

LANGUAGES OF CHANGE IN ISLAMIC LAW: REDEFINING DEATH IN MODERNITY

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"The most noble of sciences is that in which reason combines with tradition, and opinion is accompanied by revelation. The science of positive law and its principles is of this kind. It takes equally from the quintessence of revelation and reason. Neither is it purely rational discretion to the extent that makes it incompatible with revelation. Nor is it the exclusive obedience to authority, so that reason is unable to endorse it..." Abū Ḥāmid al-Ghazālī, *al-Mustasfā*.¹

INTRODUCTION

Answers to modern ethical and legal questions have almost become predictable in the case of Muslims.² It has become predictable in the sense that libertine jurists tend to be permissive towards the changing social context, while traditionalists would resist the pace of change and declare many acts to be prohibited. Open any recently issued compendium of legal *responsa* (*fatāwā*) dealing with modern issues such as organ transplantation, autopsy, bank interest, scientific computation of the lunar month and blood transfusion, and there is every likelihood that one will encounter a stock of roughly two different kinds of arguments,³ two diametrically opposite views of affirmation and negation. Those who approve and declare the above-mentioned practices permissible would do so on the basis of either social necessity (*darūrah*)

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or public benefit (*maṣlahah*),⁴ while those who disapprove would argue that the consequences of these practices go against the literal or implicit meaning of one text or the other. At times even if an issue is not *prima facie* impermissible, it becomes illegal when maxims such as the following are applied: "Prevention of harm takes precedence over [potential] gain" (*dar' al-maṣṣadah muqaddamun 'alā jalb al-manfa'ah*),⁵ or on account of precautionary considerations (*sadd al-dhārī'ah*).⁶ Another common argument is that the continuity of the authority of operating customs takes precedence over change. In a reductionist form one can say that the dominant legal reasoning in contemporary Muslim jurisprudence remains on the extremes of prohibition and permission.

This observation, however, betrays a larger and more complex underlying problem. Of course, one must admit that it may only be a "problem" for revisionists and reform-minded students of the law. Otherwise law and legal theory can blissfully ignore the demands of reality and context and also functionally play the role of myth and ritual. Revisionists have identified one of the main problems to be the discipline of legal theory (*uṣūl al-fiqh*) itself, which is effectively moral philosophy. They consider the current legal theory to be largely pre-modern in its epistemological and ontological coordinates. The legal theory that the jurists employ today was theorized in a world that was very different from the contemporary context. There is little doubt that the realities of the pre-modern world featured prominently in this legal theory. The jurists (*fuqahā'*, sing. *faqīh*) of the classical and post-classical Muslim world had a "comprehensive understanding (*fiqh*) of the social realities facing Muslims", says Najjār.⁷ "That understanding was the foundation for their independent interpretation in the understanding of religion and revelation".⁸ Instead of engaging reality and reformulating a contemporary legal theory, however, most Muslim jurists today still employ the pre-modern legal theory as a framework.⁹ In the words of Fazlur Rahman, in the course of time not only legal thought but also Muslim thought generally became backward-looking: "It is that which, instead of having to be accomplished, is already accomplished in the past".¹⁰ The upshot of such legal activity is anachronism in one case and pragmatism in the other: anachronism as a result of changed reality and pragmatism due to a lack of theoretical coherence. Challenged by novel and complex ethical problems, the modern legal opinions reflect the paradoxes, inconsistencies and a patchwork of ad hoc reformulation of legal theory without any reasonable coherence. In what follows I will elaborate on aspects of Islamic law *vis-à-vis* the problems posed by modernity. I will then proceed to examine and analyze the opinions given

in a ruling on brain death, an issue that highlights the salient features of contemporary Islamic legal thinking.

LEGAL THEORY AND PHILOSOPHY

In pre-modern times, Muslim legal theory (*uṣūl al-fiqh*) and positive law (*fiqh*) managed a mutual "fit" and coherence. This is borne out by the traditional corpus of Islamic law to which Muslim jurists continue to adhere. Textbooks, legal opinions and scholarly discourses that have been preserved indicate that the law responded to very real life conditions and addressed the needs of the societies it served. Legal theory, as a meta-theory, reflected the contemporary socio-political realities. In other words, even a law coloured by overt religious imperatives had a functional sociology and anthropology. Of course, in order to remain operative and relevant, Islamic law continuously made itself relevant to the societies it served. It achieved this by means of its internal dynamism and regular synthesis between its norms and the changing social realities. Like all legal systems, Islamic law also had a pragmatic dimension. This is evident from the legal maxims that advocate that rules based on customs and community practices change with a change in time and place.¹¹

From an epistemological and metaphysical perspective, theology or sacred authority informs law and jurisprudence in Islam. The primary authority and source of law is the revealed text of the Qur'ān. The second most important source is the corpus of authentic reports (*ahādīth*, sing. *ḥadīth*) of the Prophet Muḥammad (peace be on him) that describe his sayings and practices as well as the acts that he tacitly approved. This source is better known as the *Sunnah* of the Prophet. Together, the Qur'ān and the *Sunnah* constitute the two primary sources of law in Islam. The other instruments that are also referred to as sources are in reality legal instruments such as consensus (*ijmā'*) and analogy (*qiyās*). In addition, there are also several controversial kinds of legal reasoning and procedures about whose validity there is no universal agreement among jurists. Some of these concepts and doctrines are public benefit (*maṣlahah*), necessity (*darūrah*), custom ('*urf*'), presumption of continuity (*istiḥāb*), and juristic preference (*istiḥsān*). Traditional Muslim jurisprudence utilized these procedures when the primary sources of the law were silent. In some instances these doctrines and procedures were used to supplement the primary sources. In an otherwise watertight theoretical system, these procedures allowed, in a limited manner, for the proverbial "spirit of the times" to enter the law.

It would be evident from this very brief overview that in pre-modern Muslim societies a given hermeneutic defined the relationship between human existence, social context, and revealed authority. Legal developments in the formative period of Islam primarily took place via the school tradition (*madhhab*) where jurists of different pedigrees operated within the broad interpretive frameworks of their founders. Among the plethora of schools in early Islam, the four that have survived to this day in the Sunnī tradition are the Ḥanafī, Mālikī, Shāfi'ī and Ḥanbalī schools.¹² Of course, political authority also attempted to exercise its powers via the law. Political control did not automatically mean that the state had control of the law. Jurists were also divided into those who were independent of the state and those who were in its employ¹³ or were considered to be under its influence. In fact state intervention in legal affairs increased as the official judiciary became a more developed and stabilized apparatus of statecraft.

The school tradition also developed a formidable and sophisticated intellectual and legal edifice. The coherence and continuity of this legal tradition was mainly secured by a systematic methodology that favoured adherence to the interpretive framework of the founders of the law schools. Those jurists who operated within these given parameters without radically altering the character of the founder's hermeneutic were considered to follow a regime of *taqlīd*, meaning, "following the primary legal findings of another scholar". If properly qualified, a jurist could also have direct access to the primary sources of the law and exercise independent reasoning (*ijtihād*) in interpreting these sources.

In recent years there has been an ongoing debate among the scholars as to whether *ijtihād* had ceased in the Sunnī legal tradition, and if so, for what reasons and by whose authority. The main reason provided for its discontinuity was that jurists capable of doing comprehensive *ijtihād* were no longer to be found. However, *ijtihād* of a lesser kind was still theoretically and practically possible. Modern Muslim reformers have spiritedly argued for the reintroduction of *ijtihād* into the fibre of Muslim intellectual life. Some traditionalist quarters, especially religious scholars in the Indo-Pakistan Subcontinent, Turkey and the Muslim republics of Central Asia still believe that a regime of *taqlīd* is a necessary and a worthwhile methodology which ought not to be abandoned. Other traditionalists in Egypt, Saudi Arabia and elsewhere in the Middle East will either approve of *ijtihād* with some caution or allow it without much restraint. Needless to say that the issue remains the subject of great controversy.

For sometime up till the eighteenth and nineteenth centuries the Muslim legal system functioned effectively in its traditional environment. Without wishing to freeze Islamic law into a utopian and irretrievable past, it has been observed that certain events coinciding with the emergence of modernity had disrupted its continuity. The most notable of these was the advent of colonial rule and the displacement of the traditional Muslim educational system. But technological modernity also dramatically changed the cumulative social, cultural and economic systems of the Muslim peoples. These changes not only impacted on social and cultural values and norms but also on law.

First, colonial law supplanted the indigenous Islamic legal systems in the colonized territories. Variations of the French, Swiss and English legal systems were adapted to meet the needs of the changing Muslim societies under the supervision of colonial administrations. The traditional Muslim jurists were gradually removed from the mainstream legal system and replaced by judges trained in Western secular law. Increasingly, the role of the *fuqahā'* was limited to that of administering the application of a codified Muslim family law. Effectively, the jurisdiction of the *fuqahā'* was limited to matters of family law and ritual law related to devotional issues. Codification also brought in its wake the transformation of Islamic law with an increasing emphasis on form over substance.¹⁴ The pre-modern legal discourse was the casuistical old discourse that differed from the bureaucratized new language of codification with a concern for abstract rationality. The former developed principles within cases, while the latter elaborates principles independently of and prior to the cases to which they are applied.¹⁵

In the nineteenth and twentieth centuries there have been numerous attempts to resurrect and implement Islamic law in many Muslim countries.¹⁶ Although there has been a common rhetoric of implementing the "eternal *Shari'ah*", this phrase has meant different things to different persons.¹⁷ In one modern Islamic trend there was a palpable shift to revive rationalism in Muslim discourse. Notable among them were the major intellectual reformers such as Khayr al-Dīn al-Tūnisī (Tunisia) (d. 1889), Sir Sayyid Ahmad Khan (d. 1898) (India), Muḥammad 'Abduh (d. 1905) (Egypt), and Muhammad Iqbal (d. 1938) (India). Even some of their successors like the Syrians Rashīd Riḍā (d. 1935) and Jamāl al-Dīn al-Qāsimī (d. 1914) understood Islamic revival and renewal to mean a tryst with modernity, reason and enlightenment. They tried to instil confidence among Muslims by suggesting that the Islamic past was not the enemy of change and intellectual innovation. The predominant view tried to domesticate modernity, emphasizing that it was compatible

with traditional Muslim thought. The Mu'tazilah, a ninth century Islamic group, was always extolled as the model of Islamic rationality long before Europe encountered it. Little, if any, analytical distinction was made between different kinds of rationality. Today we know that pre-modern notions of reason differ substantially from the Enlightenment and post-Enlightenment forms of reason.

Already during the colonial interregnum in the Muslim world efforts at the codification of Islamic law had begun. These efforts continued during different stages of autonomous rules until the attainment of independence by the colonized Muslim regions. One recalls the efforts of the Egyptian scholar and jurist, 'Abd al-Razzāq al-Sanhūrī (d. 1971), whose name is associated with the revised Egyptian Civil Code of 1948 and the Iraqi Civil Code of 1951.¹⁸ Sanhūrī's legal work seeks to ensure that the main elements of Islamic law were incorporated in the new dispensations. The last half of the twentieth century saw various efforts of law reform taking place in Libya, Pakistan, Sudan, Malaysia, Iran and the Gulf States. One of the major challenges that faced the Muslim legal scholars was to formulate a jurisprudence that would maintain continuity with the Islamic legal heritage, on the one hand, and address the modern context and changed social realities, on the other.

