

Islamic Juridical Discourse on Death: Is Brain Death a Modern Criterion of Death?

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Abstract

This paper engages with a highly sensitive issue of biomedical ethics where a patient—whose heart is still beating—may or may not be declared dead. To be more precise, the study outlines some of the controversies associated with the issue of brain death debated and argued by contemporary Muslim juridical scholars and medical scientists, with illustration of the legal and medical reasoning behind them. The study will explore the question of removing a patient from life support machines once scientifically declared brain dead by medical experts and practitioners. It is demonstrated that the discussion on brain death has evolved into plurality of opinions and hence the issues involved in it have been subject to disagreement, which lends flexibility to the Islamic jurisprudence and allows implementation of Islamic injunctions in the best interest of the person in question and his/her family. The discussion is directly related to the question, “when does legal personality end?” The end of legal personality entails determining—if the patient is a man—(a) should his wife be treated as a widow?; (b) should his wife undergo ‘iddah period and be allowed to marry another man?; (c) should his children be treated as orphans; (d) should his property/assets be divided among his heirs?; (e) while in such a condition (i.e., brain dead) should he inherit if a relative dies?; (f) can he be given any gift while in such a state? These are some of the legal questions this discussion will help answer them.

Keywords

brain death, biomedical ethics, modern legal debates, Islamic jurisprudence, organ transplantation.

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Introduction

Brain death is relatively a contemporary phenomenon to Muslim world that came to limelight due to advances in medical science in the second half of the twentieth century. This entails that classical Islamic law and related literature of earlier times will not provide any direct ruling on the issue of brain death. However, the issue of death and dying is discussed by several Muslim scholars including but not limited to Abū Ḥāmid Muḥammad al-Ghazālī (d. 505/1111) and Ibn Qayyim al-Jawziyyah (d. 751/1350) at some length.¹ Moreover, several Qur'ānic verses elaborate process of death and afterlife. *Ḥadīth* literature is equally filled with narrations from the Prophet (peace be on him) on death and dying, its process and its relevance to the worldly life. However, direct discussion on brain death and associated subjects started when ethical questions of organ transplantation emerged in the twentieth century. Likewise, when a brain-dead patient's heartbeat was kept running through life support machines, questions were raised whether a brain-dead patient to be considered dead and life support removed, or such patient be considered alive and life support machinery continue to support heartbeat. In this paper, an effort has been made to address these questions. It further outlines some of the controversies associated with this issue of brain death, with illustration of the legal and medical reasoning behind them.

Absence of breathing and heartbeat were long taken as the defining criteria for death. Medical advancements in the twentieth century obliged scientists and physicians to question these criteria. Further, the successful heart transplant dismissed the idea that cessation of heartbeat is the moment of death. Whether death occurs instantly or it is a process is a question, which scholars of medical sciences, philosophers, religious scholars, and jurists are equally engaging with. New definition of death where absence of breathing and heartbeat is no more considered complete death provided hope for life to dying patients on the one hand, and it created opportunity of receiving an organ donation from not-yet-dead person on the other hand. Rady and Verheijde vehemently oppose the idea of considering brain-dead patients cadavers and propose to revise the definition of death.² In a complete contrast, Omar Sultan Haque engages with Ibn Sīnā (d. 428–1037) and Ibn Qayyim al-Jawziyyah to redefine personhood in Islam to treat the subject of brain death.

¹ For example, see Muḥammad b. Muḥammad al-Ghazālī, *Iḥyā' 'ulūm al-dīn* (Beirut: Dār al-Ma'rīfah, 2004) 4:448–524; Muḥammad b. Abī Bakr b. Ayyūb b. Qayyim al-Jawziyyah, *Kitāb al-rūḥ*, ed. Muḥammad Ajmal Ayyūb Iṣlāhī (Makkah: Dār 'Ālam al-Fawā'id, 1432 AH).

² Mohamed Y. Rady and Joseph L. Verheijde, "Brain-Dead Patients Are not Cadavers: The Need to Revise the Definition of Death in Muslim Communities," *HEC Forum* 25, no. 1 (2013): 26, doi:10.1007/s10730-012-9196-7.

Haque argues that “if Ibn Sina were alive today . . . and knew how the brain worked, he would be the first to admit that his own dualism was merely a function of a commendable but incomplete theory of the mind.”³ He, however, believes that the issue may still remain controversial between Sufis and non-Mutazilite traditionalists. He is confident that Muslims’ acceptance of monistic account of personhood will alleviate organ shortage in the Muslim world. In Haque’s words,

Corporeal monistic account of Muslim personhood as embodied consciousness incorporates the insights of pre-modern Muslim thinkers yet rehabilitates their characteristic mistakes and thus has the advantages of neuroscientific validity and modern relevance in trans-cultural ethical discourse; it also helps to alleviate organ shortages in countries with majority Muslim populations, a serious ethical impasse of recent years.⁴

This shift from dualistic notion of person that has incorporeal soul separate from a body to a “corporeal monistic account of Muslim personhood” supported the idea of brain death as new definition of death. Likewise, in Iran brain death has long been accepted as death where organ transplantation has become permissible, provided the person has donated his/her body prior to death. To this, Akrami and others provide definition of brain death as follows: “Brain death is defined as complete and irreversible cessation of all brain and brain stem functions synchronously.”⁵ Iran has also legislated on the issue of transplanting organs from a brain-dead person to needy patients. According to Akrami and others, the rate of organ transplantation has significantly increased after brain-death legislation as compared to “heart-lung” cadavers.⁶

In contrast to this position Ahmet Bedir and Şahin Aksoy do not consider brain death as absolute death, “for in the patients diagnosed with brain death the soul still has not abandoned the body.” For Bedir and Aksoy, those patients who are in the state of brain death suffer from every operation that is performed on their bodies. They argue on the basis of the Qur’an where it is said that the soul is an entity and it departs from the body at the time of death.⁷ It is further argued that “the aliment of human body is water,

³ Omar Sultan Haque, “Brain Death and Its Entanglements: A Redefinition of Personhood for Islamic Ethics,” *Journal of Religious Ethics* 36, no. 1 (2008): 33–34, doi:10.1111/j.1467-9795.2008.00334.x.

⁴ *Ibid.*, 13.

⁵ S. M. Akrami et al., “Brain Death: Recent Ethical and Religious Considerations in Iran,” *Transplantation Proceedings* 36, no. 10 (2004): 2883, doi:10.1016/j.transproceed.2004.10.046.

⁶ *Ibid.*, 2886.

