

## **THE UTILISATION OF ORGANS FROM HEART- BEATING DONORS FOR TRANSPLANTATION: AN ISLAMIC LAW PERSPECTIVE**

**Mardhiyyah Ja'afar<sup>1</sup>**

### **ABSTRACT**

The significance of human organ donation cannot be overstated. Through the donation of suitable organs, persons with damaged, defective or absent organs are given a new gift of life. However, the process of procuring organs raises ethical, legal, medical, religious and social issues. These issues are most prominent in the process of procuring organs from heart-beating donors. The inclusion of heart-beating donors as sources of organ donation is primarily to increase the number of donor organs but before life-prolonging organs are procured, the fundamental issue that must be determined with certainty is the death of the prospective donor. However, the determination of death has been a subject of controversy from the perspectives of medicine, religion, and law. This paper discusses the Islamic law perspective on the utilisation of organs from heart-beating donors for transplantation. It is found out that scientific evidence creates doubt regarding the heart-beating donors and in Islam doubt is always weaker than certainty as there is certainty that heart-beating donors are alive.

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<sup>1</sup> LLB (ABU), BL, LLM (ABU), PhD (in view) ABU, Visiting PhD (King's College London), Lecturer Baze University, Abuja, GSM number: +2348037037878, email address: mardhiyyahjaafar@yahoo.com

## 1.1 Introduction

Human organ transplantation is regarded as one of the most significant achievements in modern medicine. Through the donation of suitable organs, persons with end-stage liver, cardiac, hepatic and pulmonary diseases have the functional capacities of their failed or failing organs restored. However, shortage of suitable organs for donation is the major barrier to organ transplantation, especially in the context of organs that can only be obtained when persons are dead. This necessity birthed the utilisation of organs from the deceased.

However, the central issue that must be determined before organs are procured from the deceased is the death of the prospective donor. Thus determination of death is with a view to ensuring that prospective donors do not have their lives prematurely terminated or hastened for the purpose of harvesting their organs. This issue is most prominent when considering heart-beating donors, also referred to as the brain dead.

The importance of good health cannot be overemphasised. Overtime people have been suffering from diseases and in recent times there is a high increase of vital organ failure of which Muslims are vulnerable too. This has necessitated the search for treatments, one of which is the utilization of organs from heart-beating donors. However, in seeking medical treatment, Muslims must comply with laid down rules that are in agreement with the *Shari'ah*, which plays an outstanding role in the lives of Muslims. Thus it is a fundamental requirement in Islam for Muslims to find out the basis of all their actions and utterances before proceeding to act, in order to avoid going beyond the limits set by Allah (Glorified and Exalted be He). It is in the light of the above that this paper considers the Islamic position on transplantation of organs from heart-beating donors.

## 1.2 Deceased Donation

This involves the utilisation of organs from 'dead' people. Under this procedure, organs and tissues are procured from

heart-beating donors (HBDs) or Non heart-beating donors (NHBDs),<sup>2</sup> or from biologically dead donors (BDDs), who are donors without heart beat, respiration or brain activity and whose organs except the vital ones are harvested.<sup>3</sup> The utilisation of cadaveric organs has become imperative in view of the fact that there are some organs and tissues that can only be obtained after death. Hence harvesting an organ such as the heart will terminating the life of that person except For instance, the heart is fundamental to survival thus it is rarely harvested from the living unless where a patient with end-stage cardiac and pulmonary disease receives a heart-lung from a deceased donor while the patient's healthy heart is given to a person on the heart transplant waiting list.<sup>4</sup> In other cases, persons in need of new hearts will have to rely on donation either heart-beating donors or non-heart beating donors. However, before vital organs are procured for transplantation, it is a legal and ethical requirement that medical practitioners must comply with the dead-donor rule. This refers to a person who must be dead for his vital organs to be procured. In addition, it is conditional that the deceased had consented to donating his organ or organs and in some cases consent following the consent by heirs/next of kin. Tied to the dead donor rule requirement is that a person's death should not be hastened for the purpose of retrieving his organs.<sup>5</sup>

### 1.3 Definition of Death

The shortage of organs from non-heart-beating donors and especially the inclusion of heart-beating donors, as additional organ sources ignited discussions amongst doctors, clerics,

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<sup>2</sup> Baker Bin Abdullah Abu Zaid, *Fiqh of Current Controversial Issues*, Volume Two. (Aljumuah Magazine for Editing & Publishing 2002) p 28

<sup>3</sup> Norm Barber, *The Nasty Side or Organ Transplanting: The Cannibalistic Nature of Transplant Medicine*. 3rd edn p 38. <<http://www.nereja.free.fr>> accessed 2 January 2019

<sup>4</sup> UNOS, 'Living Donation'. <<https://www.transplantliving.org>> accessed 5 December 2018

<sup>5</sup> Dale Gardiner, 'How the UK Overcame the Ethical, Legal and Professional Challenges in Donation after Circulatory Death' (2016) 16(1) QUT Law Review <https://lr.law.qut.edu.au/article/view/632/584> accessed 16 May 2018

judges and lawyers on death and its determination. The statement of Veatch R.M. and Ross, L.F. supports this assertion: *"It cannot be denied that this sudden infatuation with the usefulness of human organs was the stimulus for the intense debate about the real meaning of death."*<sup>6</sup> However, the practical problem lies in defining death with such precision that it leaves no one in doubt that a person is really dead. The question therefore is how can we tell a dead person from a person that is alive?

