

**ETHICAL VERSUS MEDICAL VALUES
ACCORDING TO CONTEMPORARY ISLAMIC LAW**

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Modern medical treatment is throughout the Islamic world associated with originally imported Western medicine which has meanwhile become internationally applied. As a result especially of oil revenues a certain number of Muslim Arabian states are in the position to offer high medical standards to large parts of their population. The setting up of new health care centers and the offering of modern techniques, machines and medication is also a matter of national prestige. Besides, it may be instrumental in ensuring social peace. Looking through for instance Saudi-Arabian newspapers the importance of these achievements can easily be perceived. Medical facilities are indeed an important topic there, for they are part of the 'presents' the shepherd, namely the Saudi-Arabian king offers to his flock. Other countries like Egypt cannot afford to present the same medical standard to all their citizens. It is however not only money that prevents a full-range implementation of these modern medical achievements throughout the Islamic world. Indeed, not all of these are unanimously hailed when they are introduced. Some of them encounter opposition and protest from self-appointed pious circles who feel thereby challenged in their traditional religious habits and attitudes.

In the following I am going to outline some of these anxieties and their recourse to Islamic legal norms. I mainly concentrate on contemporary legal opinions (*fatwās*). This type of source provides us with fresh insight into immediate reactions of an irritated Muslim public and with major trends of adaptation which the scholars pro-

pose in answer to this. From the wide range of medical topics discernable in this kind of literature I picked out first of all organ transplantation, artificial insemination and sex change-surgery in order to outline the border between medical possibilities and ethical or legal hindrances. These problems have been variously debated in the last years and are all connected with the basic assumption that every new medical invention — like any new development in general — has to be evaluated on the background of the all pervading *shari'a* rules. Organ transplantation is a rather extreme case of ensuring the prolongement or improvement of life.

Artificial insemination interferes with the creation of life in order to increase human fertility. Sex change surgery stirs up the question to what amount man should confine himself to 'God given' biological factors or may strive to alter and refine them.

As a last topic I am going to deal with female circumcision. In contrast to the aforementioned operations which were introduced only in the last years or decades, circumcision is something very old, if not one of the oldest 'medical' operations at all. It is practiced in various parts of the world including large regions of the Islamic one. This last subject should be understood as a sort of counter-point to the importance given to various modern medical achievements. Its discussion contributes to the understanding of medicine as seen from the viewpoint of Islamic law. What can serve as a legitimation to carry out medical operations? To what degree is it allowed to interfere with the integrity of the human body? Female circumcision might have fulfilled old 'needs'. Whether it can be reasonably continued in the so called scientific age is another question.

1 Organ transplantation

Since the 1950s scientific progress has enabled enormous achievements concerning the transplantation of various organs of the human

body. Previously, "people whose vital internal organs decayed were invariably left to die", and it is only now "possible to replace some decayed vital internal organs with sound ones thereby revitalizing man and making him survive".¹ Meanwhile, transplantation not only left the experimental stage, but developed to a technique which is applied world wide.² Further, the transplantation of hearts, lungs, eyes and kidneys already became what Furqan labels as "an easy job".³ Due to certain climatical circumstances, unhealthy food consumption and modern sedantary life style people in the Arabian Peninsula are especially in need of kidneys and also witness an increase in heart insufficiencies. To these factors has to be added the growing number of traffic accidents. The latter however not only requires new organs, but at the same time provides them. Eye diseases are traditionally rather widespread within the central Islamic lands. Transplantation achievements offered new possibilities to overcome looming blindness by new corneas taken from the dead.⁴

The great majority of legal scholars first of all agree that organ transplantation (*naql al-a'dā'*) is an essentially new topic regarding its evaluation in Islamic law. It therefore cannot be easily subsumed under already established *shari'a*-rulings. Instead, its judgement in the light of the holy law has to be developed by way of *ijtihad*, legal development on the basis of the God given sources. A second commonly shared opinion of most of the authors is that organ transplantation represents a highly complicated issue. Its various legal aspects have to be carefully differentiated.

Let us start with the donor. Is he at all allowed to donate one of his organs while alive? Who is in the end to be regarded as the owner of his body? As a monotheistic religion Islam does not concede to man "full ownership" of his body which is "at most" a "deposit for [a] lifetime, after which it is returned to the creator"⁵ by way of a ritual burial. Nevertheless, man does possess a kind of reduced power of disposal. However, anything the transplantation of which would be fatal to the donor, like the donation of heart or liver

while alive or the taking out of both duplicate organs like kidneys⁶ is strictly forbidden. Such an operation would immediately lead to death. Since these organs belong to the “ground-stock of life” (*asl al-hayāh*) they are regarded to be only at God’s disposal (so called *haqq Allāh*).⁷ Human interference with it would amount to suicide⁸ which is strictly forbidden in Islam or — on the part of the surgeon — to the killing of someone else. This physical fundament of human life represents an absolute value which cannot be disposed of by any kind of social advantage or human interest (*maṣlaḥa*) whatsoever. No one’s life is to be regarded as superior to the life conditions of someone else. Nevertheless, there are border-cases like the disposing of one of one’s eyes.⁹ Regenerative parts of the body (*al-mawādd al-mutajaddida*), like skin, blood or bone marrow¹⁰ as well as pairy (*muzdawij*) organs represent another category.¹¹ Within this category man may practice altruism in accordance to the general rules of the *sharī‘a*¹² and donate during lifetime.