⁷ In the Qur’an 56:83–84, it is said, “Then why, when the soul at death reaches the throat. And you are at that time looking on.” Likewise, in the Qur’an 71:26 Allah said, “No! When the soul

and the pabulum of the soul is air. Just as in the absence of water the body collapses, so with the cessation of air the spirit goes out.”⁸

As suggested above, there has been scant literature on the very question of brain death and its implications for a Muslim patient. Al-Bar and Chamsi-Pasha has rightly argued that “the debates within Muslim bioethics need both updating and deepening with regard to the early rulings on brain death.”⁹ This is because in most countries, the declaration of death is the responsibility of a medical doctor.¹⁰ Doctors are trained to ensure well-being of the patient regardless of legal, ethical, philosophical, societal, cultural, or religious implications of death.¹¹ Within Muslim discourses on death and brain death, the Islamic fiqh academies of the Organization of the Islamic Conference and the Muslim World League, and the Islamic Medical Association of North America acknowledge brain death as representing true death, However, a sizeable minority accepts death by cardiopulmonary criteria only.¹² Finally, Andrew Miller considers the subject of brain death among Muslim jurists unresolved. He argues that debate within Sunni and Shi’i jurists continue and no final verdict could be provided as to the validity of brain death.¹³ For Miller, from among the five sources of Islamic law, the Qur’ān and *ḥadīth* do not address this issue directly. There is no consensus (*ijmā’*) among scholars on this issue. Analogy (*qiyās*) cannot be applied to the case of brain death. Therefore, one is left with only one option, that is, *ijtihād*, which depends upon conflicting non-binding *fatwās*, hence debate continues on this subject within Muslim juristic circles.¹⁴

Considering that the issue of brain death is not yet settled and is still open to *ijtihād*, it requires to address another complex question of purely legal nature that when does legal personality end? Answer to this question is simple

has reached the collar bones.” Both these verses prove dualistic nature of human person as opposed to the arguments of Omar Haque who holds that human personhood is to be considered monistic entity.

⁸ Ahmet Bedir and Şahin Aksoy, “Brain Death Revisited: It Is not ‘Complete Death’ according to Islamic Sources,” *Journal of Medical Ethics* 37, no. 5 (2011): 293, doi:10.1136/jme.2010.040238.

⁹ Mohammed Ali Al-Bar and Hassan Chamsi-Pasha, “Brain Death,” in *Contemporary Bioethics: Islamic Perspective* (Cham: Springer International Publishing, 2015), 239, doi:10.1007/978-3-319-18428-9_14.

¹⁰ *Ibid.*, 227.

¹¹ *Ibid.*

¹² Andrew C. Miller, Amna Ziad-Miller, and Elamin M. Elamin, “Brain Death and Islam: The Interface of Religion, Culture, History, Law, and Modern Medicine,” *Chest* 146, no. 4 (2014): 1097, doi:10.1378/chest.14-0130.

¹³ Andrew C. Miller, “Opinions on the Legitimacy of Brain Death Among Sunni and Shi’a Scholars,” *Journal of Religion and Health* 55, no. 2 (2016): 402, doi:10.1007/s10943-015-0157-8.

¹⁴ *Ibid.*, 394.

if death of a person is ensured. Pronouncement of death by medical doctors and its acceptance by legal heirs and religious scholars necessitate immediate end of legal personality of the dead. With the end of legal personality several legal rights arise that have impact on other living humans who are in some way related to the legal personality whose life—due to brain-dead state—has just ended. These issues include *inter alia*, if a brain-dead person is considered legally dead—if the patient is a man—his wife shall be considered a widow from that moment on; and she shall undergo her waiting period (*iddah*) and eventually shall be free to marry another man once she completes the waiting period. Likewise, his children shall be treated as orphans and his property/assets shall be divided among his heirs as per the *sharī‘ah*. On the other hand, brain-dead person shall not inherit if a relative dies after the brain death of the person concerned, nor shall he be given any gift in this state since he is declared dead due to his brain death and so on.

On the other hand, if brain death is not considered complete death then ruling of end of legal personality cannot be implemented. This will mean that the patient shall be treated as living person and all his rights shall remain intact. Brain-dead person does not maintain consciousness, but given that all the states between a fully conscious human being and a dead person are considered life, brain-dead person shall be treated like other living human beings. As we shall see shortly, there are several death-like conditions that a human may undergo such as comma and persistent vegetative. Until Muslim jurists do not agree on brain death as complete death, patients whose brain has died shall be treated in the same fashion as patients in comma or persistent vegetative state are treated. There is no disagreement among medical scientists and jurists that comma and persistent vegetative state are forms of life. As for the brain death, jurists differ as to whether consider it death or not, while majority of medical scientists treat it as death.

With this background, the study demonstrates that the discussion on brain death has evolved into plurality of opinions and hence the issues involved in it have been subject to disagreement, which lends flexibility to the Islamic jurisprudence and allows implementation of Islamic injunctions in the best interest of the person in question and his/her family.

It is Qur’ānic notion that at the moment of death souls (*anfus*, sing. *nafs*) depart from their bodies and are taken by God.¹⁵ However, the Qur’ān is silent on the nature of soul except that it “descends by the command of my Lord.”¹⁶ Where does soul reside in the body is also not disclosed. How does soul look like? and whether it is a material entity or immaterial are also not

¹⁵ Qur’ān 39:42.

¹⁶ *Ibid.*, 17:85.

discussed in the Qur'ān. Nor does the Qur'ān provide details, in an explicit manner, of the process of separation of soul from the body and its signs through which a human may verify that the soul has indeed departed from the body. At another place in the Qur'ān death is linked with the permission of God. It is said, "No soul can ever die except by Allah's leave and at a term appointed."¹⁷ Muḥammad b. Jarīr al-Ṭabarī (d. 310/923) explains this verse and states that no creation of God will die except by attaining the limit that Allah has set for them and at a specific time. No one can die prior to that even with any manipulation or trick.¹⁸ One may infer from this that once the time for death comes, no artificial life support will keep the dead alive and if the moment of death, with the permission of God, has not come, the patient will remain alive despite the fact that his brain is not functioning and other organs may have also stopped working. In another *sūrah* of the Qur'ān, it is stated that "wherever you are, death will find you out, even if you are in towers built up strong and high!"¹⁹ According to al-Ṭabarī, this verse denotes the idea that "death comes by the will of God."²⁰ Once God has decided one's death, no mechanism could stop or undo it. In this way, if a patient is kept alive on mechanical support, once the time of his death arrives, the life support system will become futile and the patient will die. Interestingly the verse that speaks of human illness, also states that it is the God who heals human being from all kinds of sickness, causes him/her death, and will resurrect him/her.²¹ One may infer from the above that it is God who gives life, makes one ill, causes him/her death, and will resurrect him/her on the day of judgement. However, there is no trace of human stage between illness and death. In other words, the Qur'ān does not elaborate on scientifically defined states of human being such as brain death, comma or vegetative state. Instead, it considers human alive or dead. We will elaborate these scientifically proven states of a human being in our discussion below to properly analyse the concept of brain death. At the moment it suffices to state that brain death is not directly dealt with in the Qur'ān. Hence, we must turn to other sources such as *ḥadīth* and *ijtihād* to explore the issue further.

Prophetic traditions are equally not elaborative of this issue. *Aḥādīth* that are available to us mainly discuss death in the context of life after death. Absence of clear Qur'ānic and Prophetic guidance on the issue of death and

¹⁷ Ibid., 3:145.

¹⁸ Muḥammad b. Jarīr al-Ṭabarī, *Jāmi' al-bayān fi ta'wīl al-Qur'ān* (Beirut: Mu'assasat al-Risālah, 2000), 7:260.

¹⁹ Qur'ān 4:78.

²⁰ Al-Ṭabarī, *Jāmi' al-bayān*, 8:351.

²¹ Qur'ān 26: 80–81.

departure of soul from the body leads to the difference of opinion among Muslim scholars regarding these questions in general, and the newly emerged concept of brain death in particular. Most Western medical scientists and physicians consider brain death a point of no return and declare it as death.²² Muslim jurists have not sufficiently dealt with this question. Much needs to be researched from classical Islamic sources to answer questions associated with the concept of brain death.