Death used to be considered as a simple and straightforward phenomenon: the general practitioner would issue a death certificate when a person's breathing and heart had stopped. There was unresponsiveness, the body had turned cold and finally *rigor mortis* (body stiffness) had set in.<sup>7</sup> The practice in the nineteenth century was that doctors and others regarded *rigor mortis* (body stiffness), *algor mortis* (a fall in temperature), *livor mortis* (skin discolouration, as uncirculatory blood pools) and putrefecation (decay), as signs of death.<sup>8</sup> Death at that time resulted from unconsciousness combined with irreversible cessation of breathing and heartbeat, determined by expert medical opinion. Upon confirmation of death by doctors, as a result of the irreversible cessation of cardiopulmonary functions, organs of such persons (non-heart-beating donors) who have given prior consent are utilised for transplantation irrespective of the limitations in using such organs. The limitations include ethical issues in relation to the non-heart-beating process and the suitability of such organs for transplantation is adversely affected due to the absence of

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<sup>6</sup> Robert M Veatch and Lainie F Ross, *Transplantation Ethics* 3<sup>rd</sup> edn (Georgetown University Press 2015) p 45

<sup>7</sup> Abdul Fadl Mohsin Ebrahim, *Organ Transplantation, Euthanasia, Cloning and Animal Experimentation: An Islamic View* (The Islamic Foundation United Kingdom 2001) p79

<sup>8</sup> Dick Teresi, *The Undead: Organ Harvesting, the Ice-Water Test, Beating-Heart Cadavers - How Medicine is Blurring the Line Between Life and Death* (First Vintage Books Edition New York 2012) p90

cardiorespiratory function and depending on the categorization of the non-heart-beating donor.<sup>9</sup>

It is pertinent to mention here that with the innovation in the late 1950s of ventilators (a machine that supports breathing), and the successful accomplishment of heart transplantation, the medical community realized that death is not defined by the stoppage of heartbeat. This is due to the fact that cardiorespiratory functions could be maintained during heart bypass, with the use of a heart-lung machine and the heart could be replaced with that of a just-deceased donor or a mechanical one.<sup>10</sup>

The aforementioned innovations gave rise to the shift by the medical community from the traditional cardiopulmonary conception of death as unconsciousness, coupled with cardiopulmonary failure to a neurocentric conception of death, commonly referred to as brain death.

Other concepts of death include<sup>11</sup> those held by the traditional and philosophical view in Western culture, which define death as the separation of body and soul. Likewise, traditional secular thinkers hold that death is the cessation of the flow of vital body fluids, blood and breath as a result of the irreversible cessation of circulatory and respiratory functions (the circulatory concept of death).<sup>12</sup> Troug mentions that the recovery of the heart after donation after cardiac death is “paradoxical” because “the heart of patients who have been declared dead on the basis of the irreversible loss of cardiac function have in fact been transplanted and successfully functioned in the chest of another.”<sup>13</sup>

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<sup>9</sup> National Academy of Sciences, *‘Non-Heart-Beating Organ Transplantation: Practice and Protocols’* <<https://www.ncbi.nlm.nih.gov>> accessed 20 October 2018

<sup>10</sup> Bernard Haring, *Medical Ethics* (St Paul Publications Slough 1972) p 131

<sup>11</sup> Veatch and Ross (n 6) 41

<sup>12</sup> *ibid*

<sup>13</sup> Delmonico F L, *‘The Concept of Death and Deceased Donation’* (2010) 1(1) Int J Organ Transplant Med.

Death is also defined as the irreversible loss of bodily integrating functions, most of which are not brain-mediated (the somatic concept of death).<sup>14</sup> Alan Shewmon, counters this argument by stating that somatic integration is not located in one part (i.e. the brain). He states that, “Under ordinary circumstances the brain participates intimately and importantly in this mutual interaction, but it is not a *sine qua non*; the body without brain function is surely very sick and disabled, but not dead”.<sup>15</sup>

While others define death as the loss of all functions of the entire brain (the whole-brain concept of death) as against those that regard the irreversible cessation of brain stem functions as death.<sup>16</sup> Both concepts are erroneous as there is evidence to support the fact that persons who are diagnosed as brain dead are not dead. Daniel Wikler and Mark Siegler note that:

It has been known for some time that brain-dead patients, suitably maintained, can breathe, circulate blood, digest food, filter wastes, maintain body temperature, generate new functions, and fulfill other functions as well. All of this is remarkable in a “corpse.” Granted, these functions could not be maintained without artificial aid and, even so, will cease within a few weeks. However, many living

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<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4089217/>> accessed 15 January 2017

<sup>14</sup> Robert M Veatch, ‘*The Death of Whole-Brain Death: The Plague of the Disaggregators, Somaticists, and Mentalists*’ (2005) 30(4) *Journal of Medicine and Philosophy*

<<https://www.tandfonline.com/doi/pdf/10.1080/03605310591008504?needAccess=true>> accessed 19 November 2018

<sup>15</sup> Scott D Henderson, *Death and Donation: Rethinking Brain Death as a Means for Procuring Transplantable Organs* (Pickwick Publications 2011) p 143

<sup>16</sup> Pallis C, ‘*Whole-Brain Death Reconsidered -Physiological Facts and Philosophy*’ (1983) 9 *Journal of Medical Ethics* <<https://jme.bmj.com/content/medethics/9/1/32.full.pdf>> accessed 10 July 2017

patients depend on machines and will not live long;  
they are not thereby classified as (already) dead.<sup>17</sup>

Finally others define death as the absence of the capacity for rationality, experience, social interaction and self-awareness, which is referred to as the higher-brain concept of death.<sup>18</sup> The effect of this conception of death is lowering the bar for death and depriving individuals with diminished capacities such as the anencephalic infants, individuals in a permanent vegetative state, individuals in coma, the young, and the senile of their rights to life on the ground that some of them lack the capacities for self-awareness, experience, rationality and social interaction.

Simply put, death is the cessation of life but the questions that follow are: what are the signs of life? What are those changes that will be present in a human being that we can conclusively say that such human being has ceased to exist? This has been and is still a much-debated topic.

