

## ORGAN-ised Rejection: An Islamic Perspective on the Dead Donor Rule in the UK – Revisited

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Organ transplantation technology throws up deep theological, moral, cultural, and ethical questions. The discussion blurs the boundaries between life and death, and for Muslims, between halal and haram. It frustrates religious sensibilities, entangles bodies, and complicates the very identity of organ transplant patients. A recipient of a heart transplant could not get himself to say to his wife, 'I love you with all my heart!' as the cocktail of immunosuppressant medicine was a continuous reminder of the presence of an alien flesh in him which his body is fighting tooth and nail to reject. The alternative expression, 'I love you with all my liver!' elicited a repulsive look from his wife, not the response he was looking for (Wright 2020, p. 49). At rock bottom, organ transplantation questions the very meaning of what it means to be a human being. Is it an enslaved body, where the biological and metaphysical are entangled and enmeshed in to one person; or is it an embodied organism, a conglomeration of disparate body parts like that of spare car parts?

With the change of the law in Wales (1 December 2015), England (20 May 2020), and Scotland (26 April 2021), emphasis has been given to campaigns extolling the benefit of organ donation. This resulted in minority opposition voices to have been all but drowned (Master 2019; Ali 2019a).

From these minority voices is an article written by Dr Abid Hussain published in volume four of this journal (Hussain 2020). The main thrust of the article is that whilst it is admirable for doctors and organ donation campaigners to extol the benefits of organ donation based on statistics and waiting list numbers, they fail to disclose the entire range of opinions on the Islamic ruling on organ donation.

The allegation is serious. It translates into patients not being given the chance to make an informed decision since doctors and campaigners wilfully subdue

information to attain an intended outcome (increase in organ donation).

I welcome Dr Hussain's concern for more transparency and nuanced discussions on organ transplantation in Islam. However, I take issue with the absolutist tone. Elsewhere, I have argued that due to the fact that the issue of organ transplantation is conspicuous by its absence from the Qur'an and sunnah, the matter is *ijtihadi* (religious discretion of scholars), thus, organ donation is a choice (Ali and Maravia 2020). I and my co-author have extrapolated seven contradictory positions from our readings of fatwas on this issue. We make the argument that all seven positions are Islamic positions and people have the choice to adopt whichever position they want without the feeling of theological guilt or moral culpability. Dr Hussain concludes his concerns as follows:

For Muslims it is not just a mere case of legal permissibility to donate organs but perhaps just as importantly what is morally good and what will help them to get to Paradise on the Day of Judgment (Hussain 2020, p. 22)

I will revisit the above statement towards the end of this paper. Further to my objection to Dr Hussain's seemingly absolutist position, I feel that the three arguments he uses to build the main thrust of his paper overlooks nuance. These are (1) the claim that adhering to one School of Law (*madhhab*) is necessary, (2) the discussion on brain-death and Islamic death and (3) his interpretation of the three British fatwas.

I will use the remainder of this paper to nuance these arguments and demonstrate that there is more than one way of reading them. Since I have written a detailed paper on organ transplantation ethics in Islam, readers will be referred to that paper to look up the sources rather than detailing them here (Ali and Maravia 2020).

## Organ transplantation and single-*maddhab* ruling

Rejecting notions of plurality in choosing different fatwa positions, Dr Hussain maintains that the vast majority of scholars encourage their followers to confine themselves to one *madhhab* (Hussain 2020, p. 21). While this may be true in most cases, contemporary bioethical issues such as organ transplantation fall outside the jurisdiction of a single *madhhab*. This is because the Qur'an and sunna are conspicuous by their silence on these matters and the medieval scholarly legal tradition does not have accurate parallel paradigm cases on which to base one's *ijtihad* (Ali and Maravia 2020, p. 2). These are new emerging issues, and the responses are the result of individual or collective *ijtihad* which transgress the traditional boundary-lines of *madhhab*-based *ijtihad* (Caeiro 2017; Abdullah 2010). As a result, it is difficult to put the finger on the pulse as to what exactly is the opinion of any one particular *madhhab* on these issues.