Notion of Death and Soul as an Independent Entity

The Qur'ānic verses illustrate, "Every soul shall have a taste of death: And only on the Day of Judgment shall you be paid your full recompense. Only he who is saved far from the Fire and admitted to the Garden will have attained the object (of Life): For the life of this world is but goods and chattels of deception."²³ "Nor can a soul die except by Allah's leave, the term being fixed as by writing. If any do desire a reward in this life, We shall give it to him; and if any do desire a reward in the Hereafter, We shall give it to him. And swiftly shall We reward those that (serve us with) gratitude."²⁴

Mortality is a human condition. Every human being born to this world has to taste the death.²⁵ Death has to come to everyone, but no one has knowledge about its time, place, or manner. Allah has said in the Qur'ān, "Nor does any one know in what land he is to die. Verily with Allah is full knowledge and He is acquainted (with all things)."²⁶ At another place He said, "When their Term expires, they would not be able to delay for a single hour, just as they would not be able to anticipate it (for a single hour)."²⁷

Literally, death is the opposite of life.²⁸ Other names, in Arabic, for death are *al-manūn*, *al-manā*, *al-maniyyah*, *al-sha'ūb*, *al-sām*, *al-ḥimām*, *al-hayn*, *al-radī*, *al-balāk*, *al-thukal*, *al-wafāh*, and *al-khabāl*.²⁹ The root letters for the verb *māta* are *m-w-t* and from this the word *mawt* (death) is derived. One of the

²² "A Definition of Irreversible Coma: Report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death," *The Journal of the American Medical Association*, 205, no. 6 (1968): 337–40.

²³ Qur'ān 3:185.

²⁴ Ibid., 3:145

²⁵ This concept is mentioned in the Qur'ān, "Every soul shall have a taste of death," 3:185.

²⁶ Ibid., 31:34.

²⁷ Ibid., 16:61.

²⁸ Abū Ṭāhir Muḥammad b. Ya'qūb al-Firūzābādī, *al-Qāmūs al-muḥīṭ* (Beirut: Mu'assasat al-Risālah, 2005), 160.

²⁹ 'Abd al-Malik b. Muḥammad al-Tha'ālibī, *Fiqh al-lughab* (Tripoli: al-Dār al-'Arabiyyah li'l-Kitāb, 1981), 133–34.

meanings of this root is the departure of power from something.³⁰ *Mawt* is the term employed in Arabic to express the actual notion of death. The origin of the term *wafāh*, which means “accomplishment” and “fulfilment” of a person’s term of life, is Qur’ānic, and stems from the verb *tawaffā* for describing how God brings to its close a person’s foreordained period of life and gathers the person to Himself.³¹

Yaḥyā al-Nawawī (d. 676/1277) explains the Qur’ānic concept of death and states that the departure of soul (*rūḥ*) from the body is the moment of death.³² However, he does not elaborate on concrete signs of that moment from where it could be categorically concluded that the soul departed at such moment. The soul is an established concept within Muslim cosmology. There are, however, differences among the religious scholars as to how much knowledge humans have regarding the soul. Ebrahim Moosa explains that some scholars, especially philosophers and mystics, provide a detailed description of the soul. In contrast, more literal and scriptural interpretations of the Qur’ān caution against what they deem to be futile speculation about the soul because “very little knowledge has been granted to humans”³³ about it.³⁴ Al-Ghazālī argued that “it is evident through experience, Qur’ānic verses, and traditions of the Prophet that the meaning of death (*al-mawt*) is only a “change of state” (*taghayyur ḥāl*). And, verily, the soul exists even after its separation from the body, either in tormented or comforted state.”³⁵ Body loses its connection with the soul after the latter departs from it and no longer controls it. For the duration the soul remains in the body, it maintains its controlling role and limbs simply function as its instruments.³⁶ It is believed by several Muslim thinkers that movement of any human organ is in fact a movement by soul; bodily organ is simply a means to do so, the actual act is performed by the soul.³⁷

Aḥmad b. Qudāmah (d. 689/1341-42) also holds that Qur’ānic verses and Prophetic traditions suggest that soul remains alive after the death in

³⁰ Aḥmad b. Fāris al-Qazwīnī, *Muḥjam al-maqāyīs fi ’l-lughab*, ed. Shihāb al-Dīn Abū ‘Amr (Beirut: Dār al-Fikr, 1994), s.v. “*mawata*.”

³¹ M. Abdesselem, “Mawt,” in *The Encyclopaedia of Islam*, ed. P. Bearman et al., 2nd ed., last accessed November 20, 2018, http://dx.doi.org.proxy3.library.mcgill.ca/10.1163/1573-3912_islam_SIM_5064.

³² Yaḥyā b. Sharaf al-Nawawī, *Mukhtaṣar al-majmū‘ sharḥ al-muhadhdhab* (Jeddah: Maktabat al-Sawādī, 1995), 5:105.

³³ Qur’ān 17:85

³⁴ Ebrahim Moosa, “Languages of Change in Islamic Law: Redefining Death in Modernity,” *Islamic Studies* 38, no. 3 (1999): 315.

³⁵ Al-Ghazālī, *Iḥyā’ ‘ulūm al-dīn*, 4:493.

³⁶ *Ibid.*, 4:494.

³⁷ Moosa, “Languages of Change in Islamic Law,” 316.

tormented or delighted state. The soul gets tormented by kinds of grievances and distresses or delighted with kinds of pleasures and happiness, while having no connection with the body. This is the quality of soul itself and remains with it after it separates from the body.³⁸ The Prophet (peace be on him) while explaining the Qur'ānic verse, "Think not of those who are slain in Allah's way as dead. Nay, they live, finding their sustenance in the presence of their Lord,"³⁹ said, "Allah has put the souls of martyrs inside the green birds, they return back to the streams of paradise, they eat from its fruits, and they house in golden lamps hanging under the shadow of throne."⁴⁰

In another *ḥadīth* narrated by Ibn 'Umar, the Messenger of Allah (peace be on him) said, "When a person dies, he is shown his seat morning and evening. If he is one amongst the inmates of Paradise (he is shown his seat) in Paradise and if he is one amongst the denizens of Hell-Fire (he is shown his seat) in the Hell-Fire. Then it is said to him, 'That is your seat where you would be sent on the Day of Resurrection.'"⁴¹ Al-Nawawī explains this narration and states that the body is made alive again by bringing the soul back into it for the purposes of pleasure or torment to it,⁴² making soul an entity that does not die rather body dies by separation of soul from it.

Such sources imply that the souls have their independent identity and they remain alive after the separation from the body. Based upon the character of the person during his life, souls will be tormented or delighted till the day Allah Almighty will put them back in their bodies. If the souls died, the pleasures or sufferings would have discontinued for them.⁴³

Declaring a Human Dead Based on Signs of Death

Due to the inability to determine the exact moment when soul separates from the body, the jurists depend upon the empirical indicators that verify death. The Prophet (peace be on him) is reported to have said, "If the soul is captured the eyes follow it."⁴⁴ Therefore, people are required to close the staring eyes of

³⁸ Aḥmad b. 'Abd al-Raḥmān b. Qudāmah al-Maqdisī, *Mukhtaṣar minḥāj al-qāṣidīn* (Damascus: Maktabat al-Shabāb al-Muslim/al-Maktab al-Islāmī, 1961), 499–500.

³⁹ Qur'ān 3:169.

