

Brain Death in Islamic Jurisprudence

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ABSTRACT

BACKGROUND AND OBJECTIVE: In today's world, Islamic jurisprudence encounters new issues. One of the areas where jurisprudence gets involved is the issues concerned with brain death, whether brain death in jurisprudence and Islamic law is considered the end of life. In this study, brain death was discussed from the Shiite jurisprudence perspective and also the opinions of the specialists are taken into account.

METHODS: This study is designed based on library collection and review of the literature in the field of brain death. Also, Quranic verses, hadiths and fatwas (religious opinions) of the scholars are used. Some of the articles which were centered around Islamic jurisprudence, particularly Shiite jurisprudence that explain and deal with brain death were given special consideration.

FINDINGS: Brain death from religious and jurisprudence perspective is considered the termination of life and removing the vital organs from the body is not viewed as committing manslaughter. A person with brain death is not a normally known injured man who is still alive. The brain death patients have no life and getting rid of the body does not constitute a case of manslaughter. Amputation of the organs of brain death patients for donation and transplantation amounts to the amputation of a dead body. If the life of a Muslim is subject to transplant of organs from the body of a brain death patient, it will be permissible.

CONCLUSION: In principle, if the life of a Muslim entails transplant of organs of brain death patients, it will be permissible.

KEY WORDS: Brain death, Religious death, Jurisprudence verdicts, Amputation, Organ transplants.

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Introduction

In today's world, Islamic jurisprudence is dealing with new issues in various economic, political, social and scientific areas. Jurisprudence also shows concern about medical sciences. In this regard, we can point to the issues such as abortion (1), organ transplant, blood injection, anatomy(2), transgender operation (sex reassignment surgery), sterilization, inoculation, insemination, cosmetic surgery, hair transplantation, forensic medicine, issues related to the operating room, physician liability, different hygiene and health issues. One of the major and highly sensitive issues in medical science is brain death. It is an controversial issue in the society that can be discussed from legal, juridical and ideological aspects.

In this regard, there are many unsettled disagreements and many questions have been raised that require careful and in-depth analyses to answer. The key questions are whether the religion and jurisprudence consider brain death as the end of life, whether we can transplant organs of brain-dead patients to save the lives of others or preserve their health, whether there is a difference in transplantation of vital and non-vital organs, whether switching off the support devices that leads to cessation of heartbeat and breathing is permissible, whether the testament of the patient before death has effect on permissibility of the organs transplant.

Many other questions have been posed in this regard. Answering them entails settling the point that whether brain death is considered as the termination of life. In explaining brain death, there are remarkable differences between the views of medical experts in the past and contemporary medical community. Old medical practitioners and physicians consider the heart beating stop as the cause of human death. This theory is not welcomed now by the medical community and brain death is viewed as certain death.

Although the heart beating stop normally brings about the cessation of brain function, it is possible that the heart can continue working naturally or with the aid of advanced resuscitation apparatus and equipment. Therefore, a patient's heart can remain activated even in the full cessation of brain function. Such patients whose brains have failed are considered to be still alive from the perspective of the medical sciences as well as the customs of the people. This idea is no longer accepted by the modern professionals who consider such patients as dead.

That is why the difference between these two views is important. It should be noted that there is no consensus in this regard among Muslims. Still, a significant minority view the cessation of cardiac and respiratory function as a criterion for ascertaining death. To validate brain death criteria, there are differences between the various sects of Islam. Therefore, recognizing the religious beliefs of a community or local laws governing the determination

and establishment of death is of great importance to the medical community (3). Assessment of brain death is also of particular importance in Islamic law and ethics. Some institutions related to Islamic ethical and legal issues believe that brain death equals cardiac death. Some maintain that brain death is intermediate between life and death and do not fully affirm the criteria set about brain death (4).

Therefore, a series of negative and affirmative religious decrees can be applied to resolve the disputes. When jurisprudence gets involved in these issues and problems, it is expected to provide satisfactory answers. Problems such as the date of payment arrears, division of property, the loss of permission to lawyers who are hired to do something, calculating the edah of deaths (religiously specified period of not having sex or getting married after death of the husband), decisions on the one-third of the inheritance and provisions in the will, the accuracy of judicial duties of the deceased and other religious orders that are applied on a deceased person must be answered. Therefore, the permit for removal of the main organs from the human body such as the heart, liver or lung for transplant to other people who need them to survive is primarily much more important.

