

# Afrika Zamani

An Annual Journal of African History  
Revue annuelle d'histoire africaine

Spécial Issue / Numéro spécial

*L'état civil de Dieu et ses biographies dans l'Afrique contemporaine/  
The Civil Status and Biographies of God in Contemporary Africa*

Guest Editor / Rédacteur invité  
Achille Mbembe

No. 5, 1997 and No. 6, 1998

## **Transacting the Body in the Law: Reading Fatawa on Organ Transplantation**

**Ebrahim Moosa\***

### **Introduction: Body, Self, Identity and Reflexivity**

In a comparative and reflexive study of Muslim legal discourse, our notions of the body and other psychic processes are perversely affected. In a single religious tradition such as Islam, there are diametrically opposed positions on the use of body parts. This gestures towards differentiated notions of identity and self. According to Giddens, the reflexive project of the self sustains a coherent, yet continuously revised biographical narrative as filtered through abstract systems such as law (Giddens 1991:56-58). In post-traditional societies or those in various stages of de-traditionalization, the body is less an extrinsic 'given' that functions outside the internal referential system of modernity. To the contrary, the body itself becomes reflexively mobilized. Modern lifestyles are preoccupied with the activity to construct and control the body in which biological mechanisms are socialized. But the socialization of biology, in attributing symbolic meanings and functions to the body, it must be remembered, was also part of traditional and religious perceptions of the body and is not entirely a new phenomenon. Purity rituals in religious tradition are evidence of the symbolism of the body in pre-modern traditions.

The self, of course is also embodied. Exploration of the human body is part of the feature whereby a child learns about objects and others but mainly through a process of differentiation. Regularized control of the body is a fundamental means whereby a biography of

\* Senior lecturer in the Department of Religious Studies and director, Centre for Contemporary Islam, University of Cape Town, Private Bag, Rondebosch 7700, South Africa. I would like to thank the University of Cape Town for a research grant that made this research possible. My thanks also to Dr. Shabbier Wadde for reading an earlier draft of this essay.

self-identity is maintained. Whether this control occurs by means of rituals of purity or by means of legal discourses in the form of fatawa (*judicial responsa*) (sing. *fatwa*) that permit or prohibit the use of body organs, they have the effect of putting the body on 'display', a process of embodiment (Amariglio 1988). In the process of embodiment, new boundaries are constructed between body and non-body, life and death, self and other.

In a way, the perception of the 'body' is also influenced by the passing of the modern episteme. Foucault for one, celebrated the passing of the modern episteme which takes place through decentring a variety of discursive forms (Foucault 1970). Foucault dreamt of a world where the body had no depth, no centre, signified nothing and whose order was concretely determined and redetermined. The body takes its place in a horizontal arrangement, a juxtaposition of things so that Man and his body, does not hegemonize the field of what is thinkable and knowable (Heesterman 1985). From the foregoing Muslim juridical discourses on the body, the effect of the modern episteme is evident and 'man' and his body still hegemonizes the field of imagination and knowledge.

Interest in the forensic of legal arguments—the evaluation of the evidence and the logic of the socio-legal discourse—in contemporary Muslim law has only recently begun to attract scholarly attention (Masud et al. 1996). In this essay the discourses of two divergent, but representative fatawa on organ transplantation are examined (Ebrahim 1995:291-302; Nanji 1988:257-275; Molloy 1980:139-77). These fatawa are emblematic of religious and legal diversity in approaches to modern ethical and juridical issues which differ markedly in a single religious tradition. This becomes evident when opinions emanating from South Asia are compared with those of the Middle East (Rispler-Chaim 1993, 1996; Baljon 1996:85-95).<sup>2</sup> Beyond the forensic battles, it becomes clear that the location of the mufti and the cultural context embedded in the fatwa are two of many causative factors which go beyond the 'body of the law', the significance of which had not been adequately accounted for in modern or classical Islamic law.

Major advances in biomedical technology pose some challenging and tough ethical and juro-legal questions to contemporary Muslim jurists as to the legal status of organ transplantation (Daar 1989, 1991; Abouna et al. 1990; Sahin 1990; Sachedina 1988; Al-Faqih 1991;

Ebrahim and Hafjee 1994; Gatrad 1994). Some jurists claim that such a practice is permissible and argue that the view is supported by analogy and legal precedent, while others deny the existence of any remote precedent and declare such operations impermissible.

Those familiar with Muslim jurisprudence know that in the absence of any explicit rule of prohibition or textual authority, a legal question would be in the domain of juristic discretion (*ijtihad*).<sup>3</sup> Jurists are normally guided by the general maxim that all things are permissible unless it is unequivocally prohibited in the primary sources of law. But this is not the point of departure for all jurists. Indo-Pak jurists, it has been observed, embrace a set of evaluative and moral presumptions prior to entertaining a legal question such as organ transplantation (Moosagie 1995).

The first of the two fatawa to be discussed was the one adopted by a group of scholars, led by Mufti Muhammad Shafi'i (d. 1976) of Pakistan. This ruling was issued in 1387/1966 and ruled organ transplantation to be impermissible.<sup>4</sup> The second was issued in 1400/1979, by the late Shaykh (Grand Rector) of Al-Azhar University in Cairo, Jad al-Haqq 'Ali Jad al-Haqq (d. 1996), then in his capacity as mufti (chief jurisconsult) of Egypt who ruled that it was permissible.<sup>5</sup> For the purpose of this essay, the main arguments of both fatawa are summarized and discussed below. Thereafter, some general observations are made about juridical method, the location of the mufti in society and the relationship of law, body and culture.

### Impermissibility of Organ Transplantation: The Pakistani Fatwa Outline

The Pakistani fatwa is based on the doctrine of the absolute inviolability of human dignity (*karama wa hurma*) and the primacy of avoiding harm (*darar*). A ruling permitting organ transplantation, it was argued, would cause immeasurable harm to human dignity and therefore such a practice was intolerable.

Supplementary arguments supporting the ratio of the Pakistani fatwa were among others:

- a narrow definition of what the term 'judicial necessity' (*darura*) means;
- the religio-legal fact that severed organs are defiled (*najasa*) and hence their use is impermissible; and

- that if the consumption of human flesh in life-threatening situations was prohibited by some jurists, then the transplantation of human organs would *a fortiori* be prohibited.

### Summary of the *Pakistani Fatwa*

The prologue to this fatwa makes several interesting and significant observations. The chief author, Mufti Muhammad Shafi, argued that the piety of the mufti was a crucial prerequisite for issuing of fatawa. He took a dim view of 'laboured interpretations' in order to satisfy premeditated conclusions of legal questions and acknowledged that organ transplantation was a sensitive issue which had 'two-sides':<sup>6</sup> Shafi admitted though, that he was acutely aware of two things: first, the moral burden of prohibiting what was permissible and vice versa; and secondly, that the purpose of searching for rules was to provide relief and make things convenient to the public. An unsatisfactory resolution to the question at hand could undermine public confidence in religion and its tenets, he said.

The fatwa was further prefaced by several operative legal principles (*usul*) and preliminary statements, which included inter alia:

- a question of legal philosophy that distinguished between 'primary' (*darura*) and 'secondary', (*haja*) needs in terms of public policy (*maslaha*);
- a psycho-legal discussion on the consumption of prohibited items—substances or organs—and their harmful effects on the body and soul;<sup>7</sup>
- a presumption that the moral dignity of a human being should be observed in an absolute manner. The human body is not expendable and only nature is subservient to humans in all respects;<sup>8</sup> and
- an ethical discussion about the use of remedies of a prohibited kind.

