Medicine *and* Shariah

A DIALOGUE IN ISLAMIC BIOETHICS

Edited by Aasim I. Padela

Foreword by Ebrahim Moosa

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University of Notre Dame Press
Notre Dame, Indiana

University of Notre Dame Press
Notre Dame, Indiana 46556
undpress.nd.edu

Published in the United States of America

Library of Congress Control Number: 2021931594

ISBN: 978-0-268-10837-3 (Hardback)
ISBN: 978-0-268-10840-3 (WebPDF)
ISBN: 978-0-268-10839-7 (Epub)

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A Jurisprudential (*Uṣūlī*) Framework for Cooperation between Muslim Jurists and Physicians and Its Application to the Determination of Death

MUHAMMED VOLKAN YILDIRAN STODOLSKY
AND MOHAMMED AMIN KHOLWADIA

Contemporary medicine has developed unprecedented treatments. One of the aims of those who engage in Islamic bioethics is to assess these developments to ensure that medical treatments that are aimed to stop or prevent harm to the human body do not cause harm to a patient's eternal life after death by conveying Islamic norms to physicians. Therefore, Islamic bioethics requires cooperation between two often distinct sets of specialists: the *'ulamā'* and physicians, each with different skill sets and methodologies. The *'ulamā'* make up the body of Muslim scholars who know the Shariah and whom the previous generation of scholars have entrusted with explaining and applying its rulings, starting with the generation of the Companion of the Prophet Abū l-Qāsim Muḥammad b. 'Abd

Allāh, whom he authorized to teach the Shariah. The *'ulamā'* specialize in *fiqh*, which is the discipline of understanding and interpreting the revelation that the Prophet Muhammad taught to his Companions. The goal of *fiqh*, however, as it deals with divine revelation and the transmission of Prophetic knowledge, stands in contrast to modern medicine, which is based on empirical knowledge. Given this difference, there needs to be a conceptual framework that delineates the boundaries of this relationship and the individual roles of the jurists and the physicians in order for meaningful cooperation between the two groups. In this chapter we aim to present such a framework based on Islamic jurisprudence (*uṣūl al-fiqh*), taking the influential work of Abū Isḥāq Ibrāhīm b. Mūsā al-Shāṭibī (d. 790/1388), *al-Muwāfaqāt fī uṣūl al-Sharī'ah*, as a starting point.[1] Specifically, through the articulation of this conceptual framework, we reexamine the important ethico-legal issue of the criteria for determining death.

SHĀṬIBĪ'S MODEL

Shāṭibī defines *ijtihād* as doing one's utmost to obtain certain or probable knowledge of a ruling according to the Shariah.[2] According to Shāṭibī, there are two types of *ijtihād*: one that will continue as long as the legal obligation of humanity continues (in other words, until the day of resurrection), while the other is a type of *ijtihād* that may cease before then.[3] The first type consists of *taḥqīq al-manāṭ*, which is a legal cause in which there is an agreed-upon criterion of the Shariah, but it remains to be determined whether the criterion is met in daily life. Shāṭibī illustrates the concept with examples. The Qur'an requires two just eyewitnesses in litigation in a case in which there is an allegation that the legal rights of a human being are violated (Q 65:2). Shāṭibī writes that once we understand the meaning of justness in Shariah, we will still need to designate the individuals who have the quality of justness, something in which individuals differ greatly. There are people who have the highest degree of justness—such as Abū Bakr, the first Rightly Guided Caliph—those who cannot be considered just witnesses, and a whole spectrum of individuals between whom the judge must decide whether their testimonies should be considered legal proof. What Shāṭibī means is that the Shariah will

not accept the testimony of someone who publicly commits grave sins, since such a person does not fit the qualification of being just, as is required in the statement of revelation, on the one hand; but, on the other hand, it will accept the testimony of someone who avoids major sins and does not intentionally commit minor sins. However, there are people who avoid major sins and at the same time intentionally commit minor sins, in which case the judge has to exercise his discretion in accepting their testimony. If the good deeds of such a person are deemed dominant, the testimony will be accepted; if the bad actions are deemed dominant, the testimony will not be considered legal proof.[4] Hence, although the Shariah identifies the criterion of justness as a requirement for the validity of testimony, the fulfillment of the criterion will be based in many cases on the judge's discretion.

