

More importantly, the Qur'anic view of human person, the nafs, that rejects the dichotomization of human personality into a body and mind, is at the root of theological debate on the relationship between life and death. As a nafs who dies through the divine decree any definition of this nafs's death must focus on the criteria that determines the death of the whole human rather than just a part of his biological existence. In other words, no definition of death that fails to take a living person, as seen in the Qur'an, can have a valid ground for acceptance in Islamic jurisprudence. Obviously, if the brain death criterion is rejected by Iran as a valid ground in pronouncing death, it raises the critical issue justice in distribution of meager resources for health care. What is responsibility of the health care providers to keep the brain dead person alive with expensive intensive care technology? Here the Iranian jurists have resorted to practical principles like rejection of harm and proportionality to provide sanctions for turning off the life sustaining equipment. In the final analysis, it is pragmatic considerations rather than any philosophical or theological evaluation of the obligation that have determined the course of action. And, like any other ethical judgement that takes into consideration the contextual aspects of a given case at hand, the judicial decision in this and many other matters related to the interaction of traditional values and modern biomedicine, is at the most temporary and open to revision as underlying confusion about brain death becomes clearer to not just the medical community but also Muslim jurists, theologians, and politicians.

treatment. In other words, under the present paternalistic medical care there is little room for intellectual interaction between religious thinkers, doctors, jurists and policy makers to undertake precise understanding of the way developments in medical care are interacting with traditional beliefs about life and death in Islam. In fact, there is abundant evidence to suggest that the neologism connected with braindeath among Muslims, adopted from Western languages, is fraught with persistent ignorance of the facts about brain death. The true state of patients with irreversible brain damage whose other organ systems continued to function remains non-comprehensible among various sectors of Muslim society. And, in the absence of any public debate geared towards educating the society that has accepted the brain death criterion for practical reasons without questioning its validity in certain controversial cases, it seems unlikely that any well considered definition and a set of criteria for determining brain death will emerge among Muslim jurists.

The exception is Iran where the interaction between policy makers and the religious establishment has been vibrant and even paradigm setting in the Muslim world. The Iranian parliament in 1995 rejected to accept the present brain death criteria as sufficient to initiate a state supported policy of organ retrieval for transplantation. The debates have centered on the inevitable connection between the notion of brain death and the permissibility of organ retrieval enterprise. Is the society unwittingly endorsing killing one patient in order to save the life of another? After all the success in the transplant surgery requires that organs be removed from patients who breathed. In the eyes of the public, still under the traditional criteria of death in Islam, the surgeons seemed to be engaged in literally terminating the lives of these helpless patients.

Death is, then, passing away of the soul and cancellation of life from body. Contrast this with murder. Murder is death when the cause is related to premeditation or something like that. Hence, death is distinct from murder. However, when compared with it, death is natural, whereas murder is just the contrary. In other words, this jurist hesitates to regard irreversible cessation of brain function as a valid form of death. However, the government appointed council of Islamic Jurisprudence in Iran, under the section regarding the section regarding Rulings Concerning Organ Transplantation writes: The criterion for death is that normal pulse and the heart by means of which a person continues to live has come to a complete halt. When a person reaches this stage he is regarded as dead. Reviving the pulse in his heart through an electronic device does not constitute life for him. However, if by means of a ventilator or other mechanical device the heart begins to function or by means of an artificial heart a person's life is restored, then the person is regarded as being alive. Hence,

**A.** As long as he is not dead, if he himself gives the permission to remove an organ, with the conditions stated in # 2 above, then it is permissible to remove that organ for transplantation.

**B.** After he dies, even when the heart is kept alive by some electronic device, it is permissible to remove his organs for transplant, provided he has made a will to that effect. Or, there is no problem in removing his organs under the two above- mentioned circumstances.

There is little doubt that the redefinition or expansion of the traditional criteria of death is virtually dominated by two factors: retrieval of organs and termination of medical treatment. There is little conceptual or philosophical discussion regarding the confusion over the higher brain conceptions and its implications for continuation of

2. When complete cessation of all functions of the brain occurs, and the expert physicians ascertain that the cessation is irreversible and the brain is in the state of degeneration. In this condition it is permissible to discontinue the life supportive system from the patient even when some of the patient's organs like the heart are kept functional by artificial means. God knows the best!

The document then proceeds to list the procedure that must be followed as part of the Brain Death Documentation:

Brain death is the irreversible cessation of all spontaneous brain activity including the brain stem. Before any supportive means is discontinued, the family members must be counseled. This should be documented in the patient's chart.

In a question that was submitted by Ministry of Health in Tehran to one of their leading jurists, Ayatollah Tabrizi, he was asked about the definition of death in Islamic law whether it is the cessation of brain function or the function of heart. His responsa is quite revealing of the early stages of debate on brain death in jurisprudence. He says that for that distinction one must refer to a physician. He says:

It is necessary to refer to the medical specialist in order to decide whether the first or the second conforms to the definition of death. Some experts are of the opinion that if the brain waves show the cessation for more than two and a half minutes, then death is definite and there is no way that life could return. He then proceeds to define death as it is accepted in the tradition: Death is the passing away of the soul from the body, as some commentators have indicated in their explanation of the verse from the Qur'an: "Muhammad is not but a messenger; before him also there were messengers." This certainly refers to the traditional concept of mind-body dualism inherited from Hellenistic sources by Muslims.