#### **1.4 The Emergence of the Brain Death Concept**

Notwithstanding the advantages of new medical technologies in the form of artificial life-support, in delaying respiratory failure in patients with severe trauma, it has given rise to complex problems in the context of organ donation, end-of-life decisions etc. These problems wouldn't have arisen without the success in organ transplantation, which is credited to the following: development in vascular anastomosis (a method of sewing vessels together), the development of immunosuppressive therapy, the progress in organ preservation, the emergence of the life support machine and the improvement in critical care unit. These were hitherto stumbling blocks to successful transplantation.<sup>19</sup>

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<sup>17</sup> Henderson (n 15) 91

<sup>18</sup> Veatch and Ross (n 6) 41-42

<sup>19</sup> Watson C J E and Dark J H, 'Organ Transplantation: Historical Perspective and Current Practice' (2012) 108(1) British Journal of

With the advent of cardiopulmonary resuscitation, patients with irreversible brain injuries who would have died following respiratory failure have their hearts sustained through respiratory support pending their death. However, these patients are the best candidates for transplantation because of the viability of their organs, which are maintained through mechanical ventilation (their vital organs are infused with oxygenated blood pending the time for harvest. In other words, the organs of these patients would be in prime condition equivalent to organs of the living<sup>20</sup> and have better outcomes as against organs from heart-beating donors.

Thus the brain death concept arose as a result of the innovation of life support interventions and organ transplantation but it gained widespread attention following two groundbreaking events, one in 1967 while the other in 1968: the performance of the first successful human heart transplantation in December 1967, by Charles Barnard led to widespread publicity, with over one hundred attempts the following year and the second was the emergence of the Report of the Ad Hoc Committee of the Harvard Medical School in 1968, which equated brain death as real death.<sup>21</sup>

It is submitted that the most remarkable event that reversed thousands of years understanding of death as the stoppage of the heart and lowered the bar for determining death was the Report of the Harvard Ad Hoc Committee of 1968, which birthed the brain death concept. According Rady and Verheijde. the brain death concept is “*a novel construct of death for the procurement of transplantable organs*”.<sup>22</sup>

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Anaesthesia <[https://academic.oup.com/bja/article/108/suppl\\_1/i29/237577](https://academic.oup.com/bja/article/108/suppl_1/i29/237577)> accessed 29 March 2019

<sup>20</sup> Ahmed Abdel Aziz Yacoub, *The Fiqh of Medicine: Responses in Islamic Jurisprudence to Developments in Medical Science* (Ta-Ha Publishers Ltd 2001) p 270

<sup>21</sup> Henderson (n 15) 2

<sup>22</sup> Rady M Y and Verheijde J L, ‘*A Response to the Legitimacy of Brain Death in Islam*’ (2016) 55 (4) J Relig Health

<<https://www.ncbi.nlm.nih.gov>> accessed 29 February 2018

Prior to the recognition of the brain concept as put forward by the Harvard Ad Hoc Committee, the French School, in 1959, led by two neurologists (Mollaret and Goulon) propounded the neurocentric approach to death. They first discussed the clinical, electrophysiological and ethical issues of the post-coma stage, using the term '*coma passe* (irretrievable or beyond coma). However, this remained largely unnoticed by the international community because their paper was written in French.<sup>23</sup>

Furthermore, an article, published in 1959 by M. Jouvett suggested the use of electroencephalogram (EEG) for diagnosing the central nervous system. This ignited discussions on the ethical and legal features of *coma depasse*.<sup>24</sup>

However, the most important deliberations, which preceded 1968 occurred in 1966, at the Ciba Foundation Symposium titled, "*Ethics in Medical Progress: With Special Reference to Transplantation*," where deliberations focused on the prospect of procuring more kidneys from patients with brain injuries because they will be more viable than cadaver kidneys, which go through deterioration.<sup>25</sup>

In 1968, a committee of thirteen men headed by Henry K. Beecher (an anesthesiologist) published its report in the *Journal of the American Medical Association* titled: "A Definition of Irreversible Coma". The Committee stated its reasons for a new definition of death as follows:

1. Improvements in resuscitative and supportive measures have led to increased efforts to save those who are desperately injured. Sometimes these efforts have only partial success so that the result is an individual whose heart continues to beat but whose brain is irreversibly damaged. The burden is great on patients who suffer permanent loss of intellect, on

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<sup>23</sup> Steven Laureys, 'Death, Unconsciousness and the Brain' <<https://www.coma.ulg.ac.be>> accessed 5 January 2019

<sup>24</sup> Henderson (n 15) 4

<sup>25</sup> *ibid*

their families, on the hospital beds already occupied by these comatose patients.

2. Obsolete criteria for the definition of death can lead to controversy in obtaining organs for transplantation.<sup>26</sup>

Irrespective of the fact that the Committee mentioned that obsolete criteria for definition of death could lead to controversy in obtaining organs for transplantation, as the second justification for a new definition of death, its primary motivation was to include patients with severe brain injuries, who are on life support, as candidates for organ transplantation, without fear of legal sanctions. It is preposterous to justify the termination of the lives of the 'brain dead' on the ground that they are a liability on themselves, their families and hospitals especially in view of the fact that no complaints on such were put before the Committee. Even if such were presented to the Committee, what it ought to have done was not to propose the death of such patients by including them as organ donors because their right to life is sacred.

It is on this account that Teresi mentions that:

There were plenty of patients who wanted organ transplants but then as now, far fewer dead people to take them from. I should rephrase that. There are always plenty of dead people, but for the purposes of transplant they are often too dead. What was needed were more people who were sort-of dead, whose hearts were still pumping and keeping those valuable, desirable organs fresh. It was against that background that the Harvard committee met in 1968.<sup>27</sup>

It is pertinent to mention that apart from the Harvard Committee mentioning that the brain dead are really dead, they have provided the criteria that will indicate whether or not a person's

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<sup>26</sup> Teresi (n 8) 91

<sup>27</sup> *ibid*

whole brain function has ceased irreversibly. These are: unreceptivity and unresponsivity, no movement or breathing, no reflexes and a flat electroencephalography (EEG),<sup>28</sup> which is the confirmatory test.