The obligation of determining the actualization of the criterion is not limited to litigation but is a duty for every Muslim. As an example, Shāṭibī cites the issue of unnecessary movement in *salat* (prayer). The agreed-upon criterion in the Shariah is that excessive unnecessary movement invalidates the *salat*, whereas nonexcessive movement does not: the person performing the *salat* has to judge for himself whether his movement is excessive. It is clear from these examples that the actualization of the criterion in the way Shāṭibī articulates it is something that concerns every Muslim and is inescapable. Hence Shāṭibī states that there is a consensus in the Muslim community that this type of *ijtihād* is valid.

The second type of *ijtihād*, which may cease before the day of resurrection, consists of three categories. The first is *tanqīḥ al-manāṭ* (literally, the refinement of the pivot), for which the relevant criterion is mentioned with other attributes in the Qur'an or the *Sunnah*, so that the attributes have to be sifted to single out the applicable factor. Shāṭibī mentions an example that is often cited in works of jurisprudence in which a Bedouin relates to the Prophet that he had intercourse with his spouse in daylight hours during Ramadan. The Prophet responds by saying that he needs to emancipate a slave as expiation. Jurists eliminate the factors that are not relevant, such as the fact that the person was a Bedouin or that the female was his spouse to ascertain the relevant factor upon which the judgment rests. According to Abū 'Abd Allāh Muḥammad b. Idrīs al-Shāfi'ī (d. 204/820), this factor is intercourse while fasting in Ramadan, whereas, according to Abū Ḥanīfah Nu'mān b. Thābit (d. 150/767) and Mālik b.

Anas (d. 1797/795), it is intentionally doing something that breaks the fast in Ramadan.

The second category is *takhrīj al-manāṭ* (literally, the extraction of the pivot), in which the statement in the Qur'an or the *Sunnah* that is the basis of a ruling does not mention the applicable attribute at all. In such cases, the jurist has to investigate the issue to extract the legal cause. This constitutes legal analogy proper (*qiyās*). Examples include the prohibitions of drinking wine and exchanging a lower quantity of wheat with a higher quantity of wheat, in which the causes of the prohibitions are not explicitly stated. Jurists attempt to discover the causes of the prohibitions and conclude that the former is prohibited because it is an intoxicant and the latter is prohibited because of the unequal exchange of two commodities that are of the same kind and measured in the same way.[5] The extraction of the *ratio legis* allows its application to other cases in which the same cause exists.

The third category is a specific type of the actualization of the criterion (*taḥqīq khāṣṣ*), which is that the jurist attains a special discernment through fearing Allah that allows him to know how a general ruling relates to a specific individual and his personal traits. In this regard, Shāṭibī cites a verse of the Qur'an, "If you fear Allah, he will make for you a *furqān*" (Q 8:29), which means a criterion by which one distinguishes truth from error. For example, Shāṭibī states that the Prophet said to the Companion Abū Dharr Jundab b. Junādah al-Ghifārī, "Oh Abū Dharr, truly I see you are weak and truly I love for you what I love for myself. Verily do not become a commander over two people and do not be in charge of the wealth of an orphan." Although being a just ruler and taking care of orphans are among the best of deeds according to other statements of the Prophet, Shāṭibī observes that the Prophet told Abū Dharr not to engage in these because of what he discerned from his character.

It is clear from Shāṭibī's exposition of *ijtihād* that the first type of *ijtihād*, the general actualization of the criterion (*taḥqīq 'ām*), concerns all Muslims, whereas the second type of *ijtihād* is the domain of the Muslim jurist, since it requires reading revelation in its original language and processing it with technical legal thought and insight. According to the command of the Qur'an, in any disputed matter the criterion for determining its resolution must be based on revelation: "If you dispute something, return it to Allah and the Messenger if you believe in Allah and the last day" (Q 4:59). Once the applicable criterion for the issue is identified

by the Muslim jurist based on revelation, one does not need to be a jurist to observe the realization of the relevant factor in daily life.