### Discussion

Two issues of principle discussed in the fatwa deserve amplification. The first is that the fatwa very cryptically constructs a hierarchy of ethical needs and equally briefly provides different ways in which each can be remedied. Someone suffering from a life-threatening and emergency medical condition would be seen to have a 'primary' (*daruri*) need. Someone who shows symptoms of a non-emergency

(*ghayr idhtirari*) kind would be described as having a 'secondary' (haji) need. In order to treat a 'secondary' need, the remedy should not violate an absolute Qur'anic prohibition, by using substances such as wine, carrion, pork and blood. Further, if the satisfaction of a 'secondary' need necessitated the violation of an authority lesser than the Qur'an, then such action would be acceptable.<sup>9</sup> The example provided is instructive. As a general rule, the Prophet prohibited men to wear gold jewellery and ornamentation. However, he approved the use of a gold prosthesis in order to substitute a silver one since it proved to be a more efficient substitute. The need for a gold prosthesis was classed as a 'secondary' need, and using such a prohibited metal was tolerable because it only went contrary to a prophetic report and not the Qur'an.

The second argument relates to the use of prohibited substances as part of a remedy. The ruling on this point stems from a prophetic report (*hadith*) which said: 'Allah has not provided a remedy in those things which are prohibited for you'.<sup>10</sup> The legal test which lifts the ban on the use of a prohibited substance is when the curative value of such a medication is conclusively (*yaqini*) known. If such remedies are used to address a 'primary' need, then they must pass a three-point test: (1) the 'need' must be of a life-threatening kind; (2) the threat must be actual, not a potential one and to be diagnosed by a qualified medical practitioner; and (3) the medical practitioner should conclusively establish the curative value of the prohibited substance.<sup>11</sup>

The authors of the Pakistan fatwa were acutely aware of their anomalous position in prohibiting organ transplant but permitting blood transfusion. This is significant if one bears in mind that that fatwa adopted an exclusively Hanafi position which regarded severed organs and blood outside the body, as both defiled and impure substances.<sup>12</sup> Despite this prohibition, the authors of the fatwa permitted blood transfusion to remedy cases of 'emergency' or 'primary' (*daruri*) needs, but disallowed its use in the remedy of 'secondary' needs.<sup>13</sup> So for instance, blood transfusion intended to increase body strength or for cosmetic purposes was ruled to be impermissible.

Clearly, if there was to be any analogue for organ transplantation then blood transfusion would have been the obvious one. But the legal argument permitting blood transfusion was constructed in pragmatic terms. Blood, said the fatwa, facilitated convenient transferability,

unlike organs which involved elaborate surgery.<sup>14</sup> In addition, the authors found a useful analogue for blood. It was analogous to female breast milk, the use of which past jurists permitted for medicinal purposes. The fatwa did not provide a compelling and formal legal argument to prove why organ transplantation under emergency circumstances was not permissible but blood transfusion under similar circumstances was permissible. Could it be that the curative value of transplantation was not conclusively known, while that of transfusion was? In terms of its own criteria for 'secondary' needs, it did not explain how the use and transfer of blood, a substance explicitly prohibited by the authority of the Qur'an 2:173, could be permissible. Nor did the fatwa address the general issue of surgery for non-transplantation purposes, which inevitably involved extensive invasion of the human body, one of the reasons it proffered for the impermissibility of transplantation.

What becomes evident is that in the matter of blood transfusion, two doctrines are invoked: 1) the choice of the lesser of two competing harms; and 2) that necessity lifted prohibition. Blood transfusion was viewed to be a less harmful practice to human dignity than the surgical intrusion of the body by means of transplantation. Another possible reason could be that blood was a regenerative tissue, unlike organs which were non-regenerative.

The fatwa makes an interesting psycho-legal argument. It states that the violation of shari'a rules have both material and spiritual consequences. Substances prohibited by the shari'a not only causes physical harm, but spiritual harm too. Thus, while legally and technically the use of blood donated by a non-Muslim, a person deemed to be sinful (*fasiq*) or a profligate (*fajir*) Muslim would be permissible, Muslim jurists believe that the donor's negative spirituality stemming from unbelief and sinfulness would be transmitted to the recipient. Ideally, such transactions should be avoided.<sup>15</sup> The blood of such persons carries 'spiritually impure effects' (*atharat-e khabitha*) and will undoubtedly have an effect on the moral character of the donee.<sup>16</sup> Jurists are also of the opinion that a sinful woman breastfeeding a child would transmit the effects of her negative moral character to the suckling.

The fatwa argued that organ transplantation was not permissible (na ja'iz) because it presented unforeseen harm (*darar*) to the religious, individual and social dimensions of human life.<sup>17</sup>

Permission to dismember the human body for the purpose of harvesting organs is an explicit affront to human dignity (*karama*) (Johansen 1996). By way of analogy the fatwa argued in *obiter*, that even the most dire of circumstances did not warrant the eating of human flesh or even one's own flesh.<sup>18</sup> Organs were given as a trust (*amana*) to human beings by Providence and therefore they did not have an unfettered use of their bodies. Furthermore, it was feared that permission for organ transplantation would open the ethical floodgates and could lead to the slippery slope of large-scale abuse and moral depravity. A specific fear was that the rich may exploit the poor in a bid to harvest organs, or that the poor may out of desperation sell their own dispensable organs.

Furthermore, repetitive and routine use of organs from cadavers could lead to the degradation of human society. In the view of the authors, it was visualised that if transplantation became a routine practice, it could lead to a situation where certain features of society such as burials, funeral rites and other related religious rituals could permanently disappear from Muslim society. Precisely how burial rituals could go into disuse is not clear, since cadavers would be available for burial purposes once the organs had been harvested. It is clear that the authors view western medicine as a 'cultural force' in itself and their religious opinion implicitly resists this impositions of westernisation.<sup>19</sup>

In theory, the Pakistani fatwa viewed organ transplantation as a form of medication. But, given (a) the violation of human dignity and the absolute imperative to avoid the resultant 'harm', and (b) the impurity of severed organs, supported by (c) the mainly Hanafi ruling that the consumption of human flesh even in the most dire circumstances was impermissible, it was ruled that organ transplantation was by way of *argumentum a fortiori*, (*bi daraja awla*) deemed to be prohibited. Put differently, one can say that juristic formalism in the choice of analogies and the narrow interpretation of the 'necessity' or a primary need compelled the Pakistani jurists to arrive at a balance of probabilities that prohibited transplantation. Indo-Pak Hanafi jurists are particularly opposed to legal eclecticism. In fact, a notion such as 'necessity' which is well developed in Maliki law, would not be some of the concepts that these jurists will entertain outside the Hanafi tradition as a practice, unless they are forced to do so. As a category, 'necessity' or

'emergency' would also be viewed to be a very subjective notion for the practitioners of a very formalize Hanafi dogma. The fatwa instead proposed that alternatives such as prosthesis and other artificial substitutes, described as 'plastic surgery' and reconstructive prosthetic devices be explored.<sup>20</sup>

### Permissibility of Organ Transplantation: The Egyptian Fatwa

#### Outline

The Egyptian fatwa issued by the official body responsible for religious rulings, Dar al-Ifta al-Misriyya, approached the same question as:

- a matter of juristic discretion (*ijtihad*) since there was no settled rule on the matter;
- a policy matter of the 'dominant public interest' (*ri'aya al-masalih al-rajiha*) or common good;<sup>21</sup>
- that numerous positive law (*furu*) decisions provide analogous rulings that could be extended to validate organ transplantation, which included inter alia:
- The fact that past jurists permitted a procedure akin to Caesarian-section to remove a full-term viable foetus from the body of a dead mother, or that they allowed surgery to retrieve a valuable item from the body of a dead person.
- That human organs were ritually pure even if they were severed from a body.
- That it was permissible to eat human flesh in circumstances of dire 'necessity'.