Coming to the donation of organs *after* death the categorization in life stock and regenerative or pairy organs naturally becomes irrelevant. Nevertheless, as well as during lifetime, the human body enjoys after death not only the right but also the obligation to physical integrity (*hurma*).¹³ This *hurma* is in itself an expression of the acknowledgement of God’s ownership. The deceased is so to speak to be fully handed back to his creator. This being the case, his corpse should not be harmed in any way. Moreover, the community is under the collective obligation to bury him ‘untouched’ and in one piece in accordance with the prescribed rites of traditional Islamic law.¹⁴ Anything else, exposure of his decay to the outward world with even the danger that parts of his corpse might get plucked out amounts to mutilation which is prohibited and most strongly detested.

The opening of a corpse is something which had already been discussed in Islamic law before organ transplantation was invented over the last decades. One of the latest actualizations of this old

topic is the problem of post mortems (*tashrīh al-juthath*).¹⁵ Only a minority of authors categorically forbid *tashrīh*, referring to the famous Hadith that breaking the bone of the dead is likē breaking the bone of the living. Sanbuhaylī for instance sees post mortems as such a debasement of the sanctity (*hatk al-ḥurma*) of the deceased that he regards it to be strictly forbidden.¹⁶ The majority of scholars however admit certain exceptions for well defined individual reasons:

- the use of forensic medicine (*aṭ-ṭibb ash-shar‘ī*) to establish the real causes of death when a crime is suspected;
- detection of epidemics etc. by the state authorities responsible for public health;
- post mortems as part of medical education.¹⁷

These ends are meanwhile more or less accepted as a justification (*mubarrir*) for dissection although the dead’s sanctity remains principally upheld.¹⁸ Already here the idea is discernable that it might even be an honor for the dead to be able to do such a good service to mankind. This idea is reiterated later in the context of organ transplantation.

In the case of post mortems the *sharī‘a* experts were already forced to practice *ijtihād* in order to come to an appropriate conclusion. They not only applied general principles of the *sharī‘a* to do so, but also turned back to even much older cases drawn from Medieval Islamic law books. These were used to widen by way of analogy the list of possible exceptions from a nonetheless general rule. This concerns on the one hand the question of whether it is allowed to open the corpse of a deceased pregnant woman whose child is still alive and on the other hand of whether a dead body may be opened when the deceased person had swallowed a valuable item.¹⁹ It becomes evident that it is not only the act as such — the opening of the corpse — which is under discussion but also the

intention (*niyya*) for doing so. Deeds have to be judged according to the intentions accompanying them, *al-umūr bi-maqaṣidihā*, as tells one of the most famous legal principles.²⁰ So long as an essentially unlawful deed is in itself accompanied by a religiously accepted benefit for society (*maṣlaḥa*) it might be allowed. This benefit must further outweigh the damages caused by it. However, the most important general legal principle is “Necessities render the prohibited permitted” (*ad-darūrāt tubīḥ al-maḥzūrāt*). The life-preserving aspect is not disputed so much — or only in the case when modern medical techniques are still in their experimental stage and not yet reliable. Most problems arise with whether lesser important benefits — such as in the case of swallowed pearls or coins — may be accepted as a justification. Preservation of life is not the only central goal of the *sharī‘a*. There are other ones which all together rank as the five basic *sharī‘a* values which are encouraged and defended on all its levels, namely legitimate offspring, religion, intellect and property. Much room for differing interpretation of legal norms is further given to the more dubious cases which do not automatically accomplish one of the five basic values. Principally, all these values might come into play and have to be evaluated according to the specific circumstances. Allowing post mortems to students of medicine does not immediately and in each case definitely ensure the saving of life. Also many organ transplantations fail. It is here where Islamic scholars have to study the exact circumstances, weigh the pros and cons and confer part of the responsibility to the medical experts. They themselves have to explain only the general guidelines and conditions. Technically speaking these are more worldly needs (*ḥājīyyāt*) or even only mere ‘improvements’ (*taḥsīnāt*) which are not directly stipulated by the *sharī‘a*.

In the case of organ transplantation the legal experts utilized not only older discussions concerning the opening of a corpse but also legal discourses on the “treatment with forbidden things” (*at-tadāwī*

bi-l-muḥarrām). The latter are applied only to cases concerning living donors. *At-tadāwī bi-l-muḥarrām* has ever since been a vast topic in Islamic law. Its long standing tradition is concerned with the use of for example pork or wine for medical purposes, the utilization of gold or even music in therapy or the eating of carrion or even human corpses in order to survive.²¹ It can be inferred that although organ transplantation is from the medical point of view really unprecedented, Islamic law itself provides a rather wide range of more or less comparable cases. These tackle some of its diverse aspects. In connection with the various principles that govern Islamic law they are analyzed and connected with one another.