Subsequent to the Harvard Committee's redefinition of death to include brain death, legislations of countries such as all the fifty states of the United States,<sup>29</sup> Nigeria,<sup>30</sup> and the English courts<sup>31</sup> adopted the brain death concept as real death. Also, in some cases, the courts held the standard of death is what is contained in legislations of countries that have legalized the brain death concept. However, in determining death, the medical profession should apply acceptable medical standards.<sup>32</sup>

Heart-Beating Donors, also referred to as brain dead donors are persons whose hearts are beating and there is blood circulation in them but are declared dead (after failing to meet the brain death criteria). They are generally the victims of accidents, whose *whole brains* or *brain stems* are irreversibly damaged, leaving them dependent on medical technologies, including the artificial ventilator, to aid their respiration and heartbeats.<sup>33</sup>

Brain death, according to Baker Bin Abdullah Abu Zaid is:

...the cessation of the brain to function without any possibility of resuscitation. If the cerebrum or cerebellum die, the human being may live a very unusual life called the life of vegetable. If the

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<sup>28</sup> Veatch and Ross (n 6) 55-56

<sup>29</sup> Ronald Munson, *Raising the Dead: Organ Transplants, Ethics and Society* (Oxford University Press 2002) P 181

<sup>30</sup> Interpretation Section of the National Health Act, 2014

<<http://www.lawnigeria.com>> accessed 7 July 2019

<sup>31</sup> Airedale NHS v Bland (1993) AC 789 p 865

<sup>32</sup> Henderson (n 15) 24

<sup>33</sup> Sherine Hamdy, *Our Bodies Belong to God: Organ Transplants, Islam, and the Struggle for Human Dignity in Egypt* (University of California Press 2012) p 49

brainstem however dies, it signifies the end of life according to most doctors in the West.<sup>34</sup>

Mostly, what causes the death of the brain include severe head injuries, usually resulting from car accidents or fall from high places, severe bleeding in the brain, brain tumours, and disruption of oxygen from the blood due to suffocation, drowning, and fume inhalation. These may lead to brain damage as a result of the cessation of oxygen or blood flow from the brain. However, if oxygen can be delivered to the blood before the heart stops, the heart can continue to pulse for hours, days or weeks.<sup>35</sup>

Thus the brain-dead have become the primary source of organs for transplantation for the last 30 years<sup>36</sup> because better outcomes are obtained from the use of their organs. Their organs are being ventilated in an intensive care unit and when the brain dead are declared dead, artificial breathing and heartbeat continue to be maintained by ventilation pending the retrieval of organs, thereby preventing organ deterioration.

## 1.6 Death in Islam

Death is defined in Islam as the sure separation of the soul from the body; a legal and undisputed fact on which all the *Fuqaha* (Muslim jurists) agree on. It is the death, which is followed by a number of activities such as washing, shrouding the deceased, holding the *Janazah* (funeral) prayer, burying the deceased, inheritance of the deceased's estate by his heirs, and the termination of marriage contract etc. It is indicated by the absence of natural and artificial pulse and further accompanied by other symptoms of death.<sup>37</sup>

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<sup>34</sup> Abu Zaid (n 2) 135

<sup>35</sup> Yusuful Ahmad, *Ahkaamu Naqli 'A'adaail Insaani Fil Fiqhil Islaamee*, Al Juz'ul Awwal (Daar Kunoozi Ishbeeliyaa Lin Nashri wat Tawzee'e 1427/475 AH) 225

<sup>36</sup> Chaib E, 'Non-Heart Beating Donors in England' (2008) 63(1) Clinics <<https://www.ncbi.nlm.nih.gov>> accessed 20 October 2018

<sup>37</sup> Abu Zaid (n 2) 34

The *Fuqaha* seem to be unanimous on the fact that all death symptoms are centered on the separation of the body and soul, which is based on Allah Glorified and Exalted be He's statement in *Suratul Isra'*, verse 85: "*They ask thee concerning the soul. Say, 'the soul is of the command of my Lord of knowledge; it is only a little that is communicated to you.'*"<sup>38</sup>

This verse indicates that the concept of the soul is shrouded in mystery and so is the concept of death. Thus some scholars feel restrained from discussing it as they consider the concept, as being within the exclusive knowledge of Allah Glorified and Exalted be He's exclusive knowledge. However, the majority of *'Ulama* (scholars) have allowed discussion on the soul. They relied on Allah Glorified and Exalted be He's statement in the *Qur'an* that: "*We breathed into her body of Our spirit,*"<sup>39</sup> referring to Maryam, the mother of 'Eesa (peace be upon them).

They also mentioned the *Hadith* reported by Al-Baraa Bin 'Azib (may Allah be pleased with him) to justify discussion on the soul, where the Messenger of Allah (peace be upon him) described how the soul of the believed is taken by the Angel of Death...<sup>40</sup>

Al-Ghazali defines death as follows:

...What is asserted by wisdom and explained by the *Qur'an* (sic) is that death means alteration of the body condition only. Tormented or blessed, the soul remains after it has parted with the body. Parting with the body means that the soul is no longer able to command it. The body members are just tools manipulated by the soul. With them the soul, for example, can use the hand to inflict bodily harm on

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<sup>38</sup> Muhammad Muhsin Khan and Muhammad Taqi-ud-Din Al-Hilali, *Interpretations of the Meanings of The Noble Qur'aan in the English Language* (Dar-Us-Salam Publishers and Distributors 1996) 379

<sup>39</sup> Khan and Al-Hilali (n 38) 739

<sup>40</sup> Abu Zaid (n 2) 137

others...Death is disobedience exhibited by the body members to the soul. All the body members are tools used by the soul. He who does not know life, may not discover the fact of death.<sup>41</sup>

Thus the definition of death in Islam differs from the medical and legal conception of death, with the *Qur'an* referring to death as the cessation of 'being' instead of cessation of cardiorespiratory function or brain function.<sup>42</sup>