#### Summary of arguments

Firstly, the fatwa provided a contextual explanation for the prophetic report (hadith) which was frequently invoked by those opposed to organ transplantation. The report in question stated that 'breaking the bones of the dead, is like breaking it while (being) alive'.<sup>22</sup> The intention of this report, the Egyptian fatwa said, was to stress the dignity attached to the corpse and was not related to organ transplantation. The context for this statement was vital. A gravedigger was apparently trying to break the bones of a corpse in order to fit the body into a narrow grave. The Prophet disapproved of the obvious undignified behaviour towards the corpse and then made the statement disapproving the breaking of the bones of the dead. In the Prophet's view, there was no compelling reason to mutilate the

corpse as the grave could be expanded to accommodate the size of the corpse.<sup>23</sup> Caution against disrespect to the dead when viewed in the light of the contextual explanation was utterly different to organ transplantation, the Egyptian fatwa tells us.

The argument in favour of 'public interest' was reinforced by existing positive law for mutilations and precedents that also considered public policy. Positive law precedent for instance permitted the delivery of a viable foetus by Caesarian section from the womb of a deceased mother. Here the legitimate 'injury' to the dead rested on the *ratio* provided by the legal maxim: 'securing the dignity of the living and its life... is preferable to securing the dignity of the dead'.<sup>24</sup> The same rationale applied to retrieving a valuable located inside the corpse, a practice endorsed by two classical Sunni law schools, namely the Hanafis and Shafi'i is, as well as two Shi'i schools, namely the Zaydis and the Imams. The Maliki and Hanbali schools permit the retrieval of valuables from a corpse, but they paradoxically disallow the delivery of a viable foetus from the womb of a deceased mother.<sup>25</sup>

The ethical and legal status of a corpse, as well as organs or tissues that are separated from a living body, such as a tooth, kidney or cornea was a moot point. Most of the major Sunni schools and the Zaydis among the Shiis, were unanimous that the corpse of a believer was ritually pure (*tahir*), said the fatwa. Therefore, any organ or tissue separated from a living body could be nothing but ritually pure. Only a section of the Hanafi school considered a corpse and severed organs to be defiled. Even here the dispute was whether the ritual defilement attributed to the dead was an impurity of a permanent kind (*khabath*), or a transient (*hadath*) type. The fatwa then relies on the view of a leading Hanafi authority, Kamal al-Dia Ibn al-Humam (d. 861/1457) who approvingly cited in his *Fath a-Qadir* the report of Abu Hurayra which said: 'Praise be to Allah! A believer cannot be defiled, living or dead'.<sup>26</sup> The reservation of the Shafi'i school as stated by al-Nawawi (d.676/1278) was that no skin part of the dead person could be used due to the inviolability (*hurma*) and dignity (*karama*) of the human body.<sup>27</sup> The reservation of the Shafi'i school did not centre around the legal impurity of organs as much as it was linked to moral concerns, the fatwa suggested.

In search of further justification in favour of organ transplantation, the Egyptian fatwa explores the views of past jurists

permitting homologous grafts for tissue or organ replacement.<sup>28</sup> The main analogy here was rulings which approved dental homografts and zeno-graphs and the use of animal-bone in setting a splint with external fixation.<sup>29</sup> In the case of dental grafts, the Maliki law considered autografts with the aid of gold or silver bonding-thread to be permissible. According to this school, any part of one's *owwi* body was pure. There were two views in the Maliki school with regard to a homologous tooth transplant from a dead person permissible and impermissible. The Hanafi school deemed a homograft to be disapproved (*makruh*) by consensus. Autotransplants were also disapproved by both Abu Hanifa (d. 150/767) and one of his disciples, Muhammad al-Shaybani (d. 189/804).<sup>30</sup> Abu Hanifa's student, Qadi Abu Yusuf (d. 182/795), on the contrary approved of autotransplants. In the case of splints with external fixation, the Hanbali and Shafi'i schools preferred to avoid the use of prohibited pig tissue when other permitted-types were available. Splints made of prohibited tissue should be removed once they had served their purpose, provided that removal will in turn not cause greater harm.

The fatwa also addressed the question whether one could eat human flesh in instances of dire 'necessity' and found that, the Shafi'i, Hanbali and Zaydi schools and one version of the Maliki school deemed it permissible. The Shafi'i and Zaydi schools went as far as permitting the consumption of one's own flesh in extremely dire circumstances provided that 'the resultant harm emanating from eating a part of the body was less than the harm of not eating anything at all (i.e. Starvation)'.<sup>31</sup> It was mainly the Hanafi school which absolutely proscribed the consumption of human flesh. The injunction to observe the dignity and integrity of a human being was a devotional command (*amr ta'abbudi*) which was not subject to rationalization and required absolute obedience. The Hanafis were joined in their view by one section of the established Maliki opinion.

On the grounds of the varying positions stated above, the fatwa argued that given: (1) the permissibility of removing a full-term viable foetus from the body of a dead woman or the surgical retrieval of a valuable from a corpse; (2) the purity of severed human organs and tissue of; and (3) the permissibility to consume human flesh for purposes of survival in extreme circumstances, then by way of *argumentum a fortiori* there was even greater reason to approve the permissibility of organ transplantation. The decision read:

based on these [examples] that it is permissible to cut the abdomen of a person and remove an organ, or part of it, in order to be transplanted to another living body, given the preponderant probability of the doctor's consideration that the recipient—donee will stand to benefit from the donated organ. [This follows] the jurists' consideration of the preponderant public interest... that 'necessity lifts prohibition' and that 'a greater harm can be offset by a lesser harm' are [principles] whose authority is derived from the noble Qur'an and the sublime Sunna [tradition of the Prophet].<sup>32</sup>

### General Discussion and Comments

Both fatawa rely on a type of syllogistic reasoning known as *argumentum a fortiori*. Al-Shafi'i (d. 204/820) had very early on discussed this in his seminal treatise, *al-Risala*. He said that

the strongest form of analogy is where God in the Qur'an and His Messenger forbid a small degree of anything and it is known that if a small degree is forbidden, much of it is equally forbidden or more so in virtue of excess of the large amount over the small... Similarly if He permits a great deal of something, less of it is all the more permitted.<sup>33</sup>

In both rulings there is a search for analogous precedents, even remote ones, in a bid to justify or legitimate the policy considerations adopted by the respective jurists. Here, the location of the jurist, in the widest sense of the term, is a vital consideration in the choice of precedents. The inference drawn is that judicial policy is conditioned by the location and context of the jurist and, in a sense precedes the search for God's rule. For it is apparent that the choice of precedents invariably determine the outcome of decisions. In each fatawa, a similar, if not identical arguments and sources are employed, with different results. Both fatawa are concerned about the dignity and inviolability of the human body. In the one, this objective is served by prohibition and in the other, it is realized through permission. Not to do transplantation would preserve human dignity say the Pakistani jurists, while the Egyptians say that restoring health to the body by means of transplantation epitomizes the fulfilment of human dignity.