The end of life should be ascertained on two bases. In the first case, the patient's heart rate and breathing can be a criterion for being alive. Namely, the person who can breathe and his blood circulation system works is still alive even if the brain does not show any reaction. In the second case, breathing or heart rate is not a criterion for establishing the life of a patient unless the brain is not practically dead.

Thus, brain death will be the end of life of these people and such a person is certainly dead. The main issue is whether brain death is considered the end of life in jurisprudence and Islamic law. Islamic scholars and jurists have developed two theories on this issue. Some have suggested that brain death is not the end of one's life and as the heart and the pulse beat continue, the person is still alive. Therefore, it is not permissible to remove the organs of his body, particularly the vital organs for transplant to another person. In contrast, other jurists believe that with brain death human life comes to an end. Thus, if necessary, it is permissible to transplant the organs to another body (5).

In this regard, it is noteworthy to point to the fatwa of the late Imam Khomeini and Ayatollah Khamenei in response to the question of doctors and scholars. In February 1991, some experts has written a letter to the Supreme Leader and inquired for an answer on the issues pertaining to brain death as follows: "A number of patients completely lost their brain cortex activity due to irreversible and irreparable brain damage and are in a deep coma and do not respond to internal and external stimuli. Moreover, the activities of brain stem are also lost and the patients has no respiratory activities and show no response to different optical and

physical stimulation. In such cases, there is absolutely no possibility of sustaining the mentioned activities. The patients have automatic heart rate that continues temporarily and lingers for a couple of hours or at most a few days with artificial respiration equipment. In medical terms, this state is called brain death. Saving the life of some other patients is contingent on the organs donation and transplant of the brain death patients. With regard to the fact that the brain death patients are void of breathing, consciousness, feeling and voluntary movement and never restore life, you are respectfully requested to offer your guidance on the issue and clarify whether it is permissible to transplant the organs of the brain death patients to save the life of other patients in the case that the above-mentioned conditions are established."

The Supreme Leader answers the inquiry as: "In the name of God, transplanting the organs of a brain death patient under the mentioned circumstances is allowed in the case that there is expediency of saving an honorable life(5). In addition, the fatwa of the late Imam Khomeini in this regard is "... If you believe saving a human life is contingent on transplant of heart or liver, etc., it is allowed with the permission of the owner" (6). Apart from the religious tenets and principles that are influential on this issue, the dominant laws of a country must be also obeyed. In the Islamic Republic of Iran, the issue of brain death and organ transplantation lies mainly in the scope of the country's medical system and is a governmental issue. The fatwas of the jurists regarding brain death are different and sometimes contradicting.

Therefore, these rulings can not be relied and put to work on the country's macro-level policies such as administrative, medical or judicial institutions and can not be looked as a law. As a result, the issue goes back to the governmental decree. In Iran many civil and criminal laws are based on the Law of Islam. In other words, the legislations are based on Islamic Shiite jurisprudence called Fiqh. The Iranian Islamic Council parliament in a single article on the April 5th, 1996 has announced that the hospitals equipped with organ transplant facilities can perform organ transplanation on brain death patients whose death is certain and established by experts after obtaining the written permission from the Ministry of Health and Medical Education, subject to the will of the patient or the deceased person or consent of the ward of the deceased person on the transplant of the organs that involves survival of patients who are in dire need and critical condition for organ transplan.

The honorable Council of Guardians did not object, given the fatwa of Imam Khomeini and the Supreme Leader. However, a clear understanding should be formed by both doctors and the people for determining and establishing brain death to shatter any doubt that may be arisen (7). Some medical professionals who have fairly a good command of juristic issues

(jurisprudence) hold that brain death is irreversible and affirm organ transplant from such patients provided that certain death is established and confirmed by experts using instruments (8). On the contrary, some jurists who were familiar with medical issues but have no clear understanding of brain death and organ transplant believe that such patients are alive according to jurisprudence and legal terms of living person are applied to them. Therefore, they prohibited taking medical advantages of brain death bodies, otherwise it is subject to liability (9). Many countries have accepted brain death and allowed organ transplantation under certain conditions.