⁴⁰ Muḥammad b. 'Abd Allāh al-Ḥākim al-Nisābūrī, *al-Mustadrak 'alā al-Ṣaḥīḥayn fī al-ḥadīth* (Riyadh: Maktabat al-Naṣr al-Ḥadīthah, 1968), 2:88.

⁴¹ Muslim b. al-Ḥajjāj al-Nisābūrī, *Ṣaḥīḥ*, Kitāb al-jannah wa ṣifat na'īmihā wa ahlihā, Bāb 'arḍ maq'ad al-mayyit min al-jannah aw al-nār 'alayhi wa ithbāt 'adhāb al-qabr wa 'l-ta'awwudh minh, *ḥadīth* no. 2866.

⁴² Yaḥyā b. Sharaf al-Nawawī, *al-Minḥāj sharḥ ṣaḥīḥ Muslim bin al-Ḥajjāj* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1392 AH), 17:201.

⁴³ Ibn Qayyim al-Jawziyyah, *Kitāb al-rūḥ*, 97–98.

⁴⁴ Muslim, *Ṣaḥīḥ*, Kitāb al-janā'iz, Bāb fi ighmād al-mayyit wa 'l-du'ā' lahu idhā ḥuḍir, *ḥadīth* no. 920.

the dead person because the body becomes lifeless after the departure of the soul. Since the inception of Islamic law, jurists have adopted a list of physiological features as a test to indicate the moment of death when soul separates from the human body.⁴⁵ These include the cessation of breathing, limpness of the feet, looseness of the wrists, de-shaping of the nose, grove in temples, shrinking of the testicles, elasticity of the facial skin, and coldness of the body. In case any of these signs cannot be verified due to shock or apoplexy, then, according to the postclassical Shāfi'ī jurist of Damascus al-Nawawī the determinations of death should be delayed until there is a change in the body's odour.⁴⁶

In the great majority of cases, diagnosing death through generally known features or through medical examination of the body is not a difficult task. However, in some situations, generally in a medical setting where intensive medical care is provided, it becomes important to establish the diagnosis of death when life-like movements exist on a terminally ill patient who is about to die. This life-like state of the dying person could be due to natural spontaneous reasons or through artificial machinery that is attached to the patient to provide him life support. Therefore, it is necessary to define death accurately and formally. One such possible definition could be "a complete change in the status of a living entity characterized by the irreversible loss of those characteristics that are essentially significant to it."⁴⁷

Robert Veatch suggested that this definition would apply equally well to a human being, a nonhuman animal, a plant, an organ, a cell, or even temporally limited entity like a research project, a sports event, or a language. Therefore, for a definition of human death, it is necessary to focus on those characteristics that are unique to humans. He further believes that it is quite inadequate to limit the discussion to the death of the heart or the brain.⁴⁸ There are several traits that are unique to human beings for example, as opposed to other creatures humans develop cultures, their posture is upright, they have rational soul, they have direct relationship with God and so on. In order to declare death, one needs to evaluate these qualities of human being. Any declaration of death will depend directly upon how one evaluates these qualities. Veatch has proposed four approaches that could be used for declaring death: first, flow of vital fluids has been irreversibly lost; second, complete

⁴⁵ Muḥammad Amin b. 'Umar b. 'Ābidīn, *Ḥāshiyat radd al-Muḥtār 'alā 'l-durr al-mukhtār*, 2nd ed. (Beirut: Dār al-Fikr, 1979), 2:189; Niẓām al-Dīn al-Balkhī et al., *al-Fatāwā al-Hindiyyah* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, n.d.), 1:157.

⁴⁶ Yaḥyā b. Sharaf al-Nawawī, *Rawḍat al-ṭālibīn* (Beirut: Dār al-Kutub al-'Ilmiyyah, n.d.), 1:610.

⁴⁷ Robert M. Veatch, *Death, Dying and the Biological Revolution* (London: Yale University Press 1976), 25.

⁴⁸ *Ibid.*, 26–27.

departure of soul from human body; third, complete loss of bodily functions; and fourth irreversible loss of capacity to socially interact.

Unlike the lungs and heart,⁴⁹ permanent loss of flow of breath and blood—that are considered vital fluids—is one of the characteristics of death. Therefore, the human organism, like other living organisms, dies when there is an irreversible cessation of the flow of breath and blood. The soul remains a central element in the concept of man in most religions today. The irreversible loss of it from the body is another established characteristic of death. When the soul leaves body, vital fluids stop flowing, and the reason for stoppage of flow is the absence of soul. The second view is that when fluids stop flowing the soul departs. In fact, these two phenomena are interconnected. Capacity for bodily integration refers to two things: first, a capacity for integrating one's internal bodily environment (which is done for the most part unconsciously through highly complex homeostatic, feedback mechanism); and second, a capacity for integrating one's self, including one's body, with the social environment through consciousness which permits interaction with other persons. The irreversible loss of this capacity is another characteristic of death. Fourth approach to death is the irreversible loss of capacity for consciousness and to socially interact. This would entail that human being no longer possess characteristics of humanness and hence, this definition would render the person dead.⁵⁰

In *Mosby's Dictionary of Medicine, Nursing and Health Professions*, the death is defined as “the total absence of activity in the brain and central nervous system, the cardiovascular system, and the respiratory system as observed and declared by a physician.”⁵¹ However, the definition of death is not an exclusively medical matter, and may be influenced by religious, legal or political criteria. Inherent in any medically grounded definition is the assumption that death is an irreversible state, which can be diagnosed in terms of the cessation of crucial cardio-respiratory and neural functions. Normally, it is assumed that death takes place at a specific moment. However, from a scientific and medical standpoint it can be considered a gradual process that leads to complete death.⁵² In short, many organisations and people have tried

⁴⁹ The cessation of heart and lungs is not declared the vital characteristic of death based on the reason that these organs can be replaced with artificial mechanical respirator or heart-lung machine can keep a man alive. On the other hand, if the heart is beating and lungs are functioning but the flow of vital fluids is permanently ceased then the life comes to an end. For details, see *ibid.*, 30.

⁵⁰ *Ibid.*, 29–42.

⁵¹ Tamara Myers, ed., *Mosby's Dictionary of Medicine, Nursing & Health Professions*, 7th ed. (St. Louis, MO: Mosby Elsevier, 2006), 515.

⁵² David Lamb, *Death, Brain Death and Ethics* (London: Croom Helm, 1985), 2.

to define death, but none could reach to consensus. For some, death occurs when heart and lungs stop beating, but this definition could not stand alone after successful resuscitation of heart and lungs. Another approach holds that when vital fluids of body stop flowing, the death occurs, because at that moment soul leaves the body. There is no scientific method has yet been discovered that could record departure of soul from the body. Hence, this definition was also not fully endorsed. Contrary to the second approach in defining death it was believed that flow of blood and breath stops only when soul departs from the body. Again, the flow of these fluids was restarted and maintained through the assistance of several mechanical devices such as heart-lung machines, ventilators, the techniques of cardiopulmonary resuscitation, and extracorporeal membrane oxygenation.⁵³ Similarly, artificial hearts, left ventricular assist devices (LVADs), and other technologies reversed the process of death when vital organs such as heart, kidneys, or lungs stop functioning due to any medical reasons. Irreversible loss of capacity for consciousness and social interact is also linked to the earlier three approaches. If blood flow and breathing could be sustained then capacity for consciousness could also come back. It is apparent from this discussion that all the above criteria fail to attain a consensual definition of death. However, the definition of *Mosby's Dictionary* has another aspect, that is, complete loss of activity in brain, to which we may call brain death. Centrality of brain's role in human life cannot be underestimated. Therefore, now we turn to the concept of brain death that could replace the simple notion of death.

