

The Application of the Rule of *Istihsan bi Al-Maslahah* (Juristic Preference by Interest): A Practical Approach on Some Medical Treatment

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DOI Link: <http://dx.doi.org/10.6007/IJARBSS/v7-i5/2975>

Published Date: 21 May 2017

Abstract

Islamic jurisprudence is built from two major foundations which are to give *maslahah* (interest) to human beings and push away all the troubles from them. This is as stated in the method of *fiqhiyyah* which is "*Jalbu al Masalih wa Dar'u al Mafasid*". *Istihsan* is one of the secondary sources in Islamic law that is created from the principle of *maslahah*. Islamic jurists define *istihsan* as leaving a designated law to a new law, in an event with the account of Islamic primary sources and current relevance. Today, the method of *istihsan* is used to solve many current social issues. This study is done using the methodology of library research to prove the relevance and efficiency of this method in countering new emerging issues. Several current medical issues are analysed with the use of printed and electronic resources. These issues are then examined and scrutinised from Islamic point of view to visualise the process of law designation through the method of *Istihsan bi al Maslahah* that is utilised by some Islamic jurists to give answers to current problems. The outcome of this research is important as an evidence that Islam is a religion that is also capable of solving current issues.

Keywords: Islamic jurisprudence, *istihsan*, *maslahah*, *Istihsan bi al Maslahah*, *Maqasid Shariah*.

Introduction

The rule of *Istihsan* is one of the rules that have been introduced by the scholars of Islamic jurisprudence a long time ago. This rule is *syar'ie*-base because the sources of its legislation are al-Quran, al-Sunnah, and the practice of the companions of Prophet Muhammad pbuh. Al-Quran, for example, in order to introduce the graduality of certain rule, is based on the rule of *Istihsan*. Al-Sunnah also, in many ways, is formed by way of *Istihsan*, such as the validity of fasting of a person who forgot and consumed food at midday is justified by *Istihsan*.

In many issues, this rule of *Istihsan* is not only applicable by the existence of textual authority, but also applicable via absolute interest or *maslahah*. This situation may cause pro and contra among Muslim scholars as to its validity to be one of the sources of Islamic law. The writers will not touch on that issue. The emphasis will be more on its role in deducing legal rulings regarding medical issues.

Research Methodology

In general, this research uses the methodology of library research. The writer has done some research to examine several methods of current medical treatment that are featured in the written works. They are taken from journals, seminar proceedings, scientific magazines, printed media, electronic media, internet, and others. Library research goes through the following phases:

Phase 1: Examining thoroughly the methods of current medical treatment including the treatment processes, the treatment procedures, the substances used, the level of a patient's treatment necessity, the parties involved, and so on.

Phase 2: Referring to the Quran verses that have connection with the examined issues, then reviewing Islamic jurists' interpretations of those verses.

Phase 3: Referring to the hadiths that have connection with the studied issues and reviewing the laws created by Islamic jurists based on those hadiths.

Phase 4: Examining the past Islamic jurists' views that have relation with the issues. These "past Islamic jurists" are not restricted to those of the four prominent sects, but also include the prophets' *sahabah* (friends) and Islamic scholars from every position.

Phase 5: Examining and revealing current Islamic scholars comments on whatever matter that has links with the studied issues.

Phase 6: Examining the medical experts' reviews and comments on the matters relating to the issues. The reviews and comments of those experts who are Muslims are given the preference due to their relevance and reliability to help with the law designation regarding the issues.

This research uses descriptive approach. Every selected issue are analyzed, explained, argued and reviewed by the researcher to obtain a verdict that is relevant and fitting with the Islamic law and capable of giving the best solution to the issues countered. This verdict, or can be termed as *tarjih*, takes into account both the Islamic jurists' and the medical experts' views.

Finding And Research Discussion

These are the issues related to the methods of current medical treatment that prove the use of the *istihsan* method in the process of law designation. The issues are as follows.

