

Performing Curative Medical Experiments on Incurable Patients: Between Islamic Jurisprudence and the Laws of the Middle East

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Abstract

This study aims to elucidate the Islamic jurisprudential and legal ruling on conducting curative medical experiments on incurable patients. The study found it appropriate to divide those experiments into two parts. Firstly, medical experiments on incurable patients to secure a cure for the illness from which they suffer. Secondly, Medical experiments on incurable individuals produce a cure for an illness from which they do not suffer. The present study adopted the descriptive method grounded in describing the issue and then comparing and analyzing the jurisprudential opinions leading to the chosen opinion. The Study concluded that Emirati and Jordanian Laws and Islamic jurisprudence find it permissible to conduct medical treatment experiments underpinned by a set of parameters and restrictions.

Keywords

Experiments, Incurable, Islamic Jurisprudence, Law, Medical.

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Introduction

Several devastating illnesses (e.g., HIV/AIDS, several types of cancer, etc.) leading to death have spread at a large scale, and science has not found effective cures to eradicate them. In order to treat those illnesses, physicians find it an urgent necessity to experiment with some types of medicines or treatments on those patients, primarily to treat them and to treat others. Viewed from a religious standpoint, the question remains: Is it permissible to perform experimental treatments on individuals with incurable illnesses to develop an effective cure? The present study discusses the issue of performing medical experimentation on patients suffering from terminal illnesses with the sole purpose of discovering curative medicines from the Islamic perspective by elucidating the positions of Muslim jurists and then comparing their positions with the laws governing such needs, found and is practice in some Arab countries.

The importance of this research stems from the subject of medical and scientific experiments on the human body, as it has sparked controversy in Islamic jurisprudence regarding the legitimacy of carrying it out due to its connection to the human body, which has protection and infallibility in terms of harming it. Moreover, these experiments greatly impact medical progress and the treatment of diseases, especially incurable ones. Therefore, there is a need to treat the issue of conducting medical experiments on the terminally ill through an independent study based on an in-depth jurisprudential approach of the subject and comparing it with the legal position. Furthermore, there is an urgent need to stand on the legal ruling for conducting medical experiments on the terminally ill and establish clear rules and controls for the permissibility of conducting these experiments, which the

doctor must adhere to before starting the therapeutic or scientific experiment. Then, the subject of medical experiments revolves around two considerations, namely (i) giving the doctor freedom to conduct therapeutic and scientific experiments on humans and (ii) preserving the safety and benefits of humans and not harming them except for a higher interest approved by Sharia. Thus, specialized and in-depth studies should be provided on the issues of conducting these medical experiments.

As for the most prominent shortcomings in previous studies on this topic, although some studies addressed the topic of medical experiments, including the study Sanousi,¹ of medical experiments on humans in light of criminal liability, the study Al-Uthman,² of medical experiments on humans, a jurisprudential study, and the study of Abu Matar,³ of scientific experiments on the human body, a comparative jurisprudential study, and the study Al-Mazrou`⁴ of provisions of medical experiments on animals and humans, a comparative study, and the study Ma`Abrah,⁵ of the ruling on conducting medical (therapeutic) experiments on humans and animals. The aforementioned studies addressed the topic of medical

¹ Sanousi Bin Audeh, *Medical Experiments on Humans in the Shadow of Criminal Liability, a comparative study*, (Algeria, University of Abou Bakr Belkaïd, a doctoral dissertation, 2018).

² Abdel Rahman Ibrahim Al-Uthman, *Medical Experiments on Humans ar., Jurisprudential Study*, (Saudi Arabia, Imam Muhammad ibn Saud Islamic University, doctoral dissertation, 2011).

³ Nariman Wafiq Abu Matar, *Scientific Experiments on the Human Body: A Comparative Jurisprudence Study*, (Gaza: a master's thesis, the Islamic University. 2011).

⁴ Abdel Ilah Bin Mazrou' Al-Mazrou`, *Rules on Medical Experiments on Animals and Humans.- a comparative study*, (Saudi Arabia: King Saud University, a Master's thesis, 2007), 173.

⁵ Afaf Atiyeh Ma`abrah, *Ruling on Performing Medical Treatment Experiments on Humans and Animals*, (Jordan, Yarmouk University, a master's thesis, 2002).

experiments in general and did not specialize in researching specific issues in experiments. In addition, these studies were limited to the jurisprudential aspect and did not study the topic from a legal perspective.

On the one hand, the shortcomings of the legal position appear in that the law dealt with the subject of medical experiments and its controls in general and did not address the controls specific to conducting medical experiments on the terminally ill. On the other hand, Arab laws relied in their conditions for permitting medical experiments on the fundamental principles adopted by the 18th World Medical Association Helsinki, Finland, 1964, the Nuremberg Regulations of 1947, and the Charter of Fundamental Rights of the European Union of 2000, without linking that to the jurisprudential position, and that these controls have a jurisprudential basis.