Here it should be noted that Shāṭibī uses the word *manāṭ* to refer to the specific criterion of the legal cause (*'illah*), while in this chapter we use the broader category of legal criteria because the normative elements of Islamic law that may be relevant for the physician are not restricted to legal causes. Statements of revelation establish either rulings (*al-ḥukm al-shar'ī*), such as permissibility or prohibition, or the factors upon which these rulings depend (*al-ḥukm al-waḍ'ī*), such as legal occasions (*sabab*), causes (*'illah*), conditions (*sharṭ*), and signs (*'alāmah*), the details of which are discussed in works of Islamic jurisprudence (*uṣūl al-fiqh*).

The *mujtahid*, a Muslim jurist who is capable of doing *ijtiḥād*, directly derives both the rulings and the factors on which they depend from revelation. The jurist who is not a *mujtahid* uses, beyond the criteria the *mujtahid* identifies, additional normative criteria to address new issues. Through the legal process of *takhrīj*, which refers to the derivation of norms from the legal heritage of the school, jurists identify the specific maxims (*ḍābiṭ*) pertaining to each legal subject through an inductive analysis of the opinions of the *mujtahid* on related cases. The jurist then applies these specific maxims to new issues that resemble the issues in the repository of the school. Some jurists also use the criteria of general legal maxims (*al-qā'idah al-kulliyyah*), although this is not agreed upon. The committee that wrote the *Majallah*, the Ottoman law of transactions that was the first codification of Islamic law in history and whose introduction became one of the most influential reference works for legal maxims, explicitly prohibited judges from using legal maxims to issue rulings in the absence of other legal proofs, stating that "Rulers of the Shariah" cannot rule by these [general maxims] without finding an explicit transmission." Ali Haydar Efendi also voiced the same opinion in his commentary on the *Majallah*.[6] However, other jurists have used general legal maxims as normative criteria in the absence of relevant statements of revelation and opinions transmitted from the *mujtahid*.[7] In sum, Muslim jurists use a number of normative criteria that may be relevant to the physician.

In the context of Islamic bioethics, then, the role of the Muslim jurist is to determine the pivotal criteria of bioethical issues based on revelation, while the role of the Muslim patient and physician is to determine whether the criteria are met in actual cases. For instance, Ḥanafī jurists,

based on revelation, identify three criteria for the permissibility of the usage of prohibited substances in medicine: necessity (*ḍarūra*), which refers to danger to life or limb; the absence of a permissible alternative; and certain or satisfactory knowledge that the treatment is effective.[8] Once the jurists disclose the criteria, it is the role of the patient and the physician to determine whether the criteria are met in a certain illness.

To summarize the conceptual framework, Shāṭibī identifies two broad categories of *ijtihād*: (1) determining the applicable Islamic criteria based on revelation through specific jurisprudential methods, which is the duty of the Muslim jurist, and (2) applying the criteria, which is the responsibility of whoever is tested with a situation in which the criteria are applicable. If we apply Shāṭibī's framework to Islamic bioethics, jurists have to identify the criteria in bioethical issues based on revelation, and patients and physicians need to apply them in particular cases.

APPLICATION OF THE MODEL TO THE ISSUE OF DETERMINING DEATH

With this conceptual framework in mind, let us evaluate the disputed issue of determining death through what is popularly called brain death. To begin with, it has to be stated that the expression "brain death" is misleading since it leads to the misimpression that in this condition the brain is "dead," that is, it has irreversibly lost all functions. As Aasim Padela and Taha Abdul-Basser note, brain death is a misnomer given that certain functions of the brain may continue: "For example, the pituitary gland may continue to release hormones, the hypothalamus may continue to regulate body temperature, in response to surgery, blood regulation may be intact, and some brain dead patients have demonstrated a breathing response. Extreme examples include the ability of the brain dead women to undergo labor."[9] Others have observed that "brain-dead patients maintain residual vegetative functions; e.g. growth, reproduction, pregnancy, childbirth etc. that are mediated or coordinated by the brain or brainstem."[10] Hence, "irreversible coma," which is how the Ad Hoc Committee of the Harvard Medical School that popularized the concept referred to it, might be more accurate and less misleading to the public.[11] Nonetheless, in this chapter, "brain death" will be used to refer to this clinical

state, since it is the designation that is more commonly used and was the one Muslim jurists contended with in juridical councils.

