

Nine

Brain Death and Islamic Traditions

Shifting Borders of Life?

Birgit Krawietz

The notion of brain death has evolved only during the last decades. Since 1968, it has challenged traditional understandings of death all over the world. For centuries, the Islamic concept of death and dying had remained relatively stable,¹ and the determination of death was traditionally a task that fell to the immediate family of the deceased. Western civilization and modern life brought about fundamental changes that gravely affected conventional wisdom and behavior in this regard.² As a consequence, illnesses and dying increasingly became the responsibility of doctors and hospitals. On the one hand, Muslims do not have so many general objections to modern medical treatment as a non-Muslim observer might assume. On the other hand but not at all paradoxically, they often react fiercely and adversely when problems of death and dying are handed over to secular experts and regulated according to secular needs.³ This chapter sees such sensibilities to be rooted in the Islamic notion of the sanctity (*ḥurūma*) and dignity (*karāma*) of the human body, a cornerstone of Islamic legal thinking. Without it, various anxious reactions to modern developments cannot be properly understood.

Traditional Islamic law already pays great attention to death and dying. The reason lies not only in its general responsibility for worldly legal consequences, but also in the fact that the only way to preserve *ḥurūma* and *karāma* is through the legally prescribed ritual program to bury the deceased. This program guarantees that the one stricken with a fatal illness is not deprived of any second of life by premature declarations of death. Likewise, the deceased person knows that his or her corpse will be left untouched and “handed back” to the Creator. Brain death affects both these aspects, but it is the central thesis of this chapter that the notion of brain death does not necessarily cause a total upheaval of Islamic tradition such that the border between life and death would have to be shifted and newly defined in the light of modern scientific findings. Rather, the

underlying traditional *concept* of death as the departure of the soul (*rūḥ*) upheld by the majority of scholars.⁴ But while most Muslim scholars are not willing to equate death with the failure of one organ, be it the whole brain or only the brain stem, a number of them realize that brain death challenges the death *criteria* of Islamic law, the inappropriateness of which can no longer be overlooked. Two trends in Islamic legal discussions on brain death become noticeable: “if in doubt, don’t,” stressing *ḥurūma*; and the proposing of an “intermediate state,” relocating *ḥurūma*.

Both these different approaches will be presented in the last part of the chapter. Without being able to predict which one will finally prevail, the necessity to redefine the Islamic legal criteria for the determination of death seems, already at this early stage of the discussion, to be inevitable.⁵

History of Brain Death and Islamic Reactions

Waves of infantile paralysis—polio (*vabū’ shālal al-atfal*)—in 1952 in Denmark and 1953 in the US led to the use of machines allowing artificially sustained breathing and, therefore, heartbeat. Patients were thereby given time to recover and regain these vital functions. Such means were also newly employed during the Korean War (1950–1953).⁶ Due to constant improvements in the field of modern anesthetics, intensive care medicine (which actually created a new type of patient and hitherto unknown special units in hospitals), operative techniques, and immune suppressive therapies, organ transplantation constantly gained new ground from about the middle of the twentieth century onward. Since it became possible to supplant “vital” functions like heartbeat and breathing, the failure of these functions no longer had the character of a clear-cut measure of death. All of a sudden, established truths about the discernment of death lost ground. Besides, the decay of organs, which naturally sets in after a few minutes, could now be avoided by artificial means and such organs thereby be “rescued” for transplantation purposes. Before achieving worldwide recognition, the idea of brain death had emerged in France in 1959 as “coma dépassé.”⁷ In 1967, the South African surgeon Christian Barnard carried out the first successful transplantation of the heart of a “brain dead” person. Given the legally awkward situation, a so-called “Ad hoc Committee of the Harvard Medical School” consisting of medical, legal, and theological scholars proposed a definition for brain death in 1968.⁸ Different nations and cultures were now called upon to react against the background of their own traditions and to reconsider their ideas about death.⁹