Even though Islamic law has been exposed to new forms and processes of legal management and codification, there remains a paradoxical insistence on retaining and conserving the juridical logic of the law in its traditional guise. The adoption of new bureaucratic processes as a result of modernization has indeed transformed the conceptions of time, space, property, work, marriage, body and the state. These have undoubtedly affected the Muslim legal thought and practice but that impact still awaits careful scrutiny. We know that minor and major changes in the law can subtly and overtly reshape culture and consciousness. Questions of modernity, its intrusive effects on every sphere of existence as well as the merit of its alternatives still await an adequate inquiry in the Muslim socio-legal discourse. On the other hand, the oversimplified and hasty equation of Islam with modernity has its own self-evident shortcomings.

There also exists, however, the opposite trend which rejects modernity and views it as part of an orchestrated Western cultural intrusion (*al-ghazw al-fikrī*) on the purity of Islamic cultural life. The only way in which some Muslim thinkers visualized resistance to this onslaught was to mount a counter-culture that drew on pre-modern Muslim religio-political constructs that emphasized the essential difference between Muslims and non-Muslims. Boundaries and

differences became a non-negotiable feature of this kind of thinking. Any resemblance of the "other" even in cultural practices was strongly resisted. This can be evidenced in the ideology of the evangelical Tabligh movement, as well as the religio-political movements such as the Islamic Jihād in Palestine, the Jamā'āt Islāmiyyah in Egypt and Dār al-Arqam in Malaysia.¹⁹ A tradition attributed to the Prophet (peace be on him) stating that "whosoever imitates a community, is actually part of them",²⁰ became the main ideological justification for this trend. Any form of resemblance with non-Muslims, especially Westerners, in traits and habits from the wearing of attire to the style of beard had to be avoided by a conscientious Muslim. At the political and social level the demand for "Islamic solutions" to political, economic and social issues became more intense. The Islamization of everything, from statecraft and education to banking, became the watchword. In short, this discourse selectively retrieved concepts and notions from the repertoire of classical Islam. At another level it meant the religionization of the public space.

Under the impact of neo-revivalism or Islamization the discipline of law offered no new theories or methods. In fact it perpetuated a trend of legal patchwork based on pragmatism that started in the nineteenth century. Some of these pragmatic efforts at reform have resulted in the emergence of a utilitarian approach to the legacy of traditional jurisprudence. This means that certain legal concepts are selectively taken from traditional legal theory and then given a new function and value different from its original role and formulation centuries ago. An example of this is the ceaseless invocation of the doctrines of "necessity" and "public benefit". These two legal doctrines which have become very prominent in modern Islamic jurisprudence had a limited place in traditional legal theory. This method was evident in the work of reform-minded jurists who made an impact in Egypt like Muḥammad 'Abduh, Rashīd Riḍā and 'Abd al-Wahhāb Khallāf (d. 1956). Today this has also become the dominant trend in jurisprudence articulated by institutions such as al-Azhar University in Cairo, the Zaytūnah in Fez and at the universities in Jordan, Syria, Iraq, Kuwait and Saudi Arabia.

The neo-revivalist approach to law can be characterized as making constant reference to the primary sources, the Qur'ān and the *Sunnah*. It tends to avoid the inherited juridical legacy if it can, claiming the right to interpret the sources. The appropriation of the revealed sources, however, has a semblance of providing a justification for existing practices. It has already been observed that the end result of the neo-revivalist approach was pragmatism and utilitarianism.²¹ Modern Islamic jurisprudence, among both traditional and neo-revivalist scholars is not

as loyal to the inherited legal theory as some of its protagonists claim to be.²² Hallaq observes that the utilitarianists among the moderns

subscribe to a particular set of principles which were laid by the early and medieval jurists of Islam. But they share these principles rather nominally, for they have drastically manipulated and indeed recast them to their own advantage. The religious liberalists, on the other hand, discard altogether the principles developed by the traditional jurists, and their hermeneutic, though far from being well developed, is a new phenomenon in Islam. But their substantive assumptions are not.²³

On closer investigation it becomes apparent that the utilitarian approach ends up in reducing the revealed sources to the concepts of "public interest" (*maṣlahah*), "equity, ('*adl*), "need" (*hājah*) and "necessity" (*darūrah*). Theoretically and methodologically this approach is unsatisfactory. If there is an overarching hermeneutic, then it is a pragmatic one driven more by contingency than by prescriptive values.²⁴

Thinkers like Fazlur Rahman (d. 1988) and the contemporary scholars, Muḥammad Shahrūr and Muḥammad Sa'īd al-'Ashmāwī, notwithstanding the strong criticism of some of their ideas for which they are faulted by a number of their co-religionists, seem to offer a legal hermeneutic that appears to be more cohesive and integrated.²⁵ In their own particular approaches these authors propose a contemporary hermeneutic for the interpretation of Islamic law. The authoritative texts are subjected to an interpretation where history plays an important role. In this approach, the literal meaning of the text must indicate the underlying humanistic spirit and value of the revelation. This liberal approach has yet to advance itself into a full and convincing theory. Furthermore, this theory is embryonic and has few adherents and as such has as yet to devise a history, anthropology and sociology of Islamic law. Such a development could possibly lead to a greater complexity and sophistication in both the application and understanding of Islamic law.

I will attempt to demonstrate some of the problems raised in this brief overview through the prism of a legal question spawned by modernity. Brain death, but more accurately brain-stem death, is an important legal and ethical question in an era of hi-tech medicine, especially with rapid advances in organ transplantation. It is a well-established fact that organs for complex transplant surgery can be harvested from patients deemed to be brain dead. Live donors can give a limited number of organs such as kidneys. The legal forensics of the arguments on brain death examined below provides a good picture of the state of developments in contemporary Islamic law. The legal opinion

examined here comes from a representative source in modern Islamic legal thought, namely, from the record of the Academy of Islamic Jurisprudence (*Majma' al-Fiqh al-Islāmī*), hereafter referred to as the Academy.

The Academy held its inaugural meeting in 1403 AH/1983 CE in Makkah.²⁶ It functions under the auspices of the transnational Organization of Islamic Conference (OIC) and the formation of this body was first proposed at the Third Islamic Summit Conference of the OIC in 1401/1981.²⁷ The Academy issues an annual publication that contains the research presented by individual jurists and experts to the juridical consultations. It also records the proceedings and resolutions adopted at the various consultations. Leading jurists of the Muslim world serve on this body. The Academy is inclusive to the extent that a few scholars from Iran and Lebanon also participate in the proceedings and provide perspectives from the Ja'farī school of thought adopted by the adherents of the Shī'ī theological school.

CONTEXT OF BRAIN DEATH

With the advent of the modernization of medicine and health-care in the oil producing Gulf States, an index of development has been the advances in hi-tech medicine. Among the services that such advanced medical facilities can provide is organ transplantation surgery. Allied to organ transplantation are such ethical issues as to whether brain-stem death was an acceptable definition and thus permissible in Islamic law. Organs for transplantation purposes are generally harvested from persons who are declared to have suffered irreversible brain-stem injury and whose bodies are artificially ventilated. A new definition of death spawns a set of new questions. Conventionally death was ascertained by the cessation of cardiopulmonary functions, namely heartbeat and pulse. But even after brain death has occurred the heartbeat and pulse can be kept functional with the aid of a ventilator. Yet from the medical expert's viewpoint the person was considered to be dead as a result of the absence of brain function. This definition of death has been accepted by far and large by the medical fraternity but remains a source of debate among religious scholars.²⁸ Of course the inherited Islamic discourse and modern medical practices represent two traditions and epistemologies — the pre-modern and modern — that interweave in creative ways. In fact they represent rich and highly variegated "traditions".²⁹ Not only does Islamic law find new ways of engaging with modern scientific traditions, but Muslim jurists also articulate their views on modern science.

BRAIN DEATH IN ISLAMIC LAW

In a special consultation on brain death the learned jurists of the Academy studied submissions made by both medical doctors and jurists. All the medical submissions were unanimous that brain-stem death (*mawt jidh' al-dimāgh*) was another form of death. The submissions made by the jurists, however, differed both in their quality and findings. Some submissions focused on the central question: whether a new definition of death was acceptable. Others, for some inexplicable reason, addressed the topic of organ transplantation. What became apparent was that brain-stem death was a contentious issue, acceptable to some jurists and rejected by others.

In Muslim legal parlance the act of soliciting a legal opinion from a jurist on a particular issue is called *istiftā'*. The non-binding legal response provided by the jurist is known as a *fatwā*. This kind of inquiry could be a real-life case or a hypothetical one. Another term employed to categorize this kind of juridical inquiry is *nāzilah*, pl. *nawāzil*, meaning a "specific case in question".³⁰ A term well known to jurists of the Mālikī school, there is one significant difference between a *fatwā* and a *nāzilah*. It is this difference that makes the claim of equivalence between the two terms somewhat imprecise. A *nāzilah* is the decision of an individual jurist or specialist on a real case scenario and offers the public as well as judges (*qādīs*) a choice of solutions that may be adopted in practice. A *nāzilah* can be described as a novel case and generates a jurisprudence that addresses the human, social and economic realities at a particular time and place. It is also an expedient whereby positive law (*fiqh*) is able to evolve. By calling this consultation a deliberation over a "novel case" (*nāzilah*) the jurists are giving new currency to an age-old technical vocabulary. At the same time they are also investing it with a new meaning and significance. In this context a *nāzilah* is not the opinion of a single jurist, but becomes part of a formal and comprehensive juridical consultation, together with non-legal experts relevant to the discussion. As a subsidiary of the OIC, the Academy, like the parent body, does not have powers of enforcement to carry out its recommendations and resolutions, nor are they binding.³¹ The member states have a voluntary association with the OIC and the Academy, as well as the OIC's International Islamic Law Commission which oversees the Islamic Court based in Kuwait, can only call attention to the moral obligation of the member states.

At the special consultation of the Academy on brain death held in Amman (Jordan) in 1986, several jurists made preliminary statements affirming their devotion to Islam by asserting that it is a perfect way of

life (*dīn*). The obvious inference is that all ethical and religious solutions are perfectly prefigured in Islam. In support of this claim, the following verse of the Qur'ān is cited: "Today have I perfected your religion for you, and have bestowed upon you the full measure of My blessings, and willed that self-surrender (Islam) unto Me shall be your religion" (4:3).³² While such ideal statements were made in some of the submissions, at least one participant had a different opinion. The statement of the Egyptian jurist, 'Iṣām al-Dīn al-Sharbīnī, echoed what seems a more realist perspective. He said that it appeared to both medical professionals and lay persons that there was a noticeable "dissonance" between the laws of the *Shari'ah* on the one hand, and modern issues in the practice of medicine, on the other.³³

The critical legal question for the Academy in this *nāzilah* was (1) to define death and (2) to determine whether brain-stem death was permissible according to Islamic law. Underlying the legal query was the question of intellectual jurisdiction and authority in this matter. In the final instance, who had the authority and integrity to define death: the medical practitioners or the jurists? From the perspective of the Muslim medical experts, brain-stem death was an indication of the termination of human life for all meaningful purposes. However, not all the jurists in attendance were certain as to whether this new definition of death could substitute the conventional one in which the cessation of heartbeat indicated the advent of death. Some of the jurists who made submissions rely on arguments regarding the soul and, therefore, a brief summary of the standard Muslim view of death at this point would be appropriate.