There is consensus among Muslim scholars that death is the separation of the soul from the body.[12] The Qur'an describes how the soul of a dying person comes up to the throat: "Then, when [the soul of the dying person] comes up to the throat while you are looking on at that moment, We are closer to him than you, but you do not perceive" (Q 56:83–85). Since the separation of the spirit is a metaphysical occurrence that living human beings cannot perceive through the senses, Muslim jurists consider the physical signs of life and death to infer that the spirit has separated from the body and the person is deceased. The disputed issue is whether one who is diagnosed with brain death but exhibits other signs of life, such as a heartbeat, breathing, and being warm to touch by means of life support equipment, is to be considered dead or alive. In other words, is the physician's determination of a neurologically compromised state (in common parlance, brain death) a sufficient threshold to meet the standards for legal death in Islamic law?

One of the consequences of considering brain death as death is that it makes possible the extraction of vital organs that cannot be recovered after clinical death when the heartbeat, blood circulation, and breathing stop. If brain death is not considered real death and the person is considered alive in this state, the extraction of these vital organs constitutes intentional killing of the patient. In fact, this was the opinion of the Majlis al-'Ulamā' in Port Elizabeth, South Africa, which was issued in 1994.[13] The Majma' al-Fiqhī—Islamic *Fiqh* (Legal) Academy (IFA)—of what was at the time the Organisation of Islamic Conference (OIC, currently the Organisation of Islamic Cooperation) decided in 1988 that whole-brain death is legal death even if the heart is still beating.[14] In contrast, the *fatwā* committee of the Ministry of Foundations of Kuwait in 1981 and the legal academy of the Muslim World League in 1987 decided that the death of the brain stem without cessation of the heartbeat is not considered death.[15] Their main argument was the universal Islamic legal principle "Certainty is not removed with doubt," as expressed in this verse of the Qur'an: "Verily speculation is of no avail against certainty" (Q 10:36).[16] Since it is certain that the patient was originally alive, and it is disputed whether he is really deceased when brain death takes place, the patient must be considered alive until there is certainty that he is

deceased. The main argument of the Muslim proponents of brain death as legal death is that since there is no explicit statement in revelation that determines when death actually takes place, the judgment of physicians as experts in medicine that brain death is death has to be accepted.[17]

One of the problems with the argument of the proponents of considering brain death as legal death is that determination of death is a disputed issue that has not only medical but numerous religious and ethico-legal consequences, such as hastening of the burial, distributing the inheritance, executing bequests, and determining when the spouse can get remarried. In other words, given the religious and ethico-legal significance of the disputed issue, it is problematic to leave it to the judgment of the physicians as if it were a purely medical issue. Rather, the Muslim jurists must identify the solution based on the Shariah. Based on their claim that there is no explicit statement of revelation that determines the criterion for death, the proponents do not identify the pivotal criterion of the issue but rather refer and defer it to the physicians. However, even if one grants the claim, the search for criteria according to revelation should start, not end, precisely when there is no explicit statement in revelation. In identifying criteria according to the Shariah, *ijtihād* does not stop but rather starts when there is no *naṣṣ* (explicit statement in the Qur'an or the *Sunnah*). Even though the only type of *ijtihād* physicians are capable of doing is *taḥqīq al-manāṭ*, the proponents entrust them with *takhrīj al-manāṭ*, or, in other words, determining the criterion based not on the *Sunnah* of the Prophet and the Companions, but on medical practice. This is not in accordance with this command of Allah: "If you dispute something, return it to Allah and the Messenger if you believe in Allah and the last day" (Q 4:59). This is not to dismiss the value of expert testimony in Islamic law, which is obvious, but to state that experts cannot determine religious and ethico-legal criteria by adopting and transplanting non-Islamic standards and practices without referring to the Qur'an and the *Sunnah*. Rather it is the duty of the expert to establish whether criteria that are established based on the Shariah are fulfilled in their field of expertise.

Since Sunni legal thought is cumulative, similar to the principle of *stare decisis* in US law, in which precedence guides court decisions, we must first ask within the framework of Islamic jurisprudence whether Muslim jurists have determined the criterion by which death is established in cases where there is doubt. The answer is affirmative and, significantly,

there seems to be consensus on the issue among the four Sunni schools. This criterion is certainty of death (*tayaqqun al-mawt*).