Blood Transfusion

Acquiring blood from an individual to be transmitted to another individual who is in need of such blood is known as blood transfusion. The term 'donor' is used for the person who gives or donates his blood to be used by another person.¹

¹ A healthy human body has five liters of water or 10-12 pines of blood. If he loses blood because of an accident, he needs additional blood to save his life, or at least to support his losses of blood. In some situations, additional blood is needed as a support to prevent or

Blood transfusion is not so intricate or having high risk; it does not harm the donor. This is because the blood donated will be replaced by new blood. According to medical expertise, the hemoglobin rate will become constant in the period of four to eight weeks. However, the process of stabilizing the loss of iron will consume long period of time. Therefore, the donor will be given iron tablets for a specific period after the donation (Haenen, 1979).

Blood consists of four main components; erythrocytes, leukocytes, platelet and liquid plasma. Erythrocyte, in the form of biconcave enables it to carry a large amount of oxygen. Hemoglobin (the mixture of protein, globulin and iron) is a pigment that carries oxygen contained in the erythrocytes which cause the blood to be red in color (Cormack, 1987; Wagmen, 1996). The leukocytes act as an antibody to fight the disease. Platelet is in form of tiny cells which acts when the blood is need to be frozen or the artery need to be repaired. It is known as 'thrombocytes' (Cormack, 1987).

In the medical field, there are diseases that require blood transfusion which involves all or a part of its components. One of the examples is anemia. This disease is due to the serious lack of erythrocytes cells or the liquidity of hemoglobin (pigment that bring oxygen contained in the erythrocytes). This deficiency will affect the function of blood to carry oxygen to the organs. Among diseases that are said to be the cause of anemia is kidney, peptic ulcer, piles, long period of menstruation, tumor, cancer, talasemia etc. Among the types of anemia that require blood transfusion immediately is anemia hemolytic (Macleod, 1981). According to medical scholars, the blood transfusion must be done immediately if the disease is at the stage of chronic.

From the facts discussed above, it can be concluded that blood transfusion is one of the needs in medical field. Since this is a new discovery, the early Muslim scholars have not discussed it directly. They have discussed only in general the utilization of unclean materials at the time of necessity, such as for the purpose of medical treatment etc. whereas the recent scholars have discussed this issue (blood transfusion) since it concerns with the public interest.

As mentioned before, early Muslim scholars from different schools of thought have discussed about the permissibility to use unclean materials at the time of necessity. Blood is one of the unclean materials. The uncleanness of it is unanimously agreed by all Muslim scholars (Al Zuhayli, 1989; Ibn Taimiyyah, n.d.). They based their view on some Quranic authorities, *inter alia*:

- i. *"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 God. But if one is forced by necessity, without willful disobedience, nor transgressing due limits, - then is he guiltless..."*(QS 2: 173)
- ii. *"Forbidden to you (for food) are: dead meat, blood, the flesh of swine, and that on which hath been invoked the name of other than God..."*(QS 5: 3)

Based on the above authorities, it is clear that blood is one of the unclean materials, cannot be consumed or to be utilized with other substances. However, it (blood) can be consumed

curing certain kinds of disease. This situation will cause the sufferer to be helped by other individuals by way of blood donation (Bud Getchall, Rully Pippin, Jill Varnes (1991).

as food at the time of necessity, such as at the time of grave hunger or thirst (Al Qurtubi, 1985), based on the permissibility given by the above text. Among scholars who have discussed the use of blood for medical treatment is Imam al-Nawawi who has mentioned that: *"...to conduct medical treatment using prohibited unclean substances other than liquor is permissible and this is the final view in this mazhab (Shafi'ie) and the view of majority jurist. The permissibility is given if there are no permissible clean materials. If those (permissible clean materials) exist, it is prohibited to use the unclean things without any difference of opinion among jurist."*(Al Nawawi, n.d.)

The prohibited unclean things mentioned by Imam Nawawi include blood. According to Abd al-Karim Zaidan in his commentary on the above fatwa, if a patient is given permissibility to consume blood for the purpose of medical treatment as directed by the doctor or specialist, then the blood transfusion is more appropriate to be permitted because it is done by way of transmitting blood through his artery, not by way of consummation (Zaydan 1993). To transmit blood via artery is lighter in terms of ruling (hukum) rather than to consume or to drink it.