Brain Death

The second half of the twentieth century witnessed advances in medical science and made physicians revisit the traditional definition of death. "Vital" functions of the body are easily and increasingly replaced by mechanical means.⁵⁴ Mechanical means that replace vital bodily functions include machines for dialysis, artificial breathing respirators, and mechanical hearts. These machines accurately perform bodily function in place of a defective or lost vital organ. In late 1950s, an unprecedented condition of human body was reported. In this condition, patient's all other vital organs were functioning normal. However, brain was nonfunctional due to severe damage to it. Deciding the death of such a person puzzled medical scientists. It was this point when debates around human death radically changed and the concept of

⁵³ Robert M. Veatch and Lainie Friedman Ross, *Defining Death: The Case for Choice* (Washington, DC: Georgetown University Press, 2016), 2, <http://public.eblib.com/choice/publicfullrecord.aspx?p=4709184>.

⁵⁴ Haque, "Brain Death and Its Entanglements," 19.

brain death was established in which a patient with dead brain but with other organs functioning started to be declared as brain dead.⁵⁵

There is a misconception about the origins of the concepts of brain death and organ transplantation. It is commonly believed that organ transplantation is a motive behind the development of the concept of brain death. However, historical inquiry does not support this claim because origins of these two concepts are entirely different.⁵⁶ Scientific advancement in surgery and immunosuppressive treatment made organ transplantation possible. Whereas, palliative and intensive care institutions helped develop the concept of brain death.⁵⁷ Wide acceptance of brain death as death occurred when the report of the “Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death”⁵⁸ was published in 1968. Whereas, this remains a fact that for organ transplantation, “it was necessary to identify as soon as possible when a potential donor had died so his or her organs could be harvested before they deteriorated.”⁵⁹

Headed by Dr. Henry K. Beecher the committee stated their objective “to define irreversible coma as a new criterion for death.”⁶⁰ The committee set three main characteristics of irreversible coma in addition to flat Electroencephalogram (EEG): first, unreceptivity and unresponsivity, in which even the most intensely painful stimuli evoke no vocal or other response, not even a groan, withdrawal of a limb, or quickening of respiration; second, no movement or breathing, which was observed over a period of one hour by physicians which is adequate to satisfy the criteria of no spontaneous muscular movements or spontaneous respiration or response to stimuli such as pain, touch, sound, or light; and third no reflexes with abolition of central nervous system activity are evidenced in part by the absence of elicitable reflexes.⁶¹

After the publication of the Harvard report, it gradually became realised that the essential component or “physiological kernel” of brain death was

⁵⁵ M. Pernick “Back from the Grave: Recurring Controversies over Defining and Diagnosing Death in History,” in *Death: Beyond Whole Brain Criteria*, ed. R. M. Zaner (Dordrecht, Netherlands: Kluwer Academic, 1988) 17–74.; E. F. Wijdicks, “Brain Death Worldwide: Accepted Fact but no Global Consensus in Diagnostic Criteria,” *Neurology* 58, no. 1 (2002): 20–25.

⁵⁶ Calixto Machado, *Brain Death: A Reappraisal* (New York: Springer, 2007), 1.

⁵⁷ C. Machado, “Consciousness as a Definition of Death: Its Appeal and Complexity,” *Clin Electroencephalogr* 30 (1999):156–64.

⁵⁸ “A Definition of Irreversible Coma,” 337–40.

⁵⁹ Baruch A. Brody et al., *Medical Ethics: Analysis of the Issues Raised by the Codes, Opinions, and Statements* (Washington DC: BNA Books, 2001), 105.

⁶⁰ “A Definition of Irreversible Coma,” 337.

⁶¹ *Ibid.*, 337–38.

death of the brainstem. The brainstem, in its upper part, contains crucial centres responsible for generating the capacity for consciousness. In its lower part it contains the respiratory centre. It is death of the brainstem which produces the crucial signs which doctors detect at the bedside, when they diagnose brain death.⁶² This was gradually realised that the necessary and sufficient condition for death of the brain is the death of brainstem. Once the brainstem is dead complete brain can be considered dead, hence the death of brainstem started to become synonymous with the death of the person. David Lamb argues that the “point of no return” in the process of dying is the death of brainstem. At this stage “loss of integration” becomes irreversible.⁶³ However, the brain death is defined in more simple words as “an irreversible form of unconsciousness characterized by a complete loss of brain function while the heart continues to beat. The usual clinical criteria for brain death include the absence of reflex activity, movements, and spontaneous respiration requiring mechanical ventilation or life support to continue any cardiac function.”⁶⁴

Brain Death, Coma, and Persistent Vegetative State

Brain death is significantly different from coma and vegetative state, hence should not be confused with them. Brain death differs from the latter two “in the extent to which there is function of the brain stem, the part of the brain that controls unconscious activity.”⁶⁵ As argued by Mark, Mary, and Orentlicher, due to the complete and irreversible loss of brainstem function and cerebral hemisphere function, brain no longer remains able to regulate body’s vegetative functions.⁶⁶ The heart, lungs, kidneys, intestinal tract, and certain other reflex actions become inoperative. Moreover, brain-dead persons do not respond to stimuli such as pain, touch, sound, or light. For a short period of time the heartbeat, breathing, and some other vegetative functions may be continued. Mark, Mary, and Orentlicher believe that in this condition the mechanical support should be withdrawn because the person is in fact dead and withdrawal of support is nothing but a routine medical procedure after death and “out of proper respect for the deceased.”⁶⁷

⁶² David Lamb, *Death, Brain Death and Ethics*, 4–5.

⁶³ *Ibid.*, 5.

⁶⁴ Myers, *Mosby’s Dictionary*, 249.

⁶⁵ Mark A. Hall, Mary Anne Bobinski, and David Orentlicher, *Bioethics and Public Health Law* (New York; Aspen Publishers, 2005), 234.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

On the other hand, in persistent vegetative state (PVS) the patient remains alive. This is because brainstem function remains normal. Body of the person in this state, without any assistance, maintains food digestion process, can also breathe normally, and kidney function for producing urine remains normal. People in vegetative state go through sleep and awake cycles, sometimes they keep their eyes open and at other times close them for sleep and rest. In this state a person may smile and make unintelligible sounds. Movement of limbs such as arms, legs and eyes could also be observed sporadically. A persistent-vegetative-state patient also responds to certain stimuli and generates reflex reactions such as cough, gag, grimace, and movement of arms and legs. These reflex reactions of the patient suggest consciousness. However, the patient in fact is not conscious but in persistent vegetative state.⁶⁸

Coma could be characterised as intermediate condition between persistent vegetative state and brain death. In coma, patient's eyes remain closed and it appears as if the patient is asleep. In addition to that, breathing of the patients also becomes impaired and they do not generate reflexes in response to stimuli. Vegetative state normally lasts for few weeks. When this state continues for several months, it is called persistent vegetative state. In persistent vegetative state a patient could survive from months to years and in very rare cases may return to consciousness but with severe neurological disability.⁶⁹

For coma and vegetative state there are uncountable cases where patients gained consciousness even, in some cases, after more than two decades. Recently, a woman has been reported to gain consciousness after living in coma for twenty-seven years.⁷⁰ Similarly, gaining consciousness from persistent vegetative state is frequently reported. As for brain-dead patients, they have never been reported to gain consciousness. However, they live on artificial life-support system, maintaining their heart beat, breathing, and blood flow. This situation made scholars and jurists remain reluctant in accepting brain death as complete death. Now we turn to some objections and fears related to the acceptance of brain death as complete death.