The Ḥanafī jurist Ḥasan b. ʿAmmār al-Shurunbulālī (d. 1069/1659), in *Marāqī al-falāḥ*, a widely taught work on the laws of worship, writes, "If one is certain of death, the funeral preparations are expedited." He brings two pieces of evidence for the necessity of certainty, one based on transmission, the other on the experimental knowledge of physicians. The transmitted evidence is no less than the passing away of the Prophet himself. Shurunbulālī writes, "The Prophet, may peace and blessings be upon him, died on Monday before noon and was buried late at night on Wednesday." While some scholars suggest that this delay in burial was due to the fact that the Companions were engaged in the important task of selecting the leader of the Muslim community, Shurunbulālī's extraction of the criterion is that the Companions delayed the burial to be certain that the Prophet had indeed passed away. The experimental evidence is a testimony from a physician who states that in certain sicknesses only the best of physicians can determine that death has taken place.[18] In other words, since even physicians who are the experts on human health make mistakes in diagnosing death, one must make sure no signs of life remain to declare death when there is any suspicion that the person may still be alive.

In *Bidāyat al-mujtahid*, the Mālikī jurist Abū l-Walīd Muḥammad b. Aḥmad Ibn Rushd (d. 595/1198), known in the West as Averroes, first notes that it is commendable to expedite the burial, except for one who dies from drowning. According to the Mālikī school, in this case it is commendable to delay the burial for fear that signs of life might not be recognized. Ibn Rushd observes, "If this is the case for drowning, it is all the more so for many other patients."[19] Al-Shāfiʿī, the founder of the Shāfiʿī school, addresses the issue in *al-Umm*, one of the earliest works of Islamic law. He states: "If the deceased has been struck by lightning, or dies from grief, or has been tortured, or due to burning or drowning, or he has an illness that hides like death [i.e., gives the impression of death], his burial is delayed and he is attended to until his death becomes certain . . . even if it is a day, or two days, or three days, as long as death does not become clear-cut." Elsewhere he states, concerning the same conditions, "I like it that he is delayed until his decomposition is feared, even if that takes two or three days."[20] The prominent Shāfiʿī jurist Abū Zakariyyā Yaḥyā b. Sharaf al-Nawawī (d. 676/1277) echoes the same position, "If there

is doubt [concerning death] due to the fact that there is no [observable] cause of death, or the probability of heart attack . . . or others, it is delayed until certainty."[21] The Ḥanbalī jurist Abū Muḥammad Muwaffaq al-Dīn ʿAbd Allāh b. Aḥmad Ibn Qudāmah al-Maqdisī (d. 620/1223), whose *al-Mughnī* is arguably one of the most influential work of the Ḥanbalī school, also identifies certainty as the criterion for the determination of death: "If the matter of the deceased is ambiguous [i.e., if there is doubt concerning his death], the manifestation of the signs of death is considered. . . . One waits for these signs until his death becomes certain."[22] This survey shows that leading jurists of all four Sunni schools independently identified certainty as the pivotal criterion for the determination of death when there is doubt, in accordance with the verse of the Qur'an and the legal maxim mentioned above. This means that no sign of life should remain. Since there are obvious signs of life after the diagnosis of brain death, such as heartbeat, breathing, and being warm to touch, brain death cannot be considered legal death according to the criterion of certainty. Given that Muslim jurists of all four extant Sunni legal schools agreed upon certainty as the criterion for the determination of death when there is doubt, Muslim physicians can fulfill their role of applying this criterion in actual situations. Accordingly, the Muslim physician must not declare death until all signs of life cease and cannot be detected by available methods, whether by palpating a heartbeat or listening with a stethoscope or looking at the monitor of an electrocardiograph.

Proponents of brain death counter that classical jurists listed possible signs of death, such as the stopping of breathing, the becoming limp of the feet, the drooping of facial muscles, the sinking of the temples, and the body's becoming cold, and assert that since physicians consider different signs today, this shows that there is no problem with adopting new standards such as brain death. This overlooks the obvious fact that jurists searched for these signs only when there were no signs of life. No one advocated looking for signs of death when there were obvious signs of life, such as breathing. To the contrary, even when there were no signs of life, we have seen that the *'ulamā'* were so careful to preserve and protect human life that they were unanimous in advocating waiting until no doubt remains—even if that means waiting until the beginning of decomposition.