Meanwhile, there are early scholars who viewed that to conduct medical treatment using prohibited unclean materials (including blood) is totally prohibited. They were majority jurist of Hanafis, Malikis, Hambalis and some scholars of Shafi'ies (Ibn 'Abidin, n.d.; al-Nawawi, n.d.; al-Syarbini, 1958; Ibn Hazm, n.d.). Those who followed the second view have differentiated between the permissibility to consume those materials at the time of necessity and the use of those materials for the medical purpose. The latter is absolutely prohibited whereas the former is permissible. The writers viewed that to differentiate between the two is very hard to understand, because the sufferer who needs the materials such as blood etc. is in the same shoe that of person who faces the grave thirst and hunger. It shows that the terms "medical treatment" and "consummation during necessity" share same meaning and objective, thus the medical process such as blood transfusion is lighter compared to consummation process. This can be seen from the ruling of fasting. The blood transfusion, if done on a person who is fasting, will not invalidate his fasting, and this is different from the situation where he consumes or drinks blood; it will invalidate his fasting. Therefore, according to the writer, the two terms (medical treatment and consummation during necessity) shall be appropriately accepted in terms of their similarities and concept or their objective. Also this consummation can be classified as a part of medical process.

Contemporary scholars have permitted the practice of blood transfusion from a person to another. Among them are Jad al-Haq (n.d.), Tantawi (n.d.), al-Qaradhawi (1993), Zaidan (1993), al-Sakari (1988), etc. Among fatwa authorities, nationally and internationally, which manifest the fatwa as regards to blood transfusion are Majma' al-Fiqh al-Islami (1988), Jordanian Fatwa Authorities (1977), Algerian Fatwa Authorities (1972) and etc.

Sperm Bank

Islam is a religion that protects and stresses the importance of lineage. Therefore, Islam prohibits adultery because it will cause the mixture of lineage and the loss of the sense of responsibility towards the children born. In order to preserve this responsibility, Islam requires a marriage to be solemnized by certain 'aqd and executed by the guardian (wali) from the female side. The 'aqd made also must be witnessed by two just and trustful persons who bear responsibility to make sure that the marriage is rightly solemnized. These matters

show that Islam put a stress on the protection of lineage. Marital relationship is regarded by Quran as a strong and serious contract or relationship. This expression portrays that Islam is stressing on the responsibility not only to the wife but also to the generations born as a result of the marriage itself.

If the existence of sperm bank can be utilized to arrange ovulation process between the husband and the wife's seeds, then the process, as mentioned above, is allowed by Islam, but it will not make its existence to be permissible. This is because Islam is stressing on *sadd al-zara`i* (blocking pretences) or the ruling that will block permissible matters which can lead to prohibited matters (Zaydan, 1987). In this issue, the establishment of sperm bank will create more demands from the people who are having pregnancy problem without concerning the origin of the seeds used, and this is for sure not permitted.

In the meantime, the standard of human morality also will become low, as if human can create human wantonly; such as phenomenon happens in Western countries nowadays which use the opportunity of the establishment of sperm bank to gain profits and wealth.

This is contrary to the Islamic concept that observes mankind as the best creature honored by Allah and also as vicegerent of Him to dwell the Earth. He says to the effect that: *"We have honored the sons of Adam; and We provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favors above a great part of Our creation."* (QS 17: 70)

However, if the institution changes its modus operandi to become a place to keep seeds of husband and wife who need medical treatment in order to enable them to have descendant in future and the process is need to be done as advised by specialists, then the writers view that Islam does not prevent such effort, provided that it is done under the strict supervision from the authority in line with the rulings of *syara'*.

Utilizing Animal Organs

Medical field nowadays is moving a step further with the existence of replacement organs obtained from animals to replace damaged organs or tissues of human body. The attempt to transfer animal organs to replace human organs has been done since 1963 with 30 times of attempt. However, according to a report published by the University of Pittsburg, Pennsylvania, U.S., all of the attempts failed and it's over with the death of the patient after several hours or several months after operation (Romensky, 1997). For example, in 1964, Dr. James Hardy has transferred heart of a monkey to heart-disease sufferer aged 68 years old. Because of the ape's heart was small, the patient died several hours after the operation.

