muliira, RS; Muliira, JK 'A review of potential Muslim organ donors' perspective on solid organ donation: lessons for nurses in clinical practice (2014) *Nursing Forum* 49 (1) 59 – 70.

33. Nadvi, SS 'Islamic law and organ donation' (2020) in press *Journal of Islamic Medical Association of South Africa*.
34. Nadvi, SS 'Analytic comparison of Islamic and South African law' (2020) in press *Journal of Islamic Medical Association of South Africa*.
35. Nadvi, SS; Osman-Hyder, M 'Organ donation in South Africa – socio-legal challenges' (2019) in press *Journal of Islamic Medical Association of South Africa*.
36. Najafizadeh, K; Ghorbani, F; Hamidinia, S; Emamhadi, MA; Moinfar, MA; Ghobadi' O; Assari, S 'Holy month of Ramadan and increase in organ donation willingness' (2010) 21 (3) *Saudi J Kidney Dis Transplantation* 443 – 336.
37. Natour, A; Fishman, S 'Islamic Sunni mainstream opinions on compensation of organ donors' (2011) 2 (2) *Rambam Maimonides Medical Journal* 46-59.
38. Padela, Al; Hatidza, Z 'Relationship between Islamic religiosity and attitudes towards deceased organ donation among American Muslims: a pilot study' (2014) 97 (2) *Transplantation* 1292 – 1299.
39. Rady, MY; Verheijde, JL 'Campaigning for organ donation at mosques' (2016) 28 *HEC Forum* 193 – 204.
40. Rady, MY; Verheijde, JL; Ali, MS 'Islam and end-of-life practices in organ donation for transplantation: new questions and serious sociocultural consequences' (2009) 21 (2) *HFC Forum* 175 – 205.
41. Rautenbach, C 'Some comments on the current (and future) status of Muslims personal Law in South Africa' (2004) 1 (1) *Potchefstroom Electronic Law Journal* 1 – 34.
42. Sharif, A 'Organ donation and Islam – challenges and opportunities' (2012) 94 (5) *Transportation Journal* 442 – 446.
43. Sheikh, S 'Shariah: Law and ethics of organ donation in Islam' (2017) 13 (2) *J Int L Islamic L* 30 – 44.
44. Slabbert, M 'Combat organ trafficking – reward the donor or regulate sales' (2008) *Koers* 73 (1) 75-99.
45. Slabbert, M 'Donated human tissue: is it a medical device or just tissue?' (2016) *Obiter* 523-564.

46. Slabbert, M 'This is my kidney, I can do what I want with it' – property right and ownership of human organs' (2009) *Obiter* 499-517.
47. Slabbert, M 'One heart, two patients: who gets a donor organ?' (2009) *Stell L R* 1 124-138.
48. Slabbert, M 'Ethics, justice, and the sale of kidney for transplantation purposes' (2010) 13 (2) *PER/PELS* 77-105.
49. Slabbert, M 'The law as an obstacle in solid organ donations and transplantations' (2018) 8 (1) *THRHR* 70-84.
50. Slabbert, M; Mnyongani, FD; Goolam, N 'Law, religion and organ transplants' (2011) 76 (2) *Koers* 261 – 282.
51. Slabbert, M; Molusi, P 'The possible effect of the Protection of Personal Information Act 4 of 2013 on organ and tissue donations' (2017) *Obiter* 662-640.
52. Slabbert, M; Oosthuizen, H 'The payment for an organ and the admission of guilt by a South African Hospital. *The State v Netcare KwaZulu-Natal (Pty) Ltd* – Agreement in terms of section 105A(1) of the Criminal Procedure Act 51 of 1977, Netcare KwaZulu (Pty) Ltd and the State, Commercial Crime Court, Regional Court of KwaZulu-Natal, Durban – Case No. 41/1804/2010' (2011) *Obiter* 740-746.
53. Slabbert, M; Oosthuizen, H 'Establishing a market for human organs in South Africa Part 1: a proposal' (2007) *Obiter* 28 44-69
54. Slabbert, M; Oosthuizen, H 'Establishing a market for human organs in South Africa Part 2: shortcomings in legislation and the current system of organ procurement' (2007) *Obiter* 28 304-323
55. Slabbert, M; Venter, B 'Routine referrals: a possible solution for transplantation shortages' (2017) 10 *S Afr J Bioethics Law* 15-19.
56. Smith, RD 'Avicenna and the Canon of Medicine: a millennial tribute' (1980) 133 *Western Journal of Medicine* 367-370.
57. Sparaco, A 'Increasing organ donation: is presumed consent the answer?' (2017) 6 (1). *Transplantation News* 5.
58. Thompson, D 'Organ donation in South Africa – a call to action' (2017) 33 (2) *SAMJ* 36 – 37.
59. Tumin, M 'Organ donation in Muslim countries: the case of Malaysia' (2013) 18 *Annals of Transplantation* 671-676.