Let us consider how this jurisprudential exposition relates to the reality on the ground and whether it answers the questions of the clinicians

and patients on the verge of death. The application of brain death as a criterion to determine legal death suffers from a number of important problems. First, proponents of brain death disagree on whether brain death should be determined through whole-brain, higher-brain, or brain-stem criteria.[23] Second, although the US government recognized whole-brain death as legal death, it did not determine the criteria to be used to ascertain it, and, as a result, there is wide variability of protocols.[24] According to recent research led by neurologist David Greer and published in the *Journal of the American Medical Association Neurology*, 66.9 percent of hospitals in the research did not require the determiner of brain death to be a neurologist or neurosurgeon, and 56.9 percent of the hospitals did not even require the determiner to be the attending physician. Most of the hospitals also did not test for hypothermia and hypotension, which can resemble brain death.[25] Third, there are documented cases in which patients diagnosed with brain death turned out to be brain-alive.[26] Physicians typically respond to such cases by saying that although mistakes are possible in diagnosis, brain death is reliable for prognosis, since no brain-dead patient who has been correctly diagnosed has survived. However, as one paper puts it, "these reports speak to difficulty of diagnosing brain death and the potential for misdiagnosis given the widespread variability in clinical criteria."[27] These data raise major questions about the reliability of brain death determination in the United States and corroborate the universal validity of the Islamic bioethical criterion of certainty to establish death when there is doubt.

As for clinical concerns, the popularity of brain death as a way of determining death is related to two clinical concerns: freeing hospital beds and harvesting organs. In fact, these concerns are openly stated in the abstract of the report of the Ad Hoc Committee of the Harvard Medical School, which reads, (1) "The burden is great on patients who suffer permanent loss of intellect, on their families, on the hospitals, and on those in need of hospital beds already occupied by these comatose patients. (2) Obsolete criteria for the definition of death can lead to controversy in obtaining organs for transplantation."[28] From the perspective of Islamic law, the question of freeing hospital beds is irrelevant, since according to Islamic law neither the patient nor the physician is legally obligated to continue any treatment that they consider futile, whether the patient is conscious or comatose.[29] Thus there is no need to accept brain death as a criterion for the determination of death to free hospital beds. As for organ transplant, the criterion

of certainty this chapter and other writings advocate will prohibit the harvesting of vital organs in the state of brain death, since this will constitute intentional killing of the patient. The Shariah categorically forbids the killing of an innocent human being and equates the killing of a single innocent person with the killing of all humanity: "Whoever kills a soul not for a soul or for causing corruption in the land is as if he has killed all humanity" (Q 5:32). Hence no human being can be killed because of utilitarian concerns. As regards nonvital organs, for jurists who consider organ transplantation prohibited, like the majority of the Ḥanafī school, again this is a separate legal issue on which the brain-death criterion has no bearing, since they consider organ transplantation prohibited whether the patient is conscious or comatose or dead, based on this *hadith* of the Prophet: "Breaking the bones of the dead is like breaking them when he is alive."[30] On the other hand, jurists who do allow it for a conscious person will also allow it for a comatose person. Finally, the clinician does not have to struggle with different criteria and protocols of determining brain death, since cardiopulmonary manifestation of death will determine that the patient has passed away. Clinicians may object that there is no 100 percent certain test for any measure, which means that the criterion of certainty can never be applied. The response is that the criterion does not seek quantitative certainty but rather requires that, according to the physician, no signs of life remain.

In sum, according to the jurisprudential framework of *ijtihād* articulated by Shāṭibī, the domain of the jurist comprises identifying legal criteria, whereas the domain of the patient and the physician is their application. Jurists need to identify the applicable Islamic criteria based on revelation through jurisprudential methods, and Muslim patients and physicians need to judge whether the criteria are met in particular cases. In bioethical controversies the physician must not be assigned the duty of the jurist.

NOTES

The following chapter is based on a paper presented at "Interfaces and Discourses: A Multidisciplinary Conference on Islamic Theology, Law, and Biomedicine" at the University of Chicago, April 15–17, 2016.