As for the Islamic world, organ transplantation has been discussed in Sunni fatwa literature since about the 1950s.¹⁰ Brain death as a consequent

problem has been expressly dealt with only since about the first half of the 1980s.¹¹ While the Islamic world can be said to be very much in favor of organ transplantation, it took Muslim scholars some time to realize the impact of the new operation techniques and their consequences for the definition of death. In 1985, a conference was held in Kuwait on the question of the beginning and end of human life.¹² Medical as well as Islamic legal scholars had been invited and produced a substantial congress volume. This chapter also draws on a forty-page study on the definition of death written by one of the former rectors of al-Azhar Jad al-Haqq 'Ali Jad al-Haqq (d. 1996). It was published in a larger collection in 1992.¹³ Further, a 1997 Syrian monograph by Nada al-Daqr assembles and analyzes hitherto published material on brain death.¹⁴ Additional information comes from scattered articles from newspapers and magazines, since the definition of death has now become an issue for a broader Islamic public.¹⁵ As an example, consider the case of the late King Hussein of Jordan, as reported by the German magazine *Der Spiegel*:

Already on Friday in the week before last, the physicians diagnosed the brain death of King Hussein. According to Muslim tradition, Hussein would have to be buried within 24 hours—in that case, however, without international dignitaries, who could not show up that fast in Amman. The physicians thereupon declared cardiac arrest to be the decisive criterion of death. According to the official version, the king was therefore still alive, when, on Friday, the heads of state and government were invited for the burial on Monday. Hussein's heart stopped beating on Sunday, just twenty-four hours before the burial.¹⁶

Principle of Sanctity (hurma) of the Human Body, Dead or Alive

Non-Muslim observers at times claim that Islamic law does not have the concept of human rights. Yet there may be functional equivalents embedded in traditional law itself, and I propose that it does possess certain structures to guarantee the integrity of the human body.¹⁷ However, these structures are not founded on any likeness to God's image, ideas of natural law, or mere human decree. Instead, sanctity or integrity (*hurma*) and dignity (*karāma*) are rooted in divine messages communicated in Qur'an and Sunna. The principle of inviolability embraces the living and the dead likewise, although the latter have to be handled differently. The principle even seems to include plants, as we might infer from Khaled Abou El Fadl's remarks about the rules of war.¹⁸ There is one well-known hadith in two variants: "Breaking the bone of one who is dead is like breaking it

while he is living (*inna karr 'azm al-mayyit ka-hayyih bayyan*);" these are words which the Prophet Muhammad used to reproach a misbehaving gravedigger.¹⁹ There can be no doubt that encroachments on the corpse principally represent its impairment and a violation of its integrity. Islam upholds *hurma* and *karāma* not only up to the time of burial but also long afterwards.²⁰ Human life and the integrity (*salāma*) of the parts of the body are "a right shared between the Creator and His creature (*haqq musharak bayn al-khalīq wa-l-makhlūq*) so that it cannot be disposed of by the consent of the creature (*lā yasqut bi-idhn al-makhlūq*)." ²¹ The fact that Islamic law allows under specific circumstances to cut off a hand has to be seen as a specified exception. It certainly does not mean that doing something similar to oneself or another person is allowed, since "the sanctity of one part of the human being is like the sanctity of his life (*hurmat taraf jasad al-insān ka-hurmat nafsihi*)." ²² Likewise, someone in an intensive care unit "definitely has to be treated with respect, whereby the respectful treatment of the dead has to be equated to that of the living (*ihtirām al-mayyit ka-ihtirām al-hayy*)." This is all the more true "when some of the parts of his body are kept alive by machines."²³

Like other principles, the establishment of the exact *hurma* rules is an ongoing task that has to be carried out along the guidelines of the sharia and applied to specific circumstances and purposes. One should realize that although *hurma* implies prohibition, it is much more than that. A chain of prohibitions or repugnant things also creates a secure area that may not be violated. It is no mere accident that a wife is occasionally also called *hurma*. Further, there is the *hurmat al-mushaf*, the inviolability of the Qur'an codex. The two most holy places of the Islamic world (Mecca and Medina) are called *al-haramān*, the two sacred areas. As a rule, the protection of the bodily integrity and the respectful treatment (*takrīm*) of the human body do not merely serve its material quality but acknowledge the superior status of the human being. The protective shield cannot be equated with the skin as a possible borderline but is already penetrated when one looks at someone else's private parts or even when one sits on somebody's grave. On the other hand, the circumcision of girls, for instance, does not represent any violation of bodily integrity according to the majority of Muslim legal scholars, who argue with hadiths recommending this practice.²⁴ But the fact that protected areas are not set up following western understanding does not mean that they do not exist at all. Finally, integrity is set up by a web of punishments (and also rewards) inflicted in this world and the hereafter.