The well-recognized principles of Islam state that if there are no contradictions and impediments for the implementation of an issue, it will be necessarily legitimate. Hence, the phenomenon of brain death and organ transplantation can be recognized based on this assumption. In 1986, the Assembly of Islamic law in Saudi Arabia in a declaration based on the agreement of the majority of its members, had announced that "when all the tasks and activities of the brain is completely stopped and specialists believe in irreversibility and confirm the cessation and failure of the person's brain that has started to decay, the person is known as dead and all provisions and orders that are legally prescribed to death are applicable to him"(10). Kuwait has not expressly declared the laws pertaining to brain death issues, however, it has passed the law of organ transplant that stipulates "amputation and removing organs or tissues of a dead body is not permissible unless it is necessary to treat patients provided that the certain death of the organ donor is certified by a group of medical experts and one forensic doctor"(11). In 1986, Iraq enacted a law on organ transplants of brain death patients to be donated to critically ill patients (12).

Turkey is among the leading founders of the Association of Organ Transplantation in the Middle East. In this country, the termination of life of a brain death person is established by approval of a committee that includes a cardiologist, a specialist in internal neurology, a neurosurgeon and an anesthesiologist. Additionally, the doctor performing the transplant should not be a member of the committee (13).

United Arab Emirates deals with brain death issue similarly(10). Spain is among the countries where the donation of organs of the brain death patients is widely welcomed and only 13 percent of the families refuses organ donation (14). Most Latin American countries except for Nicaragua, legally consider brain death as the end of life and it is subject to approval of two or three specialist (15).

Many countries around the world have almost identical approach toward accepting brain death. These countries recognize brain death after establishing the conditions and regulate and develop the related law regarding their reliougs beliefs. France

was among the first countries that legally examined the issue of brain death in 1968 and issued an order to the Ministry of Social Affairs and announced that brain death should be considered as certain death if the scientific criteria and clinical symptoms and indications are established (16). The United Kingdom has accepted brain death and organ transplantation according to its legal system that is based on the country's judicial precedents. In this country, brain death must be confirmed by an experienced expert that is not a member of the transplant team. In the United States, in 1984, brain death was recognized as the end of life and its establishment and confirmation was assigned to medical expert that is not involved in transplantation or amputation of organs of the deceased person.

The amendment to the law considers all brain death patients having consent to donation of the organs of their bodies unless the opposite has been specified in the will. Currently, more than forty countries across the world have accepted this law (17). In 1977, Australia also made and announced its organ transplant laws. This law stipulates that a brain death patient's organs can be removed if the person has already signed a letter of consent that had not been invalidated before death or the first degree relatives do not object donation of organs (18). Non-Islamic countries such as France, England, America, Spain and Australia and Islamic countries such as Saudi Arabia, Kuwait, Iraq and Turkey allow organ transplant of brain death patients. This study aims at discussing and explaining brain death from Shiite jurisprudence perspective.

Methods

This study is designed based on library data collection method and exploring in various texts that have been published in the field of brain death. Drawing on Quranic verses as the most important accessible source was given a prime importance in this article, in particular the verses which contain the word Tawaffa (توفي, in Arabic literally means restoring and taking back something completely). The reliable and accredited sources of Islamic jurisprudence and Hadith books that explain the separation of the soul from the body and are concerned with the issues on death were also used in the article.

Many articles that have examined brain death from medical sciences and jurisprudence as well as the articles which deal with brain death from Shiite jurisprudence have been drawn on. Furthermore, the expert comments and opinions published by doctors and the contemporary thinkers were considered. In addition, the distinguished and accredited scientific websites were explored as science-based reference points. Shiite and non-Shiite fatwas issued by contemporary scholars on brain death were also taken into the account.