The signs of death as agreed by the *Fuqaha* include apnea, laxity of the feet, separation between the hands, cessation of respiration, hypothermia (low body temperature), contraction of the testicles and *rigor mortis*.<sup>43</sup> All the aforementioned signs do not have to be present in an individual before death can be pronounced. What is important is there must be certainty before pronouncing a person dead. Thus, in the event of doubt, people should wait for incontrovertible signs such as the change in smell or putrefaction. On this Al-Nawawi mentions: "*Should suspicion arise because of a certain malady, or the probability of a cardiac arrest, or should there be any cause for believing that the patient is still alive, other foolproof signs should be waited for, such as change of smell, or the like.*"<sup>44</sup>

It is imperative to mention that organs that have reached the stage of putrefaction have gone through complete deterioration, which are total wastes to the transplant community. This is in line with the statement of Layla Marmush, an investigative reporter and former editor-in-chief for a news publication, specializing in health issues (*Dar al-Hilal al-Tibbee*) that: "...if you wait for complete death, only the bone is still useful; all the organs will go to waste."<sup>45</sup> What this statement implies is that

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<sup>41</sup>ibid 138

<sup>42</sup> Adnan Sharif, 'Organ Donation and Islam- Challenges and Opportunities' (2012) 94(5) Transplantation Journal <<https://www.journals.lww.com>> accessed 6 April 2019

<sup>43</sup>Ahmad (n 35); Abu Zaid (n 2) 139

<sup>44</sup> Abu Zaid (n 2) 140

<sup>45</sup> Hamdy (n 33) 69

the lives of the brain-dead should be ended for the sake of others. This is clearly a violation of the most fundamental objective of the *Shari'ah* (Islamic Law), which is the preservation of life.

### 1.6.1 Islam and the Concept of Brain Death

The concept of brain death as being synonymous to real death is not mentioned either in the *Qur'an* and *Sunnah*. However, Muslim jurists, doctors and scholars have discussed the topic in view of its relevance to organ transplantation.

Opinions amongst the above-listed persons are divided as some consider brain death as the end of human life and sanction the use of the organs of the brain dead for transplantation. Others are however of the view that brain death is not real death. Hence it is illegal to end the lives of such persons by using their organs for transplantation.

The *Fataawaa* (legal opinions) on deceased donation include those issued by the Islamic *Fiqh* Academies, the Highest Council of Scholars in Riyadh, the Islamic Organisation of Medical Sciences, the Fatwa Committee of Kuwait, the National Fatwa Council of Malaysia, and the European Council for Fatwa and Research.

The Council of the Islamic *Fiqh* Academy,<sup>46</sup> in its fourth session on organ transplants sanctioned the transplantation of organs from a deceased to a living individual provided the consent of the deceased was sought from him before his demise, or from his heirs or from a Muslim ruler in the case of a person whose identity is either unknown or who has no heirs and the life of the prospective beneficiary depends on the deceased's organ or it is to restore a basic function.

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<sup>46</sup>International Organization for Medical Sciences. *Topic Sixteen: Legitimate Ways of Human Acquisition for Life-Saving Purposes (Organ Donation and Sale)* <<http://islamset.net>> accessed 7 April 2019 pp 40-41

The resolution permits an individual to make an advance will directive indicating interest to donate his organ(s). Donation is also permissible with the consent of heirs of a deceased or a Muslim ruler on behalf of a person whose identity is unknown or has no heirs. However, a condition attached to the foregoing is that the transplantation must be for the purpose of restoring a basic function or the life of the prospective beneficiary depends on it.

Al Azhar Academy permits deceased donation provided it is on grounds of overwhelming necessity, the deceased donor's consent must have been obtained freely and when his mental capacity was complete and there must be a full disclosure to him of the organ(s) he will donate posthumously. Before the commencement of harvesting the deceased's organ(s), three trustworthy physicians, who are authorized to determine death must provide a written and signed certificate that the donor's death has been ascertained, in accordance with the Islamic concept of death. Also, the transplantation must be carried out in recognized, specialized, and licensed medical institutions.<sup>47</sup> It is also forbidden to transplant reproductive organs of deceased persons because it leads to the confusion of lineage, the preservation of which the *Shari'ah* aims to achieve.

Also, the Fatwa Committee of Kuwait<sup>48</sup> declared that:

If an organ to be transplanted is taken from a deceased person, the ruling is that such transplant is permissible, no matter whether the intention for the transplant by the donor was made in the form of a will by the deceased or otherwise. This is based on exigency (*darurah*), such as saving a life, that transform what is originally prohibited into a state of permissibility. Thus, organ transplants are permissible, as long as there is an urgent need for it...

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<sup>47</sup> Mohammed A G, *Organ Transplants* <<https://www.dar-alifta.org>> accessed 3 May 2019

<sup>48</sup> *ibid*

The Highest Council of Scholars in Riyadh declared that it is *Mubah* (permissible) to donate whole organs or part of organs from the deceased to the living if the need for such transplantation is significant. Hence the determining factor in deceased donation is the importance of the organ to the donor.<sup>49</sup>

Yusuf Al Qaradawi<sup>50</sup> permits a person to bequeath his organ(s) for the benefit of another after death because such donation is completely beneficial to another person and there is no probability of harm on the donor. More so, these organs will decompose after a few days and be consumed by the soil. Thus if he bequeaths his organs, seeking reward from *Allah* Glorified and Exalted be He will be rewarded according to his intention and deed as there is no evidence of prohibition. He based his opinion on the *al aslu al-ibaahah illaa ma mana'a daleelun saheehun sareehun* (the original state is that of permissibility except what is prohibited by sound, clear evidence and that there is none in this case). He also relied on a *Hadith* by 'Umar (may *Allah* be pleased with him) where he mentioned to some companions that why should you deny your brother something which benefits him and does not harm you? This according to Al Qaradawi could be said to the person who refuses to bequeath his organs.