This article consists of several parts. After the introduction, part two will explain the concept of the incurable patient and the extent of the connection of the term to the jurisprudential tradition. After that, part three will discuss the ruling on conducting medical experiments on an incurable patient to develop a treatment for the illness from which he suffers. Then, part four will discuss the ruling of performing medical experiments on an incurable patient to find treatment for an illness from which he/she does not suffer through clinical trials that benefit other patients. Finally, last section comes to draw conclusions

The Concept of the Incurable Patient and the Extent of the Connection of the Term to the Jurisprudential Tradition

Through an examination of the jurisprudential sources, the author found the existence of two meanings of

the incurable person, namely, the first meaning is the illness that has reached a point where recovery is rare, such as the advanced stages of cancer or liver failure. This meaning is intended under the four Islamic schools of thought (madhabs): Hanafi, Maliki, Shafi`i, and Hanbali.⁶

It would be possible for a researcher to state that this meaning has to do with a patient suffering from a fatal illness, which is defined in classical *Fiqh* sources as a disease that leads to the patient's inability to perform his normal/familiar duties that healthy people can perform. It is not necessary for the patient to stay in bed. Those who are afflicted with this serious illness will likely die, and death often occurs within a year⁷.

As the illness whereby a man or woman becomes unable to practice ordinary activities and where death is expected before one year lapses from its occurrence.⁸ In

⁶ Mansour Bin Younis Al-Bahouti, *Kashaf Al-Qina`a 'An Matn Al-Iqna`a*, (Beirut: Dar Al-Kutub Al-Ilmiyyah, 1997), 5: 380. Muhammad Bin Ahmad Alish, *Manh Al-Jalil Sharh Mukhtassar Khalil*, (Beirut: Dar Al-Fikr, 1989), 3: 104. Ali Bin Muhammad Al-Mawardi, *Al-Hawi Al-Kabir Fi Fiqh Madhab Al-Shafi`i*, edited by: Ali Muhammad Mu`awwad and Adel Ahmad Abdul Mawjud, (Beirut: Dar Al-Kutub Al-Ilmiyyah, 1999), 4: 14. Muhammad Bin Ahmad Al-Sarakhsi, *Al-Mabsout*, (Beirut: Dar Al-Ma`rifah, 1993), 9: 101.

⁷ Muhammad Amin Bin Umar Ibn Abdeen, *Rad Al-Muhtar 'Ala Al-Durr Al-Mukhtar*, (Beirut: Dar Al-Fikr, 1992), 6: 660. Zakaria bin Muhammad Al-Ansari, *'Fath Al-Wahhab Bisharh Manhaj Al-Toulab.'* (Beirut: Dar al-Fikr, 1994), 2: 19. Ahmad bin Ghanem al-Nafrawi, *'Al-Fawaki Al-Dawani Ala Risalat Ibn Abi Zayd Al-Qayrawani'*, (Beirut: Dar al-Fikr, 1995), 2: 159. Mahfouz bin Ahmad Al-Kaludhani, *'Al-Hidayah Ala Madhab Al-Imam Abu Abdullah Ahmad bin Muhammad bin Hanbal Al-Shaibani,'* (Kuwait: Grass Foundation, 2004) 633. Al-Zuhayli, Wahbeh. (1985), *Muslim Jurisprudence and its Proofs*, (Damascus: Dar Al-Fikr, 1985), 4: 2978.

⁸ Muhammad Amin Bin Umar Ibn Abdeen, *Rad Al-Muhtar 'Ala Al-Durr Al-Mukhtar*, (Beirut: Dar Al-Fikr, 1992), 6: 660. Al-Zuhayli, Wahbeh. (1985), *Muslim Jurisprudence and its Proofs*, (Damascus: Dar Al-Fikr, 1985), 4: 2978.

fact, the Federal Law Number (5) of 1985 On the Civil Transactions in the United Arab Emirates -Article Number (597) defined a fatal illness as when a person is incapable of pursuing his ordinary tasks and activities and where death is most probably under such condition before the passage of one year. If the illness lasts for one year or more while being in the same condition, without further deterioration, then his conduct shall be like that of a healthy person. Actually, *Majallat Al-Ahkam Al-Adliyyah* Article Number (1595) defined it as the illness where a patient is incapable of pursuing his usual interests, whether a man or woman, and where death is imminent, and he dies in such condition before the passage of one year. This is what the Jordanian Civil Code adopted in Article No. 543.

The author is of the view that the incurable person is one whom a medical practitioner decides that he/she will not survive the illness, where the latter shall potentially be the cause of his/her death.

What was previously stated is the first meaning of death illness, while the second meaning is the illness, which is incurable to date, where the person afflicted by it is physically sound, such as sterility, for the sterile person is physically sound but suffers from an illness for which there is no cure to date.