One may argue that as long as a mufti is using the principles and hermeneutical tools (*usul*) of a *madhhab*, the resultant conclusion can be confidently attributed to that *madhhab*. In theory, this is correct, but in the case of organ transplantation, here lies the problem. Nearly all contradictory opinions can be established using the *usul* of one single *madhhab*. By way of example, let's focus on the myriad of opinions established using the *usul* and *furu'* of the Hanafi *madhhab*. Which one should we confidently attribute to the *madhhab* and why?

1. Organ transplantation is haram (both receiving and donating). This opinion includes the impermissibility of blood transfusion. This is the opinion of Mufti Akhtar Raza Khan (d. 2018) great-grandson of Maulana Ahmad Raza Khan Bareilwi (d.1921) (Khan 1991).
2. Organ transplantation is haram (both receiving and donating) but blood transfusion is permissible. This is the view of Mufti Muhammad Shafi (d. 1976) from the Deobandis (father of Mufti Muhammad TaqiUthmani) (Shafi 2010 (1967)).
3. Judgement on the legal status of organ transplantation is suspended (*tawaqquf*) until further research. However, in the case of dire necessity, one is allowed to receive an organ. This is the opinion of Mufti Muhammad TaqiUthmani (Uthmani 1998 & 2011; al-Kawthari 2004).
4. Organ reception is permissible (including from dead donors). However, only live organ donation is

permissible. Cadaver organ donation is impermissible. This is the opinion of the Islamic Fiqh Academy of India (Qasmi 1994).

5. Organ reception is permissible (including from dead donors). Organ donation from live donors is permissible. Organ donation from brain-death (DBD) is not permissible. Organ donation from circulatory death (DCD) is only permissible after elective [*sic*] irreversibility has been established. This is the opinion of Mufti Muhammad Zubair Butt (Butt 2019).
6. Both organ donation and reception are permissible from live and dead donors in all its iteration. In fact, in dire necessity, one is allowed to buy organs but not allowed to sell. This is the opinion of Maulana Khalid Sayfullah Rahmani current president of the Islamic Fiqh Academy of India (Rahmani 2010).
7. Organ reception is permissible, organ donation is permissible in all its iteration (live, dead, DCD, DBD). In fact, according to this opinion a person should be declared dead when all higher brain functions cease to exist, however, in the absence of criteria to accurately determine the cessation of higher brain function, DBD criteria is to be used. This is the opinion of Maulana Dr Rafaqat Rashid (Rashid Forthcoming 2021 2020).
8. An argument for permitting organ donation in all its iterations specifically using Hanafi *Usul al-Fiqh* made by Muhammad Rashid Qabbani (b.1942) former grand mufti of Lebanon. The argument is made by interrogating the Hanafi *usul al-fiqh* and *furu'* sources on the concepts of rights (*huquq*); especially the works of the Hanafi scholars 'Abd al-Aziz al-Bukhari (d.1438) and 'Ala al-Din Al-Kasani (d.1191). For a detailed commentary and translation of this study in English, refer to my article, '*Our bodies belong to God, so what?*' (Ali 2019b).

The holders of the above positions are all Hanafi scholars who are using the *usul* of the Hanafi *madhhab* to argue their positions. Which one of them qualifies to be the Hanafi opinion?

If one were to interrogate the details of Hanafi positive law (*furu' al-fiqh*) to find parallel paradigm cases, even there the sources yield contradictory results.

1. Use of human body parts and organs: All Hanafi legal manuals pronounce that it is haram to use limbs

and body parts (bones, teeth, hair) from one person to another (Nizam al-Din 1991, p. 7; Ali and Maravia 2020). This is because human beings are an end in themselves and not a means to an end. On the basis of these texts, it is argued by contemporary muftis that organ transplantation in all its iteration is haram as it is an affront to the dignity of the human being (Shafi 2010 (1967)). I have argued elsewhere that that may be the case, a careful study of these texts reveal that all examples of body parts and limbs discussed in the classical Hanafi law books relate to interventions on the level of cosmetic enhancements such as hair extension, tooth transplant, and bone graft. Proponents of organ donation do not allow the use of human body parts for cosmetic enhancements (Ali and Maravia 2020, p. 7; al-Buti 1988).