It is pertinent to mention that there is no certainty that harm will not be inflicted on a person who bequeaths his organ(s) as he may be prematurely (intentionally or unintentionally) be declared dead as a result of the controversies surrounding the determination of death and his organs harvested thereby leading to his death. This contravenes the Qur'anic injunction that persons should not stretch their hands to what may cause their

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<sup>49</sup> Zahidul Islam, 'Organ Donation and Transplantation Issues in Islam and Present Situation' *Journal of Policy and Globalization* (2014) 22  
<[https://www.researchgate.net/publication/286876888\\_Organ\\_Donation\\_and\\_Transplantation\\_Issues\\_in\\_Islam\\_and\\_Present\\_Situation](https://www.researchgate.net/publication/286876888_Organ_Donation_and_Transplantation_Issues_in_Islam_and_Present_Situation)> accessed 14 April 2019

<sup>50</sup> Yusuf Qaradawi, *Fataawaa Mu'aasirah, Al Juz uth thaanee*, (Darul Qalam) p 535-536

destruction. It also contravenes the legal maxim *Al shak laa yazulu bish shakk* (certainty can never be eroded by doubt).

Some Muslim scholars and jurists especially for the reason that there is no clear-cut ruling for or against deceased organ donation and transplantation in the *Qur'an* or the *Sunnah* regard deceased donation as a virtuous act. It is however fundamental to consider the inherent problems in deceased donation before issuing a *Fatwa* (a legal opinion) in support of it. This is particularly so regarding the pronouncement of death for the purpose of organ removal.

Shaykh Gad al-Haqq<sup>51</sup> the late of Shaykh al-Azhar sanctions organ donation if it is on account of *Darurah* (dire necessity) i.e. in the case of a dying patient provided trustworthy medical authorities affirm that the patient was in a dire medical condition and the donor gave his consent before his death. He argues that *Hifz al-Nafs* (preservation of life) is one of the ultimate objectives of the *Sharee'ah* and supersedes what is otherwise forbidden (harvesting organs from others, living or dead).

It is pertinent to mention that the Shaykh's focus is on the would-be recipients as against the prospective donors, who are in need of legal protection, by not having their organs prematurely harvested in line with the legal maxim *Laa darar wa laa diraar fil Islaam* (Islam forbids people to cause detriment on themselves or on others).<sup>10</sup>

However, in response to the medical profession's contention that it can define death by measuring brain activity, Shaykh Gad al-Haqq mentions that:

There is nothing to forbid the use of medical equipment to establish the death of the nervous system. But this is not the only indication of death; rather, the end of all life signs [is what confirms death].

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<sup>51</sup> Hamdy (n 33) 55

The continuation of breathing and heart beating and heart function is an indication of life. If medical equipment confirms the loss of nervous system function specifically, this is just one system of the body, and a human being is not considered dead when one part of his body loses life ... for death is the loss of all signs of life.<sup>52</sup>

This indicates that the Shaykh sanctions deceased donation but does not regard brain death as real death. However, Shaykh Tantawi issued a *Fatwa* in the late eighties that:

*“...Taking organs from the body of a dead person to transplant to someone who needs it, whether to save his life or to cure him, is permissible, and this ruling is also based on consensus of jurists”.*<sup>53</sup> It is important to mention that there is no consensus by Muslim jurists on the permissibility of taking organs from the dead, for transplantation, as indicated by opposing views of some Muslim jurists.

He said that the definition of death is a domain for medical experts and that Muslim scholars including himself should not interfere with medical issues. Notwithstanding the criticisms on Shaykh Tantawi's *Fatwa*, the Islamic Research Academy in Egypt and *Majma' al-Fiqh al-Islami* (Islamic *Fiqh* Academy) affirmed Shaykh Tantawi's position.<sup>54</sup>

Jurists that oppose deceased donation include Shaykh Sha'rawi,<sup>55</sup> Late Mufti of Pakistan Muhammad Shafi'i,<sup>56</sup> Dr 'Abd al-Salam al-Shukri of Egypt,<sup>57</sup> Maulana Khalid Saifullah

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<sup>52</sup> ibid 56

<sup>53</sup> Islam (n 49)

<sup>54</sup> Hamdy (n 33) 57

<sup>55</sup> ibid 122

<sup>56</sup> Ebrahim (n 7) 51

<sup>57</sup> ibid 54

Rahmani.<sup>58</sup> Also, Shaykh Bin Baaz opined that it is not permissible to transplant organs from the dead for the benefit of the living because the process involves mutilation and abuse of the organs of the dead. This is supported by the *Hadith*: “*Breaking a deceased person’s bone is akin to breaking it when alive.*” He expressed his fear that the heirs of a deceased may be motivated by the desire for money thus paying no attention to the sanctity of the dead.<sup>59</sup>

Shaykh Ibn ‘Uthaymeen agrees with Shaykh Ibn Baz on the prohibition of deceased donation. He mentions “*It is not allowed not before death or after death even if the deceased gives a testimony/will and says, ‘if I die, give my relative so and so my eye or my kidney to so and so or my liver to so and so and what resembles that’.*”<sup>60</sup>

Shaykh Sha’rawi<sup>61</sup> opposes organ transplantation on the basis that our bodies belong to *Allah* Glorified and Exalted be He, hence His exclusive right. He mentions the prohibition of committing suicide as evidence of his argument that our bodies do not belong to us. He poses a question on how rational is it for a person to donate or sell body parts when he does not own it?

It is opined that the reasons advanced by Muslim scholars and jurists that oppose deceased donation are more convincing than the reasons advanced by the pro-deceased donation scholars and jurists especially when we extend their reasons to heart-beating donation. This is irrespective of the fact that most of these scholars gave a blanket statement as there was no distinction between heart-beating donors and non-heart-beating donors.