60. Tumin, M 'Organ donation among Malaysian Muslims: the role of the Mosques' (2015) 20 *Transplantation* 206-210.

61. van Heerden, A; du Plessis, C 'Where do organs come from' (2016) 5 (1) *Transplantation News* 6 – 7.

62. Venter, B 'A selection of constitutional perspectives on human kidney sales' (2013) 16 (1) *PER/PELJ* 352-403.

63. Venter, B; Slabbert, M 'Rewarding a living kidney donor: a comparison between South Africa, Singapore and Iran' (2013) 34 *Obiter* 185-199

## **Newspaper Article**

1. Nancy Scheeper-Hughes 'A grisly global trade: a taboo tumbles : the market for fresh human organs is expanding worldwide, with the poor providing the rich' Los Angeles Times 3 August 2003, at 2.

## **Statutes and Cases**

Local

The Constitution of the Republic of South Africa

1. Children's Act No. 38 of 2005
2. Criminal Procedures Act No. 51 of 1977
3. Human Tissues act No. 65 of 1983
4. Medicines and Related Substances Act No. 101 of 1995
5. National Health Act No. 61 of 2003
  - S 56
  - S 58
  - S 60
  - S 61
  - S 62
  - S 63
  - S 64
6. Prevention and Combatting of Corrupt Activities Act No. 12 of 2004

7. Prevention of Organized Crime Act No. 121 of 1988
8. Protection of Personal Information Act 4 of 2013
9. Wills Act No. 7 of 1953

#### Cases

1. *The State v Netcare KwaZulu-Natal (Pty) Ltd*. Agreement in terms of section 105 A (1) of the Criminal Procedures Act 51 of 1977, Netcare KwaZulu-Natal (Pty) Ltd and the State, Commercial Crime Court, Regional Court of KwaZulu-Natal, Durban, Case No. 41/1804/2010
2. *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997)

#### Foreign

1. Organ Transplantation and Brain Death Act – 2000 (Iran)
2. Transplantation of Human Organs and Tissues Ordinance- 5<sup>th</sup> September 2007 (Pakistan)



14 November 2019

Dr Syed Sameer Nadvi (833836093)  
School of Law  
Howard College Campus

Dear Dr Nadvi,

Protocol reference number: HSS/0602/019M

Project title: Living and Cadaveric Organ Donation – A comparative study of Islamic and South African Law – Consensus and Divergence

### Approval Notification – Exempt / No Risk Application

This letter serves to notify you that your application received on 07 June 2019 in connection with the above, was reviewed by the Humanities and Social Sciences Research Ethics Committee (HSSREC) and the protocol has been granted **FULL APPROVAL**

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number. PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

**This approval is valid for one year from 14 November 2019.**

To ensure uninterrupted approval of this study beyond the approval expiry date, a progress report must be submitted to the Research Office on the appropriate form 2 - 3 months before the expiry date. A close-out report to be submitted when study is finished.

Yours sincerely,

Professor Urmilla Bob  
University Dean of Research

/ms

Cc Supervisor: Ms Munirah Osman-Hyder  
Cc Academic Leader Research: Dr Donrich Thaldar  
Cc School Administrator: Mr Pradeep Ramsewak

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