Results

Brain death is considered as the end of life according to religion and jurisprudence. Removal of the vital organs of a brain death patient is not in force of manslaughter. In the case that the omission, from a doctor or anyone else, that does not provide or improve the survival of a brain death patient, in fact, legally and religiously does not constitute a crime or unlawful act. Omission in this case, will be defined as a criminal act specified and prescribed in Islamic Penal Code. In general, a person with brain death is not defined as a customarily known injured person who is alive. Not providing an aid to the patients with established and confirmed brain death does not constitute a legally defined failure of helping people who incurred injury. Certainly, disconnecting the equipment attached to the body of a person with brain death does not amount to voluntary or quasi-intentional manslaughter. Patients with brain death have no life, hence manslaughter or murder cannot be applied in these cases. If patients with brain death are viewed as a living person with vegetative state, their organs amputation is considered as amputations of organs of a person who has unstable and unsustainable life. Organs amputation of a brain death patient for transplantation and donation is similar to amputation of a dead body. If a Muslim's life depends on receiving organ donation from a brain death patient, religious principles consider it as amputation of a dead body. Thus, transplantation of the organs of the brain death patients for donating to others will be permissible.

Discussion

Currently, brain death is considered as the end of life. According to religious scholars and jurists as well as the legal and medical experts, the organs of brain death patients can be donated for transplantation. The pros and cons of the transplantation of death brain patients' organs give numerous reasons. The opponents have adduced two reasons for supporting their stance. First, they declare that the issue of life or death from jurisprudence perspective has no religious or juristic status. Namely, none of Quran verses and hadiths has explicitly deals with explaining the concept of human life and death. However, there are various verdicts in Islamic jurisprudence pertaining to life and death. This suggests that Islam assigns understanding the matter of life and death to common customs and discretion. Wherever the legislator has not defined or explained an issue, but has laid down verdicts, this means that understanding is assigned to customs and hence customs are recognized and applicable. Concepts such as contracts and transactions fall in this category. However, the concepts of prayer, fasting, Hajj, Zakat, Khums and E'tikaf (retiring to mosque for devotion and purification of souls) have innovative and

constitutive aspects and are not referred to customs because they do not require endorsement and verification and do not have a signatory and corroborative nature. The opponents argue that the holy religion has assigned the understanding and interpretation of death and life to the prevailing customs and it must be found among the public. Therefore, we should not define life and death by reference to the special customs that are the views of doctors and medical scientists.

The assumption in common custom is that the person is alive as long as the heart and breathing person function and there is no other criterion. In the public opinion, the cessation of brain function is not the end of human life. The opponents hold that if there is no evidence for establishing life or death of a patient, the uncertainty arises from either doubt on the concept or doubt on the external instance. Hence, the practical principle of *Istishab* (i.e. the previously established beliefs and customs continue if there is a doubt) that is widely acceptable for all the senior grand jurists, the person should be considered as alive and verdicts of a living human should be applied.

Istishab here refers to what was registered in the medical history of the patient and currently we doubt the survival, hence the continuity and sustainability of the history is valid. The history of a brain dead patient is life and the associated rulings of being alive. Therefore, at the time of brain death, the verdicts shall be awarded on survival of life and continuity of the associated rulings. As a critical comment, as the second reason indicates, it must be said that adhering to the practical principle of *Istishab* or presumption of continuity (adherence to previously established verdicts) is valid when there's no reason for life or death of the person. As a result, if there is compelling evidence for life or death, *Istishab* is not applicable and valid. If we uphold the first reason of the opponents, the second reason is invalid. The second reason is valid due to the lack of credibility of the first reason or at least doubt on its authenticity.

In both cases, they are not different in terms of discredit. Therefore, the opponents of brain death has only one reason i.e the first reason. They resort to the second reason due to the discredit of the first reason or doubt on its validity. Consequently, if the proponents of brain death refute the first reason of the opponents provide conclusive proof of the truth of religious death of brain death, that will suffice to prove their claim and certainly there will be no need to reject the second reason of the opponents i.e. *Istishab*. In this case, the second reason adduced will lose its legal validity. In other words, on the first reason of the opponents it has been argued that the holy legislator did not provide any clear definition of death and its true quality in verses or narratives. Also, there is no reason for the medical professionals to refer to jurisprudence for defining death because religion maintains that in such cases

reference should be made to common customs. The common customs of people consider a person alive as long as the heart and respiration system are active. However, the true supporters of brain death validity believe that firstly the holy legislator has defined death in some verses and hadiths and brain death patient is deemed to be dead in accordance with the provisions of the verses and hadiths. Secondly, where the legislator provides a definition for a concept, referring to the custom does not make sense.