In Malaysia, scientists from Universiti Sains Malaysia and National Tissue Bank have found graph amnion tissue from goat's skin that can be used to cure wound, including blisters as a result of burning especially on face. This organ is made from the combination of goat's placental tissue and *gamma* ray (from nuclear technology) to be gushed to the sufferer (Azmah, 1997).

The recent development also suggests the use of replacement organs made from swine's organs. The early research made showed that swine's organs are the most suitable to be used as replacement of human organs because its size is more or less similar with that of human

organs. It also stated that swine's liver can be used to save the life of Hepatitis B sufferer (Romensky, 1997).

In fact, at the time of splendor of Islam, i.e. at the time of the rule of Abbasids, Muslim medical specialists have also explored new medical techniques. More than a thousand years ago, they have discussed the issue of xenografts. al-Qazarini (600-682H/1203-1283M) has founded the use of swine's bones for the purpose of curing bone problem (Ros, 1994).

To answer the question of what is the status of prayer of a sufferer who utilizes unclean organ such as organ obtained from carrion or unclean animal such as swine etc., there are textual authorities that prohibit the use of unclean materials. Among others, Allah has mentioned in the Quran to the effect that: *"He hath forbidden 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 God. But one is forced by necessity, without willful disobedience nor transgressing due limits, then he is guiltless..."* (QS 2:173)

Based on the above authority, it seems that the use of unclean materials is not allowed. The prohibitory order is not only for the purpose of consummation, but also other matters including medical treatment. It will become permissible in the case of *dharurah* (necessity) as mentioned at the end of the verse (Al Zuhaily, 1991; Al Zaini, 1993).

There is a major difference between a person who is in a state of grave hunger and there is no food to consume other than prohibited food and a sick person. The former is permitted to eat prohibited food because he is in the state of necessity. This was stressed in the ante-mentioned verses. If the hunger is not reaching the state of necessity, he is not allowed to eat such food. The latter is permitted to use unclean materials for the purpose of medical treatment, either in the state of necessity or state of need.

Therefore, the use of such organs and replacement tissues by the sufferer has three stages: First: The use at the time of necessity, it is permitted based on the generality of the two verses above. If the unclean food can be consumed at the time of necessity (Al Nawawi, n.d.), the use of artificial organs made from unclean materials is appropriate to be permitted because it does not relate to food but the use only.

Second: The use of artificial organs made from unclean materials at needy state is permitted if such organs or tissues are needed to complete his daily life.

Third: The use of artificial organs or tissues made from unclean materials in ordinary circumstances is not allowed because it will disturb the prayer which is ordered to be performed in clean state and free from unclean substances.

However, there is a fatwa made by some scholars of Hanafis which stated that unclean substances which have changed from its original state and free from unclean features (smell, color and taste), then its status is changed and it cannot be regarded as unclean (Al Kasani, 1986). Based on this fatwa, artificial organs or tissues made from such materials are not regarded as unclean anymore because of the transformation on its smell, color and taste and its original characteristics. Therefore, it can be used without restriction. This fatwa is clearly opposed to the above view because unclean is regarded as unclean in any state. Only in certain circumstances the use is allowed because of necessity or need. The writer is of this opinion

(unclean is unclean) because we are encouraged to be in clean state, either dirty or unclean substances. Moreover, the cleanliness is a part of faith.

Patient who uses animal organs or tissues, if the animal is lawful to be consumed and lawfully slaughtered (Al Zuhaily, 1989); there is no problem because it is not regarded as unclean. If the organs are obtained from lawful animal but is not slaughtered (carrion), there is a difference of opinion on this matter. According to Hanafis, carrion's organs or its parts forming hard objects which have no flowing of blood, such as bone, horn, teeth, nail or tusk are not regarded as unclean. The reason given is that the '*illah* (cause) of the uncleanness of the organs or its parts is because of the existence of unclean liquid such as blood or other fluids exist on such parts. On the other hand, such fluids or liquid do not exist on organs which forming hard objects (Al Kasani, 1986). Shafi'is (Al Syarbini, 1958) and majority jurists (Al Zuhaily, 1989) opined that all parts or organs of carrion are unclean including hard objects.