It is permissible to switch off the life support system with total and irreversible loss of function of the whole brain in a patient if three attending specialist physicians render their opinion unequivocally that irreversible cessation of brain functions has occurred. This is so even when the essential functions of the heart and the lungs are externally supported by life support system. However, legal death cannot be pronounced except when the vital functions have ceased after the external support system has been switched off. (al-qarar al-thani, p. 21)

In none of the rulings examined for this study has any Muslim jurists tried to define or determine the criteria for accepting the validity of brain death from Islamic legal perspective. They have depended on the consultant physicians to provide their expert opinion, who, appear to be more interested in getting the approval for retrieving organs. Hence, the debate in North America concerning the acceptance of "higher brain formulations of death" and the controversial aspects of providing medical care of patients with advanced forms of dementia and PVS is absent in the juridical literature dealing with the definition of death.

In its third session held in Amman, Jordan, on October 16, 1986 the Council of Islamic Jurisprudence (majma' al-fiqh al-islami) once again took up discussed the life supportive system in the ICU and after extensive and exhaustive explanation given by physicians specializing in that field of medicine decided the following:

The person is considered legally dead, and all the guidelines provided by the Shari'a to determine death are applicable when following signs are confirmed:

1. When complete cessation of the heart or respiration occurs, and the expert physicians ascertain that the cessation is irreversible.

- Can the government policy authorize the health care providers to withdraw treatment when organ viability can be maintained by active medical intervention?

Until recently, health policies in the Muslim countries generally reflected insensitivity to the public's moral and cultural sensitivities connected with death. The authoritarianism of medical profession in Muslim societies is abundantly clear in the following decision that was imposed as a government policy in Saudi Arabia under the rubric of Religious Aspect of Organ Transplant:

(1) The Purport of the Senior Ulama Commission's Decision No: 99 dated 6-11-1402 (AH)/25-08-1982: The board unanimously resolved the permissibility to remove an organ, or a part thereof from a Muslim or a Dhimmi living person and graft it onto him, should the need arise, should there be no risk in the removal and should the transplantation seem likely successful.

According to two leading medical doctors Ali al-Bar and Nizamuddin, the latter being the liver transplant surgeon in King Fahad National Guard Hospital in Riyadh, the above policy statement requires the following elaboration:

Should the diagnosis of brain death be established unequivocally, the physician in charge may keep the corpse ventilated for the purpose of pre-arranged organ donation until receiving the consent of the heirs, or an order from the Qadi, the magistrate, in the case of an unknown corpse. The ventilated corpse is considered dead from the time of declaration of brain death and not from the time of turning off the ventilator.

The last statement is contradicted by the Council of Islamic Jurisprudence, which includes jurists from all schools of thought in Islam and which meets regularly to review some of these new rulings. Their ruling reads as follows:

کیا آپ کو معلوم ہے کہ: ☆ قانون شریعت کا دوسرا نام فقہ اسلامی ہے۔ ☆

tradition provides any criteria to determine when a person can be regarded as dead.

### **The Traditional Criteria and Modern Medicine**

Until recently, determination of death in Muslim culture was not enigmatic at all. In general, Islamic law has depended upon the opinions of scientific experts and professionals who have used the pragmatic but traditional criteria for death routinely observed in patients. According to the traditional criterion, the life ends with the permanent cessation of respiration and of circulation. In other words, Muslim jurists regarded complete cessation of heartbeat as a sufficient criterion to declare a person legally dead. The problem arose when modern medical technology acquired the ability to keep the signs of life through respiratory support in a brainstem dead patient. The patients were regarded alive in accord with the traditional definition of death. It is important to add a footnote here that the paternalistic and authoritarian style of medical care in the Islamic world, usually limited to medical professional and the sponsoring government agencies, has not allowed for necessary debate involving legal and religious communities on the issue of when to call patients dead. There are two interrelated reasons that have prompted countries like Iran and Saudi Arabia to reconsider the stance on brain death criteria in the case of patients with irreversible brain damage while the cardiovascular system continues to function by means of new techniques of intensive care:

- Can recognition of brain death lead to the unethical and illegal retrieval of organs for transplantation in such patients whose cardiorespiratory physiology can be kept functional for successful retrieval? In many poor countries in the Third World there is an irresistible temptation to make money from the sale of these organs.

physicians that pursuing a particular course of treatment is proportionally more harmful than allowing the nature to take its course, then it is obligatory to stop the treatment.