Whereas organ transplantation is by now accepted by the majority of Islamic scholars²² there is still disagreement over the role of testaments and the interference of state authorities. Some authors like Ṣaqr even claim that the human power to dispose of one’s body ceases with the moment of death so that neither a legacy nor a person’s heirs are in the position to decide²³ what could be done with the corpse. Mostly, however, the free will of the donor is stressed and testaments enabling organ donations encouraged. If the deceased did not decree anything during his lifetime it is often assumed that the right to offer his corpse for donations passes over to his heirs and relatives.²⁴ Another debated topic is the selling of human organs. Usually it is regarded as forbidden and against the spirit of religion.²⁵ This type of charity to others should not be commercialized. As Ḥaṭḥūt put it: It is ashaming that only rich people should win in a sort of struggle of the fittest by buying the necessary organs.²⁶ The role of doctors becomes perverted when they themselves take part in and profit from these practices. In ‘Arab News’²⁷ we read in 1988: “A number of doctors and medical specialists have come out as brokers of human limbs between traders and hospitals as they find it a very lucrative business”.

Some people express eschatological anxieties concerning the exact circumstances of resurrection of donor and recipient. In such

cases the Mufti states “it will cause no problem for Allah in resurrecting the body — including all its parts — on the Day of Accountability, for He is indeed all powerful”.²⁸ It seems that those in favor of organ transplantation whole-heartedly assure that everybody will be resurrected in his authentic physical shape. There is neither any detriment in the Hereafter nor in this world.

The majority of Sunni legal scholars do also not regard the dead as ritually impure which could be another impediment. Reservations with regard to corpses are more concerned with the religious status of donor and recipient. The underlying Islamic hierarchy should possibly be taken into account, so that organs of Muslims are not transplanted into heretics.²⁹

2 Artificial insemination

Lately, scientific inventions have helped to overcome childlessness through artificial insemination, test tube babies³⁰ or surrogate motherhood. These are used in cases where a couple are deprived by nature of the possibility to produce children. Such medical solutions might be all the more important in societies like the Islamic one where the female role is still much more definitely conceptualized in direction to motherhood and the breeding of children. Since adoption (*at-tabanni*) is forbidden, there is no legal alternative to ensure children and heirs. Offspring (*nasl*) is one of the five basic values of the *shari‘a* (*min al-maqāṣid ad-darūriyya*).³¹ The appropriate legal frame for insemination is the valid marriage contract. Offspring are not the sole, but a justified and important aim of marriage and are encouraged by revelation and Islamic law as a whole.

Islamic scholars impart that artificial insemination (*at-talqīh aṣ-ṣinā‘ī*) has long since (*mundhu qadīm az-zamān*) been known — be it with sexual intercourse or without.³² For the transfer of semen sexual penetration is only a usual but not a necessary means.

According to Shaltūt fertility not based on intercourse is not as artificial as artificial fertilization of animals and plants since no improvement of genotype is intended.³³ Nevertheless, “physical penetration” (*al-ikhtilāṭ bi-l-mubāshara*) should stay the rule and should only be deserted in case of necessity (*lā yu‘dal ‘anhā illā li-ḍarūra*).³⁴

Hearing about artificial insemination people get confused as to whether that might not be interference with God’s acts. Is that a provocation (*taḥaddīn*) of God’s will?³⁵ One interrogator speaks of the “creation of an artificial child” (*khalq ṭifl ṣinā‘ī*)? Sha‘rāwī contests that the whole science is unable to create even a single living cell. By artificial insemination God only eases the possibilities to overcome hindrances and to make use of what He Himself created, i.e. the womb (*rahīm*).³⁶ Real infertility could never be overcome by man as the Koran tells (42:50). It is only passing infertility which can be solved by this new technique.³⁷ Generally, it is upheld by quoting various traditions that Islam strongly encourages medical treatment: “shall we not treat each other medically” (*a-lā-natadāwā*) the Prophet was asked. He answered in the affirmative and added that God offers for every ailment — except old age (*haram*) — a remedy.³⁸ Treatment is not only allowed (*jā‘iz shar‘an*), but if it is carried out by the use of something which is not forbidden (*ghayr al-muharram*) it even becomes an obligation (*wājib*) to use it, says Jād al-Ḥaqq. According to him this applies to the saving of life (*hiḍḍ an-nafs*) as well as to overcome infertility (*‘aqm*) in one of the married couple.³⁹

What then might be forbidden in artificial insemination? The answer is quite unmistakable: anything that transgresses the marital relationship. Any uniting of the sexes — be it artificial or not — outside this legally approved bond is to be regarded as definitely forbidden (*ḥarām qaṭ‘an*).⁴⁰ Islamic law is not so much concerned with the modes of semen-transfer. It is the semen as such which is sanctified but only when it is conferred from a man to his legal wife.⁴¹ Anything else is an “unlawful mixing of progeny” (*al-ikhtilāṭ fī l-ansāb*).⁴² This includes