Before reviewing the details of the jurisprudential perspectives of the issue, it is worth noting that prominent jurists such as Al-Nawawi (Al-Shafi'i), Al-Kassani (Al-Hanafi), Ibn Al-Mawaq (Al-Maliki), and Ibn Qudamah (Al-Hanbali) did not discuss this issue because it is a contemporary topic.

Therefore, the researcher searched rigorously scientific journals and databases of theses with the aim of identifying pertinent contemporary jurisprudential

opinions. Thus, he relied on contemporary references, then the researcher studied them and found the evidence on which the first and second opinions relied, some of which related to original jurisprudential sources or past jurisprudential sources. Hence, the researcher referred to those early sources. To this end, the researcher focused on peer-reviewed scientific journals and databases of university theses, in addition to searching in books of the four schools of jurisprudence.

The Ruling on Conducting Medical Experiments on an Incurable Patient to Develop a Treatment for the Illness from Which He Suffers

In case a person is afflicted by an illness which the medical practice has not discovered a cure for, such as HIV/AIDS, the advanced stages of cancer, brain death, or sterility, then is it permissible for physicians to experiment on types of treatments for such illnesses with the objective to cure him/her and others in the future. Contemporary Fuqaha (jurists/scholars) have held two opinions on this matter:

First opinion: Impermissibility

One of the contemporary scholars, Abd al-Ilah Al-Mazrou', determined the prohibition of this type of experiment, and formed this opinion analogically upon what the classical *Fuqaha* (Muslim scholars) have mentioned insofar as if a group of people boarded a ship which thereby became overloaded, and were forced to jettison some of them into the sea so that the boat becomes of a lesser load and the others may survive; hence is it permissible to infringe on the life of a few individuals so

that the remaining ones survive.⁹ In this regard, many religious scholars held the view that it is impermissible to jettison some of the people into the sea to save the remaining group,¹⁰ they grounded their position in a set of proofs, including verses in the Holy *Quran*, which state: "O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent. And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful.[29] And whoever does that in aggression and injustice - then We will drive him into a Fire. And that, for Allah, is [always] easy.[30]" Surah An-Nisa' (4: 29-30) Holy *Quran*.

The underlying reasoning of this position: Allah (SWT) prohibited the Muslim to kill himself, where if one throws himself into the sea, he shall have caused his death, which the *Quranic* verse prohibited. Moreover, the verse indicates the prohibition for a person to kill himself, and by corollary, it also indicates that the killing of another life is more serious because if it is prohibited for a person to

⁹ Abdel Ilah Bin Mazrou' Al-Mazrou`, *Rules on Medical Experiments on Animals and Humans.- a comparative study*, (Saudi Arabia: King Saud University, a Master's thesis, 2007), 173.

¹⁰ Muhammad Bin Muhammad Al-Ghazali, *Al-Mustasfa*, edited by Muhammad Abdel Shafi, (Beirut: Dar Al-Kutub Al-Ilmiyyah, 1993), 1: 176. Muhammad Bin Ahmad Alish, *Manh Al-Jalil Sharh Mukhtassar Khalil*, (Beirut: Dar Al-Fikr, 1989), 7: 514. Abdel Ilah Bin Mazrou' Al-Mazrou`, *Rules on Medical Experiments on Animals and Humans.- a comparative study*, (Saudi Arabia: King Saud University, a Master's thesis, 2007), 172. Muhammad Bin Umar Al-Razi, *Al-Mahsoul*, edited by Dr. Taha Al-Ulwani, (Beirut: Mu`assassat Al-Risalah, 1997), 6: 164. Ali Bin Abdel Kafi Al-Subki, *Al-Ibhaj Fi Sharh Al-Minhaj*, (Beirut: Dar Al-Kutub Al-Ilmiyyah, 1995), 3: 179. Muhammad Bin Abdullah Al-Zarakshi, *Al-Bahr Al-Muhit Fi Usul Al-Fiqh*, (Beirut: Dar Al-Kutbi, 1994), 8: 87.

kill himself, then it is prohibited for him to kill others wrongfully.¹¹

What is stated in the Hadith: ["A man was inflicted with wounds, and he committed suicide, and so Allah said: My slave has caused death on himself hurriedly, so I forbid Paradise for him."]¹²

The underlying reasoning behind these Hadiths resides in the fact that the author finds these Hadiths have prohibited a person from taking his/her own life, and one who throws himself into the sea has intentionally killed himself because this action usually leads to death.