There is also evidence that merely heart rate can not be a proof of life. Thirdly, in the case of doubt on establishment of death, we should refer to a special customs. Fourthly, even if the first proposition is accepted and validity of religious death is denied on brain death, still according to what the jurists have stated on unstable and unsustainable life, the effect and verdicts of the first proposition can not be applied or relied upon. The proponent of brain death maintain that Quran defines death as *Tawaffa* (19-22). According to the religious commentators, the word *Tawaffa* means to receive and get hold of something completely and thoroughly. The term "*tuffite al-mal*" (restoration of property) in Arab custom indicate the case that someone receives and restores all of his property. Therefore, in Quran, death is referred to as *Tawaffa* that means delivery of soul to angels. Quran says: "those ... whose souls are taken away by angels " (23). "He who takes away your soul at nighttime (at bedtime)... or ... When for you death time arrives , our angels take away your souls and they are not negligent in this regard" (24). "Then how (will they tolerate) when the angels take their souls ..." (25). "...we worship the Allah that takes yours souls..." (26). "If you could only see when the angels take the souls of the unbelievers ..." (27). " Allah takes fully back the people's souls when they die and... and Allah created you, then takes your souls ..." (28, 29).

As we can understand, the divine forces at the moment of death take delivery of human's full personality and facts that is their divine spirit and soul and separate the soul from the corporeal body and take it to the other world. In some verses, the Holy Quran speaks of Divine Spirit for the creation of man and says "and blew from my soul into him " (30) and also speaks of a metaphysical and immaterial truth of the creation of all people that is "we have set up and created another" (31). Therefore, drawing on the notion of *Tawaffa* on death suggests that the truth of death has been interpreted as complete separation of body and soul. Now the question is whether brain death is the separation of human and divine soul from the body which is *Tawaffa*. If there is a reason for this separation, the fatwa can be definitely issued on brain death according to Quranic verses. Apparently, it is not so demanding to prove the claim based on the Glorious Quran. We can prove this referring to the verses and hadiths that have introduced the similarity

of the truth of death and slumber. The Holy Quran says: "Allah takes away the souls upon their death; and of those who do not die during their sleep, those on whom He has passed the decree of death He keeps with Him and the rest He restores for a term ordained. Verily in this are signs for those who reflect" (32). Shahid (martyr) Motahhari commenting on this verse says "this verse indicates the similarity and congruence of sleep and death and also expresses the similarity and congruence of awakening and the hereafter. In sleep as well as in death, the spirit and soul of man moves from one ecstatic status and trance to another. The only difference is that during sleep, people often do not notice it and when they wake up he do not know that in fact they have returned from a trip. However, in death everything becomes clear for people" (33). Allameh Tabatabai on this verse states that "the verse tells us that death and sleep are both occurrence of Tawaffa. The difference is that sleep is reversible but death is irreversible" (34).

There are other verses in Quran indicating this phenomenon such as "this is He who takes fully your souls at night (while you are asleep)...then at daytime (when you are awake) make you rise until the specified time arrives. When your due time arrives, you will return to Him, then you will be aware of the truth of what you have done" (35). This verse of the Quran clearly suggests that sleeping and awakening are similar to death and moving to the hereafter. By referring to the narratives of the Imams, we see that Imam Ali (P.B.U.H) said "Muslims should not sleep when they are unclean (Jonob, a person needs to clean his/ her body by water due to having sex or ejaculation). Do not sleep when you are not pure and clean (jonob), so for sleeping make your body clean by water or soil (Tayyamom) because in sleep the soul of the pious believers rises to Allah who welcomes and congratulates them. If this is your death time, He will cherish your souls in His blessing treasures, if this is not your death time, He will send the souls back to the body with a company of angels".

Imam Baqir (P.B.U.H) said "None of the people sleep unless their souls ascended to heaven and their souls remain in the body and something as tenuous as sun beam connects the body and soul. If Allah allows the capturing of the soul, the soul obeys and acquiesces, if Allah permits it to restore the soul (and returns back to body), the soul blesses and obeys. This is the promise and vow of the All-elevated Allah that "Allah takes the souls and lives at the time of death ... " (37). "Death is the same as sleep that comes to you at nights, except for it (death) is much longer than sleep and only you wake up in the resurrection" (38). This is what the Holy Prophet (P.B.U.H) used to say when he waked "Praise be to Allah who raised us after we had made us dead" (39). The verses and hadiths above-mentioned obviously indicate that there is no difference between sleep and death except for the

reversibility or irreversibility of the soul. In other words, sleep is a reversible death and death is an irreversible sleep. Now, we shall examine the condition of body at the time of sleeping.