all types of ‘hiring a womb’ or surrogate motherhood.⁴³

In their minds the legal experts think that they can really draw a clear and definite line between permissible and prohibited forms of these medical developments. Their sanctioning of artificial insemination as a legal means somehow tolerates the risk of possible mistakes made in laboratories. The Islamic principle of blocking the means to evil (*sadd adh-dharā'i'*) which declares everything as forbidden which may plausibly lead to forbidden things could have been put more in the forefront. The fact that it is not, probably shows how many scholars regard artificial insemination as a chance and blessing. There are voices that recommend refraining from this — as they say — unnecessary immoral occupation (*dhālik al-'abath ghayr al-akhlāqī*).⁴⁴ This qualification also includes the fact that the male usually has to masturbate in order that semen can be obtained, something which is usually detested in Islamic law.⁴⁵ Another legally supported anxiety concerns the fact that the process of fertilization includes the denuding (*kashf al-'awra*) in front of the physician — as is the case with many medical operations or examinations. However, all of these objections do not really lead to a prohibition of artificial insemination for married couples. This seems to be the major trend, or as Sanbuhaylī puts it: “there is no strong evidence to prohibit it” (*laysa hunāk sabab qawwī li-tahrīmihi*) or at most one could declare its reprehensibility (*karāha*).⁴⁶ — something which could not really hinder its execution. The Muftis castigate sperm banks with the same eagerness with which they usually encourage artificial insemination for a married couple. The temptation is too big to unlawfully combine elegant women with intelligent men — something which Islam forestalls before it even begins.⁴⁷ The general condemnation of sperm banks includes even the semen of the deceased husband. Mohsin says: “Moreover even if a husband has his sperm stored in a sperm bank with the intention that if he dies then his sperm could be used to impregnate his wife is illegal under Islamic law. Because death renders the marriage union void, in the sense that a woman can marry someone else after a certain specified period — the

‘iddat’ (i.e., after four months and ten days). So far the wife to be impregnated after her husband’s death with his sperm would be an illegitimate act”.⁴⁸

3 Sex change surgery

Let us now turn to sex change surgery (*jirāhat tahwīl al-jins*) which stirred up some discussion during the last decade. I draw the attention to the chapter “Never change your sex in Cairo” of Skovgaard-Petersen’s study⁴⁹ where he detailedly exposes the authentic case of an Egyptian student who underwent this type of operation in 1988. This person afterwards had to face many difficulties and resistance including that from the Azhar-University where he was enrolled as a student of medicine. Sex change surgery shall be of interest here only in so far as it is recognized by some Muftis as a medical and psychological necessity. This we should keep in mind when dealing with the fourth question: female circumcision.

Like in the aforementioned topics, also sex change surgery is nothing that takes Islamic law totally by surprise. There are three major subjects already dealt with in traditional Islamic law which are referred to in order to judge this admittedly new technique:

- Cosmetic surgery (*jirāhat at-tajmīl*) which is mostly deemed forbidden and a distortion of the creation of God (*taghyīr khalq allāh*), like for example tattoos.
- More or less ‘medically’ indicated simple cosmetic surgeries which were meant to remove or diminish distortion caused by accidents, illnesses, war or even nature itself. They were carried out either by replacing parts of the body by other substances like gold or bone or by cutting ‘superfluous’ parts of the body like a sixth finger or toe or a protruding tooth. In such cases a sort of rectification is intended — either of the body in its original shape or of the body’s shape as it should have been, that is to say with only five fingers

etc. Such surgeries are usually deemed to be allowed especially when the person acutely suffers from this irregularity.⁵⁰

- Imitation of people of the opposite sex which is forbidden in Islam (*tahrīm tashabbuh ar-rijāl bi-n-nisā*).⁵¹

Islamic law is very much concerned with a clear identity of the two sexes. Since men and women are treated rather differently throughout the various fields the *sharī'a* claims to regulate it is of utmost importance to know to which of the two groups someone belongs. Cases of doubt nevertheless did occur all the time — whether intentionally or unintentionally. People who occupied a somehow intermediate state were traditionally categorized under the rubric *khunthā*, hermaphrodite, which comprises a whole range of diverse phenomena. Such a *khunthā* is regularly dealt with in the compendia of Islamic law. Although the Prophet has cursed those men who put on the guise of women and women who put on the guise of men, his criticism is interpreted to apply only to those who could be declared responsible for their behaviour and could therefore be encouraged to give it up — at least gradually. Taking these positions into account as well as the various and often complicated individual cases a simple “answer to this question which applies to all cases” is not possible. The only definite rule is that an operation just for fun or for commercial reasons is out of the question. The mail-box mufti in ‘Arab News’⁵² states: “If we imagine that a day will come when medical surgery will make it possible for every person to change sex, we can say without hesitation that a change of sex unnecessarily is strictly forbidden, since it involves a change of Allah’s creation.” Sex change surgery as a legitimate operation is only admitted for a limited number of highly selected people and is to be regarded as a last resort where all other means have failed. In the end it is not so much a real change of sex that is intended in cases of dire psychological necessity, but rather — according to Ṭaṅṭāwī — to look for a “buried female or a covered male nature which can then be brought to light by means of surgery”.⁵³ First of all

the person who envisages this kind of treatment must live under extreme distress. Only when — it is stipulated — “highly qualified doctors determine that a person suffers from a serious disorder because of malfunctioning of his hormones and that he will continue to live in misery unless such an operation is carried out, then it may be permissible for him to have a sex change operation. Such cases should be judged individually.”⁵⁴ This attitude does not seem to be consistent with the fierce opposition the mentioned Egyptian student had to face. This opposition rather stems from the fact that his surgeon “removed the penis and created a new urinal orifice and an artificial vagina” which is “the standard procedure in sex-change operations”⁵⁵ for men. Voices from al-Azhar alleged that this is no bringing out of the authentic sex of the patient. They said that “far from changing a sex the doctor had in fact mutilated a man” who was finally “trying to have legitimate sexual intercourse with another man”⁵⁶ which is castigated and forbidden by law. It is probably still too early to speak of a major trend concerning this incision. Adaptation to a changing world is an ongoing process and more *fatwās* and comparable sources should be awaited. Over the course of time the different aspects of this rather complicated issue will be revealed and proposed to Islamic scholars to evaluate.