Muslim Responses to Brain Death

Brain death has been expressively dealt with by Muslim jurists only since early

⁶⁸ Ibid.

⁶⁹ Ibid., 235.

⁷⁰ "UAE Woman Munira Abdulla Wakes up after 27 Years in a Coma," BBC Report, April 23, 2019, accessed May 9, 2019, <https://www.bbc.com/news/world-middle-east-48020481>.

1980s.⁷¹ The first heart transplant was performed in 1967. After fourteen years, on 14 December 1981, the Religious Rulings' Committee of Kuwait (*Lajnat al-Iftā' fi Wizārat al-Awqāf al-Kuwaytiyyah*) declared that "a person cannot be considered dead when his brain has died as long as his respiration and blood circulation systems have life in them, even if that life is by means of mechanical aid."⁷² On January 15–17, 1985, a symposium was held by Islamic Organization for Medical Sciences (IOMS) again in Kuwait on "Human Life: Its Beginning and Its End from an Islamic Perspective" (*al-Ḥayāh al-Insāniyyah: Bidāyatuhā wa Nihāyatuhā fi 'l-Maḥbūm al-Islāmī*). About eighty medical doctors as well as Muslim jurists were invited and they produced a substantial congress volume.⁷³ Some famous Muslim scholars who participated in the symposium include 'Abd Allāh al-ʿIsā (Kuwait), Khālīd al-Madhkūr (Kuwait), 'Abd al-Sattār Abū Ghuddah (Syria), Yūsuf al-Qaraḍāwī, (Qatar) and Muḥammad Sulaymān al-Ashqar (Jordan). Some prominent biomedical scientists include 'Abd al-Raḥmān al-ʿAwaḍī (Kuwait), Ḥassān Ḥaṭḥūt (United States), Aḥmad al-Qāḍī (United States), 'Isām al-Shirbīnī (Kuwait), and Aḥmad Raja'ī al-Jundī (Kuwait).⁷⁴ The participants were briefed by the medical scholars. At the end of this symposium, in the recommendations of the symposium, it was stated that based on the medical practitioners' presentations, the religious scholars (*fuqahā'*) are of the opinion that a person whose brainstem death has been confirmed with certainty, shall be considered that he has departed from his life, and it is allowed to apply some of the rulings concerning death to him. This was an analogy—although not similarity—with the juridical ruling about the person who reached the stage of "movement of the slain." The consensus was also made on that if death of the brainstem is diagnosed with certainty, then disconnecting the person from artificial life-support apparatus may be carried out.⁷⁵ Ghaly opines that the participants of the symposium in fact exercised *ijtihād* in order to find answers to the question of brain death.⁷⁶ For the organisers of the symposium, *ijtihād* is an ongoing process. In the editorial of the published volume of the

⁷¹ Birgit Krawietz, "Brain Death and Islamic Traditions: Shifting Borders of Life?" in *Islamic Ethics of Life: Abortion, War and Euthanasia*, ed. Jonathan E. Brockopp (Columbia, SC: University of South Carolina Press, 2003), 195–96.

⁷² Abul Fadl Mohsin Ebrahim, "Islamic Jurisprudence and the End of Human Life," *Medicine and Law* 17, no. 2 (1998): 192.

⁷³ Khālīd al-Madhkūr et al., eds., *al-Ḥayāh al-Insāniyyah: Bidāyatuhā wa nihāyatuhā fi 'l-maḥbūm al-Islāmī* (Kuwait: Islamic Organization for Medical Sciences, 1985), 354–55.

⁷⁴ Mohammed Ghaly, "The Beginning of Human Life: Islamic Bioethical Perspectives," *Zygon* 47, no. 1 (2012): 195–96, doi:10.1111/j.1467-9744.2011.01245.x.

⁷⁵ Al-Madhkūr et al., *al-Ḥayāh al-Insāniyyah*, 354–55..

⁷⁶ Ghaly, "The Beginning of Human Life," 176.

symposium, it is said that *ijtihād* should be practiced not only once and for all but on a regular basis so that the participants in this continuous process of *ijtihād* may cope with the recurring magnificent advancements in the field of medical sciences.⁷⁷ Moreover, collective *ijtihād* is to be preferred over individual *ijtihād*. This type of *ijtihād* in Islamic law is referred to as *al-ijtihād al-jamā'ī* (collective *ijtihād*), and the first institution established for this purpose in the second half of the twentieth century (1961) was Egypt's Islamic Research Academy (*Majma' al-Buḥūth al-Islāmiyyah*).⁷⁸ This shows that one of the purposes of this symposium was to make an effort towards collective *ijtihād* when it comes to define death and brain death. However, the symposium could not reach to a unanimous decision despite its collective effort.

The following year, on October 11–16, 1986, the OIC's Council of the Islamic Jurisprudence Academy met in Amman, Jordan where scholars and jurists debated in detail on the issue of brain death and organ transplantation. However, the declaration that was passed (and reaffirmed in their 1988 meeting) contained both brain death and irreversible stoppage of vital fluids as a criterion of death. The declaration stated, "The Islamic legal rules for the dead become applicable under the following criteria: first, a person who suffers cardio-respiratory arrest and the physicians confirm that such an arrest is irreversible; and second, a person whose brain activity has ceased and the physicians confirm that such a cessation is irreversible and that the brain has entered the state of decomposition"⁷⁹

Islamic Organization for Medical Sciences organised another symposium on 17-19 December 1996 in Kuwait in which a distinguished group of scholars in the specialities of neurology, neurosurgery, anaesthesiology, intensive care, neurophysiology, cardiac surgery, organ transplantation, medicine, paediatrics, obstetrics, and gynaecology, general surgery, and medical jurisprudence who came from Kuwait, Saudi Arabia, Egypt, Lebanon, Turkey, and the United States of America was invited. The Director of the East Mediterranean Regional Office of the World Health Organization also attended the symposium. The Organization, at the end of the symposium, issued its statement and provided signs of death that could establish medical declaration of death. Signs of death include, a) complete irreversible cessation of respiratory and cardiovascular systems, and b) complete irreversible cessation

⁷⁷ Al-Madhkūr et al., *al-Hayāh al-insāniyyah*, 9.

⁷⁸ Aḥmad 'Alī Sālūs, *Mawsū'at al-qaḍāyā al-fiqhiyyah al-mu'āṣirah wa 'l-iqtisād al-Islāmī* [The encyclopedia of contemporary juristic issues and the Islamic economics] (Beirut: Mu'assasat al-Rayyān, 2008), 10.