DEFINITION OF DEATH

In terms of the sources, namely the relevant Qur'ānic verses and *ahādīth*, death is the cutting of the life-vein (*watīn*) (69:46). According to the general Muslim understanding of these sources, death is the moment when the soul (*rūh*) parts from the body.³⁴ As a concept, the notion of the soul is an established one within Muslim cosmology. There are differences though among the religious scholars as to the extent of knowledge that is possible for human beings to acquire about the soul. 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 humans, according to the Qur'ān, "have been granted very little knowledge" in this regard (17:85). The twelfth century Muslim thinker Abū Ḥamid al-Ghazālī (d. 504/1111) was, however, more forthcoming. He argued that "the diverse channels

of experience and the [Qur'ānic] verses and [Prophetic] reports suggest that the meaning of death is only a 'change of state' (*taghayyur ḥāl*), and, indeed the soul survives after its separation from the body: either in a state of suffering or comfort".³⁵ When the soul parts from the body, it means that the body is no longer under its command. Human limbs and organs are conceived as instruments of the soul. Muslim thinkers go as far as to contend that when the human hand strikes, then it is actually the soul that strikes, the limb only being the means to do so.

Knowledge about the empirical indicators that verify the departure of the soul is found in a Prophetic report (*ḥadīth*): "If the soul is captured the eyes follow it", is a report attributed to the Prophet.³⁶ Therefore, the living are advised to close the staring eyes of the dead since the departure of the soul leaves the body lifeless. Since the inception of Islamic law, jurists have adopted a list of physiological features as a test to indicate the separation of the soul from the body.³⁷ These include the cessation of breathing; the limpness of the feet; the looseness of the wrists; the bending of the nose; the sunken temples; the shrinking of the testicles; the elasticity of the facial skin and the coldness of the body. If any of these features cannot be verified due to shock or apoplexy (*saktah*), then according to Sharaf al-Dīn al-Nawawī (d. 676/1277), the post-classical Shāfi'ī jurist of Damascus, the determination of death should be delayed until there is a change in the body's odour.³⁸

Abū Zayd, one of the Saudi Arabian jurists participating in the OIC consultation, argued that the attempted legal adaptation (*al-takyīf al-fiqhī*) to meet the new definition of death resulted in a stark choice between legal certainty (*yaqīn*) and legal probability (*ẓann*).³⁹ According to the legal maxim widely cited in Islamic law, "certainty is not eroded by doubt" (*al-yaqīn lā yuzālu bi 'l-shakk*). Only the test involving bodily indicators of death can categorically ascertain the moment of death. Defining death on the grounds of brain-stem function, according to Abū Zayd, involved an element of probability and uncertainty since medical experts disagree on the matter.⁴⁰ The consultation had to answer two substantive legal questions: (1) whether a new meaning of death could be adopted, and (2) whether the scientific process of determining brain death satisfied the criteria for "certainty" in Islamic jurisprudence.

BRAIN DEATH AS PERMISSIBLE

The leading jurists who accepted the definition of brain death in terms of Islamic law were the Jordanians, Muḥammad Na'im Yāsīn and Muḥammad Sulaymān al-Ashqar.⁴¹ Yāsīn's primary premise is that the determination of the end of human life is not determined by any

categorical textual ordinance (*naṣṣ*) supported by the Qur'ān or the *Sunnah*. Unlike the beginning of human life for which there is a textually supported norm, there is no revealed text to determine the end of human life. Therefore, the issue of brain death is not regulated by any definitive legal norm. There is thus scope for *ijtihād* — the capacity of a jurist to develop legal norms from the texts of revelation by a variety of technical means. Who determines when death has occurred: the jurists or the medical experts? Yāsīn is unequivocal in holding that the responsibility to determine when life ends rests squarely on the shoulders of "specialists" (*ahl al-takhaṣṣuṣ*), who in this case are the medical practitioners.⁴² Scholars learned in religious law (*'ulamā'*) should work side-by-side with medical specialists and provide the ethical principles and moral guidance and context for such practices. In the final instance, especially in matters not regulated by categorical textual ordinances, the observations and research findings of medical specialists will prevail.⁴³

Yāsīn develops two operative principles in his argument. First, that human life ends with the reversal of the process with which it began. In other words, life begins with the entry of the human soul and ends with its departure. Second, that the soul is not a mystery but another creation of God and thus its action and function can be observed empirically. In this view, he opposes those scholars who claim that the knowledge of the soul is a mystery and that it properly belongs to the realm of the inaccessible "unseen" (*ghayb*) in Muslim religious discourse.⁴⁴ Those who attempt to limit discussion about the soul, he says, do so without being able to prove categorically that such an investigation is prohibited. On the contrary, he says, Muslim scholars have written detailed treatises on the soul. Precise knowledge about the soul and death derived from the teachings of religion will enable medical practitioners to define the end of human life. Such acquired knowledge will be correct on the grounds of its "dominant probability" (*ghalab al-ẓann*).⁴⁵ On the basis of this knowledge we realise that the soul plays an important function in the perception of things. In some of these functions the soul is dependent on the body. The soul's most visible role is its ability to control the volition of the body. The soul remains with the body as long as the latter is capable of serving it.

Then Yāsīn takes recourse to an analogy in order to establish a precedent resembling the case at hand. In criminal law there arise occasions when the cause of death has to be established. In such instances the jurists are required to differentiate between various phases leading to the death of a victim. In criminal law there are technical differences between the "duration of death" (*zaman al-wafāt*) and the

"instant of death" (*lahzat al-wafāt*).⁴⁶ These insights from this legal forensic are analogically employed to assist the jurists in determining whether Islamic law can entertain a notion of brain-stem death. A criminal law case might involve two persons acting independently of each other who had stabbed the same victim. Let us consider the following example: Criminal A wounds victim V, and leaves. A second criminal B proceeds to stab the wounded V, and as a result of this stab wound the victim immediately dies. The legal query is: Who of the two is the murderer and is liable to the Islamic criminal law of penal retaliation (*qisās*)? Is the first attacker, the murderer, or is the second attacker, whose blow directly caused the death, culpable?

Jurists have agreed that culpability should be linked to causation. In other words, the law relates the "cause" of the injury to the "condition of the victim". The extent of the injury caused by A, prior to the action of B, is a critical determination in Islamic law. If A left V, despite his wounds, in a condition of "stable life" (*hayāt mustaqirrah*) which is explained as the estimation that the victim will live for a day or two, then A is not culpable for the murder since causation for death was not linked to A.⁴⁷ In that case B's actions are deemed to have been the cause of death. However, if A wounded V to the extent that V's senses in terms of sight, speech and volitional activities were irreversibly damaged, then A is the murderer and is liable for penal retaliation. In this instance the second attacker, B, will then be subject to a discretionary penalty, but not the mandatory penal retaliation, since B did not directly cause the death of V.

The upshot of these rulings is that, firstly, Muslim jurists linked culpability to causation. Secondly, and most importantly, the test for causation of death is determined as to when the victim entered the "phase of death" (*marḥalat al-mawt*). Specialist evidence is crucial in determining the "phase of death". And Muslim jurists have accepted the fact that the cessation of the spontaneous function of the senses indicated the "phase of death". Thirdly, the evidence must suffice to constitute knowledge that satisfies the "dominant probability" (*ghalabat al-zann*) of rectitude, not absolute certainty (*yaqīn*).⁴⁸ Yāsīn argues that an assumption made by the classical jurists plays an important role in their ruling on the causation of death. That assumption was their knowledge and understanding that the soul had departed from the body. If the body did not respond to the test of sensory and volitional activity they knew the soul had departed. From the knowledge derived from criminal law, Yāsīn draws the direct inference that in the case of a brain dead person, the soul had already parted. The evidence for that conclusion is that the

body had ceased to respond to sensory and volitional impulses. From the views of the classical jurists he deduces that sensory perception and volitional activity are the main indicators of consciousness and human personality.

Yāsīn believes that there is no contradiction between the views of the religious scholars and the medical specialists as to when life ends, since he believes that the latter are best qualified to decide that matter.⁴⁹ He acknowledges that both juristic and medical findings are not based on incontrovertible certainty, but are in the realm of the dominant probability of rectitude. Legal theorists have also confirmed that rules governing human conduct are based on knowledge arrived at on the grounds of dominant probability.⁵⁰ He also has a response to his possible detractors who may argue that certainty is required in matters of life and death. He argues that in several analogous decisions evidence amounting to "dominant probability" was always sufficient to secure a conviction in several instances.⁵¹ He cites as example the death penalty in Islamic law for offences such as the violation of sex laws and the law of retaliation for murder. Convictions for both these offences — adultery and murder — are enforced on the evidence of four and two credible male witnesses, respectively. Surely the possibility always remains that a judge can err in evaluating the testimony of witnesses. Despite that margin of error, Islamic law allows for the ultimate penalties to be applied even though the grounds of knowledge were the "dominant probability" of rectitude.⁵²

Yāsīn is explicit in his claim that a sign of pulse, a heart beat, kidney function or any other functional organ is not conclusive evidence of the presence or absence of the soul. It is the function of the brain that determines the state of the soul. "The human soul in its presence or absence remains [unmistakably] linked to the brain".⁵³ If one looks at a beheaded person and a brain dead one, then on the surface of it the level of visibility determines the extent of death. To an ordinary spectator the headless person is considered to be dead beyond all doubt. When looking at a brain dead person, the element of death is not obvious and self-evident. Only those persons who had acquired specialized knowledge can conclude that the brain dead person and the headless person are both equally deceased. From a legal point of view the degree of self-evidence is inconsequential in its effect on a ruling. To cite Yāsīn:

A lay person's inability to comprehend a specific event has no consequence in denying the reality. For clearly the matter in this rests on specialist [knowledge]. This is a rule widely used. Do we not agree that if sight is an indispensable means in a testimony of a matter, and a blind person denies [such evidence], then the ruling is based on the testimony of the one

who has sight. If judgements were dependent on every person's perception of events, then this would invalidate the majority of rulings.⁵⁴

Thus, for Yāsīn, knowledge about the brain is not a matter of religion or one that belongs to the mysterious unseen world. In fact, in terms of another Prophetic dictum, the determination of brain death should be considered a "worldly matter" (*umūr al-dunyā*).⁵⁵