4 Circumcision

Male circumcision (*khitān*) is practiced throughout the Islamic world as is the case with Jewish people and even some Christians. As such it does not stir up much discussion.⁵⁷ Dareer qualifies the circumcision of boys as “a minor and necessary operation, entailing the excision of functionless skin only” which “is medically indicated, whilst the circumcision of girls is a major operation entailing the excision of vital parts of their sex organs”.⁵⁸ Although not stipulated in the Koran, it is unanimously regarded as an obligation for Muslims. According to classical authors the state authorities may enforce this operation on a

Muslim. A woman can even claim divorce if the husband turns out not to be circumcised and refuses this operation.⁵⁹ It is a generally accepted opinion that otherwise all sorts of microbes etc. would cause a variety of illnesses and even cancer.⁶⁰

What concerns here is the circumcision of girls which is in everyday language also called *khitān*. In Arabic legal language female circumcision is named *khafd* or *khifād* as well as *tahāra*, the common expression for ritual purity.⁶¹ It is practiced in many parts of Africa, especially in Black Africa, East and West Africa, as well as in Egypt. It is not known in the Maghreb states. Further, people in Turkey and Iran do not practice female circumcision, whereas it occurs in the southern and eastern parts of the Arabian Peninsula as well as in some Asian countries like Indonesia, Malaysia, Pakistan and India.⁶² In these regions like elsewhere in the world (eg. Brazil or Peru)⁶³ it is not bound to confessional borders and occurs also among people who practice animistic religions.

One has to distinguish three main types of female circumcision:

- Clitoridectomy, which “consists of the removal of the prepuce (hood) of the clitoris”.⁶⁴ This is the type recommended by Islam removing — according to prevailing Muslim opinion — “only the tip of the prepuce of the clitoris” which they therefore regard to be “analogous to male”.⁶⁵
- Excision of the “prepuce and glans of the clitoris and often the removal of the whole of it” (there is also an intermediate type which is erroneously called *sunna*).⁶⁶ For Sudan Dareer tells that this “intermediate type has varying degrees between *sunna* and pharaonic, and was invented after legislation forbidding pharaonic circumcision was passed in 1946”.⁶⁷
- Infibulation or “pharaonic circumcision”,⁶⁸ “removal of all the external genitalia, the whole of the clitoris and the entire labia minora”. Afterwards “the vaginal opening is sewn together leaving only a small opening for the passage of urine and menstrual

flood”.⁶⁹ This type is especially practiced in Sudan and Somalia.⁷⁰

Because of refugees from African and Arabian countries female circumcision has become a topic also of many European countries where physicians and social organizations are increasingly confronted with it. There are no exact numbers about these mutilations which take place in Europe because most of them are carried out secretly. We have one estimated number of 2.000-3.000 per year in Great Britain. There are some help organizations but since these acts are generally performed between the age of seven to ten years or even earlier, it is usually years afterwards that the afflicted turn to such organizations. There is a great variety of possible immediate and long-term complications not to be discussed here which result from the mentioned three types of operations.⁷¹ The scale of complications resulting especially from the more severe types of female circumcision “shows that circumcision is not simply a question of a few minutes duration after which it is all over, but the subsequent complications exist until the end of a woman’s lifetime.”⁷² Increasingly Western doctors have to tackle with them.

In reaction to Western protests or criticism articulated from within Muslim societies, legal scholars often boldly deny the gravity of such complications or attribute them solely to exaggerations of the correct *khafd*-procedure.⁷³ A main line of their reasoning is that medical doctors always come up with new theories and are not able to prove definitely that circumcision is in itself harmful from the medical point of view.⁷⁴ How is it possible that a ritual performance the roots of which are definitely not Islamic has gained such a position in Islam? Does that have to continue once and for all?

The Koran neither mentions male nor female circumcision. Nevertheless, many Muslim scholars regard Koranic orders to follow the model of Ibrahim (as in 16:123) as a more or less direct call for circumcision.⁷⁵ Abraham was allegedly circumcised at about 80.⁷⁶ Further, there is a saying of the Prophet that ‘circumcision is an