1. Abū Isḥāq Ibrāhīm b. Mūsā al-Lakhmī al-Shāṭibī was a Mālikī jurist from Muslim Granada. His work *al-Muwāfaqāt* is perhaps the best-known work of

Maqāṣid al-Sharī'ah (the aims of the Shariah) and is one of the few works of Islamic law that is studied and taught by jurists of schools other than that of the author. See *Turkiye Diyanet Vakfi Islam Ansiklopedisi*, s.v. "Şâtibî, İbrâhim b. Mûsâ."

2. Abū Isḥāq Ibrāhīm b. Mūsā al-Lakhmī al-Shāṭibī, *al-Muwāfaqāt fī uṣūl al-Sharī'ah* (Beirut: Dār al-Kutub al-'Ilmiyya, 2009), 789. We refer to the Shariah as the rules that Allah ordains for competent beings to follow as a religion through revelation, which cannot be known without revelation, regardless of whether revelation decrees the rule itself or its like. 'Alī Ḥaydar Arsebuk, *Durar al-ḥukkām sharḥ majallat al-aḥkām* (Beirut: Dār al-Kutub al-'Ilmiyyah, 2010), 1:13.

3. Shāṭibī, *al-Muwāfaqāt fī uṣūl al-Sharī'ah*, 774 ff. Shāṭibī's discussion of *ijtihād* is based on and develops al-Ghazālī's earlier exposition of the same subject. al-Ghazālī, *al-Mustaṣfā* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1993), 1:281 ff. We discussed Ghazālī's exposition and its relevance to the juristic role of the Muslim physician in Muhammed Volkan Stodolsky and Mohammed Amin Kholwadia, "Physician's Juristic Role," in *Encyclopedia of Islamic Bioethics*, ed. Ayman Shabana. *Oxford Islamic Studies Online*, http://www.oxfordislamicstudies.com/article/opr/t343/e0271 (accessed April 4, 2018).

4. Cf. 'Abd al-Ghanī b. Ṭālib Maydānī, *al-Lubāb fī sharḥ al-kitāb* (Damascus: Maktabat al-'Ilm al-Ḥadīth), 578.

5. This is the legal cause according to the Ḥanafī school; according to the Mālikī and Shāfi'ī schools, the legal cause is the unequal exchange of foodstuff of the same kind.

6. Necmettin Kizilkaya, *Hanefi Mezhebi Baglaminda Islam Hukukunda Kulli Kaideler* (Istanbul: Iz Yayincilik, 2013), 335 ff., 399.

7. Zayn al-Dīn Ibn Nujaym, *al-Ashbāh wa l-naẓā'ir* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1999), 14.

8. Muḥammad Amīn Ibn 'Ābidīn, *Radd al-muḥtār 'alā al-durr al-mukhtār sharḥ tanwīr al-abṣār* (Beirut: Dar al-Fikr, 1992), 1:210.

9. A. I. Padela and T. A. Basser, "Brain Death: The Challenges of Translating Medical Science into Islamic Bioethical Discourse," *Medicine and Law* 31, no. 3 (2012): 441.

10. M. Y. Rady et al., "Islam and End-of-Life Practices in Organ Donation for Transplantation: New Questions and Serious Sociocultural Consequences," *HEC Forum* 21 (2009): 175–205, quoted in Aasim I. Padela, Ahsan Arozullah, and Ebrahim Moosa, "Brain Death in Islamic Ethico-Legal Deliberation: Challenges for Applied Islamic Bioethics," *Bioethics* 27, no. 3 (March 2013): 8.

11. "A Definition of Irreversible Coma," Report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, *Journal of the American Medical Association* 205, no. 6 (1968): 337–340. http://jamanetwork.com/journals/jama/article-abstract/340177. Cf. Padela and Basser, "Brain Death," 436.

12. Padela, Arozullah, and Moosa, "Brain Death," 6.

13. Ibid., 3. On the same page, the authors provide a useful chart that notes the dates of Islamic verdicts issued on brain death.

14. Padela and Basser, "Brain Death," 439. Padela discusses the philosophical and clinical problems of this and other opinions in the articles cited in this paper.