Another jurist at the consultation, Ashqar, makes it clear in his presentation that he is not providing formal legal response (*fatwā*), but rather presents his views as part of his research in progress.⁵⁶ In other words, he is participating in a consultation that takes the form of a group investigation in a *nāzilah*. In this matter of determining the state of the brain dead person, certainty for him is a major concern. Ashqar illustrates his point by importing and comparing the logic developed in two analogous cases. The first case is the same as the one illustrated above involving the determination of causation of death. Take the following scenario. A person called V is badly wounded by A, but still shows signs of life. Another person B comes along and fatally stabs V again. As such B is the cause of death and thus culpable. However, if A had wounded V to the extent that he showed signs of struggle and of being on the verge of death and then B comes along and stabs V again, hurrying him on to death, then A is the murderer. B will receive a discretionary penalty but will not be held as the cause of death.⁵⁷

Contrast this example to that of a sick person or a person experiencing the throes of death (*fī 'l-naz*). This dying person is not the victim of a crime, but displays symptoms of being unresponsive to the test of his senses and does not respond spontaneously — symptoms similar to those that a fatally wounded person displays. In this scenario, A comes along and stabs the man considered to be in the throes of death. The man then immediately dies as a result of the crime. Among the several opinions offered, the Ḥanafī school explains that the correct view is that A is culpable and liable for the penalty of retaliation. The penalty will apply even if the murderer was aware of the fact that his victim was dying. This is also the view endorsed by the eighteenth century Syrian Ḥanafī jurist, Muḥammad Amīn ibn 'Abidīn (d. 1258/1842). Ashqar then draws on Ibn 'Abidīn's ruling on the two cases. He argues that certainty was a foremost concern in Ibn 'Abidīn's ruling on the two cases. The reason why the penalty for retaliation would apply for the murder of the person in the pangs of death was that in this instance death was not a "certainty". For it is possible, and it often happens, that a terribly sick person may only appear to be in the pangs of death to observers and then makes a surprising recovery. The assailant who killed a person on the

verge of death already suffering from a previous injury will not get the mandatory penalty. The reason behind this ruling is that there exists empirical evidence amounting to certainty that given the excessive injuries the victim will not recover. The life expectancy of a severely injured person is assessed not being high. According to the Ḥanafī and Ḥanbalī schools, a severely injured person is, and legally treated, like a deceased (*mayyit hukman*). The Shāfi'ī school in fact employs the term "dead" (*mayyit*) for a severely wounded person.⁵⁸ In terms of the law a severely injured person on the verge of death cannot inherit as an heir, if one of his or her nearest relatives die. Only the living or those who have a prospect for life, like the unborn child (*nasciturus*), can inherit. Dead persons or those considered to be in the "phase of death" do not inherit.

From these legal precedents Ashqar draws two important conclusions. Firstly, the precedents inform us that a person with a pulse or heartbeat is not for the purposes of the law considered to be a living person. A seriously wounded person nearing death is viewed as either "dead" or being in a preliminary "phase of death". Secondly, the element of certainty (*yaqīn*) or the lack of it plays a crucial role in the jurists' assessment of the various scenarios in the cases. But more importantly, it is the "means of verification" (*wasīlat al-taḥaqquq*) that informs the notion of certainty.⁵⁹ The indicators and evidence for the means and process of verification may be self-evident in the case of a seriously wounded person but may not be so apparent in the case of a brain dead person. In the latter case it is only the expert physicians who can do the verification with certainty.⁶⁰

On the basis of these established precedents, Ashqar proposes that a brain dead person should have the "legal status of a deceased" (*huwa fī hukm al-mayyit*) and, therefore, his organs can be used for the purposes of transplantation. Paradoxically, and as a sign of his lack of certainty, he does not allow the brain dead person's estate to be divided. And in the event that the brain dead person was a man, then his wife cannot be declared a widow until the conventional cardiopulmonary test of death had been made.

BRAIN DEATH AS IMPERMISSIBLE

Among those who opposed the definition of brain death, that of Tawfiq al-Wā'ī was perhaps the most comprehensive and detailed submission.⁶¹ A feature of his argument was that he drew his evidence mainly from the Qur'ān. On several occasions he also makes reference to the arguments of the jurists of the past. He also discusses the variant meanings of death,

the concepts of the soul (*rūh*), body (*jism*) and their interrelationship, the death of organs and the meaning of consciousness.

At first he explores the Arabic meaning of the word "death" (*mawt*), especially as it was used in the Qur'ān. He discovers that it is a polyvalent word which signifies not only "death", but is also used to signify "tranquillity" (*sukūn*), "sleep", the cessation of growth, the end of sensory perception, ignorance, the preliminary pangs of death, and the loss of life.⁶² The soul (*rūh*) in turn is described as a "luminous, living, moving, celestial body and different in essence from [the] sensory body".⁶³ Again the word "*rūh*" has several referents in the Qur'ān. It refers, among other things, to the archangel Gabriel, to revelation, and to the divine mystery breathed into Adam. Wā'ī is in agreement with people like Yāsin that it is the soul that gives the body life. The soul will continue to play the life-giving role as long as it has the capacity to do so. A human being is not only a physical body but the combination of body and soul.⁶⁴ Citing the classical Muslim jurist, theologian, and exegete, Fakhr al-Dīn al-Rāzī (d. 606/1209), who is well known for his predilection for reason, Wā'ī argues that the human body is the composite of several organs rather than a single organ by itself.⁶⁵

He argues that theologians affiliated to the Ahl al-Sunnah wa 'l-Jamā'ah, the Sunnī school, consider the body and soul to be separable. The soul does not perish with the death of the body. It appears that Wā'ī wishes to make the point that in the Sunnī conception, the body is viewed as a separate entity from the soul even though there is an interdependence between the two. To reinforce his point he argues that the Qur'ān itself always makes reference to the "death of the body".⁶⁶ This argument is apparently made in order to counter any view that suggests that once the soul had departed the body was dispensable. Wā'ī believes that the body has its own integrity independent of the soul, a fact that he again traces to the Qur'ān.⁶⁷ From the Qur'ān again he derives the fact that the stoppage of the heart is a sign of death.⁶⁸ And the same source, he argues, refers to the function of every bodily organ to be a reflection of the creative power of the Creator and the miracle of creation. He takes the point even further. All life in the human body, whether it is cell life or motor movement, deserves to be recognized as part of the divine miracle and mystery of life. In a response to the pro-brain death argument that places an emphasis on the brain, he asks the rhetorical question: "Why is the emphasis on one specific organ and why does it ignore the remaining organs? Why attribute life and death to it [the brain] only?"⁶⁹

After an exegesis of several Qur'ānic passages, Wā'ī points out that the revelation distinguishes between death and the loss of consciousness. These are two entirely separate conditions, he argues. He illustrates this by utilising three narrative stories in the revelation, each showing how life was restored after remaining in a death-like state for a period of time, the story of the hamlet that had been totally destroyed where a man was restored to life after having been dead for a hundred years (Qur'ān, 2:259); the story of Abraham (Qur'ān, 2: 260), and the story of the People of the Cave (Qur'ān: 18). The underlying theme of the three narratives is that there is a difference between death and the loss of consciousness. In the story of Abraham animals are dismembered and given life. Here Wā'ī explains that life means the life of the body and not the presence or absence of consciousness. The stories pertaining to the hamlet and the people of the Cave show that some persons had experienced a death-like sleep for one and several centuries, respectively. Yet God did not refer to them as dead, even though they were not conscious at all. Indeed the stoppage of sense perception or consciousness does not indicate the end of life unless it is meant figuratively or by way of a simile. No rational person will say that a sleeping person is dead, nor will anyone say that an insane person is devoid of life, or describe one who lacks capacity like a non-discerning child as dead. No one will say that they should be dealt with the way the dead persons are treated.⁷⁰

Then Wā'ī extrapolates an interesting fact from the story of the People of the Cave. The story makes mention that the bodies of the sleeping persons regularly received sunlight and were also physically turned by Providence (Qur'ān, 18:17-18). For him the reference in the Qur'ān is clear evidence that stationary bodies should, as a minimum requirement, in addition to being fed, also be provided with warmth and be regularly moved to prevent stiffness. In other words, he establishes from the Qur'ān that there is a way in which human bodies such as brain dead patients should be cared.

He further argues that the Ḥanafī, Shāfi'ī and Hanbalī schools all consider breathing to be an indicator of human life. "We find that the jurists (*fuqahā'*) have never made the mind (*'aql*) and sense-perception (*ihsās*) the source of life, otherwise how will we know that [dimension] in an infant unless it articulates that?"⁷¹ Obviously an infant cannot articulate itself in order to demonstrate its rational ability and sense perception. Furthermore, the classical jurists, he argues, insisted on death being ascertained on the grounds of certainty. They went so far in pursuit of certainty that in the event of a doubt that death had occurred,

the body had to be observed in order to check if it changed odour before declaring it to be dead. "And this is the consensus of the jurists from the earliest times till today".⁷² In the case of declaring a person to be dead or a spouse to be missing, Wā'ī argues, Islamic law operates on the basis of investigation (*taharrī*), not doubt. He reiterates the standard legal maxim that "certainty is not eroded by doubt". When a body shows signs of heartbeat, pulse and breathing, then respect for human dignity demands that such a person be protected.

One must bear in mind, he says, that human beings are mysterious beings about whom we know very little. Therefore, one should exercise caution in order not to commit excesses. The doctrine of "presumption of continuity" (*istishāb*) requires that a rule should not be changed unless there is categorical and compelling proof that the change is imperative. "The principle is in favour of the *status quo*, until it can be proved that it should be changed".⁷³ Therefore, the presumption of the continuation of life should apply to any human body that is still being nourished and where metabolism occurs.⁷⁴ "How can certainty [of death] occur when the body is still pulsating; and life is full of mysteries? And whatever is proved today can be contradicted tomorrow. 'And what is impossible today are the realities of to-morrow'".⁷⁵

According to Wā'ī the law in several other instances places the emphasis on overall bodily life, not the life of the mind.⁷⁶ He examines the law relating to persons who only have partial mental capacity, like children, those incapacitated by illness, a sleeping person, an unconscious person, or those who lack full mental capacity, like the insane. While these categories of persons lack the general "capacity to act" (*ahliyyat al-adā*), they do have the "legal capacity" (*ahliyyat al-wujūb*). This means that this category of persons cannot escape the consequences of legal capacity. For instance, these persons would still have to compensate for damages caused to other people's property. And if such persons are married then they will also have to fulfil maintenance duties. Legal capacity, he argues, exists due to the acknowledgement of the humanity (*insāniyyah*) of the subject. From this sample of precedents it appears that the law does not exonerate one from liability simply on the grounds of lack of mental capacity. In these examples the humanity of the legal subject as physical body, instead of so reducing the human being as to be tantamount to the mind, is given consideration.