By the same token the preservation of integrity and dignity is also positively constructed. This is most clearly evident in the case of the ritual

program for the deceased. The necessity of carrying out this program is one of the main reasons why Muslims have always paid great attention to the phases of dying and the exact moment of death. They have to watch the phases of dying carefully so as to offer spiritual instruction and because God will no longer accept repentance (*taṣṭubā*) once one has entered the last phase of dying.²⁵ People have to realize when death actually sets in, because the burial should take place with the least possible delay within the next twenty-four hours. The burial program is a collective duty (*farḍ kifāyā*) of the community of believers. They may not culpably postpone or neglect the washing, shrouding, and preparing of the corpse for burial. Otherwise, they commit a sin altogether.²⁶ The deceased should even be told what he will have to answer to the angels of the grave, Munkar and Nakir.²⁷ It is not only the corpse that enjoys protection but also the grave and the cemetery even long after burial.²⁸

Various Islamic genres are concerned with death and related issues. Hadith manuals have chapters of their own on burials (*janāzāt*).²⁹ Islamic law books traditionally lay down what is nowadays called "the rights of the dead (*huqūq al-mayyit*)."³⁰ The correct behavior during illness or accompanying a dying person is also often dealt with in both *furūʿ* literature and hadith works. Besides, there is a rich eschatological literature dealing with theological and spiritual aspects of death.³¹ No pious Muslim may expect an easy death. The Prophet himself suffered from fierce agony.³² A good death may not be equated with an easy one but signifies that the deceased died as a brave Muslim upholding the right creed.³³

Traditional Signs of Death and Its Determination

Appropriate treatment of the dying and immediate Islamic burial are not the only reasons that Islamic law pays great attention to the exact moment of death. Various legal relationships also end at death.³⁴ Although the Qur'an itself talks about death many times, especially God's monopoly on giving and taking life,³⁵ it does not provide precise information on how to discern the exact moment of death. When scholars quote the Qur'an with reference to death, they quote verses that deal mainly with preliminaries of death as such, and much less with defining it.³⁶ Muhammad Nu'aym Yasin from the faculty of Shari'a and Islamic studies at the University of Kuwait correctly states that "there is no clear-cut text (*nass*) from Qur'an or Sunna concerning this problem of ours that could be taken as a starting point for investigation."³⁷

Traditional Islamic law nevertheless developed a series of so-called characteristics (*ʾalāmāt*) or "signs of death (*amārat al-marṭ*)" that had to

be ascertained in order to prepare the dead for burial or proceed with other rituals.³⁸ These signs include the glazing of the eyes, stopping of breath, parting of the lips, relaxation of the feet, bending of the nose, or caving in of the temples.³⁹ Obviously, these and other signs were never fixed in a binding catalogue, and they vary from one author to another. There was no need to demand a fixed standard. If there was any doubt about whether the person was really dead, the body had to be left untouched until it began to smell.⁴⁰ The legal scholars' characteristics of death were largely derived from "human experience (*taḥrībā basharīyyā*)" and not from divine sources.⁴¹ The variety of such signs notwithstanding, there is unanimity that the departure of the soul (*ruḥ*) from the body signifies death itself.⁴² Since death is a process, a "complete departure (*inḡitāʾ-iāmm*)" has to take place as indicated by "the completion of its signs (*istikmāl amārātihī*)."⁴³