This opinion concluded that the lives of those on the ship are not more valuable than those jettisoned into the sea, given that they are lives of equal inviolability. Thus, the position adopted is that such experiments are prohibited due to the sacredness of life and the imperative of safeguarding it, and given that this person whose life is inviolable was afflicted by this illness leading to death- most probably- is not a justification for performing such fatal experiments on him, even if this leads to the cure of a large group of patients from the illness; given that the cure of a large group of people of inviolable life from those fatal illnesses, even if achieving substantial interest, it also causes considerable harm and corruption, represented by causing the unseemly death of an equally inviolable life and warding off evil takes precedence over bringing benefits.¹³

¹¹ Abdel Ilah Bin Mazrou' Al-Mazrou', *Rules on Medical Experiments on Animals and Humans.- a comparative study*, (Saudi Arabia: King Saud University, a Master's thesis, 2007), 173.

¹² Muhammad Bin Ismail Al-Bukhari, *Sahih Al-Bukhari*, edited by Muhammad Al-Nasser, (Dar Tawq Al-Najat, 2001), 2: 96.

¹³ Abdel Ilah Bin Mazrou' Al-Mazrou', *Rules on Medical Experiments on Animals and Humans.- a comparative study*, (Saudi Arabia: King Saud University, a Master's thesis, 2007), 175, 186.

Second Opinion: Permissibility Restricted by a Set of Limitations and Parameters

Several contemporary scholars, namely Osama Al-Tayeh, Mahmoud Taha, and Afaf Ma`abrah determined it is permissible to perform the experiments within a set of limitations, and it is the view of this author that this group that Islam based its opinion on permitting medical treatment with a view to curing, healing and the soundness of intention; and among the most evident proofs of the permissibility of seeking treatment is the Prophetic Hadith: [‘Seek treatment, O slaves of Allah! For Allah does not create any disease, but He also creates the cure with it, except for old age.’]¹⁴ accordingly, the ruling is that such experiments are permissible by the paradigm and principle,¹⁵ It is noteworthy to add that the International *Fiqh* Academy - Decision Number: 67- has permitted the performing of experiments on humans without limitation.

Based on the author’s examination of this opinion, he concluded that among the foremost limitations on permissibility are for the sick person to be incurable by the recognized and safe methods of treatment and for it to be in the interest of the patient to experiment on him/her, where the possibility of his/her benefiting from the experiment is equal or more than the harm which may befall him/her as a result of it, and also for the experiment to have reached a stage making it fit for performing on a human, and that the person experimenting shall have the

¹⁴ Muhammad Bin Yazid Ibn Majah, *Sunan Ibn Majah*, edited by Shu`ayb Al-Arna`out, (Beirut: Mu`assassat Al-Risalah Al-`Aalamiyyah, 2009), 4: 497.

¹⁵ Afaf Atiyeh Ma`abrah, *Ruling on Performing Medical Treatment Experiments on Humans and Animals*, (Jordan, Yarmouk University, a master’s thesis, 2002), 40. Usama Ibrahim Al-Tayeh, *Criminal Liability of the Physician in the Islamic Shari`ah*, (Amman: Dar Al-Bayareq, 1999), 173.

necessary qualifications to perform it from a scientific and ethical standpoint. Specifically, it should not be known for risking the life of patients to fulfill scientific desires and aims, and the physician should candidly and honestly inform the patient of the benefit or damage that the experiment may result in, in addition to the approval of the person who is fully qualified in a manner devoid of coercion, and the approval of his/her guardian in case of deficient qualification, and also the interests shall override the damages which may arise from the experiment; whereby the life of the patient should not be put at risk for purposes of experimentation and the desire to claim high skills without this being grounded in acceptable cause.¹⁶

Analysis

It would be possible for a researcher to discuss the proofs of the opinion holding that it is impermissible to perform experiments on an incurable patient based on the analogy that if a group board a ship which becomes of a heavy load, and they were forced to jettison some of them into the sea, whereby the ship is lightened and the remaining people are more likely to survive- it is a sound analogy, but for the fact that casting a few from the ship would lead most definitely to their death, while performing the experiment on the incurable person entails a greater possibility of cure.

On the other hand, performing experiments on an incurable patient to cure him entails the principle of seeking treatment and its legitimacy, and all of this

¹⁶ Afaf Atiyeh Ma`abrah, *Ruling on Performing Medical Treatment Experiments on Humans and Animals*, (Jordan, Yarmouk University, a master's thesis, 2002), 40. Usama Ibrahim Al-Tayeh, *Criminal Liability of the Physician in the Islamic Shari`ah*, (Amman: Dar Al-Bayareq, 1999), 173. Mahmoud Taha, *Modern Medical Methods and their Reflections on the Criminal Liability of the Physician*, (Al-Mansoura: Dar Al-Fikr W`al Qanoun, 2015), 296.

naturally is limited and restricted by the above-mentioned parameters, however unless the medical experiments were conducted, medicine would not have progressed and numerous drugs for illnesses would not have been developed.