Based on Hanafis view, the use of dead animal organs or parts or hard objects as replacements for certain parts of human body is permitted without limitation. Moreover, there are Hanafi scholars who clearly allowed the use of such things in their sayings. The writer of *al-Fatawa al-Hindiyyah* (n.d.): *"And it is permissible to cure disease using bones obtained from goat, cow, camel, horse or other animals."*

The use of carrion's hard object in Shafi'ies must be limited to certain state of necessity and needy only because that part is unclean (Al Syarbini, 1958). According to the writer of *Mughni al-Muhtaj* (1958): *"And anyone who fuses his bone (because of injury) with certain part of unclean substance, and this is done because of lack of other clean, suitable part for him, or if there is a clean substance but not suitable for him according to the specialist, then he is allowed and his prayer is valid because of necessity."*

Based on the view of Shafi'ies, if there are other parts which are clean and can be used by the patient, the use of unclean parts is not allowed because it will disturb the execution of prayer which is valid to be executed in a clean state. If a person uses an organ or any parts of the carrion as replacement for his organ, and then he finds other replacement which is clean, there are differences of view in Shafi'ies school of thought (Qalyubi, n.d.).

First view: He must remove the bone or any part used from unclean materials if it does not harm himself. Otherwise, he doesn't have to remove it.

Second view: He must remove such part although it will harm himself because he has transgressed the limit.

The first is the final view of Shafi'ies. This is because there is no element of transgression of limit in this case because it was done at the absence of unclean materials. The writers view that parts which forming hard objects obtained from carrion is not unclean is the strong view. It means that the use of it is allowed without limitation to necessity only. However, there is a condition that it does not harm the patient's body.

Any organs or parts or tissues of unslaughtered animal not forming hard objects, such as heart, liver etc., it is not allowed except for necessity or needy states. This is because all or such organs are regarded unclean in the view of all mazhabs.

The use of organs or parts or tissues of prohibited animals also shares the same ruling that of use of organs or parts or tissues of lawful animals, with the exceptions to swine and dog. As regards to the use of organs, parts or tissues of swine, Imam al-Qurtubi said that it is unanimous view among scholars on the uncleanness of all parts of such animal, except its fur (Al Qurtubi, 1985). There are scholars who allowed the use of pig's fur (Al Husaini, n.d.). However, majority of scholars according Shafi'ies prohibit such use.

The writers view that the use of organs, parts or tissues obtained from swine is prohibited as regards to the verse: *"He hath forbidden 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 God..."* (QS 5:3)

The use of parts of such animal can only be used at the state of necessity; similar to the ruling of permissibility to consume it. This permissibility is found from the sayings of the early scholars. Among others the expression of Imam al-Syarbini (1958) in Mughni al-Muhtaj as stated before. The expression of "unclean substance" and in his saying *"And anyone who fuses his bone (because of injury) with certain part of unclean substance..."* is general, including swine's parts. This was strengthen from the historical fact that the issue rose up by Imam al-Syarbini has answered the question of people at that time about the use of swine's bone as replacement to human's bone.²

As regard to dog's organs, parts or tissues, the scholars differed in their view on its uncleanness. Shafi'ies (Al Syarbini, 1958) and Hambalis (Ibn Qudamah, 1983) considered dog is an unclean animal, including all its parts, including its saliva and sweat. Hanafis viewed that dog is not an unclean animal. The uncleanness is only its mouth and sativa. This was based on the hadith which ordered the seven times wash for its lick (Al Kasani, 1986). Malikis viewed that dog is not an unclean animal, similar to other animals. Based on the hadith above, they considered the wash as *"ta'abbudi"* or order with no reason (Al Dusuqi, n.d.).

Based on the view of Shafi'ies and Hambalis, the use of parts of dog forming hard objects such as its bone, nail etc. is not allowed at all, except for necessity. However, based on views pointed out by Hanafis and Malikis, the use of it is allowed without limitation to necessity. Regarding inner parts not forming hard objects, such as heart, liver etc., the use must be within the limit of necessity or needy because such organs are unclean in the view of all mazhabs (including Malikis) because they are parts of dead meat which are covered with unclean fluids. The use is limited to necessity or needy only. Malikis viewed it unclean because the fluid of such animal is unclean although it is a clean animal.