According to the orthodox Islamic understanding, there are four phases of human existence each of which is larger than the former one: the womb of the mother, this world (*al-dunyā*), limbo (*barzakh*),⁴⁴ and the hereafter (*al-ākhirā*). After resurrection and the Day of Judgment, true Muslims will only temporarily stay in hell. How long this has to last depends on their behavior on earth: "Death is the gate or the entrance to eternal life. Life is the key to death (*miṣṭāḥ al-marṭ*). The sense in which a person deals in his life with the blessings of God decides what he may expect behind this gate." Death is therefore "only a step towards eternal life."⁴⁵ The Azhar professor of Qur'an interpretation and Qur'an studies 'Abd al-Hayy al-Faramawī describes it as "the move from the realm of obligation and worldly occupation to the realm of recompense and punishment in the hereafter (*intiqāl min dār al-taklīf wa-l-ʿamal al-dunyawī ilā dār al-thawāb wa-l-ʿiqāb al-ākhirawī*)."⁴⁶ Talal 'Ali Turfā, another modern author, confirms the traditional understanding of the Qur'an's testimony that "the life after death is a second creation (*khalaq*) and both lives (birth and resurrection) belong to the blessings of God." Turfā further relates that God gives new human bodies to human beings at the time of resurrection so that they can take part in the new creation.⁴⁷ In all four worlds, the soul and the body, with its parts and organs, have a different relation with one another.⁴⁸ It is assumed that the soul departs from the body in accordance with the exact span of life preordained by God. This likewise applies to discernable secondary causes like illness or manslaughter, or to sudden death or a stroke (*sakata*).⁴⁹ God is always the final cause of death. Life has to end in the same way as it begins, namely with the taking away of the soul after ensoulment⁵⁰ or, as al-Ashqar puts it: "Human life began with a blowing (*nafḥa*) and it ends with a blowing."⁵¹

Doubts and Anxieties Concerning Brain Death

The doubts and anxieties that are repeatedly expressed in connection with brain death consist of four main arguments that dominate the opposition to it: reluctance to give up customary signs, be they part of the Islamic legal tradition or not; the claim of possible recovery; the necessity of protecting all life, even vegetative or unconscious life; and the disagreement of the medical scholars themselves.

The first of these objections was the subject of an article titled "Hot Debate on Organ Donation and Clinical Death—The Center of Cairo . . . a Black Market for Organ Trade" that appeared in a well-known Arabic magazine in 1997. The writer stresses that there are two fundamentally different definitions of decease (*wafāh*), the modern medical one and the sharia law definition of death. The last one implies the total departure of the soul with the consequence that the body becomes cold and decay sets in because the organs have stopped functioning.⁵² According to the latter, mere brain death (*mawt al-dimāgh*) or death of the brain stem (*mawt jidh' al-dimāgh*) would not really be death but would have to be considered only a warning (*nadhīr*) of death and a step towards it. As long as the separation (*infisāl*) of the soul has not entirely taken place, the patient has to be regarded as living.⁵³ Before the appearance of the "sharia signs of death (*al-āimāt shar'iyya*)," the harvesting of organs would have to be regarded as an encroachment on a "dying patient (*al-marīd al-mubtadīr*)" and to be criminalized as either injury or manslaughter.⁵⁴ Further, there is the longtime general custom of regarding heartbeat as an important measure of human life. In Egypt, for instance, heartbeat is still recognized as decisive for the proclamation of death.⁵⁵ However, as some Muslim writers nowadays underline, cardiac arrest (*tamaqquf al-qalb*) normally does not rank among the sharia signs of death.⁵⁶ After several cases of "organ-tourism" of Egyptians seeking help abroad, the Egyptian government decided to accept brain death; their action in turn stirred up heavy protests. Some scholars vehemently argued against "the failure of the functions of the brain stem (*tamaqquf wazā'if jidh' al-mukhbh*)" as a valid proof of death, urging that every legislation should take into consideration the social and ethical outlook of Egyptian society. Also, they insisted, the patient should not be declared dead without further medical tests.⁵⁷ From these arguments, it seems that many Muslims—although they theoretically acknowledge the nonbinding character of legal opinions not clearly based on holy texts (*masūh*)—tend to sacralize human findings that have been integrated into Islamic legal regulations. Theoretically, only findings that have been agreed upon through the consensus of legal scholars

not universally attested among the sharia signs of death. Finally, modern life-support machines and other scientific advances have caused the traditional signs of death to seem very out of date.