From the perspective of medicine, in a deep sleep, the neuromuscular system of the body is disabled and the person is incapable of understanding, perceiving, thinking and taking voluntary actions. In fact, sleeping is failure of different brain centers. Since different parts of body are controlled by specific parts of the brain, as soon as the brain is disabled, body organs fall into sleep. First, the eyelids fall, the neck muscles become loose and hearing gets poor. When a break and rest prevails the vital centers of the brain, it is time when the body is overwhelmed by sleep (40). These physiological changes that occur during sleep have been interpreted in Quran as Tawaffa that is the separation of the soul from the body. Thus, sleeping is a case of disconnection and separation of the soul from the body. Now, we get back to the issue of brain death thereby any feeling, perception, consciousness and voluntary activities have also been disabled and vanished. Would that be far-fetched to say brain death is a deep sleep in which Tawaffa and separation of the soul from the body occurs.

In explaining this, we can say the nervous system loses its activities forever and brain cells completely die and are destroyed due to the damages suffered. The patients do not give any response to internal and external stimuli. Besides, the temporary activities of the heart and respiratory systems do not come from the brain. These activities can continue as reflex using medical resuscitation apparatus for a few hours or days. Hence, scientifically, the likelihood of reviving the brain is zero. Undoubtedly, in this case, an irrevocable separation of body and soul will occur. Regarding the two mentioned points i.e. the complete body-soul separation and its irreversibility, we can conclude that brain death is the end of life, a real death and permanent separation of body and soul.

As it is derived and understood from Quranic verses and hadiths, sleep and death are similar in separation of soul, however, the separation is reversible in sleep but irreversible in death. Therefore, death and complete Tawaffa is applicable to instances of brain death. There is also some evidence in Islamic law and narrations that can be used for considering the brain death patients as religiously and legally dead. Now, some of this evidence is discussed. According to the jurists' fatwas, if the expecting mother dies during pregnancy, the fetus in the case of insufflation of soul must be removed from her womb. Otherwise, the removal is not necessary. Therefore, the insufflation of soul conveys the time the embryo achieves the status of a complete human. According to jurists, the movements of the child in the womb are the sign of human life and insufflation of soul. From this verdict we can conclude that the body's voluntary movement is

the important sign of human life. Given that the brain death patients have no voluntary movements, they can be viewed as dead. In this regard, there are some narratives that are correct or reliable. Sheikh Hurr Ameli in the book *Wasael Al-Shiite* has written a chapter on “the verdicts on the death of the fetus with out the mother’s death and vicevers”. In the chapter, a series of category of narratives imply that movements are the sign of life and lack of movement is the indication of death. Some of the narratives are cited here. The first narrative belongs to Kalini authentically cited by Ibn Abi Umair from some compaions of Imam Sadiq (P.B.U.H). The Imam was inquired and questioned about a woman who died and the child moved in her womb and whether they are allowed to make an incision in her abdomen and the pulled out the baby. The answer was “yes, and the abdomen must be sutured after pulling out the baby”. The second narrative is from Wahab Ibin Wahab cited from Imam Sadiq (P.B.U.H) that Imam Ali (P.B.U.H) said if a woman dies and her unborn child moves, her abdomen is split and the baby is brought out (41). Relying on the traditions and narratives, the jurists in the case of a child who is born, have said that the indication of being alive is moving the limbs, crying or any activities that signify life. Otherwise, it is doomed to be born dead (42). In juristic literature, we can find narratives that maintain “if the baby is born alive is entitled to receive inheritance. Being born alive is defined as the baby that cries or moves his/her limb voluntarily, otherwise, he/ she is not entitled to inheritance”.