The interpretation or hermeneutics of a single hadith plays a pivotal ruling in each of the fatawa. The Prophet's ruling not to break the bones of the dead is adopted literally and without any contextual explanation in the Pakistani fatwa. In the Egyptian ruling this report is contextualised. A feature of the Pakistani fatwa is its self-evident legal formalism. It is limited by seeking final recourse in the mainstream and approved opinion of the Hanafi school and does not take the initiative to apply juristic preference (*tariih*) by ventilating the value of some lesser known views within or outside this school in

the interest of contextual socio-legal thinking. One detects an unflinching commitment to imitation (*taqlid*) of one law school. Even on occasions where there were divergent opinions within the Hanafi school, such as the status of a ruling adopted the approved position in the school, which also happened to be the most rigid and cautious posture (*ithiyat*) from a juristic point of view (Alavi 1988; Metcalf 1982). What becomes explicit in the fatwa is the characteristic priority Indo-Pak Hanafi thinking gives to moral caution and piety over legality, especially the Deoband school (Rahman 1985). Here no distinction is made between law and morality. Morality, in the final instance decides the legal argument.<sup>34</sup> The compelling argument which guided the jurists in the direction of prohibition in this was a moral argument about the sanctity and dignity of the human body, not a legal one. In this scheme of things, the social consequences of the legal question (*istifta*) is secondary. Foremost in the minds of the jurists is a defensive posture which takes the form of combating the negative social effects that transplantation may have on society. Even if there were remote 'legal' possibilities of issuing a ruling of permission, the risk of unforeseen consequences—real or imagined—weighed heavily on the juristic imagination. 'Closing the means' (*sadd al-dhari'a*) of harm is part of the moralising rhetoric of the law.

Furthermore, the Pakistani fatwa operates on a binary logic. The legal category of 'necessity' (*darura*) has as its equivalent medical condition, 'life-threatening'. Thus formalism also leads to functionalism as a mode of application. What does not become clear is whether the term 'life-threatening' was used in the sense of an 'actual' or 'potential' threat. A dysfunctional organ, for instance, may not immediately develop into an 'actual' life-threatening condition. However, the prolonged malfunction of one organ may have a domino effect on the function of other vital organs. In the end, the cumulative condition can be described as an actually life-threatening situation. But a patient who faces a life-threatening situation as a result of multiple-organ failure may find the exercise of transplantation to be redundant at that advanced stage. It appears that the Pakistani fatwa did not view transplantation as a preventative remedy and treatment for diseased organs. The insistence on differentiating between 'actual' and 'potential' life-threatening circumstances and ignoring the variety of uses of transplantation, is

one of the main weaknesses of the fatwa and possibly the grounds for it being reviewed (Atiyeh 1975).

But there is also a contradiction in the argument. In its cautious and formal approach, the fatwa consistently argued that a substance explicitly prohibited in the Qur'an had no curative value, irrespective of the need. Now, it is known that blood was an explicitly prohibited substance by the authority of the Qur'an. If authority was to be the determinant of prohibition and permission, then it could be argued that while there was no explicit prohibition of organ transplantation in any of the sources of Islamic law, blood had indeed been prohibited. Yet, blood transfusion is permissible and organ transplantation is prohibited.

If one examines the Egyptian fatwa one will note that it has the elements of a positivist approach to law mixed with a pragmatism which considers the preponderant public interest (*mas'aha*) in policy considerations.<sup>35</sup> The legal approach is a liberal one, considering the opinions of all the major law schools in order to find the best law. What is at work is the more liberal method of judicial eclecticism (*talif*) and selective choice (*takhayyur*) from a range of existing legal opinions. This is a trend increasingly encouraged by al-Azhar and adopted in most of the modern Middle East, even in traditional juristic establishments.

The juristic point of departure in this fatwa does not make any conscious effort to make assumptions about the implications of transplantation on moral philosophy and ethics. This approach does rely on general juristic principles and employs the logic of positive law (*fiqh*) rulings that may be analogous or associated to the case at hand. Furthermore, the social context appears to drive and direct juridical policy and is taken as a given. In other words, the fatwa merely legitimates what is already in practice. In seeking legitimisation for its own views, the Egyptian ruling contextualises the historical arguments and freely engages in legal hermeneutics to support the policy preference.

The Egyptian fatwa does not address the crucial issue of brain-death which is integrally related to organ donation for purposes of transplantation. In fact, it explicitly mentions that no organ can be removed unless death is ascertained. This is a major contradiction since most organs are harvested from brain-dead patients (Ahmad 1987; Sahib 1987). The fatwa requires that the conventional



cardiopulmonary test for death be applied, such as the fixed gaze of the eyes; limpness of the feet; bending of the nose; sunken temples and the turgidity of the skin. While neurological tests are approved, it goes on to say that neural dysfunction is not the only indicator of death! If there is breathing, heart and pulse function, then these should be accepted as signs of life. Paradoxically, it approves the removal of life-support systems even if it is known that such a step will lead to termination, a form of passive euthanasia. Further, the Egyptian ruling only sanctions non-heart-beating cadaver donations or live kidney-donations, but fails to address more complex forms of multiple-organ transplants, which requires the removal of organs under clinical conditions as soon as possible to reduce warm ischemia time. Such potential organ donors are in most cases those who are irreversibly brain-damaged patients who are ventilator dependent (Thompson 1990). Again the juridical assumptions in this fatwa seems to be at odds with the general practice of transplantation and contemporary medicine.

#### **Legal Embodiment: The 'Body' in Shari'a Code**

Viewed in the light of two cultural apertures, these fatawa also make a larger statement about the way in which the body is viewed in at least some strains of Egyptian and Indo-Pak juridical cultures. As a cultural system it is preferable to view law as the meaningful constitution of symbolic forms and their social contextualization (Humphreys 1990). At another level, law, is in the words of Sally Humphreys, 'one of the most explicit, concrete and institutionalised cadres of ethno-sociological discourse' (Douglas 1970). Mary Douglas, following the sociologist Marcel Mauss, maintains that the 'human body is always treated as an image of society and that there can be no natural way of considering the body that does not involve at the same time a social dimension' (Csordas 1994; Winter 1995). The bodily cosmology and its cultural meaning can be distilled from products such as blood, excrement, semen and I would add, organs for that matter (Reinhart 1990 [believes that the defining element in *Islamic purity rituals is control*]; Martin 1996; Douglas 1985; Olivelle 1995). We know that the body in Islam and other religions is subject to purity rituals that establish and maintain a system of symbolic order or a system of control as far as the social perception of the human body is concerned (Doniger 1996). Transgressing this system of symbolic order and control can threaten one's sense of

personal identity. Claude Levi-Strauss also taught us that the sense of order and disorder was the basis of our entire cognitive world (Frankfort 1948). The religious concern about 'human dignity' in relation to transplants express anxieties about social integrity and the maintenance of social and symbolic order. Any attempt to 'dis-(em)body' the cadaver through eviscerating surgery, may indeed signify the violation of a symbolic and social 'order'. This may be the cultural subtext that underlines the understanding of the Pakistani jurists.