ordinance (*sunna*) in men and embellishment (*makrūma*) in women.⁷⁷ There is also a discussion between Muḥammad and Umm ‘Aṭiyya, a woman who circumcised girls in Medina. He questioned her and told her “Reduce, but do not destroy” (*ashimmī wa-lā tanhaktī* or *ikhfiḍī wa-lā tanhaktī*).⁷⁸ He added as an explanation for this order: “It is more illuminating to the face and more enjoyable to the husband”,⁷⁹ or — according to another version: “This is enjoyable to the woman and preferable to the man.”⁸⁰ There are some more traditions which are also quoted as referring to female circumcision. These appear to be rather weak judged from the viewpoint of Islamic legal theory. This makes some authors hand the whole question of female circumcision over to the responsibility of medical experts. I mention for example ‘Abdalḥamīd as-Sayyid Shāhīn in *Majallat al-Azhar*⁸¹ where he issued a corresponding *fatwā* in the name of the *Lajnat al-Fatwā* of Azhar-University. He therein quotes the Koran (16:43): *fa-s’alū ahl adh-dhikr in kuntum lā ta’lamūn*.⁸² Nevertheless, such a position has to be labeled as a minority opinion. In the case of female circumcision we instead encounter strong or even fierce defence of this practice even among scholars who are otherwise known for their relatively liberal minds and sensitivity towards medical questions. It is not so much the accumulation of admittedly rather weak traditions that encourages it but its alleged embeddedness in local rules and customs.

According to Abū Hurayra, Muḥammad said that purity is accomplished by five things, namely circumcision, removal of hair from the pubis, trimming of the moustaches, paring of the nails and plucking of hair from under the armpits.⁸³ The removal of these five are regarded to belong to man’s natural disposition (*fiṭra*). According to a *fatwā* from the deceased scholar Jād al-Ḥaqq, previously Great Mufti of Egypt and later rector of the Azhar, dating from 1992 this applies both to men and to women.⁸⁴

The subsumption under the *fiṭra*-concept does not just mean one more Hadith of dubious origin. It expresses the total indifference to the fact that female circumcision cannot be equated with the removing of

dead horn like nails or grown out parts of the beard. The decisive legal move is that the clitoris or the upper part of it — according to the ‘milder’ Muslim concept — is not really regarded as a permanent part of the body. It therefore does not partake in the concept of the sanctity of the body. Otherwise this strange collective deafness towards medical and psychological objections against circumcision could not be upheld. Only few Muftis like Shaltūt openly state that female circumcision basically represents bodily harm towards a living being and could only be allowed in cases of immediate benefit that outweighs the infliction (*ilām al-ḥayy lā yajūz illā li-maṣlaḥa ta’ūd ‘alayhi*).⁸⁵ The astonishing thing is that the statements in favor of female circumcision in regions where it is still prevalent stand in sharp contrast to the usual anxieties of scholars concerning the harming of people’s rights. Instead, there are rather revealing expressions like in an article from 1991 which starts with the sentence: “Discussions will not come to an end about circumcision; no *sharī’a* stipulation is there to allow or prevent it.”⁸⁶ This deliberately upheld position is in accordance with the phenomenon that the scholars do not systematically try to defend female circumcision on the basis of an established necessity. They rather enumerate some quite amorph ‘advantages’ which lack final legal consistency. They state for instance: Female circumcision is a custom (*‘āda*) which the expanding early Islam encountered and confirmed (*aqarra*) “because of public interest (*maṣlaḥa*) and because of the blessing (*khayr*) it represents for the woman herself and for society”.⁸⁷ These blessings consist mainly in soothing womens’ sexual drive which is — as is assumed — appropriately reduced in order to ensure chastity. Otherwise girls would be exposed to all sorts of temptations. This rationale is frankly mentioned although honor (*‘ird*) does not rank among the five basic goals of the *sharī’a*. Nevertheless there are people who claim this.⁸⁸

Besides, there is occasionally also a sort of pseudo-medical argumentation comparable to the reasons given for male circumcision: An abandonment of this practice would lead to infections caused by

microbes which could finally end in the blocking of the Fallopian tube which causes infertility etc.⁸⁹

Most scholars claim unanimity that female circumcision is permissible in Islamic law. They are said to have only differed as to whether it is an obligation (*wujūb*) or only recommended (*mandūb*). The first is maintained especially by Shafii authors whereas Hanafites Malikis and Hanbalis see it only as *makrūma* or recommended.

Also the new and actual Great Mufti of Egypt, Naṣr Farīd Wāṣil stresses in a *fatwā*⁹⁰ its non obligatory character. He labels female circumcision as *makrūma* which should be distinguished from *farḍ*, *wājib* and even *sunna*. That means for him that there is “freedom of choice and preference connected with it” (*fiḥā ḥurriyya wa-tafḍīl*). Again, no reference to bodily integrity is made.

In July 1996 the Egyptian Minister of Health promulgated a decree which declared female circumcision forbidden. Under the leadership of the Muslim fundamentalist Yūsuf al-Badrī⁹¹ a group of plaintiffs appealed to the Administrative Court in Cairo which ruled in their favour. However, on December 28, 1997 the Supreme Administrative Court affirmed the decree of the Minister of Health and turned Badrī’s reference to the principles of the *sharī’a* as the major source of legislation against him.⁹² Whether prohibitions are an appropriate means of putting female circumcision to an end or only drive this procedure underground shall not be discussed here. As the decision of December 1997 shows in detail it is quite possible to ban female circumcision on the background of the Islamic legal tradition. Nevertheless, many Muslim legal scholars are up to now deaf concerning medical experience when it comes to this topic. Although there generally is a strong acceptance of various modern techniques like organ transplantation medical knowledge does not in every case function as an *ultima ratio* as this last topic shows.