It should be noted here that the patient's consent to experiment should be an informed consent. It means that the process in which the health care provider discloses the appropriate information to the patient concerned in turn for him/her to make a voluntary choice to accept or refuse treatment. Moreover, there are necessary elements to achieve this consent namely (i) the person giving consent is willing and able to make a decision, (ii) the medical service provider discloses all available information about the treatment or test(s) that will be taken, including: the benefits and risks of the experiment, and (iii) the extent to which the benefits and risks are likely to occur, (iv) in addition to the fact that the information provided to the patient is information directly related to the experiment to avoid being distracted by a large amount of information that affects his decision, (v) the patient is given sufficient time to discuss the issue with family and relatives or with whomever he wishes to consult, and (vi) that the person is able to understand the information given to him and has the ability to use the information to make a decision.¹⁷

The researcher believes that in the case of a person with an incurable disease, this disease may affect his decision to consent or not. Also, the researcher believes

¹⁷ Elif Akyüz, Hülya Bulut, Mevlüde Karadağ, "Surgical nurses' knowledge and practices about informed consent," *Nursing Ethics*, 26, no. 7-8 (2019): 2173-2174, <https://doi.org/10.1177/0969733018810767>. Muhammad Kamal Al-Jizawi, Informed Consent: A Study in Medical Ethics, *Nile Valley Journal of Human, Social and Educational Studies and Research*, 27, No: 27, (2019), 56-57, 10.21608/JWADI.2020.115977

that it is necessary to combine the consent of this patient and his direct guardian, such as the father, in the event that the son is the patient, and in the case of the brain dead, the consent of the direct guardian of the patient is required.

Ruling of Performing Medical Experiments on an Incurable Patient with the Purpose of Finding Treatment for an Illness from Which He/ She Does Not Suffer Through Clinical Trials Benefiting Other Patients

Moving forward to the second part of performing medical experiments on an incurable patient in a situation where the subject is not afflicted by the illness for which the medical experiment is intended for, so what is the jurisprudential ruling on this matter? The Fuqaha (scholars) have differed on this matter and are of two opinions as follows:

First opinion: Impermissibility

Two of the contemporary scholars namely Aref Ali Aref and Afaf Ma`abrah deemed to prohibit performing medical experiments on the incurable patient who is not afflicted by the illness for which the medical experiment is conducted.¹⁸ They anchored their position in a set of proofs to include the following:

Illness is a trial from Allah, and there are rewards for it, and affliction by a serious illness does not mean that it is incurable, given that despair from recovery from an illness of whatsoever type and degree is despair from the

¹⁸ Afaf Atiyeh Ma`abrah, *Ruling on Performing Medical Treatment Experiments on Humans and Animals*, (Jordan, Yarmouk University, a master's thesis, 2002), 41. Aref Ali Aref, *Extent of the Permissibility of Disposing of Human Organs*, (Iraq, University of Baghdad, doctoral dissertation, 1991), 335.

mercy of mighty God, and represents doubting in His Capability.¹⁹

Among the ethical behaviors of a physician is that he should not end, by any means, the life of an incurable patient who suffers from pain, but rather should help him by alleviating his pains to the extent possible until the inevitable time of death, because ending his life is considered unlawful killing.²⁰ Thus, performing medical experiments on an incurable person may lead to his death, and killing is prohibited in the Islamic Shari`ah, and there are many texts in the latter which prohibit it. For instance, the Ayah: Do not kill any person the life of whom is sanctified by Allah, except for a just reason. Surah Al-Isra of the Holy Quran (17: 33) and the Hadith: ["Avoid the seven destructive things." It was asked: (by those present): "What are they, O Messenger of Allah?" He replied, "... killing a soul..."]²¹

It is the view of the author that based on the foregoing it becomes clear that if the incurable patient is afflicted by the illness for which the experiment is intended, it is impermissible to perform the experiment on him/her by analogy to the sound person, and hence infringing on a sick person irrespective of the severity of his illness and its nature is equivalent to infringing on a sound person, and so one who kills him or removes one of his organs on the grounds of despair from his recovery, or another sick

¹⁹ Afaf Atiyeh Ma`abrah, *Ruling on Performing Medical Treatment Experiments on Humans and Animals*, (Jordan, Yarmouk University, a master's thesis, 2002), 41.

²⁰ Muhammad Bin Abdel Jawad Muhammad, *Studies on the Islamic Shari`ah and the Law on Islamic Medicine*, (Alexandria, Mansh`at Al-Ma`arif, 2008), 20. Abdel Fattah Idris, *Medical Issues from an Islamic Standpoint, A Comparative Jurisprudential Study*, (no publisher, 1993), 58-59.

²¹ Muhammad Bin Ismail Al-Bukhari, *Sahih Al-Bukhari*, edited by Muhammad Al-Nasser, (Dar Tawq Al-Najat, 2001), 4: 10.

person benefiting from one of his organs, or to perform experiments on it, or for any similar purpose, then the assurance depends upon the nature of his performance is based on whether the actions were intentional or an error.