The bodily cosmology in modern Egypt to some extent, sublimates ancient and indigenous personal cosmologies of the body. Egypt from Pharanic times was said to have had a static cosmos, where life was everlasting and the reality of death was denied.<sup>36</sup> 'The body ceased to function but man survived', said Frankfort of ancient Egypt (Ramsey 1970). The body was the seat of human identity. And, neither could the soul be abstracted from the body. Human personality required both body and soul. For this reason, the Egyptians developed a rich heritage of sculpture and mummification in order to preserve the body so that life could continue. There is an uncanny resemblance in the bodily cosmology of ancient Egyptians and the modern bodily cosmology in Egypt. If the ancient Egyptians mummified their Pharaohs for everlasting life, then modern humans, in the words of Paul Ramsey, have the 'triumphalist temptation to slash and suture our way to eternal life' (see Gallagher and Laqueur 1987, for an interesting study on the history of the human body in a Western context).

The above explanations do not entirely account for why the body, which is subject to nearly the same ritual and symbolic ordering in all versions of Islam, has different histories in Egypt and Pakistan.<sup>37</sup> One reason may be that the indigenous personal cosmologies operate alongside the meta-narrative of bodily cosmology in Islam. Going further than Douglas and treating the body as the correlate to 'textuality', Csordas talks about 'embodiment'. In this schema, the body is the existential ground of culture, as well as the locus of dynamic and sensate occurrences in which a passive and representationalist body does not enjoy any prominence. If there is, paradoxically, any essential characteristic of embodiment, then indeterminacy would surely be the proper description. In fact, in cross-cultural studies such as the one undertaken above, it becomes

clear how within the same religion, the body rejects determinacy and accommodates hybridity and difference.

It becomes clear that the Indo-Pak view valorizes the preservation of human dignity (*karama*) as the jurist's primary concern. This view frames the performative to nurture human dignity as a devotional imperative (*amr ta'abbudi*). In Muslim jurisprudence commands from the sources of law that deal with civil transactions (*mu'amalat*) are bound by their meanings and contexts, and can therefore also change with new contexts.<sup>35</sup> However, the 'rule in devotional imperatives with respect to the one who is morally obliged is compliance (*ta'abbud*), without recourse to their *rationes (ma'an)*' says al-Shatibi.<sup>36</sup> Devotional imperatives will remain rules in perpetuity, in the words of jurists, 'as long as the earth remains earth, and the heavens remain heaven' (Geertz 1983). The Pakistani fatwa implies that transplantation would violate human dignity and flout a devotional imperative which is disallowed.

In other words, religiosity and law are considered to be relations of equivalence. Closer inquiry shows that the Pakistani authors do not distinguish between law (*shar'*) and religion: In fact law incarnates religious values. Both religion and law are cultural systems and their respective imaginative-symbolic discourses, according to Geertz, construct the world (Goodrich 1990). Thus when law is 'inscribed' on the body, the symbolic order of both law and religion transferred on to the subject—the body. The space between 'law' and 'body' is thus obliterated. In terms of jurisprudential aesthetics, the 'body' is to be understood as an icon or image that represents the figure of the law in human form.<sup>40</sup> Take this analogy a step further and one can see that jurisprudence is actually a form of representational techniques in which signs are carefully inscribed onto the body and their codes become manifest in juristic speech.

The discourse of the Pakistani fatwa implicitly resists disorder which would disrupt the symbolic identity of the body and its classifications. For this reason it maintains a classification that imposes boundaries between body and non-body. This, it achieves by invoking a minority Hanafi legal view which regards a dismembered body-part to have been defiled and hence a non-body. Clearly, here is a case of dis-'ordering' through disembodiment, where symbolic meaning resonates in the law.

It is indeed juristic discourse which articulates the expressive vocabulary of determinants (*ahkam*)—the five positive commands on the scale of obligations to prohibitions and the various intermediate commands. The 'determinant' or 'rule' (*hukm*) is in the words of the medieval jurist al-Ghazali (d. 1111), the nomothetic discourse or speech of God (*khitab Allah*) (Bakhtin 1981). In other words, it is the jurist-mufti who during his investigations discovers the 'speech of God', which then becomes emblematic for 'God's rule'. So when a jurist articulates the 'rule', can one say it is the representation or material image (*simulacrum*) of the deity? The rule, decision or guidance offered by the jurist-mufti spells out divine presence, authority on behalf of the Law-giver which instructs the natural hierarchy of society. It is also a question of voice: that of who speaks. It includes issues of the internal stratification of language and its inner dialogue. The question of voice also raises the question of whose language is being spoken, of whom it speaks and who is qualified to speak in the unfolding of the social heteroglossia of Islamic law at a given time and place. Mikhail Bakhtin had observed that where discourse performs as authoritative discourse, and a fatwa is just such a discourse, it 'no longer performs as information, direction, rules, models and so forth—but strives to determine the very bases of our ideological interrelations with the world...'. By invoking Bakhtin again, one can say, that we encounter the authoritative world (*hukm*) as provided by the fatwa, with its authority already fused to it. The authoritative word is located in a distanced zone, organically connected with a past that is felt to be hierarchically higher. It is so to speak the word of the fathers. Its authority was already *acknowledged* in the past. It is a *prior* discourse. It is therefore not a question of choosing it from among other possible discourses that are its equal. It is given (it sounds) in lofty spheres, not those of familiar contact (Calder 1996).

So the fatwa is partly a legitimating discourse but at the same time it also dissimulates the human construction of religious guidance and presents it as a form of divine naturalness. For this reason, the duty of providing a single answer (*fatwa*) to a layperson which relies on independent intellectual exertion (*ijtihad*) of a fallible mufti is such a challenging one. Calder deems such a practice to be a 'dangerous' task since it 'represented an arrogation of authority making the mufti a direct mediator between God and man'.<sup>41</sup> But

there is very little doubt that the mufti does play a mediatory role. It was al-Shatibi (d.790/1388), the jurist from Muslim Spain, who said: 'the [status] of the mufti in the Muslim community (umma) is the same as that of the Prophet, on whom be peace and salutations' (Masud 1984). It is therefore, questionable whether the mufti can actually avoid this role as mediator between God and humans. A further implication is the fact that the subjectivity of the mufti becomes part of the 'act' of rule-discovery. Some jurists indirectly admit that the lower-self can interfere with one's objectivity in rule-discovery and, therefore, piety is a recommended quality in a jurist, but not essential (Marsot 1968:267-296).

The location of the mufti in Pakistan is markedly different from that of his counterpart in Egypt. In Pakistan the mufti is part of a discourse in civil society and not officially part of modernising state-discourse. There is no official office for a mufti that is subject to state patronage. In fact one can find competing discourse of shari'a jurisprudence in Pakistan, which in itself resists the homogenisation of law and the religious 'subject'. The mufti in Pakistan feels no compulsion to legitimate the practices spawned by hi-tech medicine, modernity and the secular order. Here again the legal space turns into a field of contestation, in terms of the legitimisation and delegitimation of modernity and secularism. The traditional 'ulama' for instance, are deeply suspicious of the rational ethos of modernity, although they may not entirely be consistent in their stance. If anything, the organ transplantation fatwa addresses different communities within the Pakistani society. It speaks mainly to an audience that is committed to a particular form of traditional religion and for these adherents, this fatwa of prohibition becomes the emblem of self-identity.