2. Cannibalism and anthropophagy: All Hanafi legal manuals declare it haram to consume the flesh of another human being even in the case of dire necessity (Nizam al-Din 1991; Shafi 2010 (1967)). The argument is that if eating another human to save one's life, which is the ultimate aggression towards the human being, is allowed, then taking an organ from another person will be permissible. Hanafi scholars are unanimous that cannibalism and anthropophagy is not permissible. Using this as a paradigm case makes organ transplantation haram. However, one can question if this is an accurate paradigm case to base the discussion of organ transplantation on in the first place? Is transplanting an organ into the recipient in a sterile environment with surgical precision the same as consuming a human carcass, where the flesh is gnashed with the teeth, swallowed, and later excreted?
3. Caesarean section of a dead woman: All Hanafi texts deem it permissible to cut open the womb of a dead mother-to-be if it means that this will save her unborn child (al-Yaqubi 1987, p. 80-88). The violation of the dignity of the dead (mother) is tolerated for a greater good (the life of the unborn child). This paradigm case is used as evidence for life-saving organ transplantation intervention; that it is permissible to violate the dignity of the dead for a greater good which is saving the life of person on the cusp of death (Ali and Maravia 2020, pp. 10-11).
4. Exhuming a body: Hanafi scholars allow that a person whose wealth has been usurped by another individual who subsequently died, to exhume the corpse of the deceased and cut open his belly in order for the person to retrieve his wealth. Muftis who use

this paradigm case argue that if the dignity of the deceased can be violated for worldly possessions, it can be extended to the preservation of life through organ donation.

5. The classical Hanafi scholar al-Kasani argues that while human life belongs to Allah, human organs and limbs follow the ruling of wealth; since both wealth and organs have been created to preserve and facilitate life. He further argues that the sanctity ('isma) afforded to body parts is not absolute and at times this sanctity can be suspended. He writes,

If a person said, 'cut my hand off, and the other person cut it, there is no repercussion on the other person by consensus. This is because body parts follow the ruling of wealth, the protection of which is his right. It can be suspended either through making lawful (*ibaha*) or through consent similar to if the person said, 'destroy my wealth, and the other person destroyed it,' (al-Kasani 1986, 7:236; Ali 2019b).

The point of the above prolixious discussion was to highlight that it is difficult to talk about a single *madhhab* point of view, at least for the case of organ donation.

### Brain-death and Islamic death

Dr Hussain argues that the real crux of the matter is that in order to retrieve organs from dead donors, the donor has to be already dead Islamically (i.e., the dead donor rule). This is universally accepted, and no one would deny it. He further points out that death determined using neurological criteria is neither agreed upon by physicians nor Muslim scholars. This is also a fact which one cannot deny. However, this difference of opinion should not automatically translate into haram and non-acceptability. Islamic law mainly operates on the level of 'highly probable knowledge' (*ghalabat al-zann*) (Padela, Ali, and Yusuf 2021 forthcoming) and a great number of doctors as well as Muslim scholars have declared brain death to be akin to Islamic death (Chiramel et al. 2020; Padela, Arozullah, and Moosa 2013; Moosa 1999).

However, what does it mean to be dead Islamically? Death is defined as the cessation of that which is essential to its nature (Veatch and Ross 2015, p. 54). From an Islamic point of view this is translated as the cessation/exiting/extraction of the soul from the human body. Scholars in the past have debated whether death is an entity (*wujud*) or a non-entity ('*adammahd*). In other words, is death the absence of life or a separate entity

closely related to life, but independent of it. Both opinions have been put forward (al- 'Ayni 2000, 1:429). The ramification of this difference is thrown into relief in the case of brain-death. If death is a non-entity, i.e., the absence of life, any semblance of life, even mechanically is an indicator of the presence of life. On the contrary, if death is an entity, related to life but independent of it, it is incorrect to bracket some somatic activities with the presence of the soul in the body. According to this understanding of death, retrieval of organs in the case of brain-death is not problematic even though some mechanically supported biological functions remain.