Second Opinion: Permissibility

Two contemporary scholars, namely Abd Al-Rahman Al-Othman and Nariman Abu Matar, divided these type of experiments into two parts as follows:

First part: experiments leading to the death of an incurable patient, where such experiments are impermissible; because they cause the death of human life, and it is evident that among the foremost aims of the Shari`ah is the preservation of life and preventing infringement of the latter, and hence it is impermissible to perform this type of experiments.²²

Among the proofs supporting this stance: Islam forbids killing of a life except if done so rightfully as Al-Qisas (i.e. equality of punishment); because the right to life is sacred in the view of the Shari`ah and performing fatal medical experiments on the body of a person is unlawful taking of a life, and it has been determined in jurisprudential rules that "There should be neither harming nor reciprocating harm.", and in performing medical experiments is harm to people, and the Shari`ah has prohibited causing damage. On the other hand, the Islamic Shari`ah has given due regard to achieving benefits and warding off evil, and in performing fatal experiments there is an evil greater than the benefits sought.

Second part: Experiments that do not harm the incurable patient or those whose harm is slight and

²² Nariman Wafiq Abu Matar, *Scientific Experiments on the Human Body: A Comparative Jurisprudence Study*, (Gaza: a master's thesis, the Islamic University. 2011), 40.

controllable, where the exponents of this opinion have permitted this kind of experimentation given that they do not harm the person and do not constitute a threat to his/her life.

The author finds that this attitude is correct because the Islamic Shari`ah supports science and encourages the person to reflect on and ponder the universe, and to perform experiments to unveils its secrets, sciences, and knowledge which contribute to solving medical problems and producing treatment which leads to a healthy life: "and if anyone saved a life, it would be as if he saved the life of all mankind" Surah Al-Ma'idah of the Holy Quran (5: 32). Thus, performing experiments on some people to benefit from their results in the service of humanity is a revival of others, and promotion of their health interests. Thus they are permissible.

The Hadith that urges seeking treatment has been mentioned, and the author believes that the Hadith calls on scientists to deepen their research to produce medicines treating illnesses. This requires one experiment after another to ascertain that the medicine benefits the patient. Moreover, the aims of the Shari`ah encourage the view that holds that performing experimentation is permissible for promoting human health, and given that this type of experiment entails no harm to the individual and does not constitute a risk to his life, it is then permissible and laudable given its benefit to his health.²³

This is in reference to individual opinions, as for the opinions of the official fatwa bodies the author found that

²³ Nariman Wafiq Abu Matar, *Scientific Experiments on the Human Body: A Comparative Jurisprudence Study*, (Gaza: a master's thesis, the Islamic University. 2011), 50. Abdel Rahman Ibrahim Al-Uthman, *Medical Experiments on Humans ar., Jurisprudential Study*, (Saudi Arabia, Imam Muhammad ibn Saud Islamic University, doctoral dissertation, 2011), 65.

some of the Ifta (Islamic Advisory) bodies in the Arab World have permitted performing experiments on a person in general and on the incurable patient, including: The Jordanian Ifta Council which stated that experimenting with medicines on a human, in case the physicians find it probable that they are of benefit, is permissible, if certain conditions are met, including: those responsible for those researches and experiments are approved research centers, which comply with the highest standards of scientific research, and which are overseen by qualified experts and specialists, in addition to the necessity for research centers to comply with the regulations and laws which govern this type of activities, so that what is dubious is eliminated and lack of dereliction, and to prevent the matter from turning into trading or a market for the competition of pharmaceutical companies at the expense of human lives. Furthermore, we call upon the legislative and supervisory institutions to supervise this sector and to overcome any shortcomings or weaknesses in the legislation.²⁴

Among the official fatwa bodies, the Egyptian *Dar Al Ifta* considered that medical experiments on humans are permissible under certain conditions. The most important thing is that there should be no harm in experiments on humans, such as experiments previously tested on non-humans. It is known that there is no harm in them if they are conducted on humans while taking all measures to prevent danger in performing them, as in experiments conducted on humans. To learn more about the details of the functions of the organs or the appropriate doses and

²⁴ Decision number: 207, 2014

quantities of a particular drug. These experiments are permissible according to Sharia.²⁵

Analysis

Performing medical experiments on a patient involving the incurable is a religiously permissible activity based on a constellation of limitations and parameters; namely, it is necessary upon performing medical research to obtain the consent of the fully legally capable person in a manner devoid of coercion, or the consent of his/hers legal guardian in case of lack of legal capacity,