In the Egyptian fatwa the legal reasoning combines elements of both positive law (fuq and jurisprudence) (*usul al-fiqh*). Juridical meaning here is constructed from the law's 'body', which is at a remove from the physical body. There is no invocation of the devotional imperative in this fatwa. The two bodies—the human body and the body of law—are separated with no mystical or metaphysical bridge between them. At place, is a dualism in which law and religion seem to occupy relatively autonomous spheres, while still being part of a whole. This is not saying that the fatwa has disavowed the religious moorings of the law. It does appear, however, that legal debates within traditional religious circles in Egypt had been subject

to cultural transformation and modernization. Compared to religious educational institutions in Pakistan where there is resistance to modernization, al-Azhar has been extensively modernized. This may account for the liberal attitude and openness of Egyptian jurists (Mallat n.d.:286-296). The 'worldliness' of the fatwa in the guise of its preoccupation with public interest (*maslaha*) considerations eschews strict legal formalism and favours pragmatism.

Some decades ago the doctor in George Bernard Shaw's 'The Doctor's Dilemma' had enough elixir to help only one patient. The question was, who was it to be? In Islamic law, respect for medicine was well stated by the leading Egyptian jurist of the twelfth century, 'Izz al-Din Ibn 'Abd al-Salam al-Sulami (d. 660/1262)) who held the honoured position of being mufti of both Egypt and Syria. According to al-Sulami:

Physicians will [generally] treat the more serious of two competing illnesses by tolerating the lesser one. [When confronted] by two [competing] conditions of health they will not mind if the lesser [of the two] conditions is forfeited. [However], they are in a dilemma when having to [decide] in instances of equivalence and disparity. For indeed, medicine is like law (*shar'*): it has been designed to procure [certain objectives] such as healing and vitality, and to avoid the harm resulting from [bodily] deterioration and disease. [Medicine has been designed] to avoid whatever can possibly be avoided and to attain whatever can possibly be attained. If it is difficult to avoid or attain all, and [things] do reach an equilibrium, then a selective choice (*takhayyur*) is made. If there is a disparity, one should exercise a preference if the [factor of]disparity is known, or exercise restraint if that [factor] is unknown.<sup>42</sup>

The emphasis on *maslaha* and the location of the mufti in Egypt is crucial to the outcome of the ruling. In Egypt the official mufti is a state functionary and serves the citizenry through the will of the state. In key religious issues, the mufti's opinion would be sought to sanction certain practices, ranging from banking practices to transplantation.<sup>43</sup> In recent years, a number of fatawa issued by the official mufti have been seen to legitimate state action. Organ transplantation would be one of the issues that the medical fraternity in Egypt sought a verdict from the official mufti. In this sense he has a role in the construction of 'public policy' when it relates to matters of religion, whereas in Pakistan the mufti plays more the role of being the civil society's guardian of religious virtue. This may also explain why the Egyptian fatwa is pragmatic, worldly and a legitimizing discourse, whereas the Pakistani fatwa is concerned about saving the

individual from damnation if he or she erred in matters related to organ transplantation—a soteriology of sorts. The fact that the Egyptian ruling resembles western thinking on organ transplantation, can be ascribed to a section of the Egyptian elite having a stronger cultural affiliation with Europe than with Asia.<sup>46</sup> In more than one sense, the Egyptian mufti not only serves as the legitimizing authority for social practices, but also becomes the mediator of several myths or ideologies—the Islamic, the modern and to a lesser extent the ancient Egyptian myths.

### Conclusion

Contemporary Muslim juridical culture is far from being a seamless unit. The fact that Muslim jurists, located in different cultures but employing the same textual sources, arrive at diametrically opposed conclusions demonstrates that to talk of a monolithic legal tradition is highly problematic. In fact, the comparative study of fatawa underscores what Heesterman (1989) said in another context of the 'inner conflict of tradition'. Law—Islamic law being no exception—does not function in isolation from society and the social contextualization of symbolic forms. It is in effect part of a larger construction of social discourse and webs of meanings. The location of those who construct, interpret and enforce the law—like the mufti—on these webs is just as crucial in determining what the law is as the power that the normative source texts exert on meaning. In short, religious law as a function of civil society or even political society, is dependent on the identity and nature of the cultural context in which it functions.

### Notes

1. *Fatawa* are legal rulings or judicial advice provided by a jurist (mufti) following an inquiry or a social exigency and is comparable to the Roman *ius respondendi* in many aspects. See *Encyclopaedia of Islam*, s.v. *fatwa* (Leiden: E.J. Brill 1993 second edition). Also see Krawietz 1995).
2. Rispler-Chaim's study only examines the views of Middle-Eastern Muslim jurists, primarily Egyptian views on medical ethics. The present study attempts to include the Indo-Pak opinions which constitute a large and significant part of the Muslim world. Indo-Pak Muslims and significant immigrant communities in different parts of the world, especially Europe, Africa and North America. For many Indo-Pak Muslims, even those abroad, the opinions of their own institutions are considered

to be authoritative and they would not necessarily follow those rulings emanating from Middle Eastern jurisdictions.

3. Subhi Mahmasani, *al-Da'ua'im al-Khuduqiyya li'l-Qawamin al-Shar'iyya* (Beirut: Dar al-'Ilm li'l-Malayin 1393/1973, 357; Abu Ishaq al-Shatibi, *al-Muwafaqat*, ed., 'Abd Allah Daraz, Beirut: Dar al-Ma'rifa, n.d., 4:105.
4. Muhammad Shafi, Tanshit al-Adhhan fi al-Tarqil' bi A 'da al-Insan: Ya 'ni Insani A 'da ki Paywandkari (Urdū), exercising the mind in matters related to the joining of human organs: In other words, joining human organs, hereafter referred to as *Tanshit*. Second ed., Karachi: Dar al-Isha'at, 1972.
5. Jad al-Haqq 'Ali, Jad al-Haqq, *Al-Fatawa al-Islamiyya min Dar al-Jfa'* al-Misriyya, hereafter referred to as *al-Fatawa al-Islamiyya* 10:3702-3715, fatwa no. 1323 titled: 'Transferring organs from one person to another', Cairo: al-Majlis al-'A'la li'l-Shu'un al-Islamiyya, 1983/1403).
6. Shafi, *Tanshit*, 8.
7. *Ibid.*, p.12.
8. *Ibid.*, pp.13-14.
9. *Ibid.*, p.22.
10. *Ibid.*, (p.21) citing the hadith of Sahih al-Bukhari, see Ibn Hajar al-'Askalani, Fath al-Bari bi Sharh Sahih al-Imam Abi 'Abd Allah Muhammad bin Isma al-Bukhari, ed., Muhammad Fu'ad 'Abd al-baqi and Muhibb al-khanib np.: al-Maktaba al-Salfiyya, ne. 'Kitab al-Ashriba', 10-78. Those scholars who deemed the use of prohibited substances permissible, did so on the basis of two other prophetic reports. In a report the Prophet permitted the tribe of 'Urayna to use camel-urine and camel-milk as part of a remedy for a disease with which they were afflicted. see Ahmad bin Hanbal al-Musnad, ed., 'Abd Allah Darwish (Cairo: Dar al-Fikr, 1991/1411), 4:572, hadith no. 14063. Although this report suggested that it was permissible to use a prohibited substance, the Pakistani fatwa rejected the evidentiary value of this tradition. In another hadith the Prophet allowed one of his companions, 'Urfaja b. As'ad b. Kurayb to replace his artificial nose made of silver with one made of gold, see al-Musnad, 7:22, hadith no. 19028. It will be remembered that the cosmetic use of gold is prohibited for males. But, in this case gold had a lesser corrosive quality than silver, which cosmetically made it easier for the user, and therefore it was permitted by the Prophet for practical reasons. Again the Pakistani fatwa also discussed this report but did not explicitly rebut it.
11. Shafi, *Tanshit*, 22.
12. *Ibid.*, 24.
13. The moral obligations of the law (takalif al-shari'a), says al-Shatibi, is to implement the policy objectives (maqasid) of the law among people, al-Muwafaqat, 2:8. The history of policy objectives range from primary (daruriyat li'l-' necessities'), secondary (hajiyat 'essentials') and optional (tahsinat 'adornments'), al-Muwafaqat, 2:10.
14. The authors of the Pakistani fatwa may have considered al-Ghazali's very realistic view that the law (shari'a) does indeed allow for some amount of bodily harm to oneself if it was in pursuit of some benefit. The examples he cited were phlebotomy and cupping. Similarly, it is permitted to amputate a gangrenous limb, even though some people at that time may have viewed this remedy as a major risk.