A similar situation can be observed in the beginning of life. Ensoulment is a metaphysical phenomenon. A foetus before ensoulment is viewed as a human organism but not a human person by most scholars. It is alive and leeching (*alaqa*) the resources from the mother. It is only after ensoulment (120 days or 40 days) that the foetus is deemed a proper person in Islam with proper rights and responsibilities. In other words, A human organism can be living, but without a soul.

Whilst it is commonly believed that it is impossible to know the moment the soul exits the body based on Qur'an 17:85, that the soul is unknowable, this is not an agreed upon position. First of all, there is no consensus amongst scholars that the word '*ruh*' in the above ayat refers to the human soul/spirit. Al-Razi was of the opinion that it may refer to the Qur'an. He argues that when the pagans of Makkah heard the Qur'an, they thought that it was a superior form of poetry or the poetic rambles of a sorcerer. Allah rejects this by saying that it is nothing but an '*amr* (command) of Allah (al-Razi 2000, 21:391-93). Even if we were to accept that the word '*ruh*' in Q 17:85 refers to the human soul, this does not necessarily mean that we do not know anything about the '*ruh*'. The most it means is that we do not know the reality of the '*ruh*'. However, the Prophet has told us about the functions and actions of the *ruh*. For example, the Prophet said, 'When the soul leaves the body, the eyes follow it,' (*Ṣaḥīḥ Muslim, k. al-Janā'iz, b. fī ighmāḍ al-mayyit waal-du'ā' lahidhā ḥaḍar*). It is on this basis that Shaykh Muhammad Na'im Yasin of Jordan (one of the first scholars to have bracketed the exiting of the *ruh* with brain-death) argues that the soul is not a mystery but a creation of Allah. Its functions can be observed empirically (Yasin 1986, p. 638).

Furthermore, the 'ulama treat the subject of death in relation to death-enacting behaviour not as a theological issue but a legal one. There are precedents in Islamic law manuals for similar types of deaths where a person has

somatic activity and yet declared to be legally dead (*al-hayy fī hukm al-mayyit*) (Albar 2001). Scholars discuss the case of the 'slain person' (*madhbuh*) who still has some semblance of biological life and yet legally has been declared dead (Moosa 2002; Rashid 2020). Thus, they argue that if a *madhbuh* person's father was to die after him, the *madhbuh* person will not inherit anything from him, for he is legally dead, and the deceased does not inherit.

The brain-death criterion is a bottleneck situation among Muslim scholars. It is based on competing worldviews regarding the human, death and dying. Unfortunately, there is no conciliatory views between the two positions, and strong arguments have been put forward by both parties. Advocates of Brain-death criteria include: the Islamic Organisation for Medical Sciences in its 1985 and 1995 conferences (IOMS cited in IIFA 1985; Moosa 1999; Grundmann 2005; Sing 2008; El-Gindi 2013). The IOMS dealt specifically with the issue of brain-stem death. This was followed by a resolution arrived at by the International Islamic Fiqh Academy (IIFA) of Jeddah in its 3rd conference held in Amman, Jordan in 1986(IIFA 1986) for the purpose of switching off the life-support machine. It was further discussed by the IIFA in 1988 in its 4th session in Jeddah where whole brain-death criterion was deemed as Islamic death for the purpose of organ retrieval (IIFA 1986). It is also the opinion of some eminent scholars such as the former rector of Al-Azhar University, Shaykh Sayyid al-Tantawi (d. 2010) (Hamdy 2012, p. 48). This is also the opinion of Shaykh Yusuf al-Qaradawi (al-Qaradawi 2009) and the opinion which is becoming progressively accepted as transplant medicine advances. Dr Albar writes in his exhaustive study on organ transplantation that the Saudi Government relied upon the IIFA declaration for its policy on brain-death. Up to the period of 1991 Saudi Arabia has had a success of 823 kidney transplants, 352 of which came from brain-death patients (Albar 1994).