The researcher finds that in the case of a person with an incurable disease, this disease may affect his decision to consent or not. Thus, the researcher believes that it is necessary to combine the consent of this patient and that of his direct guardian, such as the father, if the son is the patient, and in the case of the brain dead, the consent of the direct guardian of the patient is required further to the condition that no harm is caused by such research and experimentation by the legal principle that “there should be neither harm nor reciprocating harm”²⁶ further to the necessity of respecting human dignity, by the words of God Almighty in the Holy Quran: “And We have certainly honored the children of Adam.”²⁷

The harm criterion here is determined by what the patient can bear, as well as not reaching the degree to

²⁵ The Egyptian Dar Al Iftaa, (2020), the media center of the Egyptian Dar Al Iftaa, news titled: The Egyptian Dar Al Iftaa resolves the controversy over the issue of “clinical trials” and confirms medical experiments on humans are permissible with conditions, published on the official website of the Egyptian Dar Al Iftaa on: 9-15- 2020, Accessed on: 1-5-2023, <https://www.dar-alifta.org/ar/articles/7230>

²⁶ Fadi S. Al-Jbour, Jurisprudent Rules Related with Mishaps of Charity Deed and their Applications in the Financial Side, *Jersah for Research and Studies*, 23, No: 1, 683 – 710, (2022), 692.

²⁷ Surah Al-Isra Ayat 70 (17:70)

endanger human life or one of his organs. If it leads to such outcomes, it is not permissible to proceed. These medical experiments are in line with Islamic directives in urging medication and Islamic guidelines for searching for a cure for diseases. As for the issue of harm, the researcher determines that medical experiments shouldn't be done on humans except after a series of procedures, examinations, and experiments on non-human subjects. In other words, it is not performed on humans until after reaching a substantial percentage of the drug's success.

It should be noted that the pros and cons of the first and second opinions respectively in the first and second topic of the research is that the most prominent negative of relying on the opinion that prohibits medical experimentation is depriving humanity of testing a drug for a specific disease on a patient suffering from the same disease. Hence, if a person has cancer and that disease is not discovered except in advanced stages and the doctors judge the patient that it is not possible to recover, the presence of treatment under trial here allows the possibility of recovery, especially if we apply the controls that were indicated by the second opinion. In addition, this experiment opens the door to treating similar cases of the same disease, further to the fact that experiments are a principal factor in the development of advances in medical science.

Position of the Law

The author has discerned that the Emirati and Jordanian laws have permitted medical experimentation for treatment. Article 12/2 of the Emirati Medical Liability Law of 2016 has stipulated that it is prohibited to perform medical experiments on a human except upon his consent and obtaining a written statement from him/her so

indicating and according to the conditions determined by the implementing regulation and the implementing regulation of the Law stipulated: Article: 8- that: It is prohibited to conduct research or medical experiments on the individual except upon obtaining a permit from one of the following quarters based on the competence of each one: 1- Ministry of Health. 2- Department of Health – Abu Dhabi. 3- Dubai Health Authority 4- Dubai Medical City. 5. Public universities. Furthermore, Article 9 of the same regulation states that It is required to issue a permit for performing medical experiments and research on an individual to meet a set of conditions, including for the research to be connected to a licensed health entity endowed with all the necessary capacities for conducting the research, and for the research to be conducted by qualified and licensed persons. Moreover, there should be an undertaking to respect the rights and dignity of the persons subject of the research and to safeguard their health and the confidentiality of related data.

It is worthy of mention that among the foremost conditions that the author finds important to focus on is that experimenting requires the written consent of the subject of the research in case of being of full legal capacity or the approval of his/her guardian in case of lack of legal capability and that those approvals materialize after informing the person of the stages and procedures of the research and the expected side effects, and all the information related to the research. Moreover, he has the right to stop the research at any time and in any of the stages of the research. In addition, the consent should not be the result of material or in-kind remuneration, the consequence of material or moral coercion, or the approval to be based on fraudulent motives and/or deception.

Thus, the Emirati legislator laid down a set of rules ensuring the protection and safety of the individual in general, and he formulated the fundamental rules for organizing medical experiments and laid down special regulations to safeguard the individual's right to his physical and mental safety.²⁸

Moreover, the Jordanian Medical and Health Liability Law of 2018 prohibited the service provider, namely any natural or juridical person who practices the medical or health professions, or performs any of the activities of the service or partakes in performing them in accordance with the provisions of the laws in effect- Article: 2- to conduct research or medical experiments on any person except upon his written consent and to obtain a written permit for such from the quarter determined by the concerned quarters in accordance with the applicable legislation.²⁹ (Article Number: 8/J)

It is the view of the author that the Arab laws have adopted in their requirements for permitting medical experiments the fundamental principles adopted by the 18th World Medical Assembly (Helsinki, Finland, 1964), the Nuremberg Code (1947), and the 2000 Charter of Fundamental Rights of the European Union.³⁰ (Mahdawi, 2014, p.55)

Notably, Emirati and Jordanian Law addressed the punishments on the physician or the party carrying out medical experiments in case he/she contravenes the

²⁸ Sanousi Bin Audeh, *Medical Experiments on Humans in the Shadow of Criminal Liability, a comparative study*, (Algeria, University of Abou Bakr Belkaïd, a doctoral dissertation, 2018), 142.