Wā'ī does not engage the arguments that the other jurists at the consultation employed in order to describe the logic of causation underlying the elements of criminal law. For him that debate is about establishing actual causation and the appropriate penalties associated with

a crime. Instead he employs these precedents to demonstrate the criminal liability of the medical practitioner if he/she switched off the ventilating apparatus or disconnected the feeding of a patient. If a patient was denied ventilation or feeding without a valid reason of an emergency circumstance, then such action would constitute culpable homicide and the medical practitioner would be liable to the appropriate sentence for such an offence.

If brain death was to be accepted then it raises a series of questions with respect to the person in that condition. Among them are matters related to contracts, testamentary bequests, inheritance, debts, trusteeships, maintenance and the termination of marriage contracts. Can persons declared to be brain dead have their contracts terminated or can their estates be distributed? In matters of religion a new definition of death would affect matters such as washing, praying and mourning rituals. There are clear guidelines in the law as to when the rituals of burial would take place, but in the event of brain death there would be several challenges and conundrums.

Wā'ī then asserts that the physicians should keep the body functioning by maintaining the circulation of the blood and breathing and assist the digestive capacities of the body. A person cannot be deemed to be deceased as long as the body continues to function. If the cessation of brain function and consciousness were the criteria for death, then an insane or unconscious person would also fall under the category of a dead person.⁷⁷ He also cautions that if the brain function and consciousness were to be adopted as an index of human life, then the day was not far when the aged, the infirm and the disabled may be considered to be dispensable, since they do not fulfil the essential mental functions of life.

Another participant, Muḥammad al-Mukhtār al-Salāmī, the *muftī* of Tūnis, argued that the end of life can be viewed from two perspectives: circumstantial (*zarfiyyah*) and absolute (*mutlaq*).⁷⁸ After examining the juristic views dealing with death, his view was that as long as the fundamental organs of a person showed signs of life, he is to be considered alive and deserves all the rules applied to the living. He admits that it is impossible to provide an absolute definition of death since knowledge continuously develops and innovations are introduced.⁷⁹ In this vein, he argues, that it always remained a theoretical possibility that in future a damaged brain stem could be repaired and the injury reversed.⁸⁰ As this was a matter open to new legal interpretation (*ijtihād*), no scholar or researcher could hope to acquire certainty (*yaqīn*). This is

another reason why cooperation between specialist organizations should be encouraged in order to arrive at meaningful decisions.⁸¹

'Abd al-Bāsiṭ, an Egyptian jurist, described brain death as bordering on "extreme danger" since its goal was to benefit from the human organs of a potential donor.⁸² His major argument was that in unregulated matters such as this topic, the *fatwā* should be driven by caution (*al-ahwat*) following the maxim that "certainty is not eroded by doubt".⁸³ 'Abd al-Bāsiṭ also rebuts arguments that justified brain death on the grounds of public benefit (*maṣlaḥah*) contending that "wherever public benefit was found there is the revealed law of God" (*idhā wujidat al-maṣlaḥah fa thamma shar' Allāh*).⁸⁴ Equating public benefit with the revealed law was an exaggeration and a sweeping generalization, he said. Only those public benefits that corresponded with the law of God and had not been repealed by the Legislator (God) can be equated with the revealed law. Public benefits about which God is silent, in other words, those which are not sustained by textual evidence, are called "unbounded public benefits" (*al-maṣāliḥ al-mursalah*).⁸⁵ In these matters expert opinion is relevant. 'Abd al-Bāsiṭ also warns jurists from succumbing to passions and desires. He cautions against the practice of law that first finds a favourable decision and subsequent to that goes to seek out the legal causes and ratios in order to justify the decision.⁸⁶ The human mind, he believes, has the capacity to find any justification if it is motivated by passions and desires.

After an extensive debate the Academy issued the following resolution:

A person is considered to be legally dead, and all the rules of the *Shari'ah* can be applied, when one of the following two signs is established:

1. Complete stoppage of the heart and breathing, and the doctors decide that it is irreversible.
2. Complete stoppage of the all vital brain functions and the specialist doctors rule that it is irreversible and the brain has started to degenerate.⁸⁷

The Academy's published record does not describe how the decision was reached and the process by which the resolution was adopted. Nor was there much explanation as to how the submissions opposing brain death were rebutted. But the resolution confirms the conventional definition of death and also accepts brain death.

PATTERNS OF INTERPRETATION

The arguments against and in favour of brain death provide a running commentary on the state of contemporary Islamic law. Contrary to the popular claim about the absolute nature of religious discourse, here we see that on one issue in Muslim law the antinomies of both permission and prohibition exist. This should suggest that at least at the level of religious law, normative pluralism has a long established pedigree. At another level it also reflects the different Muslim responses to modernity and technology. More importantly, one observes how legal change takes place within Islam by interrogating, transforming, subverting, reconfiguring, and re-inventing the contextual literacies of the pre-modern legal tradition.

The two opposing decisions and verdicts on brain death suggest that in this instance at least two kinds of argumentation are evident. It raises a larger question about the nature of Islamic law as a sacred law with a rational character. How does one account for the varieties of verdicts and norms within Islamic law? Among Western legal sociologists, Max Weber (d. 1920) made some comments about Islamic law. Weber's views on Islamic law enabled him to develop a category of Kadijustiz, the justice of a Muslim judge. Whether he meant to give offence or use the term in a pejorative sense is not the point of discussion here. He did use this phrase as "a term of art to describe the administration of justice which is oriented not at fixed rules for a formally rational law but at the ethical, religious, political, or otherwise expediential postulates of a substantively rational law".⁸⁸ Weber acknowledged that during the charismatic period the founders of the law schools, whom he calls the "prophets of the law" (*mujtahidūn*), and after them the "commentators" (*muqallidūn*), contributed towards the rational coherence of Islamic law. Despite its rational coherence, he argued, a sacred law like Islamic law could not always sustain such rationality. Legal adaptations and innovations had to take place, however. These "inevitable innovations had to be supported either by *fatwa* [*fatwā*] — obtained in a particular case", Weber said, "sometimes in good faith and sometimes through trickery, or by disputatious casuistry ..."⁸⁹ But his skepticism aside, when such legal creativity did take place it was again at the risk of increasing the "irrationality of the sacred law rather than contribute, however slightly, to its rationalization".⁹⁰ In the end, Weber's critique is that the Muslim legal system lacked a formal rationality and at best acquired a semblance of substantive rationality.⁹¹ If legal decisions are influenced by the concrete factors of a concrete case, rather than by general norms, such as ethical, political and emotional bases, then it is

substantively irrational.⁹² Yet we observe that a characteristic feature of the Islamic "legal system is the plurality of norms. Is this regime of normative pluralism a symptom of the irrationality of the law *per se*, or is the generation of multiple and new norms, the outcome of the process of change driven by rational juristic interpretation (*ijtihād*)? This is a question that a Weberian analysis of Islamic law does not answer unambiguously.⁹³

Change, according to some Occidental scholars of Islamic law, among them Johansen, took place by means of an interpretive strategy. He carefully examines the evolution of land tenancy laws in the Hanafi school during the Mamlūk and Ottoman periods and compares these developments to the earliest doctrine of this school. Legal change in those periods, argues Johansen following Schacht, "is not the radical eradication of old solutions and their replacement by new ones: it is a juxtaposition of different solutions to one and the same problem".⁹⁴ By means of a careful scrutiny of the function of the hierarchical arrangement the intellectual tradition in law into texts (*mutūn*), commentaries (*shurūh*) and juridical *responsa* (*fatāwā*), one can observe these changes, says Johansen.

In recent years it was Hallaq who argued that *ijtihād*, the capacity of individual jurists to solve new cases and seek the rulings decreed by God,⁹⁵ was not only characteristic of the charismatic period of the founder lawyers of Islam, but continued within the established law schools (*madhāhib*). Johansen differs with Hallaq as to whether *ijtihād* was "effective in bringing about a change in the legal norms of the systems of Islamic law".⁹⁶ Whatever else *ijtihād* may have achieved, it did not generate new norms, says Johansen. If a single case, like in the instance of brain death, results in the co-existence of two explanatory concepts, namely verdicts, it then leads to "normative pluralism" which more importantly "creates the condition for the growth of casuistry".⁹⁷ Legal casuistry is then identified as the primary reason for abandoning legal principles, observes Meron.⁹⁸

There are, of course, subliminal traces of Weberian analyses or its adaptation evident in Meron and Johansen's readings of Islamic law. A crucial trace is Weber's assertion that when the jurisconsult (*mufti*) adapts the law, especially makes changes in commercial law to meet new circumstances, it will only add to the "variety of norms". This variety is in effect the product of the irrationality of the law, according to Weber, the reason being that the validity of these norms did not derive from the stable principles of a rational legal system.⁹⁹ Thus a Weberian analysis would view the normative pluralism of Islamic law to be a manifestation

of its irrationality. For indeed in Weber's opinion a proper legal system will be normatively consistent if not monolithic and coherent instead of being possessed of normative diversity. The critique that *ijtihād* did not produce new norms does, however, make sense in one sense. After the formative period of the law, the jurists of the classical and post-classical periods did not design new legal theories (*uṣūl al-fiqh*) that radically differed from that of their predecessors. This means that the epistemological framework producing knowledge from the source texts was not substantially altered. There may have been marginal shifts in emphasis but not fundamental changes.

At least some modern Muslim legal scholars have a very different understanding of *ijtihād*. For them *ijtihād* means the right to interpret the original source-texts *ab initio*. But this does not mean that they espouse the idea to create a new methodological and epistemological framework (*uṣūl al-fiqh*) for interpreting the primary sources. On the contrary, nineteenth and twentieth century reform-minded jurists continued to work within the inherited framework of legal theory. They employed the paradigm of traditional legal theory merely to extrapolate (*istinbāt*) rules of positive law from the source-texts. This was especially true for matters on which the early jurists did not provide an opinion, or their opinions had been rendered invalid by the passage of time. What modern jurists continue to do is to focus their labour on those dimensions of legal theory on which there is no general agreement among past jurists. For instance, they would revive doctrines like public interest, juristic preference, equity, custom and objectives of the law in an attempt to generate a modern consensus on questions of legal theory. This they did because there was very little thought invested in re-thinking the norm-creating theory itself, namely legal theory, in order to construe a contemporary legal ethics. These legalistic procedures that they adopted with a vengeance allowed for some rays of the "spirit of the time" to enter into the legal discourse, albeit sometimes in a clandestine manner.