The second claim against the use of brain death criteria is that a brain-dead person might still return to life. Since God may decide whatever he wishes, and his ways are inscrutable, it is not only the religious scholars who use such an argument. In fact, several Muslim medical doctors advocate this idea of recovery. For example, Dr. Safwat Hasan Lutfi, a professor of anesthetics and intensive care medicine, suggests:

Brain dead people (*manntā al-mukhbh*) are not really dead but are living people who lost consciousness or were victimized by accidents. There are cases where the brain died, yet afterwards, they returned to life. To deal with those [patients] as if they were dead and remove organs from them fully amounts to the crime of manslaughter.⁵⁸

In this sense, the Saudi Arabian judge al-Khudari declares that the soul might occasionally return to the body like a heart that resumes beating after a while.⁵⁹ This argument does not seem to carry much weight either, since there is a scientific consensus—at least in western literature—to the effect that brain death is a point of no return. Muslim authors who accept the notion of brain death therefore argue that not to remove life-support machines although the patient is clinically dead is an impairment of *hurma*.⁶⁰ The respect for the deceased and his corpse make it necessary to stop exposing him to useless treatment. One might think that this issue of "recovery" could be clearly decided scientifically. The problem, however, is that things can hardly be falsified when the argumentation is grounded upon theological beliefs, in this case insistence on God's monopoly to revive.

A third objection against brain death is that even an unconscious, vegetative life should be protected and upheld. 'Aqil al-'Aqli claims that a brain-dead patient's acceptance of medications and food indicates physical life. To disregard such a life amounts to a violation of Qur'an, Sunna, and consensus (*ijmā'*).⁶¹ Reference is further made to the growing of nails and hair and—as far as children are concerned—the body itself.⁶² Special suspicion arose from reports about, for instance, a brain-dead woman named Farida who in that condition gave birth to a child.⁶³ Since al-Khudari does not accept "the decease of the brain (*al-wafāh al-dimāghīyya*)" as dying in the true sense, he consequently counts the maintaining of brain-dead people in life-support machines among the rights (*huqūq*) the Islamic sharia guarantees to humankind.⁶⁴ As far as such unconscious life denotes the so-

has to be stated that Islamic law in no way equates it with brain death itself. The patient in such a state is affected only in his cerebrum (*qisr al-mukhkhā*), which means that “the centers of will and consciousness” are destroyed but not the brain stem. It is the brain stem that organizes vital functions of the body, like temperature, blood pressure, heartbeat, and breath. People in the persistent vegetative state show no consciousness and reaction whatsoever but breathe spontaneously.⁶⁵ Some people may still recall the well-known case of Karen Ann Quinlan, a coma patient widely recognized from her high school yearbook photo, which was often displayed in the media while she was in a persistent vegetative state from 1975 to 1985. Her family fought fiercely to shut down the machines that were keeping her “alive,” and it was this case that turned the general public’s attention—both in America and internationally—toward the problem of brain death.⁶⁶

According to a fourth argument, the medical doctors themselves are said to be at variance. They hold conflicting opinions, for instance, on “the death of the brain stem as a possible dividing line (*al-hadd al-fāsi*) between life and death.” According to the medical expert Mustafa al-Dhahabi these differences hold not only from country to country but from hospital to hospital.⁶⁷ Although Muslims have traditionally very much thought of death as a process, they are now expected to come up with an arbitrary point of death.⁶⁸ An eminent sharia judge from Qatar claims that there is not and will not be a “dividing line between life and death.”⁶⁹ Dr. Ahmad al-Shawaribi, assistant professor for anesthetics and intensive care medicine at Ain Shams University in Cairo, declares that brain death is “a great lie” and that there are numerous cases of false diagnosis.⁷⁰ According to him and others, a medical doctor may anyhow never be able to define exactly the hour of death, which is up to God alone.⁷¹ This fourth objection appears generally to be the most serious one. The undeniable diversity of opinion among medical experts themselves and biologists, philosophers, and other scholars and scientists cannot be overlooked.⁷² How Muslims try to come to terms with this phenomenon will be discussed in the last section of this chapter. One general awkwardness is discernible: Since life is not an end and has for centuries been understood as a mystery and an intervention of God who sends out an angel to take up the souls, Muslim legal scholars are very much averse to hand over the power of definition to secular experts who concentrate on medical or technical subtleties.