The author of the book *Wasael Al-Shiite* has allocated the seventh chapter for the issuses of neutral and doubtful inheritance and under the guise of the narratives, it is concluded that moving, screaming and crying are the signs of living birth that bring about the entitlement to inheritance. We also can rely on the narratives from Abdullah Ibn Sanan on inheritance entitlement of the innates. The narrative runs “the baby does not receive inheritance unless it cries and the voice is heard”. Also, Ibn Awen has heard from Imam (P.B.U.H) that “a baby does deserve inheritance unless it cries and the voice is heard”. Rabi ibn Abdullah cites from Imam Sadiq (P.B.U.H) that “If the baby moves, it receives inheritance.” Elsewhere, Rabi says “I heard Imam Sadiq (P.B.U.H) said when the baby is born and shows clear movements can receive or give inheritance’. Ibn Sinan quotes from Imam Sadiq (P.B.U.H) “for the baby who did not cry or scream no prayer is said and such a baby is not entitled to inheritance of pecuniary remedy (Diyah) or etc. If it cried (and died afterwards), say prayer upon him/her and give him/her inheritance”.

In such traditions and narratives, voluntary activities are the signs of life. Now, the question is whether there are voluntary activities in brain death patients. In accordance with the narratives, it was

found that signs of life are crying, shouting and movement. If the brain is alive and still working, these indications are available, too. If the brain is not fulfilling the functions, the person is incapable of screaming, crying and moving. Heart rate and breathing are not decisive in this case and have no effect on such vital signs. No statement has been in the narratives that heart rate or breathing are signs and indications of life. The credible evidence suggests that embryo do cardiovascular activities even before insufflation of soul and human life. This shows that there is no correlation between human life and cardiovascular activities. As a result, cardiovascular activities in brain death patients are not per se a compelling reason for being alive. In addition, on the animals that are slaughtered religiously the jurists have declared that in case of doubt about life, the movements after religious slaughter indicate the life before the slaughter, otherwise, the animals had been dead before the religious slaughter (44,45). In the accredited and distinguished books of Islamic jurisprudence, there are narratives indicating that the voluntary activities are vital signs. (46). The similar evidence also reveals that according to the jurists, the diyah (blood money) imposed for abortion of a complete fetus is 100 dinars before the insufflation of soul and a complete diyah after the insufflation of soul. Also, the diyah for decapitating a dead body is one hundred dinars (47,48). Integration of these juristic verdicts and views allows us to conclude that the fetus has no human life (and is dead) before insufflation of soul that is characterized by movements although heart beat and the pulse are present. As a result, complete diyah should be allocated.

Therefore, activity of the heart and pulse in brain death patients are not indication of being alive. Another viewpoint that can explain brain death has been discussed in the verdicts. The issues the legislator has defined and stipulated specified decrees for them such as prayer, fasting, Hajj, Zakat, religious trips, affordability of the Hajj, poverty and iundigence in paying Khoms (one-fifth of your earning given away for charity) or paying Zakat can be called religious issues. There are issues for which the legislator has no specific definition or term. This category of issues can be called customary issues which are of two types. First, the issues that have clear concept and reference (external example and instance) in custom, practice and the people such as the concepts of absolute water, mixed water, contract, sale, trade, the unclean (Nijasaat) and the clean (Mutaharat). The second category of issues have clear concepts but unclear references. In this regard, we should refer to the experts. For example, the concept of gold, silver, agate, turquoise and pearls for which the legislator has issued decrees. Nevertheless, ascertaining whether that gold and silver are real or fake, or differentiating between metals such as gold or platinum and

identifying onyx, turquoise and pearls entail employing experts. Moreover, verifying whether or not lime, plaster, cement, glass, tar or precious stones are considered to be proper for posturation and requires expertise and opinions of the experts. It seems that the concepts life and death are of this type. The public understand the meaning of being dead or alive. The custom maintains that death is separation of soul and body and a dead person lacks any understanding, perception, feeling and action and his/her body systems are disabled and ceased functioning. Many of these concepts are self-evident and some have unclear external examples. Hence, to determine if a person is dead, doctors are called on.

This indicates that all instances of occurrence of death are not clear. To certify whether a person is dead, we do need to rely on medical specialists to establish if the body system is reversible even if the person show no vital signs of heart beat and pulse. Customarily, we can consider a brain death person alive or dead by the appearance that is the respiratory and cardiovascular activity. However, the medical specialists judge the situation differently. Doctors believe that the patient is dead because of the complete loss of nervous system functions. The patient feels no pain and shows no movement. Plus the heart and pulse do not come from the brain and breathing is maintained by artificial apparatus. At any time, if the device is disconnected, the heart and pulse and breathing will be lost. This condition is permanently irreversible. Meanwhile, the experts note that the activity of the heart with the aid of devices is no indication of survival of the soul and being alive because the heart activity can be sustained outside the body for a while using devices.