It was only for a small minority of modern Muslim jurists for whom *ijtihād* meant the creation of new and rational norms. And that case too was argued as a matter of sentiment, rather than a general theory of law and method. The Moroccan scholar, 'Allāl al-Fāsi (d. 1974) claims that there was no religious principle that was beyond the scope of reason.¹⁰⁰ He then boldly states that the "Legislator (*Shāri'* — God) had provided certain grounds for the partnership of Muslims in the legislative procedures (*tashrī'*) by means of *ijtihād*".¹⁰¹ The Lebanese scholar, Ṣubḥī al-Ṣāliḥ, argued that although the revelation was silent on several norms (*aḥkām*), there were implicit indicators (*amārāt*) by which one could

discover new norms required in course of life.¹⁰² It was, therefore, the responsibility of the one who had the capacity to do independent reasoning, the master jurist (mujtahid), to establish norms in instances where neither revelation nor consensus had provided one.¹⁰³ The process of *ijtihād*, he said, should also demonstrate that "the law of Allāh (*shar'* Allāh) corresponds with the demand of life and the living".¹⁰⁴ There was surely little doubt in the mind of at least some Muslim scholars that *ijtihād* also generated multiple norms (*ta'addud al-ahkām*)¹⁰⁵ provided that these conformed to the principles of religion (*uṣūl al-dīn*) or the revealed paradigm (*al-iṭār al-shar'ī*).¹⁰⁶

To use the terminology of the Austrian-American jurist, Hans Kelsen (d. 1973), the new norms discovered must conform to a Grundnorm, a kind of transcendental-logical condition in order to be valid. In Islamic law that function is fulfilled by a cosmological myth.¹⁰⁷ Its legal and moral expression is "obedience to Allāh" (*tā'ah*). This does not necessarily mean that all norms have to appear in the form of revelation in order to be valid. Jurists can also discover norms in the human-divine legislative partnership. It is the Grundnorm that authorizes the norm-creating authority of the master jurist (mujtahid) as well as prescribes the manner how legal norms are created. However, it does not decide the content of a norm. The manner of creating a legal norm is entrusted to legal epistemology or legal theory (*uṣūl al-fiqh*) on which there is broad agreement among the community of scholars. Partly due to the impact of modernity, modern Muslim jurists increasingly seem to favour the adoption of a system of rational and coherent legal norms and principles.

The search for general principles of law is but one strain and method in the complex quilt of Islamic jurisprudence. Some modern legal reformers are increasingly embracing a jurisprudence that envisages the use of universal principles. Hallaq calls this a "liberal" jurisprudence as opposed to a utilitarian kind. One of the post-classical figures frequently cited by the liberals is Abū Ishāq al-Shātibī (d. 790/1388), the Mālikī jurist of Muslim Spain. His jurisprudence includes clearly articulated principles and general norms. Since his rediscovery his views have been repeatedly endorsed and adopted by modern scholars. Difficulties arise with general principles when two or more principles come into conflict or collide in the resolution of a concrete case. The universality of theory and principles makes all times and places equivalent. For the ethicist and legal practitioner it is the uniqueness and particularity of the case at hand that has to be addressed. Not only has the advent of technological modernity made it possible for the acute and detailed observation of

reality, but the process of relating theory to practice has also become extremely complex, resulting in an increase of "hard cases" that appear insoluble. It is also acknowledged that not all issues can be solved at the level of high theory and general principles, since this can lead to deadlock.

In a bid to solve contentious and complex problems at a practical level, Muslim jurists developed a set of legal procedures to address the problems in real life. In legal and ethical parlance these procedures, designed to provide practical solutions came to be known as "casuistry". If casuistry has a pejorative nuance in the Western legal tradition, it does have a respectful status in the Islamic legal tradition. The strict application of analogy or the norms derived from the revealed sources would at times not always address the practical needs of a case or a societal development. In order to relate the general norms to the particularity of the cases several procedures were developed to serve the aims of casuistry. In some schools procedures such as juristic preference or discretionary opinion (*istiḥsān*) were developed in order to achieve equity. Attention was also given how to relate local and customary norms and practices (*'urf*) with revealed norms. Further reflections on legal theory suggested that the law was primarily designed to serve the public interest (*istiṣlāh*). And the use of legal fictions (*hīlah*, pl. *hiyal*) is well known although controversial in Islamic law.

All of these procedures if properly construed, attempt to redress the excessive emphasis placed on unchangeable and universal norms and principles. And attempt is made to take the concrete circumstances of a novel case (*nāzilah*) seriously with the intention of finding practical wisdom to address the issue. These procedures would singly or cumulatively be employed in order to fulfil the function of legal casuistry. Casuistic analysis has several features. Among the main ones is the generation of a moral taxonomy of similarities and differences as to how closely the present circumstances resemble the earlier precedents. Then there is also a frequent use of pithy legal maxims meant to convey an oracle-like truism in the form of apothegmatic statements. Then there is an emphasis on concrete circumstances with a predilection for arguments in the realm of probability and the accumulation of varied supporting reasons.¹⁰⁸

A whole genre of legal literature is associated with casuistry in Islamic law. The genres are identified as *al-qawā'id*, "rules", meaning legal maxims; *al-ashbāh wa 'l-naẓā'ir*, "similarities and correspondences", and *furūq*, "contrasts", while having appearances of

similarities. Weber understood that a legal system that had sacred origins was predisposed to this kind of rationality as he said:

... The priestly approach to the law aims at a material, rather than formal, rationalization of the law. The legal teaching in such schools, which generally rests on either a sacred book or a sacred law fixed by a stable oral or literary tradition, possesses a rational character in a very special sense. Its rational character consists in its predilection for the construction of a purely theoretical casuistry oriented less to the practical needs of the groups concerned than to the needs of the uninhibited intellectualism of scholars — Its casuistry, inasmuch as it serves at all practical rather than intellectual needs, is formalistic in the special sense that it must maintain, through re-interpretation, the practical applicability of the traditional, unchangeable norms to changing needs. But it is not formalistic in the sense that it would create a rational system of law.¹⁰⁹

If Weber had the opportunity to study Muslim positive law more closely he may not have concluded that the procedures for casuistry served purely theoretical ends. The work of Johansen, for instance, shows that these procedures mainly served practical ends and also generated normative pluralism.

In the two arguments on brain death described above one observes at least two kinds of legal rationality at work: the method of casuistry and the method of general principles. Yāsīn, in particular, has employed the method of casuistry. He tried to find the substantive reasoning underlying legal precedents and argued that they resembled the present case in hand. In criminal law he finds similarities and analogies that resemble the condition of a person who is brain dead. He discovers that Islamic law did not necessarily consider a body ostensibly pulsating with life and showing signs of blood circulation to be a "living person" in the full sense. An argument then develops as to what constitutes a human person and what role does the soul play in this. By induction the jurist excludes the possibility of an argument that the soul is only linked to the human body. A new proposition emerges that suggests that the soul is related to human personality and consciousness. The locus of the soul is, therefore, not the heart and the blood system, but the brain. Now that the brain is the seat of the soul and personality, the evidence and knowledge of medical specialists and the knowledge of jurist-theologians now share a common framework. The two kinds of knowledge, namely, medical and juristic, share the same moral and epistemological taxonomy. So in terms of practical arguments, the certitude of the precedent cases in criminal law is passed on to the new case of brain death.

Having done this Yāsīn is in a position to introduce a new definition of death. His main argument is that there is no revealed norm that regulates the end of life. The conventional definition of death is established by juristic norms. But he still had to rebut the argument that the norm for death was certainty (*yaqīn*) and was determined on the grounds of "necessary knowledge" (*'ilm darūrī*). This kind of knowledge is ascertained instead by common sense and the immediate perception of the fact that a person was dead by observing the cessation of heartbeat. Contrast this definition to that of brain death which is a highly refined and sophisticated determination undertaken by technical experts. This descriptor of death makes the phenomenon invisible and is effectively a technological discovery of death. With the acceptance of brain death, the previous norm of certainty (*yaqīn*) is restricted to the conventional definition of death only. In turn, brain death is a specific "kind" of death that is based on acquired knowledge (*'ilm muktab*). Knowledge of this kind is, by definition, attained by inference and reasoning. And this type of knowledge generates the norm of probability (*ẓann*) or the dominant probability (*ghālib al-ẓann*) of rectitude, but not certainty. Muslim jurisprudence differentiates between these various gradations of norms. Jurists define "certainty" as the conclusive conviction that the apprehension of a fact is nothing but what had been apprehended.¹¹⁰ Sometimes the term "conclusive" (*qat'ī*) is employed to suggest that the proposition is bereft of probability. "Probability" means when the evidentiary quality determining the existence or non-existence of a thing can go either way or it has a preponderant bias in favour of one of the sides. And the phrase "dominant probability" is used in the same sense as a certainty.

The casuistical method explained above confirms the observations of Schacht and Johansen that legal change in Islamic law takes place by juxtaposing another individual norm alongside an older one. Seen from this point of view, the presence of another norm (normative pluralism) cannot be construed to be a brand new norm. They are perhaps pale imitations and adaptations of the pre-existing general norm of the school.¹¹¹ However, from the cases examined above we note that casuistry in the modern context does indeed result in the making of new norms. In the instance of brain death, legal certainty has been replaced by probability. Even someone like Ashqar, who is cautious, insists that death can only be determined by the norm of certainty. For him only cardiopulmonary cessation is death "proper". However, from the forensics of the criminal law precedent, he had to admit that a person in some preliminary phase of death cannot be equated with a living person.

That means he could not categorically state that a brain dead person was a living person in the full sense. Within that penumbra of indecision, he suggests that a brain dead person has the "legal status of a deceased". So he admits that the brain dead person has biological life and for this reason all the rules applying to the dead would not be applicable on these grounds. Here again we note a bifurcation of categories of death: legal death and biological death. While Ashqar rhetorically holds up the norm of certainty, in practice he abandons it by permitting the use of the organs of a brain dead cadaver without satisfying the criteria of "proper" death.

Wā'ī, who opposed the notion of brain death, makes a different kind of argument. He ostensibly seems to champion the cause of those who argue on the basis of a general norm and principle. But his notion of a norm is very different from that of the juristic tradition, though it is possibly closer to the legal reasoning of the literalists. From his arguments it appears that he considers the entire revealed text, namely the Qur'ān, to have normative value. For this reason his norm is not the product of a hermeneutic and interpretive understanding (*fiqh*). His norm is the literal meaning of the verses of the Qur'ān or inferences drawn from it. He goes to great lengths to prove that his inferences and arguments are based on a logic derived from the Qur'ān. This is how he develops his arguments regarding the concepts such as "body", "soul", and "consciousness". Wā'ī takes the narrative stories of the Qur'ān, such as the Sleepers in the Cave, literally and extracts a norm from its meaning to imply that a loss of consciousness does not necessarily mean death.

Wā'ī's hermeneutic could be described as the "text-as-norm" approach to sacred scripture. This form of argumentation is very much in vogue in the wake of Islamic revivalism in the twentieth century. Whereas in traditional jurisprudence the Qur'ān was treated as a "source" for different kinds of knowledge, now it has been replaced with the Qur'ān as "authority". There is, of course, variation in this trend. But persons who follow this trend do invariably adduce any part of the Qur'ān as evidence of absolute authority and certainty. Arguments supported by revealed texts may lack in epistemological value, but certainly they have immense rhetorical and persuasive value for audiences who accept their authority. What is quite evident is that whereas in the juristic tradition texts and verses acquired a particular knowledge status on the basis of epistemological inquiry, among many modern Muslims in modern times the sources *per se* are accepted *a priori* as absolute.