Organ transplantation on the other hand is — apart from marginal individual protests — whole-heartedly accepted by the scholars although strong religious scruples related to the position of the dead in *sharī’a*

law had to be overcome. Besides, all this had to be justified in a rather complicated process of legal development (*ijtihād*). How far the Islamic legal concept of necessity and need reaches is illustrated by the case of sex change surgery. According to one part of the *sharī’a* experts, this principle encompasses also medically attested fierce psychological distress which makes such operations necessary. How far reaching such a concession is can only be appreciated when we take the strong differentiation between men and women in Islamic law and society in general into account. These circumstances influenced also the evaluation of artificial insemination. Therein the muftis try to draw a clear line between marital insemination and all other forms which are altogether declared forbidden in order that Muslim couples do not miss new fertilization techniques.

As the foregoing subjects show the scrutiny that Muslim legal scholars inflict on modern Western medical knowledge and achievements is not only highly reflective and selective according to supposed *sharī’a* norms but at times even advertising concerning scruples of a ‘pious’ Muslim public.

NOTES

- 1 Moulavi M.H. Babu Sahib, The Islamic Point of View on Transplantation of Organs, in Symposium: Organ Transplant — Euthanasia — Right to Die. Indian and Islamic Legal Responses, in *Islamic and Comparative Law Quarterly* 7 (1987), pp. 111-164, pp. 128-131, p. 129.
- 2 M. Zakaria Siddiqui, Legal Issues in Human Organ Transplant. Indian Perspective, in Symposium: Organ Transplant, pp. 144-164, pp. 144 f.
- 3 Ahmad Furqan, Organ Transplant in Islamic Law, in Symposium: Organ Transplant, pp. 132-136, p. 132.
- 4 Cf. Ḥasan Ma’mūn, Naql ‘uyūn al-mawtā ilā l-ahyā’, 1959, in *Al-*

- Fatāwā al-islāmiyya* 7 (1981), pp. 2552 ff.; Ahmad Harīdī, Salkh qarniyyat al-‘ayn min mayyit wa-tarkābuhā li-hayy, 1966, in *Al-Fatāwā al-islāmiyya* 6 (1982), pp. 2278 ff.
- 5 Vardit Rispler-Chaim, *Islamic Medical Ethics in the Twentieth Century*, 1993, p. 31.
- 6 Furqan, *Organ Transplant*, p. 133.
- 7 Muḥammad Sa‘īd Ramaḍān al-Būfī, *Intifā‘ al-insān bi-a‘dā’ insān ākhar ḥayyan aw mayyitan. Baḥth muqaddam li-Majma‘ al-Fiqh al-Islāmī bi-Judda* [manuscript 18 pp.], pp. 8 f.
- 8 On suicide Birgit Krawietz, *Die Hurma. Schariatrechtlicher Schutz vor Eingriffen in die körperliche Unversehrtheit nach arabischen Fatwas des 20. Jahrhunderts*, 1991, pp. 91-104.
- 9 ‘Abdal‘azīz an-Nāṣir ar-Rashīd, *Ifādat as-sā‘il fī aḥamm al-fatāwā wa-l-masā‘il*, 1980, p. 75.
- 10 Rispler-Chaim, *Medical Ethics*, p. 31. For blood transfusion and the special problems attached to it see further Krawietz, *Hurma*, pp. 202-210; cf. Jād al-Ḥaqq ‘Alī Jād al-Ḥaqq, *Aḥkām shar‘iyya fī darūrāt ‘aṣriyya*, in *Buḥūth wa-fatāwā islāmiyya fī qadāyā mu‘āṣira*, vol. 3 (1994), pp. 419-452.
- 11 Aḥmad Sharaf ad-Dīn, *Al-Aḥkām ash-shar‘iyya li-l-a‘māl at-ṭibbiyya*, 1983, p. 143.
- 12 Al-Būfī, *Baḥth*, p. 9.
- 13 For this concept in general see Krawietz, *Hurma*, especially pp. 317-326.
- 14 Rispler-Chaim, *Medical Ethics*, p. 32.
- 15 Cf. Rispler-Chaim, *Medical Ethics*, pp. 72-83; Krawietz, *Hurma*, pp. 125-147. Rashīd Riḍā discusses it as early as 1907, *Istiftā’ ‘an al-kashf at-ṭibbī ‘alā l-mayyit*, in *Fatāwā al-Imām Muḥammad Rashīd Riḍā*, 6 vols. (1970-71), vol. 2, pp. 592 ff.
- 16 Muḥammad Burhān ad-Dīn as-Sanbuhaylī, *Hukm ash-sharī‘a al-islāmiyya fī zar‘ al-a‘dā’ al-insāniyya*, in *Qadāyā fiqhiyya mu‘āṣira*, 1988, pp. 61-68, p. 67.
- 17 ‘Abdal‘azīz ibn Bāz, *Hukm tashrīḥ juthath al-muslim*, 1976, p.