Struggle for the Power of Definition

In Qur’an 17:85 it is explicitly said: “They will question thee concerning the spirit (*al-rūh*). Say: ‘The spirit is of the bidding of my Lord. You have

been given of knowledge nothing except a little.’”⁷³ Although some scholars interpret this verse to indicate that death in itself is finally inscrutable to humankind, others claim the opposite. Muhammad Yasin declares that this verse should not be construed as forbidding human legal exploration, *ibtihād*, of the issue of the *rūh* claiming that it belongs to the hidden things (*ghaybīyāt*).⁷⁴ Yasin nevertheless concedes that “it in fact belongs to the most difficult tasks to find out the viewpoint of the legal scholars concerning this question.”⁷⁵ Another author states the need for “human *ibtihād* (in its two halves, the legal and the medical one) in the absence of a proof of the holy law (*fī ghaybat al-naṣ al-shar‘ī*).”⁷⁶ However, the question is which of the “two halves” may claim preeminence of definition. Al-Dhahabi insists in his 1993 monograph *Organ Transplantation Between Medicine and Religion* that “these signs (*‘alāmāt*) [of death] are derived from people’s experience in those issues.” For him there is, therefore, “no hindrance from the religious law’s point of view to ascertaining the signs by newly invented medical means that are available nowadays.” In such specialized fields, medical experts have to be “the final authority to turn to (*al-marj‘ al-nihā‘ī*).”⁷⁷ Islamic legal scholars, however, claim that they lay down the general outlines where “decisive texts (*nusūḥ ḥāsima*)” are lacking. They explain to the medical doctors the issue of death as the departure of the soul. Yasin further states:

The role of the scholars (*‘ulamā’*) takes priority over (*sābiq*) the role of the experts (*ahl al-ikhtisās*) and is connected with it (*lābiq labih*), for they put into the hands of our brethren, the medical doctors, first of all the principles (*mabā‘it*), definitions (*hudūd*), and general conditions (*shurū‘*) to which the Muslim adheres (*yaltazim bihā*) in the practice of his [medical] speciality.⁷⁸

Such views need not lead to any contradiction so long as the two different tasks are not confused. Western authors insist that the *concept* and the *criteria* of death should be clearly differentiated and not mixed up. The former is first of all a philosophical, cultural, or theological question. The latter, however, depend on scientific research and technical-medical means.⁷⁹ As such they have to be open to progress and revision, like the introduction of new technology—such as the electroencephalograph (EEG). Thus far, the possibility of a certain diagnostic development and diversity should not be too disturbing. Douglas Walton warns that the matter is even more complicated. The problem with brain death is that it is “a bridge concept between the concept of death and the diagnostic criteria for the determination of death, so it is hard to know where to locate it in the

usual concepts/criteria dichotomy.”⁸⁰ Muslim authors do not pay much attention to the dual character of the brain. They often do not clearly distinguish between the understanding of the brain as the crucial factor for the very concept of life on the one hand and its status as just one among other discernable criteria for the establishment of death on the other. A few Muslim scholars take the potentially risky step and give up the traditional distinction between the eternal soul and the brain as an organ. Ahmad Shawqi Ibrahim, for instance, declares

that the psyche (*nafs*) and the soul (*rūh*) are consciousness (*yaʿy*) and discernment (*idrāk*), comprehension (*ʿaql*) and thinking (*fikr*) . . . and all that is connected with the brain (*mukhbh*) . . . or that the brain is their only tributary stream (*rāfiʿāt al-nāḥiyyāt*) . . . therefore the end of life is brain death (*nihāyat al-ḥayāh biḥa manṭ al-mukhbh*).⁸¹

Yasin also seems to fall under this rubric of at least a semi-equation of *rūh* and brain although he expresses himself in more cautious terms. He first of all calls for “the existence of a rational, immaterial, living creature not perceptible to the senses,” that is the soul that is behind every intentional brain activity.⁸² He declares that “cognizance (*ʿilm*), discernment (*idrāk*), sensory perception (*ḥiss*) and free will (*ikhtiyār*) are the most important functions of the soul (*abḥamm waḥāʾif al-rūh*).” The whole body therein serves the soul. He hastens to remark that the soul also carries but some of its functions—although on a minor scale—without the means of the body.⁸³ He adds later on that when the brain becomes “totally incapable of responding to the will of the soul (*li-istijābat irādāt al-rūh*)” and when all the other organs deteriorate to the point of no return, then “the soul has departed from (*rahabat ʿan*) the body with the permission of her master and the angel of death has taken her on a new journey.”⁸⁴ His theologically tinted expression and lengthy tribute to the traditional concept of death cannot conceal the fact that his theory that the soul masters the body with the help of the brain is highly provocative. Al-Daqr praises Yasin’s article highly as the “strongest discussion of the understanding of brain death from the viewpoint of canonical law (*al-sharʿ*).”⁸⁵ To others, though, it might smack a bit of “scientific” Qur’an interpretation.