⁷⁹ Ebrahim, "Islamic Jurisprudence and the End of Human Life," 193.

of the functions of the brain including the brainstem.⁸⁰ Apart from providing this definition, the recommendations of its symposium held in Kuwait in 1985 on “Human life: Its Beginning and Its End” were reaffirmed. The statement issued at the end of the symposium stated that there is no reason to “discard, modify, or alter the recommendations of its previous symposium.” The OIMS also ratified the rulings that were issued by the Congress of Islamic Jurisprudence in Makkah in 1986, as they were similar to that of OIMS earlier recommendations.⁸¹

Iran accepted the notion of brain death at national level. Ayatollah Khomeini approved the idea of organ transplantation not only from living donors but also from brain-dead patients.⁸² In a response to an *istiftā’* (religious question) regarding organ transplantation from the brain-dead person with irreversible life, he held, “It is authorized to use organs such as heart, liver, etc. of a definite brain dead with permission of organ owner for transplantation if someone else’s life is depended on it.”⁸³ First in its nature in Muslim world is the law passed by Iranian legislature in April 6, 2000 “Deceased or Brain Dead Patients⁸⁴ Organ Transplantation Act.”⁸⁵ Haque who strongly supports the idea of brain death and organ transplantation is not content with the less wide acceptance of this notion even after legislation and opines that “this relative openness has made little difference, as marginal progress has been made in non-living donations.”⁸⁶

⁸⁰ “Statement of the Islamic Organization for Medical Sciences about the Medical Definition of Death,” accessed May 7, 2019, <http://www.islamset.net/bioethics/death/index.html>.

⁸¹ “Islamic Organization for Medical Sciences,” 2nd Seminar on the Islamic Concept of Human Life, Its Beginning and Its End, accessed May 7, 2019, <http://www.islamset.net/bioethics/death/index.html>.

⁸² Akrami et al., “Brain Death,” 2884.

⁸³ Ibid.

⁸⁴ This title itself has a big controversy in it as the term “brain dead patient” is to combine life and death at the same time. The “patient” is a human being who is alive and his soul has not departed from his body but he/she is ill and needs medical help for treatment and medication. *Black’s Medical Dictionary* provides its definition as “a person with injury, physical or mental disorder, disease, or abnormality who comes into the care of a health professional or of an institution responsible for providing care to such persons,” *Black’s Medical Dictionary*, ed. Harvey Marcovitch, 43rd ed. (London: A&C Black, 2018), s.v. “patient.” At the moment when the soul separates from the body and a person becomes dead, he/she no more remains patient. To call him/her patient will leave behind a question that removal of organs from brain-dead person is as removal of organs from a living person. Although organ transplantation was permitted from brain-dead person with the belief that the one whose brain is dead his/her soul has separated from his/her body and his/her cessation and breathing is continued artificially. Therefore, he/she is no more alive.

⁸⁵ Akrami et al., “Brain Death,” 2885.

⁸⁶ Haque, “Brain Death and Its Entanglements,” 20.

Notion of brain death as death is widely accepted by Muslim physicians serving in the technologically advanced countries. Farouqe A. Khan, a professor of medicine at State University of New York is of the view that “as a physician caring for critically ill patients in New York, I have reviewed various Islamic definitions of death and concluded that using brain death, which is defined as cortical and brainstem death, as a criterion of death in Islam is quite acceptable.⁸⁷

However, in a survey conducted in 1977 on prominent Muslim scholars in six Muslim countries—Kuwait, Saudi Arabia, Iran, Egypt, Lebanon, and Oman—90.6% of the scholars initially rejected the concept of brain death and did not allow the discontinuation of life support in brain-dead patients.⁸⁸ Although the “Academy of Islamic Jurisprudence,” having members from several Muslim states, has accepted the concept of brain death as early as 1986,⁸⁹ yet there is no consensus on accepting brain death as death proper. One of the reasons is that the Qur’ān or Prophetic traditions do not provide the precise definition of death.⁹⁰ The moment of death is kept in the knowledge of God.⁹¹ Most Muslim scholars do not consider a brain-dead person dead; rather they consider he is dying. The majority of Egyptian scholars rejected the cadaver programme in their country, based on their view that brain death is not a complete death. On the other hand, Saudi Arabia, Kuwait, and Iran have established cadaver programme as the scholars of these countries relatively accepted the concept of brain death as death.⁹² Therefore, they permitted the usage of a person’s organs if permitted by him before his brain death or by his immediate family members. In the following section, we will attempt to analyse the anxieties and fears of medical practitioners as well as religious scholars regarding the acceptance of brain death.

Why Brain Death Should not be Accepted as Death Proper

Arguments against the brain death are based on four different concerns: “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

⁸⁷ Farouqe A. Khan, “Religious Teachings and Reflections on Advance Directive—Religious Values and Legal Dilemmas in Bioethics: An Islamic Perspective,” *Fordham Urban Law Journal* 30 (2002): 270.

⁸⁸ M. al-Mousawi, T. Hamed, and H. al-Matouk, “Views of Muslim Scholars on Organ Donation and Brain Death,” *Transplantation Proceedings* 29, no. 8 (1997): 3217.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ Qur’ān 7:187; 31:34.

⁹² al-Mousawi, Hamed, and al-Matouk, “Views of Muslim Scholars on Organ Donation and Brain Death,” 3217.

life, even vegetative or unconscious life; and the disagreement of the medical scholars themselves.”⁹³

First objection was discussed in an article appeared in an Egyptian magazine in 1997. The author expresses that there are two definitions of death, the medical definition and the *shar‘ī* one. As per the *shar‘ī* definition, the person can only be pronounced dead when the total departure of the soul takes place manifested as bodily coldness and decay secondary to organs’ functional cessation. The author further claims that brain death or brainstem death is a warning sign of death, whereas the soul has not yet departed from the body and hence a person is to be considered still alive.⁹⁴ Jād al-Ḥaqq ‘Alī Jād al-Ḥaqq declares the harvesting of organs before the appearance of the “sharī‘ah signs of death” as an encroachment on a dying patient and terms it a criminal act of injury or manslaughter.⁹⁵

Krawietz argues that the legal opinions of individual scholars when not affirmed by jurists’ majority or established by a consensus of opinion (*ijmā‘*) are non-binding. However, the presence of these opinions “tends to sacralize human findings that have been integrated into Islamic legal regulations.”⁹⁶ Therefore, non-acceptance of brain death as a death remains there.

The second argument in rejecting brain-death criterion is that there is a possibility of brain-dead patients, return to life. It is God who decides whatever He wishes, and His decisions are inscrutable. Not only Muslim jurists but also several Muslim biomedical scientists are advocates of this argument. For example, Safwat Hasan Lutfi, a professor of anaesthetics and intensive care medicine, suggests,

Brain dead people 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.⁹⁷

In this sense, the Saudi Arabian judge al-Khudārī declared that the soul might occasionally return to the body like a heart that resumes beating after a while.⁹⁸

⁹³ Krawietz, “Brain Death and Islamic Tradition,” 200.

⁹⁴ ‘Abd al-Ḥayy Muḥammad and Badr Muḥammad Badr, “Niḡāsh sākhin ḥawl al-tabarru‘ bi ‘l-a‘ḍā’ wa ‘l-mawt al-iklīnikī: Wasaṭ al-Qāhirah . . . sūq sirriyyah li tijārat al-a‘ḍā’,” *al-Mujtama‘* no. 1254 (1997): 23.

⁹⁵ Jād al-Ḥaqq ‘Alī Jād al-Ḥaqq, “Ta‘rif al-wafāh,” in *Buḥūth wa fatāwā Islāmiyyah fī qadāyā mu‘āṣirah*, 6 vols. (Cairo: al-Azhar al-Sharīf, 1992–95), 2:514.