Here, we can conclude that common custom takes the same stance as the doctors in establishing death and termination of life and both consider a brain dead patient as dead. Another reason that can be adduced is that if brain death is not certified by religion and jurisprudence, it could amount to a matter of unstable and unsustainable life means that a person is not likely to sustain a stable and definite life due to the grave injuries inflicted and this situation will definitely follow death. To clarify the concept of unstable and unsustainable life, the jurists provide the example of a person whose head is cut off, but the head is not totally off the body. Also, take the example of a person whose belly is completely torn in an accident. In this case, if a third party causes harm to the victim, his act constitutes a commission of crime on a dead body (49). In this regard, Imam Khomeini states "if a person is affected by a crime as if s/he is slaughtered (killed by beheading) and remains no established or sustainable life for him/her, and in the meantime a third party commits an act of manslaughter on him/her, the first criminal is subject to retaliation and the second criminal is liable to pay the diyah for commission of

crime on dead bodies" (50). The author of Jawaher al-Kalam is his book, clarifies the meaning of a unstable and unsustainable life by pointing out to an injured person who has no perception, speech and voluntary movement. This definition truly conveys the instance of brain death. In such cases, the verdict is modified and the third person who inflicts injury on such a person shall be sentenced to pay blood money (diyah) as much as awarded for a dead person.

The verdict issued by the author of Jawaher al-Kalam is "as if he has cut off the head of a person who is considered as dead" (51). Now, the question is how to ascertain the criteria for establishment of unstable and unsustainable life. In response to this question, some scholars like the author of Jawaher al-Kalam have noted the decline and loss of understanding, intelligence, speech and voluntary movements. Some other have considered the indisputable certainty of death and the impossibility of survival as the criteria. Another group has counted the emergence of death-time struggle and agony and moribund as the criteria. Some religious scholars have interpreted and conceived the unstable life as "as if getting slain" because by cutting the larynx and esophagus, gradually the circulation is lost and breathing stops as death will certainly be resulted.

Given that the patient affected by brain death shows no signs of voluntary movements, perception, understanding and feeling and his/her respiratory activity will cease without devices and there is no likelihood of reversibility and survival, the doctors compare him/her to a person without a head who will soon lose the signs of the vegetative state. Undoubtedly, it can be said that such a person lacks a stable and established life that is the criterion of the penal verdicts.

In this case, brain death can be considered as an instance of unstable and unsustainable life. To sum up, unstable and unsustainable life is a state that a person is in the course of the separation of the soul from the body, but the separation has not completed yet. If we can apply the characteristics of religiously and juristically defined death to brain death cases, the remaining questions can be answered more effectively. One of the important questions is whether the different organs of such patients can be removed from the body for transplantation to the patients who are critically ill and their survival depends on donation of organs. The point is whether there are any legal and religious restrictions on this issue. First, it should be noted that if a brain dead patient is considered as a dead person, there is certainly no difference in removal of the vital and non-vital body organs.

The question that may cross one's mind is why we should sustain and maintain this brain dead person who is certainly dead in a vegetative manner using medical life support systems and artificial breathing devices. Therefore, disconnecting the medical support

devices from a brain dead patient could not be religiously or rationally problematic. This is religiously permissible, in force and binding if a person who is the owner of his/her body permits the donation and transplantation of the organs before being inflicted by brain death. It is common that some people allow organ donation (in the case of infliction of brain death) in their wills and thereby the inheritors and heirs can coordinate with the country's to medical system and institutions for donation and transplantation of the organs before corruption or decay. Finally, although brain death is viewed as unstable and unsustainable life (and the concept of death cannot be yet applied), as noted above, some

verdicts of the dead are applicable. For example, if something happens or is done that expedited death, it does not amount to crime of manslaughter, but the rules of blood money are still applicable and in force. Therefore, if the life of a Muslim is contingent on organ donation from brain dead patients, the organ transplant is, in principle, legally and religiously permissible

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