At the same time, to protect the individual's right to life, the Islamic law empowers Muslim courts to determine each case of terminal illness whether it deserves the essential treatment that would put financial and emotional burdens on the family and society. Although the court takes into account the suffering and welfare of the family, there is no justification in Islam to end a human life merely because of the family's and patient's suffering. Nevertheless, it must weigh financial and related demands imposed on the state's resources to provide medical care to needier patients who have a better chance of recovery. Based on its presuppositions about the communitarian ethics the primary obligation of the Islamic court is to ensure the safety and welfare of the individual in the context of the society as a whole. This conceptual and cultural understanding of death in Islam is important to keep in mind as we consider the legal and ethical deliberations that were undertaken by Muslim legist in providing the criteria to determine death. Their decisions were not deduced solely on the basis of what we would call normative sources like the Qur'an and the Tradition, the Sunna; they also took into account cultural understanding of the nature of life and death in the community. In Muslim culture, until recently when modern medical technology admitted the distinction between cessation of cerebral function and cardiorespiratory function, the pronouncement of death was based upon the criteria provided by the vitality of mutually dependent organic system of human body. The terms cerebral death and brain death are neologisms in Muslim societies which continue to see death as the cessation of vital functions in a single organ system rather than a part of the organ. Having said this, the question arises whether the Islamic legal



families and society in general to regard a person living. These include a person's ability to make decisions and execute them through his own conscious and cognitive competence. In the absence of such competence close family members or religious and lay leaders in the community assume the guardianship to protect the person's rights. The principle of equity and public good for society in Islam allow the leaders of community act as surrogate decision makers in cases when the person due to mental or any related incompetency is unable to assume that responsibility.

Significantly, in the case of a patient in the vegetative state ethical deliberations in Islam are not only concerned with determining the value of the patient's life. The principle of public good (maslaha) demands that an individual's life must be weighed in the scale of general well estate of those who are horizontally related to the patient. End of life decisions require to take into consideration an individual's interpersonal relationship with his own family and society in general. If active medical intervention in the case of a severely brain-damaged patient leads to further suffering of the patient and those related to him in society, then the ethical judgement cannot ignore the ensuing general harm, including the rising cost of prolonging such life for the entire society.

It is for this reason that Muslim jurists, the Ulema, have adopted the view that it is permissible for the patient in an irreversible vegetative state, either through a prior living will or his immediate family or supreme legal authority (hakim al-shar'), to refuse any treatment that simply prolongs the patient's miserable condition. The point is explicitly made clear that in the eyes of Muslim public it is pointless and even degrading to intervene medically in the nature's course towards an imminent death. On the basis of the religious and moral duty of rejection of harm, if it is reasonably determined, at least by three consultant

In other words, the Qur'an says that it is a person who has to taste death, and not his physical existence separate from his soul. It is a person who ceases to exist when death occurs. Death is the termination of an individual comprehensive being, capable of believing and disbelieving, and not simply a living organism. Even though later orthodox Islam came to accept the mind- body dualism, the Qur'an by using the term nafs, seems to be rejecting the idea that some entity, like the soul, leaves the body at the time of death. Life does not end with death. In the same way that a person does not cease to exist in sleep, so also he does not cease to exist in death. And in the same way that a person comes back to life when walking from sleep, so also will he be revived at the great awakening on the Day of Judgement. Hence, Islam views death merely as a stage in human existence. Physical death should not be feared as an evil. One should, however, worry about the agonies of spiritual death caused by living a life of moral corruption. That sinful life is not worth living.

The mystery of life and death is resolved in the Qur'an by linking it to the working of human conscience and its ability to maintain a healthy status of human spiritual-moral existence with faith in God. Once that necessary equilibrium between faith and work in life is lost, then a state of human being's death has set in. It is this death that should cause anxiety in human beings. Human efforts should be concerned with the revival of human conscience which will lead to a meaningful life. Does it mean that human body should be simply neglected? No, not at all. It simply means that human death must be viewed as secondary to the spiritual and moral quality of life. This religious evaluation of death is reflected in Muslim cultural attitudes to life and death. In general, Muslim public does not view, for instance, a persistent vegetative state of an individual as life. Life in Muslim culture has a set of criteria which must be fulfilled in order for the patients, their

## Brain Death in Islamic Jurisprudence

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### Abstract

Traditionally Islamic jurisprudence defines death as complete cessation of the heart or respiration. However, a further dimension has been added to this formulation of death in view of the modern medical technology that can intervene to prolong life through the life-support system in the case where all functions of the brain have ceased. This development has given rise to the question whether brain death can be recognized as a valid formulation of death without first defining the criteria of life in Islam. Can innate integration of vegetative functions without cognition in a brain dead person be used as the necessary and sufficient condition of life? What are the social and moral implications of recognizing brain death as a right criterion for death in Muslim society?

### Some Conceptual Considerations

Although the Muslim scripture, the Qur'an, contains various death themes that add significantly to our insight into the meaning of death, the concept is left undefined and always portrayed in close relationship with the concepts of life, creation, and resurrection. The Qur'an seems to be more concerned to determine the nature of death. Thus, in speaking about the agonies of death suffered by the wicked ones it uses the crucial term *nafs*, which means 'person' and not simply a thing or an existing entity. To quote the Qur'an:

*Every person (nafs) shall taste of death; and We try you with evil and good for a testing, then unto Us you shall be returned. (Q.21:35-6)*