Two Choices: “If in Doubt, Don’t” or the “Intermediate State”

The majority of Islamic legal scholars do not opt for a pseudoscientific and more or less concealed equation of the soul with the brain. Instead, they are aware of the temporal gap between the fading of the invisible soul and the possibility of scientifically ascertaining death. There are two fundamentally

different ways in the relevant literature to deal with this gap, namely “if in doubt, don’t” and proposing of an “intermediate state.”

The first approach assumes that an answer has to be sought in the light of the established methodology and principles of the sharia since there are no particulars in the holy texts. The Syrian scholar al-Buti and others therefore propagate the application of the principle according to which the continuance of the former status has to be upheld unless a change can be persuasively proven (*isrāḥāb al-ḥāl*).⁸⁶ In case of doubt, the patient or victim has to be regarded as still alive unless certainty concerning his new status can be established. ‘Abd al-Rahman al-Adwi, professor in the faculty of Islamic propaganda and member of the *Maǧmaʿ al-Buḥūth al-Islāmiyya* (Academy of Islamic Research) in Cairo, explains: “From the sharia point of view this human being is surely alive whereas his death has to be doubted. A doubt cannot remove a certain issue. The legal scholars may not allow the physicians to encroach on a living human being with their scalpels (*mashāʾif*).” He then asks rhetorically whether a physician can decree the clinical death of a person who has been treated by intensive-care medicine.⁸⁷ To equate mere indicators of death with death itself is a hazard (*mughāmmara*) and a folly (*muǧāzafā*).⁸⁸ Somebody who claims that a situation has changed must bring forward a real proof, since the rights and duties of the deceased himself, or his wife, children, other relatives, or business partners might be involved.⁸⁹ Otherwise, the traditional sharia definition of death has to be upheld because “the death of the brain (*mukhbh*) is not as certain (*mu-ukhaḍ*) or definite (*qaṭʿ*) as the sharia death (*al-manṭ al-sharʿ*) and is subject to faulty diagnosis.”⁹⁰ Jad al-Haqq refers to the legal maxims that one injury may not be removed by inflicting another one (*lā yuzāl al-ḍarar bil-ḍarar*) and that warding off evil things takes precedence over ensuring positive ones (*darʿ al-mafḥūḍ muqādatam ʿalā juḥd al-maṣāliḥ*). Likewise, it is not allowed to grant life to someone by killing another person who is still alive.⁹¹ Such an “if in doubt, don’t” approach is less a question of whether a person is dead or alive in an ontological sense than of whether certainty can be established concerning one state or the other. Existing diagnostic diversity and uncertainty therefore fuel reservations concerning brain death. The question, however, is whether it is realistic to demand final proofs. Yasin reminds his colleagues that once established truths might be changing—even today’s assumption that brain death is irreversible. He warns them not to always demand absolute certainty in order to construct legal rulings. That would amount to undue restriction:

Someone might say: “How can it be correct that dangerous rulings (*al-ḥāmm al-ḥaḍira*) like [permission for] heart transplantation are built

upon a result (*natīja*) which is founded in strong probability (*ghalabāt al-ẓann*) [i.e., the assumption of brain death] although the possibility of a mistake (*khataʾ*) [i.e., the ruining of human life therein] exists.⁹³ The answer to this objection is that a great part of the realities of life are known only by strong probability and not by certainty and in a definite manner (*lā bi-l-qaṭʿ wa-l-yaqīn*). To confine oneself in laying down what is certain, means to shut out many potential benefits (*fīhi taʿīl li-kathīr min al-masāliḥ al-khāṣira*).⁹²

The other general approach calls for a third legal category between life and death. Normally, life and death are defined in mutually exclusive terms.⁹⁴ Although it is not claimed that somebody may be only a bit alive, traditional Islamic law did already establish a sort of third category. The legal scholars differentiated among “the continuing life (*al-ḥayātib al-mustamirra*)” even of the one who is only one breath away from death; “the lingering life (*al-ḥayātib al-mustaḡirra*)” of the one who has been fatally attacked but does not die immediately and will probably die within days although he can still speak, see and move at will; and “the expiring life (*al-ḥayātib ghayr al-mustaḡirra*),” which is labeled as “the movement of the fatally wounded (*ḥarūkat al-madhbiḥ*)” and denotes somebody who has been fatally hurt, has not yet died, but can no longer speak, see, or move at will.