In his argument against brain death Wā'ī resists the disaggregation of concepts such as death into various typologies. For him it is an unacceptable proposition that the component organs and functions of the body be separated. He repeatedly argues against the reductionist medical gaze of the human body as being the brain alone. The pro-brain death submission is to some extent an essentialist one: a human being is equal to the brain and consciousness. Without articulating it expressly, Wā'ī is resisting the propensity of technological modernity to fracture reality into multiple autonomous units. He would charge the casuistic approach of endorsing the negative aspects of modernity that brings in its wake the fragmentation of an interdependent reality.

Wā'ī also indirectly raises an important issue that has consequences transcending the immediate issue of brain death. If brain death is accepted as a legitimate form of death in Islamic law, then it could render the remaining laws associated with the body and death incoherent and generate unforeseen paradoxes. The new norm of probability being the criterion for establishing certain kinds of death would certainly cause a rupture in the already established normative system related to death. So the new norm would be inconsistent with the assumptions and practices of matters affecting the deceased. The norms and rules that govern the social and economic consequences after death such as the laws of intestacy, the surviving spouse and related matters are premised on a conventional definition of death. If brain death were to be accepted, then it logically would have a dominant effect on the rituals of death as well as on the socio-legal practices, such as the status of existing marriages and succession between the various parties. In other words, an incongruous legal logic is bound to surface and paradoxes will appear. So, for instance, a doctor could declare a person brain dead and harvest the organs, but the widow or widower cannot inherit from the "deceased" person's estate since "death" had not occurred. This raises a problem affecting the general discourse of Muslim legal reform. Many reform-minded jurists who are eager to introduce legal change for understandable reasons fail to reflect on the impact that their new assumptions and norms might have on other aspects of the law. If these changed assumptions and norms do not irradiate the entire corpus of the law, then it is bound to give rise to anomalies and paradoxes.¹¹²

Wā'ī makes minimal reference to the existing body of law. When he does so he only emphasizes the notion of certainty. Here he employs the casuist's favourite maxim: "certainty is not eroded by doubt". 'Abd al-Bāsiṭ, in turn, is opposed to using the casuist's procedure of *istiṣlāḥ*, seeking out the public benefit in law. He attempts to narrow down its

usage. His argument attempting to limit the use of the doctrine of public benefit is unconvincing. In fact he admits that unregulated public benefits should be regulated and balanced by expert knowledge. His opponents could well argue that for this reason the knowledge of medical specialists, who accept brain death on scientific grounds, should be accepted.

CONCLUSION

In the beginning of this essay I argued that much of the legal theory employed by Muslim jurists today suffered of anachronism and did not reflect the spirit of the time. The assertion was that the general theory of law generated in another historical context was unable to meaningfully engage with the challenges of modernity and post-modernity. Despite the acute limitation of theoretical depth and rigour at the level of general theory, it became apparent that Islamic law did attempt to adapt to social changes by means of the tried and tested procedures of casuistry. If casuistry acquired a pejorative and contemptuous nuance in Western legal and ethical thought, it did not have such a career in Muslim jurisprudence. It was the limited route by which social thinking at a given time could enter the legal discourse. This seemingly unstable legal edifice suggested to Weber that Islamic law was irrational and had a predilection for casuistry. Casuistry clearly had a very important role in making the law relevant to the social context. Furthermore, Weber's work is marked by an inclination to use the evolution of Western law as the yardstick to measure legal developments in all societies.

Developments in modern Islamic jurisprudence have reached a critical stage. On the one hand, Muslim nation-states that espouse the application of Islamic law in a modern and bureaucratized state require general norms, rules and principles to make Islamic law work. If this process continues then the trajectory for the development of a formal rationality in Islamic law may well materialize. For these reasons inter-governmental institutions like the OIC and its Academy of Jurisprudence are increasingly under pressure to provide laws applicable in a rational and transnational political order. On the other hand, Muslim minorities operating within secular states and under the impact of globalization are developing fractured identities of community which continuously require the guidance of law and ethics. Here there is a serious lack of organization and formal procedures. Jurists operating informally within these communities invariably resort to casuistic legal analyses and problem-solving in order to address their day-to-day problems.

The Academy has so far not developed general principles to resolve a novel case such as brain death since it would lead to a conflict of two principles and definitions of death. For this reason the practical requirements of society with respect to brain death patients and the allied issue of organ transplantation appeared to be a major concern. By keeping focus on the issue, the legal and ethical questions were addressed by the casuistic method that Muslim jurisprudence had developed over several centuries. It is interesting to note that the Academy's resolution followed the view of those jurists who presented their arguments on casuistic grounds. It did not appear to be convinced by the arguments of scriptural norms and arguments derived from the revealed sources as the submissions of those opposed to brain death stated. While the norm of certainty evident in the conventional definition was not eradicated or repealed, another definition of death — brain death — was juxtaposed in addition to the existing one. It was interesting to observe how the jurists at times invoked the doctrine of *ijtihād* to re-interpret the corpus of jurisprudence, not the primary source-texts, and generated new norms from such data. At times some did take recourse to the source texts but again employed either a very literal interpretive framework or the existing one inherited from the past. A broad ranging diachronic and synchronic study is required to measure the shifts in legal theory during the post-classical period as well as in contemporary times.

¹Abū Ḥamid al-Ghazālī, *al-Mustasfā fī 'Ilm al-Uṣūl*, 2 vols. (Beirut: Dār al-Kutub al-'Ilmiyyah, 1403/1983), 1:3.

²This essay only addresses Islamic law as developed in the Sunnī legal tradition. Developments in Shī'ī law have a very different trajectory and require separate treatment, following major changes in the legal practices of the Shī'ī community since the 1979 revolution in Iran. Although I am supportive of a healthy intellectual trend among some Muslim scholars not to make the sectarian divisions an impermeable division in scholarship, this essay had to be limited in order to make its modest point.

³See collection of *fatāwā* by Shaykh 'Abd al-'Azīz ibn Bāz, Shaykh Muḥammad ibn Ṣāliḥ ibn 'Uthaymīn and Shaykh 'Abd Allāh ibn 'Abd al-Raḥmān al-Jabarayn, ed. Muḥammad ibn 'Abd al-'Azīz al-Misnad, *Fatāwā Islāmiyyah*, 2 vols. (Riyadh: Dār al-Waṭan, 1414/1994) that illustrates some of my points. For the views of the Egyptian jurist Ḥasanayn Muḥammad Makhhlūf on biomedical ethics see Vardit Rispler-Chaim, "Postmortem Examination in Egypt", Muhammad Khalid Masud, Brinkley Messick and David S. Powers, eds., *Islamic Legal Interpretation: Muftīs and their Fatāwā*, (Cambridge, Mass: Harvard University Press, 1996), 278-285; see also Muḥammad Shaltūt, *Fatāwā: Dirāsah li Mushkilāt al-Muslim al-Mu'āṣir fī Ḥayātihī 'l-Yawmiyyah*

wa 'l-*Āmmah* (Cairo: Dār al-Shurūq, 1411/1991); see also Ebrahim Moosa "Shaykh Ahmad Shakir and the Adoption of a Scientifically Based Lunar Calendar", *Islamic Law and Society*, 5:1 (1998), pp. 57-98.

⁴See Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Uṣūl al-Fiqh* (Cambridge: Cambridge University Press, 1997), 219.

⁵Aḥmad ibn Muḥammad al-Zarqā', *Sharḥ al-Qawā'id al-Fiqhiyyah*, 'Abd al-Sattār Abū Ghuddah, Muṣṭafā Aḥmad al-Zarqā', eds. (Damascus: Dār al-Qalam, 1409/1989), 205-6.

⁶Wahbah al-Zuhaylī, *al-Wasīṭ fi Uṣūl al-Fiqh al-Islāmī*, 5th ed., 2 vols. (Damascus: Maṭba'ah Jāmi'ah Damishq, 1407/1987), 1:423-463.

⁷See 'Abd al-Majīd al-Najjār, *Fī Fiqh al-Tadāyyun: Fahman wa Tanzilan* (Doha, Qatar: Kitāb al-Ummah, 1989), 1:128.

⁸*Ibid.*, 1:128.

⁹Najjār, *ibid.*, also suggests that legal theory requires a reformulation that also considers the social realities, 2: 69-83.

¹⁰Fazlur Rahman, *Islamic Methodology in History* (Islamabad: Islamic Research Institute, 1984), 24.

¹¹See al-Zarqā', *Qawā'id*, 227-229.

¹²These schools are named after their founders: Nu'mān ibn Thābit, better known as Abū Hanīfah (d. 150/765); Mālik ibn Anas (d. 179/795); Muḥammad ibn Idrīs al-Shāfi'ī (d. 182/798); Aḥmad ibn Ḥanbal (d.244/855).

¹³'Abd al-Majīd al-Sughayyir, *al-Fikr al-Uṣūlī wa Ishkāliyyat al-Sultāh al-'Imiyyah fi 'l-Islām: Qirā'ah fi Nash'at 'Ilm al-Uṣūl wa Maqāṣid al-Sharī'ah* (Beirut: Dār al-Muntakhab al-'Arabī), 125-137.

¹⁴Sally Engle Merry, "Law and Colonialism", *Law and Society Review*, 25, no.4 (1991), p.915.

¹⁵Brinckley Messick, *The Calligraphic State: Textual Domination and History in a Muslim Society* (Berkeley: University of California Press, 1992), 448.

¹⁶Donald L. Horowitz, "The Qur'ān and the Common Law: Islamic Law Reform and the Theory of Legal Change", *American Journal of Comparative Law* (Parts 1 and 2), 42:2, 233-293; 42:3, 543-580.

¹⁷Muḥammad Muṣṭafā Shalabī, *Taṭbiq al-Sharī'ah al-Islāmiyyah bayna 'l-Mu'ayyidīn wa 'l-Mu'aridīn* (Cairo: Dār al-Shurūq, 1407/1987).

¹⁸Enid Hill, *Cairo Papers in Social Science: al-Sanhūrī and Islamic Law*, Monograph 1, Spring 1987, 1, 49.

¹⁹Dale F. Eickelman and James Piscatori, *Muslim Politics* (Princeton, N.J.: Princeton University Press, 1996), 36, 112, 148-53.

²⁰Abū Dā'ūd, *Sunan, Kitāb al-Libās*. Incidentally, this tradition from the Prophet (peace be on him) meant that whoever imitated another religious community in their beliefs actually became part of them. In its new application it included culture as well.

²¹Hallaq, *History*, 214-231.

²²*Ibid.*, 214.

²³*Ibid.*, 214.

²⁴Also see Muneer Goolam Fareed, *Legal Reform in the Muslim World* (San Francisco: Austin & Winfield, 1996).

²⁵Fazlur Rahman, *Islam and Modernity* (Chicago: University of Chicago Press, 1982); Muḥammad Sa'id al-'Ashmāwī, *Ma'ālim al-Islām* (Cairo: Sinā li 'l-Nashr, 1989); Muḥammad Shahrūr, *al-Kitāb wa 'l-Qur'ān: Qirā'ah Mu'āṣirah* (Cairo: Sinā li 'l-Nashr, 1992).