⁹⁶ Krawietz, “Brain Death and Islamic Traditions,” 200.

⁹⁷ *Ibid.*, 201.

⁹⁸ *Ibid.*

The third objection against brain death is that even an unconscious, vegetative life should be protected and upheld. ‘Aqīl b. Aḥmad al-‘Aqīlī claims that a brain-dead patient’s acceptance of medicaments and food indicates physical life. Disregarding such a life amounts to a violation of the Qur’ān, *sunnah*, and consensus (*ijmā*).⁹⁹ Reference is further made to the growing of nails and hair and—as far as children are concerned—the body itself. Special suspicion arose from reports about a brain-dead woman named Faridah who in that condition gave birth to a child.¹⁰⁰ Since al-Khuḍarī does not accept “the decease of the brain (*al-wāfah al-dimāghīyya*)” as death in the true sense, he consequently counts the maintaining of brain-dead people in life-support machines among the rights the Islamic *sharī‘ah* guarantees to human kind.¹⁰¹ On the other hand, the persistent vegetative state as per Islamic law is in no way equated with brain death. In such a state only the patient’s cerebrum is affected, which means “the centers of will and consciousness” are destroyed but not the brainstem. It is the brainstem which controls the vital functions of the body, like blood pressure, temperature, heartbeat, and breath. People in persistent vegetative state do not have consciousness and do not show reaction to stimuli, but they breathe spontaneously.¹⁰²

As regards the fourth argument, Muslim medical doctors themselves are at controversy. They hold conflicting opinions on “the death of the brainstem as a possible dividing line (*al-ḥadd al-fāsil*) between life and death.”¹⁰³ According to the medical expert Muṣṭafā Muḥammad al-Dhahabī, these differences hold not only from country to country but from hospital to hospital.¹⁰⁴ Although Muslims have traditionally thought of death as very much a process, they are now expected to come up with an arbitrary point of death.¹⁰⁵ An eminent *sharī‘ah* judge from Qatar claims that there is not and will not be a dividing line between life and death.¹⁰⁶ Aḥmad al-Shawārībī declares that brain death is a great lie and that there are numerous cases of false diagnosis. 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.¹⁰⁷

⁹⁹ ‘Aqīl b. Aḥmad al-‘Aqīlī, *Ḥukm naql al-a‘dā’ ma‘ al-ta‘qibah al-bayyinah ‘alā man ta‘aqqaba Ibn Taymiyyah* (Jeddah: Maktabat al-Ṣaḥābah, 1992), 154.

¹⁰⁰ Al-Madhkūr et al., *al-Ḥayāh al-insāniyyah*, 447.

¹⁰¹ See Krawietz, “Brain Death and Islamic Traditions,” 201.

¹⁰² Nadā ‘l-Daqr, *Mawt al-dimāgh: Bayn al-ṭibb wa ‘l-Islām* (Damascus: Dār al-Fikr, 1997), 189–94.

¹⁰³ Krawietz, “Brain Death and Islamic Traditions,” 202.

¹⁰⁴ Muṣṭafā Muḥammad al-Dhahabī, *Naql al-a‘dā’ bayn al-ṭibb wa ‘l-dīn* (Cairo: Dār al-Ḥadīth, 1993), 109.

¹⁰⁵ Krawietz, “Brain Death and Islamic Traditions,” 202.

¹⁰⁶ Al-Madhkūr et al., *al-Ḥayāh al-insāniyyah*, 354, 486.

¹⁰⁷ “Su‘āl bilā ijabah ḥasimah: Matā yu‘tabar al-insān mayyitan?,” *Ākbar Sā‘ah*, no. 3363, April 7, 1999, 39.

Krawietz judges the previous (fourth) objection to be the most serious one. For him, the undeniable diversity of opinion among medical experts themselves as well as biologists, philosophers, and other scholars and scientists cannot be overlooked.¹⁰⁸

Islamic juridical discourse on brain death was motivated by advancement in medical sciences in the West some more than thirty years ago. Despite the fact that several conferences and symposiums took place where Muslim jurists were informed in detail by medical scientists about scientific findings on brain death, a consensus could not be reached by jurists on a unifying position considering brain death as complete death. This is largely because the objections raised by several Muslim scholars discussed above to some extent are valid and require more research and deliberations. This leads us to suggest that a thorough discourse on brain death needs to take place in a multidisciplinary fashion afresh. Such discourse may take into consideration medical, ethical, religious, and legal dimensions to address the larger question of declaring someone dead when his brain has completely died while his breathing and blood flow is maintained through artificial measures. Need for such discourse becomes immense when we look at the question of end of legal personality. One requires to be cautious in order to abide by the Qur'ānic command "do not kill" especially because if it is established that a brain-dead person is alive, then withdrawal of ventilator and other machines that are maintaining blood flow may amount to killing a live person. Building upon the same line of argument one needs to be cautious about not keeping "dead persons" away from their due rights of being offered prayer on them, buried in time etc., and letting the rights of others become effective once a legal personality ends.

Conclusion

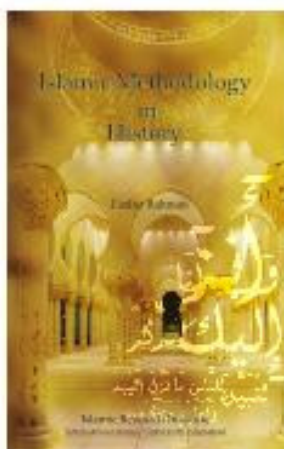
Tremendous medical advancements, whereby a person declared clinically brain dead by the physicians based on the examinations of his brainstem and reflex actions, and his heart beat or breathing can be sustained for so long, pose serious challenge to Muslim jurists in terms of deciding the end of life. A considerable effort has been made in the past by Muslim jurists and medical scientists to provide ethical and legal guidance to Muslim patients and their families when they are at verge to decide whether life support of their loved ones, whose brains have been clinically declared dead be removed or not. Yet, given the anxieties and fears in accepting brain death as death proper, need for further collective *ijtihad* seems in order so that a brain-dead patient may not

¹⁰⁸ Krawietz, "Brain Death and Islamic Tradition," 202.

suffer unnecessarily for a longer period while on artificial life support and patient's family and relatives may also remain in peace when they decide to remove life support. Need for such consensus becomes further important because once death proper is announced it will be the end of legal personality and that will lead to rights of several others who relate to the dying person. However, ethically, issue of rights that arise after the end of legal personality may not lead the proposed discourse in order to maintain the dignity of life and dying person. Nevertheless, it still remains to be a subject of further research for scientists as well as for Muslim jurists to continue thinking process for any future discovery through which the life of brain-dead person can be restored, for instance, through brain transplantation. In that situation scientists and jurists will equally be puzzled in deciding whether the person has received a new brain or the person (brain in this case) has received a new body. Moreover, it will really challenge the minds of jurists and physicians that how and when to declare the death.



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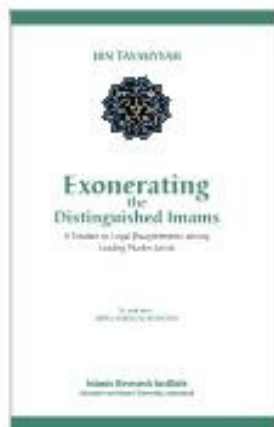


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