The existence of such a third category between life and death comes out in discussions of responsibility for attack on one who is already fatally wounded (*al-ishirāk fī al-qaṭl al-ʿamā ʿalā al-taṭābūʿ*).⁹⁵ There are various differences among the authors of the law schools, such as the Shafiʿi al-Nawawi (d. 1277), the Hanbali Ibn Qudama (d. 1233), the Hanafi Ibn ʿAbidin (d. 1888), or the Maliki al-Zarkashi (d. 1391), which cannot be dealt with here in detail.⁹⁶ Suffice it to say that in different scenarios the law manuals deal in their chapters on retaliation (*qiṣās*) and blood money (*diyya*) with the question of responsibility when somebody attacks a person whose life is already expiring.⁹⁶ Most jurists argue that the person who kills someone in this third state is not liable to the punishment for murder but only for infringing on a corpse—that is, liable to *taʿzīr*. Even if a person’s life was expiring only because of illness, retaliation (*qiṣās*) would nevertheless be necessary.⁹⁷ Al-Ashqar proposes to regard the *madhbiḥ* as “living but legally dead (*ḥayy fī ḥukm al-mayyit*);” that is, to treat him as dead concerning the removal of life-support machines and the harvesting of organs, but to treat him as living with regard to heritage and other rights.⁹⁸ Such a third legal category has not only been dealt with in chapters on the responsibility for manslaughter or injury but also in connection with the

old doctrine of death sickness (*marād al-mawt*) which forbids the fatally ill to undertake certain legal transactions.⁹⁹ The advocates of an intermediate legal state still have to explain in detail how this could completely excuse a medical doctor who takes out organs from someone without having to face *taʿzīr*-punishment. The future will show in how far this “return to Islamic law (*ʿawḍ ilā al-fiqh al-islāmī*)”¹⁰⁰ is taken up by more scholars and accepted by a wider Islamic public.

Regardless which of the two approaches prevails, they are both properly founded in Islamic legal traditions. The mechanisms of inner-Islamic discussions decide where the track is going. However, Muslim authors who embrace the concept of brain death hastily might fail to convince large Muslim populations from Morocco to Indonesia and hesitant Muslims in the west as well. It is most often lay people who count when it comes to the question of whether organs may be removed from a deceased relative. The physician A. S. Daar, for example, selectively highlights one of the few clearly positive statements on brain death (made in 1986 at the Third International Conference of Islamic Jurists in Amman),¹⁰¹ reduces other judgements more or less to mere footnotes, and declares that “Muslims are permitted to choose between these options.”¹⁰² Even if such is the attitude taken up by state regulations in countries with ambitious organ transplant programs, such as Kuwait or Saudi Arabia, the announcements will probably not suffice to soothe anxious relatives and prospective donors. In fact, brain death certificates are already used in Oman and Saudi Arabia, among other places.¹⁰³ It is up to experts of state law, medical scholars, and anthropologists to investigate the actual situation in different Islamic countries.

At least for the time being, most Islamic legal scholars obviously feel no need to give up the traditional theological concept of death as the departure of the soul. Al-Daqr even argues that according to classical Islamic teaching, although the heart of the embryo starts beating beginning with the fourth week, the ensoulment is said to take place only after 120 days, when an angel blows the soul into the fetus.¹⁰⁴ With this realization that there is no necessary connection between heartbeat and quality as a human being, “Islam anticipates the west in its ‘new’ understanding of death by fourteen centuries.”¹⁰⁵ In this view, it is rather the western world that has recently shifted its concept of death and narrowed down the borders of life.

Notes

I thank the contributors to this volume and especially Jonathan E. Brockopp for their discussion of a distinctively different earlier draft. Edward Badeen, Annabelle