² According to historical fact, a Muslim medical scholar, Zakariyya al-Qazarini (600-682H/1203-1283M) has founded the use of swine's bones for treatment of bone sufferers. Based on his research, such bone the is best among xenografitis. The use of such material may become uncomfortable among Muslims. However we must admit that this kind of treatment has been done because of lack of other alternative at that time to cure bone disease (Wan Ros,1994)

Selling Breast Milk

Islam does not prohibit its women from giving their milk to other children who are not their children or mahram. Moreover, it is an admirable act because it includes in the definition of helping each other proposed by Islam, Based on the saying of Allah: *"Help ye one another in righteousness and piety, but help ye not one another in sin and rancor..."* (QS 5:2). What more if the giving is done to a child whose the mother is not able to produce milk because of sickness and etc. Islam is giving a high respect to women who feed their milk to children other than theirs by giving a high standard to them, i.e. they share similar status of the actual mother in term of prohibition of marriage, family relationship etc. Its based on the verse: *"Prohibited to you for marriage...foster-mothers..."* (QS 4:23)

As regards to the selling of breast milk, scholars have discussed this issue and there are three opinions on this matter. Majority jurists (Shafi'ies, Zahiris, Zaidis, majority of Malikis and some scholars of Hambalis (Shirazi, n.d.; Ibn Hazm, n.d.; Saleh, n.d.; Sakari, 1988) viewed that it is permissible for a mother to sell her breast milk, whether she is independent or a slave. According to Imam Ahmad, it is not recommendable. (Al Bahuti, 1982) There are scholars who prohibited the selling of breast milk. Among them are Abu Hanifah, Muhammad al-Shaibani, some scholars of Hambalis and Malikis (Al Sanáni, 1960; Al Sharakhshi, 1986; Al Qarafi, n.d.; Saleh, n.d.). Imam Abu Yusuf opined that it is permissible for slave only, not an independent woman. They based their view on the saying of Allah to the effect that: *"...God hath permitted trade and forbidden usury..."* QS 2: 275

The permissibility of selling based on the above verse is general. The most important is that all the conditions of selling are fulfilled. The generality of this verse includes selling breast milk (Ibn Hazm, n.d; Al Nawawi, n.d). They also make an analogical deduction between human breast milk and animal milk. If it is permissible to sell milks of goat, cow etc., then the same applies to women's breast milk (Al Nawawi, n.d.). Meanwhile, those who opposed the above view argued that (Al Sanáni, 1960; Al Sharakhshi, 1986):

- i. Breast milk is not regarded as property. This is based on the concept of al-daman or damages, i.e. those who damage or destroy other's property, he must pay damages. If breast milk is regarded as property, those who damage it must pay compensation or damages. If it is not regarded as property, it cannot be used as transactional material.
- ii. Breast milk is of a kind of al-manfa'at (things that can be utilized), not a property. Things that can be utilized only can be rented (al-ijarah). It cannot be sold. Therefore, it is allowed for a woman to take wages for breast-feeding other person's child, not to sell it.
- iii. Selling breast milk will decrease human value, whereas human is created by Allah in an honorable state, Based on the verse: *"We have honored the sons of Adam; and We provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favors above a great part of Our creation."*(QS 17:70)

Conclusion

Islam, being the religion of Allah and the way which covers all aspects of human life, is able to interact and provides best solutions for all human issues, whether it involves Muslim community or otherwise. *Ijtihad fiqhi* which is done in order to permit or prohibits the new

discovery is based on the exact authorities derived from Islamic legal sources and supported by the objectives of Syari'ah. These revelation-based rulings are able to compete with the new discoveries so that it would not harm humankind.

The rule of Istihsan is one of the rules that have been introduced by the scholars of Islamic jurisprudence a long time ago. In many issues, this rule of Istihsan is not only applicable by the existence of textual authority, but also applicable via absolute interest or *maslahah*. This situation may cause pro and contra among Muslim scholars as to its validity to be one of the sources of Islamic law.

Acknowledgement

This paper is founded on the research project of the Special Research Grant Scheme (SRGS)-RR184. Special appreciation is owed to Universiti Sultan Zainal Abidin (UniSZA) for sponsoring and supporting this research.

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