²⁹ Article Number: 8/J.

³⁰ Abdel Qader Mahdawi, Restrictions on Medical Experiments on Humans Between Human Rights Conventions and the Rulings of Muslim Jurisprudence, *Majallat Al-Qanun W'al Mujtama`*, 4: 55, 2014.

conditions. An example of this is the Jordanian Law of Conducting Pharmacological Studies of 2001, which (Article:4) restricted the conduct of medical experiments to public and private hospitals, which are endowed with technical capacities, universities, and academic institutions, specialized scientific research institutions and pharmaceutical companies, provided that the capacities and sources exist for such activity. The Law (Article: 5) states that it is impermissible to perform medical experiments on a person except upon obtaining his written consent and undergoing the necessary medical tests to ensure his safety.

Regarding punishments, the Law (Article: 17) punishes by one to three years imprisonment or a penalty not less than five thousand Jordan Dinars "around 7 seven thousand USD" and not over twenty thousand Jordan Dinars "around 28 twenty-eight thousand USD" or both penalties any person who agreed to perform the medical experiment or supervised it or performed it without compliance with the conditions and requirements prescribed by this law. On the other hand, if a quarter, such as hospitals, for instance, conducts medical experiments and is not licensed to do so, then it shall be subject to a penalty of not less than twenty thousand Jordan Dinars "around 28 twenty-eight thousand U.S. Dollars" and not more than fifty thousand Jordan Dinars, "around 71 seventy-one thousand USD".

As to Emirati Law, the Medical Liability Law (Article 28/2) punishes by a period not less than six months and a penalty not less than one hundred thousand Emirati Dirhams "circa 27 thousand USD" and not over two hundred thousand Emirati Dirhams "circa 55 thousand USD" anyone that conducts medical experiments in a manner contravening the conditions.

It is noteworthy to mention that the UAE Law refers to a case that resulted in serious negative consequences resulting from the medical experiments, including death, causing a life-threatening condition for the patient that requires hospitalization or prolonging his stay in the hospital, or causing forms of disability or permanent disability, if these effects result from a violation of the conditions for conducting clinical trials. In this case, the perpetrator is punished by imprisonment for No Less than six (6) months and not more than two (2) years and a fine of no less than (50,000) fifty thousand UAE dirhams (about 13,500 US dollars) and no more than (200,000) two (2) hundred thousand UAE Dirhams (about 54,500 US dollars). Or by one of the two penalties (Article 107). In addition, the UAE Law mandates the court to close the medical facility for a period not exceeding Three (3) months or permanently with the withdrawal of the medical license and the confiscation of the materials subject to the violation. (Article: 111)

Similarly, Jordanian Law (Article 17) punishes the doctor appointed to supervise the conduct of the study if he is absent from supervising it during its conduct or does not abide by the responsibility of the necessary medical care for the volunteer, and whoever conceals any previously unknown side effects of the drug and did not inform the Drug Studies Committee of pertinent data, is punished with imprisonment from six (6) months to one (1) year or subjected to a fine of No Less than Two thousand Jordanian dinars (equivalent to: about 2,900 US dollars) and No More than Five thousand Jordanian dinars (equivalent to: about 7,000 US dollars), or both penalties.

Conclusions

This study focused on the jurisprudential ruling for performing medical treatment experiments on incurable patients, and it concluded by dividing those experiments into two parts: the first: medical experiments on an incurable person to produce a treatment for the illness from which he suffers and the second: medical experiments on an incurable patient to produce a treatment for an illness from which he does not suffer.

The study concluded by favoring the opinion that those two types of experiments are permissible subject to a set of restrictions and parameters, most importantly, the patient is incurable through the recognized and safe treatment methods, where it is in the interest of the person to undergo the experiment, whereby the possibility of his benefiting from the experiment is equal to or more than the harm which he might sustain as a result of it, and where the experiment has reached a stage rendering it suitable for performance on a person, in addition to the experimenter possessing the necessary qualifications from a scientific and ethical standpoint. In fact, the medical service provider shall not be known for risking human life to fulfill a scientific desire. Moreover, the necessity of the consent of the mature patient, where the physician informs him candidly and honestly about the possible consequences of the experiment in terms of benefit or harm whilst emphasizing the consent of the fully legally capable person in a manner devoid of coercion, while also attaching importance for interests to override detriments which could arise from the experiment; whereby the life of the patient is not put at risk for the sake of experimentation and the desire to allege high skills without reasonable justification, and no harm or damage should result from conducting the research.

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