In other words, al-Ghazali implies that risks are inherent in medication and surgery, (Abu Hamid al-Ghazali, *al-Mustasfa fi 'Ilm al-'Usul*, 'al-Istislah' ed. Muhammad 'Abd al-Salam 'Abd al-Thani, (Beirut: Dar-ak-Kutub al-'Ilmiyya, 1413/1993), 176.

15. Shafi, *Tanshit*, 28.

16. *Ibid.*

17. *Ibid.*, 30.

18. Shafi', *Tanshit*, 14.

19. Note the interface between medicine and cultural values in colonial India. At some stage Hindus resisted the use of calf vaccine and some Muslims believed that the British had a political motive in promoting vaccination and that it also interfered with 'God's will' (Macleod 1988, Arnold 1988).

20. Shafi, *Tanshit*, 30.

21. V. Ruspier-Charm, 1989, 'Islamic Medical Ethics in the 20th century', *Journal of Medical Ethics*, 15, 203-8 for a summary of Egyptian fatawa related to several issues on medical ethics. Although the Japanese resist organ transplantation, at least one Japanese intellectual, Hayao Kawai believe that an ethics that advances 'division and coexistence' may make a difference to the attitude of Japanese, see 'Religion and the Meaning of Life: Toward a New Perspective of Life', in *Cosmos, Life, Religion: Beyond Humanism*, Tenth International Symposium '86, Tenri, Tenri University Press, 1988, 274

22. al-Fatawa al-Islamiyya, 10:3705

23. *Ibid.*, 10:3707. See also the fatwa of al-Shaykh 'Abd al-Majid Salim, sanctioning postmortem and autopsy practices. The same hadith about 'breaking the bones of the dead...' is interpreted by this mufti to mean the dignity of the dead, and not meant to prohibit operations on a corpse, see *al-Fatawa al-Islamiyya*, 4:1331-1333, fatwa no. 639.

24. *Ibid.*, 10:3705

25. The reason for this seemingly strange ruling is that the foetus, in the view of the medieval schools, was considered to be an integral part of the corpse and hence there was no need to remove it. A valuable item, in turn, belonged to the estate of the deceased and therefore rightfully the property of the heirs. Obviously, our modern knowledge of the human anatomy provides us with a very different understanding of the focus and its relation to the mother.

26. Al-Fatawa al-Islamiyya 10:3708.

27. Abu Zakariyya Yahya b. Sharaf al-Nawawi, al-Majmu': Sharh al-Muhadhdhab, 9:39 (np:Dar al-Fikr, nd).

28. A homologous graft is when the organs of a dead or living person is transplanted onto another human body. A xenograft is when animal organs or tissue are transplanted from one body to another.

29. Autotransplants refers to re-setting tissue (normally a tooth) in the same body from where it was expelled.

30. Al-Fatawa al-Islamiyya, 10:3711.

31. *Ibid.*, 10:3712-3713.

32. Muhammad b. Idris al-Shafi'i, al-Risala, Cairo: Dar al-Turath, 1399/1979) ed., Ahmad Muhammad Shakir, 513. I have used Aron Zysow's lucid translation of this passage, see his, 'The Economy of Certainty: An Introduction to the Typology of Islamic legal Theory', PhD diss., Harvard University, February 1984, 158-59.

33. For further details on this point see Muhammad Na'im Yasim, *Abhath Fiqhiyya fi Qadaya Tibbiyya Mu'asira* ('Amman: Dar al-Nafa'is, 1416/1996), 145; also see Jam'iyya al-'Ulum z al-Tibbiyya al-Islamiyya al-munbathiqah an Naqabat al-Atibba al-Urduniyya, *Qadaya Tibbiyya Mu'asira fi Daw al-Shari'a al-Islamiyya*, ('Amman: Dar al-Bashir, 1415/1995).

34. In recent years there has been at least two attempts by Indo-Pak scholars to revisit the issue of organ transplantation in order to get traditional jurists to revise their earlier position on the topic. The first was at a special conference at Hamdardnagar, Tughlakabad, near Delhi in 1989, which was mainly attended by Indian scholars. In the end, the majority opinion at the conference remained opposed to organ transplantation. However, there were a few voices that argued in the contrary. The fact that the conference session could not formulate a uniform view suggested that the Pakistani opinion of Mufti Shafi which prevailed among traditional Indian scholars had slightly shifted. One advance which prevailed among of zenografts. Acknowledging the complexity of the issues of organ transplantation, the Delhi conference decided to appoint a committee to review the entire issue. (See *Bahs-o-Nazar*, 2, no. 6 which reproduced some of the conference papers) In Pakistan, the Institute for Islamic Research affiliated to the International Islamic University held a workshop on medical jurisprudence between 28 and 30 June 1995 where organ transplantation was discussed among other things and results issued in a report called, 'Workshop on Medical Jurisprudence: A Brief Assessment', (Urdu) ed. Muhammad Khalid Masud (Islamabad: Institute of Islamic Research, 1995). The result contained in the workshop report compiled by Ghulam Murtada Azad was extremely ambiguous. It prohibited live organ donation to another living person (p.40). However, it allowed cornea transplantation. A brain dead person could donate organs by way of a testamentary will or his legal heirs could consent to such donation in order to save the life of a fellow human being. Such donation it was argued would not violate the dignity of the donor and saving the life of another was an obligation (*wajib*) (p. 40). After suggesting such possible donation, the workshop astonishingly could not decide whether transplantation from one human being to another was permissible (p. 42). It was argued that 'there was a need for more thought and reflection as well as exchange of ideas. What will end the controversy is if a definition of emergency/ necessity (*idtirar*) could be reached: what does necessity mean in the law (shari')?' (p. 42). The report said that the medical experts have dispensed of their responsibility by providing the view of science and medical ethics. An urgency was expressed for a fatwa to be issued either permitting transplantation, a move that would encourage the medical fraternity to view it as a religiously rewarding practice, or prohibiting transplantation. Any delay in issuing a decision, the report said, squarely fell on the shoulders of the '*ulama*' (p. 43).