15. Articles on the subject also mention a third position that they attribute to the Islamic Organization for Medical Sciences (IOMS). This position is that brain death is an intermediate state between life and death so that some rulings of death can be applied, such as those regarding the removal of life support, but not all, such that legal death will take effect according to the cardiopulmonary criteria. This chapter will not deal with this position, as we were not able to access the original documents in Arabic or to engage the arguments and the application of the position to related issues in detail. Articles that mention the position do so very briefly. See Padela and Basser, "Brain Death," 439, and Padela, Arozullah, and Moosa, "Brain Death," 3. For a brief discussion and rejection of the position in Arabic, see Sa'd b. 'Abd al-'Azīz al-Shuwayrikh, "Mawt al-dimāgh," *Majallat al-Jam'iyyah al-Fiqhiyyah al-Sa'ūdiyyah* 11 (2011): 310, who quotes the prominent classical jurist Ibn Ḥazm in saying, "No two experts on the Shariah or anyone else differ on the fact that one is either alive or dead."

16. Ibn Nujaym, *al-Ashbāh*, 6.

17. For a summary of the issue in Arabic with citation of sources and fatwās, see Ḥamd Muḥammad al-Hājirī, "Mawt al-dimāgh bayn al-fuqahā' wa l-aṭibbā,'" *Majallat Kulliyat al-Sharī'ah wa l-Dirāsāt al-Islāmiyyah*, Qatar University 24, 1427/2006, pp. 291–338; Sa'd b. 'Abd al-'Azīz al-Shuwayrikh, "Mawt al-dimāgh," 241–350; Aḥmad 'Abd al-Wahhāb Sālim Muḥammad, "'Alāmat al-mawt bayn al-fuqahā' wa l-aṭibbā'" (http://www.islam.gov.kw/eftaa/ControlPanel/ScientificResearchDocuments/1268209811.doc).

18. Aḥmad b. Muḥammad al-Ṭaḥṭāwī, *Ḥāshiyat al-Ṭaḥṭāwī 'alā marāqī al-falāḥ sharḥ nūr al-īḍāḥ lil-Shurunbulālī* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997), 565 ff.

19. Abū l-Walīd Muḥammad b. Aḥmad Ibn Rushd, *Bidāyat al-mujtahid wa nihāyat al-muqtaṣid* (Cairo: Dār al-Ḥadīth, 2004), 1:239.

20. Abū 'Abd Allāh Muḥammad b. Idrīs al-Shāfi'ī, *al-Umm* (Beirut: Dār al-Ma'rifah, 1990) 1:315, 322.

21. Abū Zakariyyā Yaḥyā b. Sharaf al-Nawawī, *Rawḍat al-ṭālibīn* (Beirut: al-Maktab al-Islāmī, 1991), 2:98.

22. Abū Muḥammad Muwaffaq al-Dīn 'Abd Allāh b. Aḥmad Ibn Qudāmah, *al-Mughnī* (Cairo: Maktabat al-Qāhira, 1968), 2:337.

23. Aasim I. Padela, Hasan Shanawani, and Ahsan Arozullah, "Medical Experts and Islamic Scholars Deliberating over Brain Death," *Muslim World* 101, no. 1 (2011): 66.

24. Padela and Basser, "Brain Death," 437.

25. David Greer, "Variability of Brain Death Policies in the United States," *Journal of the American Medical Association Neurology* 73, no. 2 (2016): 213–18, http://archneur.jamanetwork.com/article.aspx?articleid=2478467; Sarah Kaplan,

"When Are You Dead? It May Depend on Which Hospital Makes the Call," https://www.washingtonpost.com/news/morning-mix/wp/2015/12/29/when-are-you-dead-it-may-depend-on-which-hospital-makes-the-call/.

26. U.S. Centers for Medicare and Medicaid Services, "Report on St. Joseph Hospital's Handling of Patient Colleen Burns," http://www.scribd.com/doc/148583905/U-S-Centers-for-Medicare-and-Medicaid-Services-report-on-St-Joe-s.

27. Padela, Shanawani, and Arozullah, "Medical Experts," 68.

28. "A Definition of Irreversible Coma," 337–40.

29. Omar Qureshi and Aasim Padela, "When Must a Patient Seek Healthcare? Bringing the Perspective of Islamic Jurists and Clinicians into Dialogue," *Zygon* 51, no. 3 (September 2016).

30. 'Abd al-Razzāq al-Ṣan'ānī, *al-Muṣannaf* (Beirut: al-Maktab al-Islāmī, 1403 AH), 3:444; Basser and Padela, "Brain Death," 448.

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