²⁶The founding conference was held on 26-28 Sha'bān 1403/7-9 July 1983. See *Majallat Majma' al-Fiqh al-Islāmī*, hereafter referred to as *MMFI*, issue 1, 1407/1986, p.21.

²⁷See Abdullah al-Ahsan, *The Organization of the Islamic Conference* (Herndon, VA: The International Institute of Islamic Thought, 1408/1988), esp. 111-112.

²⁸David J. Rothman, "The International Organ Traffic", *The New York Review of Books*, vol. XLV: 5, March 26, 1998, p.14.

²⁹Talal Asad, "Modern Power and the Reconfiguration of Religious Traditions", Interview by Saba Mahmood, *Stanford Humanities Review, Contested Politics: Religious Disciplines and Structures of Modernity*, 5:1, 1995, p.2.

³⁰*Encyclopaedia of Islam* (EI)², s.v. "nāzilāh".

³¹Ahsan, *The Organization of the Islamic Conference*, 51.

³²Muḥammad Asad, *The Message of the Qur'ān* (Gibraltar: Dar al-Andalus, 1980), 141 like several others translated *dīn*, as religious law. *Dīn* is also translated as "a way of life".

³³Iṣām al-Dīn al-Sharbīnī, "*al-Mawt wa 'l-Atibbā' wa 'l-Fuqahā'*", *MMFI*, 3:2, 573.

³⁴Abū Zayd Bakr ibn 'Abd Allāh, "*Ajhizat al-In'ash wa Haqiqat al-Wafāt bayna 'l-Fuqahā' wa 'l-Atibbā'*", *MMFI*, 3:2, 532.

³⁵Al-Ghazālī, *Ihyā' 'Ulūm al-Dīn* (Beirut: Dār al-Fikr, 1409/1989) 4:525.

³⁶Muslim ibn al-Hajjāj, *Ṣaḥīḥ Muslim bi Sharḥ al-Nawawī*, 'Iṣām al-Ṣabbāḥ Baṭṭī, Hāzim Muḥammad, 'Imād 'Āmir, eds. (Cairo: Dār Abī Ḥayyān, 1415/1995), 3:493.

³⁷Ibn 'Ābidīn, *Hāshiyat Radd al-Mukhtār 'alā 'l-Durr al-Mukhtār: Sharḥ Tanwīr al-Absār*, 2nd ed. (Beirut: Dār al-Fikr 1399/1979) 2: 189; al-Shaykh Niẓām, *al-Fatāwā al-Hindiyyah* (Beirut: Dār Ihyā' al-Turāth al-'Arabī, n.d.), 1:157.

³⁸Sharaf al-Nawawī, *Rawdat al-Tālibīn*, 'Ādil Aḥmad 'Abd al-Mawjūd and 'Ālī Muḥammad Mu'awwad, eds. (Beirut: Dār al-Kutub al-'Ilmiyyah, n.d.), 1:610.

³⁹Abū Zayd, "*Ajhizat*", *MMFI*, 3:2, 539.

⁴⁰*Ibid.*, 3:2, 539.

⁴¹Muḥammad Na'im Yāsīn, "Nihāyat al-Ḥayāt al-Insāniyyah fī daw' l-jihādāt al-'Ulāmā' al-Muslimīn wa 'l-Mu'tayāt al-Ṭibbiyyah", *MMFI*, 3:2, 635-660; Muḥammad Sulayman al-Ashqar, "Nihāyat al-Ḥayāt", *MMFI*, 3:2, 661-671.

⁴²Yāsīn, "Nihāyat", *MMFI*, 3:2, 635.

⁴³*Ibid.*, 3:2, 636.

⁴⁴*Ibid.*, 3:2, 636-7.

⁴⁵*Ibid.*, 3:2, 639.

⁴⁶*Ibid.*, 3:2, 643.

⁴⁷*Ibid.*, 3:2, 668.

⁴⁸*Ibid.*, 3:2, 645.

⁴⁹*Ibid.*, 3:2, 649.

⁵⁰*Ibid.*, 3:2, 655; al-Ghazālī, *al-Mankhūl min Ta'liqāt al-Uṣūl*, 328.

⁵¹Yāsīn, "Nihāyat", *MMFI*, 3:2, 656.

⁵²*Ibid.*, 3:2, 656.

⁵³*Ibid.*, 3:2, 659.

⁵⁴*Ibid.*, 3:2, 659.

⁵⁵*Ibid.*, 3:2, 659.

⁵⁶Ashqar, "Ḥayāt", *MMFI*, 3:2, 671.

⁵⁷*Ibid.*, 3:2, 668.

⁵⁸*Ibid.*, 3:2, 669.

⁵⁹*Ibid.*, 3:2, 670.

⁶⁰*Ibid.*, 3:2, 670-1.

⁶¹Tawfiq al-Wā'ī, "Ḥaqīqat al-Mawt wa 'l-Ḥayāt fī 'l-Qur'ān wa 'l-Aḥkām al-Shar'iyyah", *MMFI*, 3:2, 695-718.

⁶²*Ibid.*, 3:2, 696-7.

⁶³*Ibid.*, 3:2, 697-8.

⁶⁴He argues this point on the basis of the Qur'ān, 15:29.

⁶⁵Wā'ī, "Ḥaqīqat", *MMFI*, 3:2, 697-8.

⁶⁶*Ibid.*, 3:2, 701.

⁶⁷*Ibid.*, 3:2, 701; Qur'ān, 36:29.

⁶⁸Qur'ān, 9:110. "... in their hearts until their hearts crumble into pieces". The evidentiary value of this verse may be challenged since the verb "taqaṭṭa" employed here means "to cut into small pieces" and is not indicative of any stoppage of the heart. However, the inference is that of death.

⁶⁹Wā'ī, "Ḥaqīqat", *MMFI*, 3:2, 705.

⁷⁰*Ibid.*, 3:2, 705.

⁷¹Wā'ī, "Ḥaqīqat", *MMFI*, 3:2, 709.

⁷²*Ibid.*, 3:2, 710.

⁷³*Ibid.*, 3:2, 712. "al-aṣl Baqā' mā kān ḥattā yuthbat mā yughayyiruh".

⁷⁴*Ibid.*, 3:2, 712.

⁷⁵*Ibid.*, 3:2, 712.

⁷⁶*Ibid.*, 3:2, 713.

⁷⁷*Ibid.*, 3:2, 718.

⁷⁸Muḥammad al-Mukhtār al-Salāmī, "Matā Tantaḥ al-Ḥayāt?", *MMFI*, 3:2, 675-94.

⁷⁹*Ibid.*, 3:2, 687.

⁸⁰*Ibid.*, 3:2, 687.

⁸¹*Ibid.*, 3:2, 694.

⁸²Badr al-Mutawallī 'Abd al-Bāsiṭ, "Nihāyat al-Ḥayāt al-Insāniyyah fī Naẓar al-Islām", *MMFI*, 3:2, 679-684.

⁸³*Ibid.*, 3:2, 682.

⁸⁴*Ibid.*, 3:2, 684.

⁸⁵*Ibid.*, 3:2, 684.

⁸⁶*Ibid.*, 3:2, 684.

⁸⁷*Al-Qarār* 5, *MMFI*, 3:2, 809.

⁸⁸Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, Guenther Roth and Claus Wittich, eds., 3 vols. (New York: Bedminster Press, 1968), editors' note 40, 2:806.

⁸⁹*Ibid.*, 2:821.

⁹⁰*Ibid.*, 2:821.

⁹¹For further discussion of Weber's views on Islamic law see A. Udovitch, "Islamic law and the Social Context of Exchange in the Medieval Middle East", *History and Anthropology*, 1, 1985, pp.445-465, esp. 462-464.

⁹²Weber, *Economy and Society*, 2:656.

⁹³Also see Wolfgang Schluchter, *Paradoxes of Modernity: Culture and Conduct in the Theory of Max Weber*, tr. Neil Solomon (Stanford: Stanford University Press, 1996), 160-167.

⁹⁴Baber Johansen, "Legal Literature and the Problem of Change: The Case of Land Rent" in Chibli Mallat, ed., *Islam and Public Law* (London: Graham & Trotman, 1993), 29-47, 30; for the juxtaposition of parallel and contrasting cases see Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1982), 205.

⁹⁵Wael Hallaq, "On the Origins of the Controversy about the Existence of Mujtahids and the Gate of Ijtihād", *Studia Islamica*, 63, 1986, pp.129-141; also "Was the Gate of Ijtihād Closed?", *International Journal of Middle East Studies*, 16, 1984, pp.3-41.

⁹⁶Johansen, "Legal Literature", 30.

⁹⁷Baber Johansen, "Casuistry: Between Legal Concept and Social Praxis", *Islamic Law and Society*, 2:2, June 195, pp.135-156, 146.

⁹⁸Ya'akov Meron, "Development of Legal Thought in Hanafī Texts", *Studia Islamica*, 30, 1969, pp.73-118, 96.

⁹⁹Weber, *Economy and Society*, 2:822.

¹⁰⁰Allāl al-Fāsi, *Maqāsid al-Sharī'ah al-Islāmiyyah wa Makārimuhā*, 5th ed. (Rabāt: Dār al-Gharb al-Islāmī, 1993), 68.

¹⁰¹*Ibid.*, 58.

¹⁰²Ṣubḥī al-Ṣāliḥ, *Ma'ālim al-Sharī'ah al-Islāmiyyah* (Beirut: Dār al-'Ilm li 'l-Malāyīn, 1975), 32.

¹⁰³*Ibid.*

¹⁰⁴*Ibid.*

¹⁰⁵*Ibid.*, 36.

¹⁰⁶Fāsī, *Maqāṣid*, 59.

¹⁰⁷See Derek van der Merwe, "Hans Kelsen — Legal Positivism's Supreme Champion" in Hugh Corder, ed., *Essays on Law and Social Practice in South Africa* (Cape Town: Juta and Co., 1988); also see my essay "Allegory of the Rule (*Hukm*): Law as Simulacrum in Islam", *History of Religions* (Special Issue), 1998.

¹⁰⁸See Albert R. Jonsen and Stephen Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (Berkeley: University of California Press, 1988), 250-265.

¹⁰⁹Weber, *Economy and Society*, 2:789-790.

¹¹⁰Muḥammad A'lā ibn 'Alī al-Tahānawī, *Kitāb Kashshāf Iṣṭilāḥāt al-Funūn* (Beirut: Dār Ṣādir, n.d.), 3:1597.

¹¹¹There is another scenario in terms of which there do not have to be new norms. If one accepts, in a Kelsonian sense, that there is only one supreme general norm, then all other norms are but manifestations of the main one.

¹¹²This can be illustrated by reference to the law of personal status. Under the impact of contemporary trends some Muslim jurists are inclined to provide some accommodation to the idea of equality between the sexes. But one must not lose sight of the implications of any such legislation. For the introduction of this idea is bound to build a pressure that the principle of equality be applied consistently all the way through. In that case it would perhaps not be easy to decide where the principle of equality should be applied and where it should not. And if the principle of equality is applied in some, but not in all cases, our law will be riddled with anomalies and paradoxes.