35. Al-Fatawa al-Islamiyya, 10:3714.

36. *Ibid.*

37. Mahmasani, *al-Da'imi*, 362.

38. al-Shatibi, *al-Muwafaqat*, 2:300.
39. Mahmasani, *al-Da'a'im*, 372. Also see Ibn Hazm, *al-Ihkam fi Usul al-Ahkam*, ed. Muhammad Ahmad 'Abd al-'Aziz, Cairo: Maktaba 'Atif, 1398/1978, 5:774.
40. al-Ghazali, *al-Mustafa'a*, 45. Also see Kemal Faruki, 'Legal Implications for Today of al-Akham al-Khamsa (the Five Values)', in *Ethics in Islam*, 65-72.
41. al-Shatibi, *al-Muwafaqat*, 4:244. Also see Muhammad Khalid Masud, Brinkley Messick, David S. Powers 'Muftis, Fatwas, and Islamic Legal Interpretation', in *Islamic Legal Interpretation*, 8.
42. Abu Muhammad 'Izz al-Din 'Abd al-'Aziz bin 'Abd al-Salam al-Sulami, Qawa'id al-Ahkam fi Masalih al-Anam, Beirut, Dar al- Ma 'rifa, n.d., 1:4.
43. Taha Husayn, *Mustaqbal al-Thaqafa fi Misr*, Cairo, Dar al-Ma 'arif, c. 1938.
44. Giddens, *Modernity and Self-Identity*, 5.

## References

- Abouna, G. M. et al., 1990 'Commercialization in Human Organs: A Middle Eastern Perspective', Transplantation Proceedings hereafter referred to as TP 22, 9:18-921.
- Ahmad, B. D., 1987, 'Organ Transplant and the Right to Die', *Islamic and Comparative Law Quarterly*, 7:121-125.
- Ahmad, F., 1987, 'Organ Transplant: in Islamic Law', *Islamic and Comparative Law Quarterly*, 7, 128-136.
- Alavi, Hamza, 1988, 'Pakistan and Islam: Ethnicity and Ideology', in *State and Ideology in the Middle East and Pakistan*, ed., Fred Halliday and Hamza Alavi: 1988, London, Macmillan, 81-84.
- Al-Faqih, S. R., 1991, 'The Influence of Islamic Views on Public Attitudes Towards Kidney Transplant Donation in a Saudi Arabia Community', *Public Health*, 105, 161-165.
- Amaralho, Jack, L., 1988, 'The Body, Economic Discourse, and Power: An Economist's Introduction to Foucault', *History of Political Economy*, 20, 583-613, esp. 599.
- Arnold, David, 1988 'Smallpox and Colonial Medicine in Nineteenth-Century India', in *Imperial Medicine and Indigenous Societies*, ed., David Arnold, Manchester, Manchester University Press, 1988, 55-57. (My thanks to Shamiel Jeppie for this reference.)
- Bakhtin, M. M., 1981, *The Dialogic Imagination*, ed., Michael Holquist and trans. Caryl Emerson and Michael Holquist, Austin, Texas, University of Texas Press, 342.
- Baljon, J. M. S., 1996, 'Indo-Pakistani and Egyptian Muftis on Medical Issues', in *The Muslim World* lxxviii, January, 85-95.
- Calder, Norman, 1996, 'al-Nawawi's Typology of muftis and Its Significance for a General Theory of Islamic Law', in *Islamic Law and Society*, 3, June, 163.
- Csordas, Thomas J., 1994, 'Introduction: The Body as Representation and Being-in-the-world', in *Embodiment and Experience: The Existential Ground of Culture and Self*, ed. Thomas J. Csordas, Cambridge, Cambridge University Press, 5.
- Daar, A. S., 1989, 'Ethical Issues—A Middle East Perspective', TP, 21, 1402-1404.
- Daar, A. S., 1991, 'Organ Donation—World Experience, The Middle East', TP 23, 2505-2507.
- Doniger, Wendy, 1996, 'Transplanting Myths of Organ Transplants', in *Organ Transplantation: Meaning and Realities*, ed., Stuart J. Youngner, Renee C. Fox, Laurence J. O'Connell, Madison, The University of Wisconsin Press, 194-220.
- Douglas, Mary, 1970, 'Two Bodies', in *Natural Symbols: Explorations in Cosmology*, London, Barrie and Rockliff, The Cresset Press, 70.
- Douglas, Mary, 1985, 'Purity and Danger', in *Religion and Ideology*, ed. Robert Bocock and Kenneth Thompson, Manchester, Manchester University Press, 111.
- Ebrahim, A. F. M. and Hafjee A. A., 1989, *The Shariah and Organ Transplants*, Mobeni, Durban: Islamic Medical Association of South Africa, 1409.
- Ebrahim, Abul Fadl Mohsin, 1995, 'Organ Transplantation: Contemporary Sunni Muslim Legal and Ethical Perspectives', *Bioethics* 9, 291-302.
- Foucault, Michel, 1976, *The Order of Things: An Archaeology of the Human Sciences*, New York, Vintage Books, 385-87.
- Frankfort, Henri, 1948, *Kingship and the Gods: A Study of Ancient Near Eastern Religion as the Integration of Society and Nature*, Chicago, The University of Chicago Press, 5.
- Gallagher, Catherine and Laqueur Thomas, 1987, *The Making of the Modern Body: Sexuality and Society in the Nineteenth Century*, Berkeley, University of California Press.
- Gatrad, A. R., 1994, 'Muslim Customs Surrounding Death, Bereavement, Postmortem Examinations and Organ Transplants', *British Medical Journal*, August, 521-523.
- Geertz, Clifford, 1983, *Local Knowledge*, New York, Basic Books.
- Giddens, Anthony, 1991, *Modernity and Self-identity: Self and Society in the Late Modern Age*, Cambridge, Polity Press.
- Goodrich, Peter, 1990, *Languages of Law: From Logics of Memory to Nomadic Masks*, London, Weidenfeld and Nicolson, 289.
- Health Policy, Ethics and Human Values—An Islamic Perspective: Reflections on the Cairo Seminar, Geneva, Council for International Organizations of Medical Sciences, 1989.
- Heesterman, J. C., 1985, *The Inner Conflict of Tradition: Essays in Indian Ritual, Kingship and Society*, Chicago, University of Chicago Press.
- Humphreys, Sally, 'Law as Discourse', *History and Anthropology*, 1:242.
- Johansen, Baber, 1996, 'The Valorization of the Body in Muslim Sunni Law', *Interdisciplinary Journal of Middle Eastern Studies*, special issue, Law and Society in Islam, (Spring): iv:71-112 esp. 74.
- Krawietz, Von Birgit, 1995, 'Der Mufti und sein Fatwa', in *Die Welt des Orients*, 1995, 26:161-180.
- Macleod, Roy, 1988, 'Introduction', in *Disease, Medicine and Empire. Perspectives on Western Medicine and the experience of European Expansion*, ed., Roy Macleod and Milton Lewis, London, Routledge.
- Mallat, Chibli, n.d., 'Tantawi on Banking Operations in Egypt', in *Islamic Legal Interpretation*, 286-296.