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<sup>58</sup>saiful Islam, *Your Questions Answered*, (JKN Publications, Bradford 2010) 191

<sup>59</sup> Toronto Dawah, *Ruling on Transplanting Organs After Brain Death – Shaykh Bin Baz, Shaykh In Uthaymeen, Shaykh Muhammad Nasiruddin al-Albani, and Shaykh Muqbil bin Hadi al-Wadi’i*.  
<<https://www.torontodawah.com>> accessed 28 May 2019

<sup>60</sup> ibid

<sup>61</sup> Hamdy (n 33) 122

It is pertinent to mention that since a person has the right not to be killed, extracting that right from him for any reason whatsoever is illegal pursuant to the Islamic maxim *man wajaba lahoo shay' minal ashya' lam yudfa'a 'anhu wa lam yutasuwwur 'alaihi illaa bi idhnihi* (should one have a right, this right must not be extracted from him except by his permission).<sup>62</sup> This indicates the violation of this right in relation to the brain dead.

Furthermore, if we consider the reason for the new definition of death, which is for the purpose of obtaining transplantable organs, we could safely conclude that there is no sincerity in such redefinition. Thus the justification put forward by the Harvard Committee contradicts the Islamic maxim *Al Umuri bi maqaasidiha* (matters are determined according to the intentions behind them).<sup>63</sup>

### 1.7 Criticisms against Brain Death

The proponents of the brain death concept tell us that the brain dead are truly dead but there are factual examples to disprove their claims. These include rise in temperature, developing infections, attempting to breathe, the use of anesthetics and muscle relaxants during harvest and hormones rising in the so-called 'brain dead', which are signs only found in the living.<sup>64</sup> It is surprising to find cases of foetuses growing in the bodies of some persons who have been written off as brain dead. It is reported that between 1982 and 2010, 12 viable infants were born from brain-dead women. For example, a 35 year old woman, who was 16 weeks pregnant suffered intracranial

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<sup>62</sup> Al-Qawâ'id Al-Fiqhiyyah (Legal Maxims of Islamic Jurisprudence) A Translated Compilation. (1434h-2013). Islamic University of North America (Mishkah)

<sup>63</sup> Naim Almashoori, *Islamic Legal Maxims*

<<https://www.slideshare.net/NaimAlmashoori/islamic-legal-maxims-qawaid-fiqhiyyah>> accessed 19 June 2019

<sup>64</sup> Dr. Safwat Lofty, a senior anesthesiologist and intensive care specialist from Cairo University. Quoted in Hamdy (n 33) 59-60

hemorrhage that led to brain death.<sup>65</sup> The fetus's life was prolonged as a result of maternal somatic support (a process of maintaining the body of a brain dead woman long enough to deliver the baby) for 110 days, which resulted in the successful delivery of a viable fetus at 32 weeks. It is submitted that an idea cannot replace a fact so also will certainty never be eroded by doubts as embodied by the maxim certainty is not overruled by doubt (*al- yaqinu la yazalu bi al-shakk*).

Also, the God-conscious will controvert the brain death concept because it fails to align with the Islamic conception of death, which is indicated by some death symptoms, with certainty being the most important. It is the soul, a matter within Allaah (Glorified and Exalted be He's) exclusive and absolute knowledge that prevents the body from decomposition as against the heart/lungs or brain as advocated by some people. Death symptoms such as stoppage of bodily functions, cellular death, the body turning cold and decomposition can only be found in the dead. These are not present in the brain dead, an indication that they are alive.

There are series of scary accounts by anesthesiologists, nurses in intensive care units, organ and doctors on the brain dead. Dick Teresi gives various accounts on these. These include the first harvest of an anesthesiologist and how confusing it was for her on whether the donor was dead because he "didn't *look* dead." He says:

After his kidneys were removed, she took the body back to the ICU. A nurse said no, take the body to the morgue. She also told Dr. Au that after working her first harvest, she went home and crossed off the organ donation box on her driver's license. She no longer wanted to donate. "It was a young guy, and they took everything. Heart, liver, pancreas, everything... And after they all got what they

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<sup>65</sup> Said A, Amer J, Masood U, Dirar A and Faris C, '*A Brain-Dead Pregnant Woman with Prolonged Somatic Support and Successful Neonatal Outcome: A Grand Rounds Case with a Detailed Review of Literature and Ethical Considerations*' (2013) 3(3) Int J Crit Illn S

wanted, everyone left, and the patient was just lying here alone.<sup>66</sup>

Also, Kathleen Stein recounts her experience during a harvest: *“The donor’s heart suddenly accelerated from 100 to 200 beats per minute. The surgeons were alarmed, and shocked it back to normalcy with a jolt of electricity from defibrillating paddles.”*<sup>67</sup>

Hence why should uncertainty on whether a person is dead or not give way for certainty? And why should determination of life be tied to the brain?

Another thing that raises fear and concern is the lack of unanimity amongst medical practitioners even within the same country on the criteria for the destruction of all brain functions. Whereas the Harvard Ad Hoc Committee, which reversed the old and widely held conception about death and birthed the most significant debate on deceased donation, proposed four criteria, others have excluded the fourth criteria (a flat electroencephalogram), which according to the Harvard criteria is of great confirmatory value. For example, the Minnesota Criteria of 1971<sup>68</sup> were set out after reviewing some brain dead patients vis-à-vis the Harvard criteria. However, they rejected the need for an EEG (electroencephalogram) because they noticed some electrical activity in the brains of two brain dead patients they examined, which according to the Harvard criteria should not be present. Instead they refined the reflex tests excluding spinal reflexes, stretched the period for the apnea testing from three minutes of the Harvard Criteria to four minutes but reduced the time for repeating the apnea test from 24 hours to 12 hours.