Contrary to the above, those who believe that brain-death is not Islamic death include: the Islamic Fiqh Council of Makkah (IFC)(IFC 2010, p. 231). Scholars who hold this position include the former Shaykh al-Azhar Gad Al-Haqq Ali Gad al-Haqq (d. 1996) (Gad al-Haqq 1979; Moosa 1998), Shaykh Muhammad Sa'id Ramadan al-Buti (d. 2013) (al-Buti 1988) and the former grand-mufti of Egypt Shaykh Ali Gomaa Muhammad (Ali Gomaa Mohammed 2003). It is also the view of Mufti Muhammad Zubair Butt as well as the Islamic Fiqh Council of North America (Shah 2018; Padela and Auda 2020). In the absence of clear-cut guidance from the Shariah, we are at a bottleneck situation. One either has



to accept that a semblance of life, albeit mechanical, is signs of the presence of the soul or not, accept the difference and move on. (For a detailed exposition of why and how modern Muslim scholars bracket the exiting of the soul with the concept of brain-death, attention is drawn to my forthcoming chapter on this subject (Ali Forthcoming).

### Discussion on the three British fatwas

Dr Hussain then proceeds to discuss three fatwas which address the UK scene specifically. These include Dr Zaki Badawi's 1995 fatwa which was hitherto used in all NHS promotional material (Badawi 1995; Raanan 1996). The Declaration of the European Council for Fatwa and Research (ECFR) in its 6<sup>th</sup> session held in Dublin in 2000 (ECFR 2000) and the latest NHS-commissioned 110 pages independent legal opinion by Mufti Muhammad Zubair Butt (Butt 2019).

The conclusion of Dr Hussain's analysis of these three fatwas is that they are not fit for purpose for the UK scene. Here, I believe, is where Dr Hussain's analysis could benefit from nuance.

### ECFR and Mufti Butt's rejection of DBD?

Dr Hussain writes, 'Regarding brainstem death (DBD) both the ECFR and Mufti M. Zubair Butt fataawa reject the UK criteria for determining death,' (Hussain 2020, p. 22)

Whilst it is true that Mufti Butt is clear in his rejection of establishing death using neurological criteria (whole brain or brain-stem), the ECFR fatwa **does not** reject brain-stem death *per se*. It only establishes whole-brain death. This is less about the ECFR 'rejecting' brain-stem death and more about the unfortunate choice of sources they used as references for their position. The ECFR declaration did nothing more than parrot the declaration of the Islamic Fiqh Council of Makkah (IFC) and the declaration of the International Islamic Fiqh Academy of Jeddah (IIFA) (IFC 2003; IIFA 1988, 1986) without interrogating those declarations to see whether they were fit for purpose (in the UK).

Taking a closer look at the ECFR's sources, the IFC rejects any form of brain-death definition as Islamic death. However, the IIFA declaration (which the ECFR quote in its entirety) accepts both death determined using circulatory criteria as well as neurological criteria. It should be noted that the acceptance of the brain-death criteria here is for that of whole brain-death and not

brain-stem death. The reason for this is that the IIFA followed the American bioethical discussion on the definition of death. Whole brain-death criterion is accepted throughout the world except for the UK, India and Trinidad and Tobago. The IIFA's acceptance of whole brain-death criteria was fit for purpose for the Middle East, unfortunately it does not address the minority UK position of brain-stem death.

It is unfortunate that the members of the ECFR, who are catering for Europe including the UK did not pick up on this subtlety. A better source for them at least for the UK would have been the declaration of the IOMS in 1985 and confirmed again in 1996 which discusses and accepts the brain-stem death criteria (El-Gindi 2013). It is hoped that the above detailed excursion demonstrates that ECFR is not averse to brain-stem death, and that it was an unfortunate oversight on their part which resulted in their declaration not addressing the UK situation. The ECFR is invited to look in to this further. Members of the British Islamic Medical Association are also invited to further research the issue with keeping the UK scene in mind.