Also, other bodies which have modified the Harvard Criteria include the National Institute of Neurological Diseases and Stroke, the Minnesota Medical Association, Medical

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<sup>66</sup> Teresi (n 8) 149

<sup>67</sup> ibid

<sup>68</sup> ibid 96-98

Consultants to the President's Commission, the American Academy of Pediatrics, the American Academy of Neurology, the United Kingdom Academy of Medical Royal Colleges, the American Academy of Neurology and the American Academy of Pediatrics, Society of Critical Care Medicine, and Child Neurology Society.<sup>69</sup>

In his book *Human Life*, Dr. Ahmad Shawqi Ibrahim mentions the lack of complete reliance on the brain death symptoms in the following words: "*What are the symptoms of brain death? Science does not provide us but with electroencephalography that is decisive in some cases and indecisive in others (in the case of drug poisoning).*"<sup>70</sup>

In view of the inaccuracy of Harvard Criteria on flat EEG in the brain dead, the warning in some states and exclusion of children under five years from the brain death criteria as well as discrepancies such as the different time periods for repeating the apnea test, the questions begging for honest and disinterested answers are:

- Shouldn't a concept as vital as death have the same criteria?
- Shouldn't the Harvard Criteria be abandoned in view of the above discrepancies especially for the fact that the basis of equating brain death to real death is the Harvard Report?
- It is submitted that having different criteria for brain death shows clearly the deceit, failure and inconsistency in the brain death concept, which can best be described as double standards driven by the selfish and ungodly desire of the brain dead advocates to terminate the lives of the living brain dead for their organs.

Furthermore, administering certain drugs in the hours before the withdrawal of life support, with a view to keeping organs of

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<sup>69</sup> Veatch and Ross (n 6) 56 -58

<sup>70</sup> Abu Zaid (n 2) 136

prospective donors in good condition raise legal and ethical issues because such drugs may hasten the death of the prospective donor, which contradicts the dead-donor rule. For example administering heparin injection may induce more bleeding into the brain in persons with severe head injuries while regitine may block the synthesis of adrenaline, which can cause a stopped heart to kick back into action.<sup>71</sup>

Also, Rady and Verheijde, opine that brain death is a novel Western construct of human death, which has not been validated by neuroscience as equivalent to human death and was introduced for the purpose of procuring transplantable organs.<sup>72</sup> They argue that brain death belongs to the field of disorders of consciousness and is a severe neurological disability, which should not be confused with death. This is because of inconsistencies in brain death determination such as lack of clear understanding by majority of neurologists regarding the diagnostic accuracy of tests in determining brain death,<sup>73</sup> the presence of coordinated, biological, homeostatic and cardiovascular functions in brain dead patients,<sup>74</sup> the retention of certain neurological functions in brain dead patients,<sup>75</sup> the continuation of intracranial blood flow and circulation in some brain dead patients,<sup>76</sup> the recovery of some lost neurological reflexes and pressure to expedite the pronouncement of brain

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<sup>71</sup> Munson (n 29) 190

<sup>72</sup> Rady MY and Verheijde J L, 'Brain-Dead Patients are not Cadavers: The Need to Revise the Definition of Death in Muslim Communities' (2013) 25(1) *HEC Forum* <<https://www.link.springer.com>> accessed 15 July 2019

<sup>73</sup> Joffe A, Anton N, Duff J, and deCaen, 'A Survey of American Neurologists about Brain Death: Understanding of the Conceptual Basis and Diagnostic Tests for Brain Death' (2012) 2 *Annals of Intensive Care* 2 <<https://www.ncbi.nlm.nih.gov>> accessed 11 June 2019

<sup>74</sup> Alan Shewmon, 'Brain Death: Can it be Resuscitated?' (2009) 25(1) *Issues in Law and Medicine* <<https://www.ncbi.nlm.nih.gov>> accessed 11 June 2019

<sup>75</sup> Joffe A, 'Are Recent Defences of the Brain Death Concept Inadequate?' (2010) 24(2) *Bioethics* <<https://www.ncbi.nlm.nih.gov>> accessed 10 December 2018

<sup>76</sup> Wijdicks E F, 'The Case against Confirmatory Tests for Determining Brain Death in Adults' (2010) *Neurology* 75(1) <<https://www.ncbi.nlm.nih.gov>> accessed 13 April 2018

death may lead to diagnostic errors and mistake in considering recoverable conditions as irrecoverable.<sup>77</sup>

The term brain death presupposes an aspect of death i.e. death of the brain, as against the death of an individual as a composite whole. The term supports what is the fact i.e. brain death is a feature of death not real death as indicated by signs of biological life in the brain dead. Some of these signs according to the Harvard criteria should not be present in brain dead persons. It is opined that brain death can best be described as a kind of neurological disorder such as persistent vegetative state, locked-in-syndrome and coma, which are not termed real death.

It is submitted that irrespective of the requirement of doctors to comply with the Dead-Donor Rule, which is to protect the vulnerable brain dead, this rule can never be satisfied with the diagnosis of brain death because the brain dead are not dead. Thus, it is preposterous that notwithstanding the series of the aforementioned contradictions, brain death is still advocated by some religious leaders, doctors, legislators and lawyers.

### 1.8 Conclusion

Human organ transplantation is regarded as one of the most remarkable achievements of modern medicine. However, in the procurement of suitable organs for transplantation, the most prominent issues relate to deceased donation, with procurement of organs from heart-beating donors (the brain dead) generating the most intense debate from the religious, philosophical, ethical, medical and legal perspectives. This is due to the fact that the brain-dead exhibit signs that are compatible with life.

It is in the light of the foregoing that this paper considered the Islamic perspective of harvesting organs from the brain dead by focusing on the brain death concept vis-à-vis the Islamic

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<sup>77</sup> Marik P E and Varon J, '*Prolonged and Profound Therapeutic Hypothermia for the Treatment of "Brain Death" after a Suicidal Intoxication. Challenging Conventional Wisdoms*' (2010) 28(2) The American Journal of Emergency Medicine, 28(2)  
<<https://www.ncbi.nlm.nih.gov>> accessed 30 September 2017

conception of death. The paper concluded that all the aforementioned scientific evidence establish bout regarding brain dead patients and in Islam doubt is always weaker than certainty as there is certainty that the patients are alive.