### All three fatwas rejection of DCD?

Dr Hussain infers that the 1995-Zaki Badawi fatwa could not have issued an accurate fatwa of permissibility since the criteria for DCD was introduced only in 2008. This requires correction. DCD is a concept that was around long before it was introduced in the UK and it was practiced in the UK, albeit in a limited manner, before the millennium (Gardiner et al. 2020).

Furthermore, it is also not accurate to maintain that Mufti Zubair Butt and the ECFR reject DCD totally. Their rejection of DCD is restrictive. According to Mufti Butt, DCD is not permissible until the point of elective [*sic*] irreversibility has lapsed, which does not rule out procuring certain types of organs which have not been rendered unviable due to organ ischemia such as cornea, skin or tissues. Furthermore, Mufti Butt and the ECFR do not have a principled opposition to organs already retrieved (from live donor, DBD or DCD) to be transplanted. Their restrictive condition pertains only to donation.

Below are two tables comparing Dr Hussain and my reading of the three fatwas.

	Donation after brain stem-death (DBD)	Donation after circulatory death (DCD)
1995 Muslim Law Council fatwa	Yes	No
2000 ECFR fatwa	No	No
Mufti M. Zubair Butt	No	No

Table 1: Dr Hussain's reading of the three UK fatwas

	Donation after brain stem-death (DBD)	Donation after circulatory death (DCD)
1995 Muslim Law Council fatwa	Yes	Yes
2000 ECFR fatwa	Not discussed	Yes (restrictive)
Mufti M. Zubair Butt	No	Yes (restrictive)

Table 2: My reading of the three UK fatwas

## Conclusion

From my analysis of Dr Hussain's three secondary arguments, it can easily be observed that fatawas and sources can be read in multiple ways. It is based on this multiplicity that I argued that organ donation is a choice and whichever fatwa one accepts is an Islamic opinion without the fear of moral sin or theological culpability. In the absence of clear-cut guidance from the Qur'an and sunnah, privileging one position as **the** Islamic position (as opposed to **an** Islamic position) over another is to arrogate an opinion on to Allah for which there is no clear evidence.

Finally, Islam is predominantly a nomocratic religion where the pleasure and will of Allah is found in

following the laws of the Sharia. Muslim scholars have discussed the status of plurality of opinions by raising the question 'are all *mujtahids* correct in their opinion?'. In other words, can an opinion correspond with Allah's intention (*murad Allah*)? The 'ulama were divided on this matter in to two positions: the *mukhatti'a* and the *musawwiba*. The *mukhatti'a* believed that there is only one correct legal ruling, and the rest of the opinions are incorrect (*khata'*). The *musawwiba* on the other hand believed that every opinion is correct. Imam Sayf al-Din al-Amidi (d. 1233) summarised the *musawwiba* position as follows

Every *mujtahid* is correct in legal matters. The *hukm* Allah on the matter is not unitary, but rather arises from the considered opinion of the jurist [*zann al-mujtahid*]. Hence, the rule of Allah in the case of each jurist is the product of his *ijtihad* that leads him to a preponderance of opinion [on the subject](Al-Amidi, cited in Emon 2009, pp. 431-436).

Emon writes, 'In other words the legal determination is authoritative not because it corresponds to a pre-existing rule or truth in the mind of Allah, but rather because of the quality of investigation by which we reach *ghalabat al-zann*(Emon 2009, p. 435).

In reality, the difference is teleological. For the *mukhatti'a* there is a specific legal ruling (*hukmu 'ayyin*) which corresponds with Allah's intention and is attainable in theory, but in practice, one cannot be sure if they have attained it or not. As for the *musawwiba* the issue is epistemological. That is that it matters not whether there is correct legal ruling which corresponds with Allah's intention or not. What is important is the due diligence and the process of *ijtihad* used to arrive at that ruling. The upshot of all of this is that the *mukhatti'a* and the *musawwiba* are both aspiring to do the right thing. The question of whether their rulings and fatwas, arrived at through a process of due diligence, correspond with Allah's intention (*murad Allah*) is beyond the reach of human comprehension.

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In preparation of this bibliography, I have ignored the Arabic definite article 'Al' as a result 'al-Būṭī' is found under 'b' and not 'a'.

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