- 7.
- 18 Ibn Bāz, *Tashrīḥ*, p. 7; Krawietz, *Hurma*, p. 127.
- 19 Cf. further Ibrāhīm al-Ya‘qūbī, *Shifā’ at-tabārīḥ wa-l-adwā’ fī ḥukm at-tashrīḥ wa-naql al-a‘dā’*, 1986, pp. 47 ff., 51 ff., 60 ff., 86 f.
- 20 Krawietz, *Hurma*, p. 177.
- 21 For details see ‘Abdalfattāḥ Mahmūd Idrīs, *Hukm at-tadāwī bi-l-muḥarramāt. Baḥth fiqhī muqāran*, 1993.
- 22 For opposition see for instance Krawietz, *Hurma*, p. 198; as-Sanbuhaylī, *Zar‘ al-a‘dā’*, p. 68.
- 23 ‘Aṭiyya Ṣaqr, *Naql al-a‘dā’ min jism ilā ākhar*, *Al-Islām wa-mashākil al-ḥayāh*, 1982, pp. 212 ff., p. 212.
- 24 To the contrary as-Sanbuhaylī, *Zar‘ al-a‘dā’*, p. 67, 62.
- 25 Jād al-Ḥaqq ‘Alī Jād al-Ḥaqq, *Naql al-a‘dā’ min insān ilā ākhar*, 1979, in *Al-Fatāwā al-islāmiyya* 8 (1982), pp. 3702-3715, p. 3714; Ashraf Mufid, *A‘dā’ al-jism al-basharī hal ṣārat tijāra rābiḥa?*, in *al-Qabas*, no. 1265, 12.3.1989, p. 18.
- 26 Hassān Ḥaṭḥūt, *Bay‘ a‘dā’ al-jism wa-bay‘ ad-dam*, in *Fikr al-muslim al-mu‘āṣir*, pp. 112-115, p. 113. Cf. Rispler-Chaim, *Medical Ethics*, p. 39.
- 27 Islamic Scholars Rule Organ Selling Forbidden, 10.2.1988, p. 3.
- 28 Babu Sahib, *Transplantation of Organs*, p. 131.
- 29 Rispler-Chaim, *Medical Ethics*, pp. 36 f. Cf. for blood-transfusion: *Naql ad-dam ma’ ikhtilāf ad-dīn*, in *Fatāwā islāmiyya li-majmū‘a min al-‘ulamā’*, *wa-hum ash-shaykh ‘Abdal‘azīz ibn Bāz, ash-shaykh Muḥammad al-‘Uthaymīn, ash-shaykh ‘Abdallāh ibn Jibrīn, bi-l-idāfa ilā fatāwā al-Lajna ad-Dā‘ima li-l-Iftā’*, 3 vols. (1988), vol. 3, pp. 360-363.
- 30 For the difference see Abdul Fadh Mohsin Ebrahim, *Islamic Ethics and the Implications of the Modern Biomedical Technology. An Analysis of some Issues Pertaining the Reproductive Control, Biotechnical Parenting and Abortion*.

- Ph.D. Temple University 1986, p. 101, pp. 198 f.
- 31 Jād al-Ḥaqq ‘Alī Jād al-Ḥaqq, *At-talqīh al-ṣinā’ī*, in *Al-Fatāwā al-islāmiyya* 9 (1983), pp. 3213-3228, p. 3213.
- 32 Mūsā Ṣāliḥ Sharaf, *Ṭifl al-anābīb*, in *Fatāwā an-nisā’ al-‘aṣriyya* 1406 h., pp. 177 f. This topic was for instance discussed under the ‘waiting period for the slave girl’ (*‘iddat al-jāriya*). Cf. Jād al-Ḥaqq, *Talqīh*, pp. 3218 f.; Rispler-Chaim, *Medical Ethics*, pp. 20 f. ‘Alī at-Ṭantāwī claims that it is an *ijtihād*-question which should preferably be tackled by collective *ijtihād* of a scientific organization so that people do not get confused because of the plurality of views. The question is anyhow a medical one. So it should be conferred to a medical expert who explains it in detail to his legal colleague. Cf. *ṭifl anābīb*, in *Fatāwā ‘Alī at-Ṭantāwī*, 3rd ed. 1986, pp. 101-106, p. 102.
- 33 Maḥmūd Shaltūt, *At-talqīh al-ṣinā’ī*, in *Al-Fatāwā. Dirāsa li-mushkilāt al-muslim al-mu‘āṣir fī ḥayātihi al-yawmiyya wa-l-‘amma*, 12th ed. 1983, p. 326.
- 34 Jād al-Ḥaqq, *Talqīh*, p. 3213.
- 35 At-Ṭantāwī, *Ṭifl anābīb*, p. 101.
- 36 Muḥammad Mutawallī ash-Sha‘rāwī, *Ṭifl al-anābīb*, in *Al-Fatāwā al-kubrā* (s.d.) p. 177. Cf. Sharaf, *Ṭifl al-anābīb*, p. 177.
- 37 Cf. Krawietz, *Hurma*, pp. 212 f.
- 38 Cf. Jād al-Ḥaqq, *Talqīh*, p. 3225.
- 39 Jād al-Ḥaqq, *Talqīh*, p. 3213.
- 40 As-Sanbuhaylī, *Ṭifl al-unbūb fī ash-sharī‘a al-islāmiyya*, in *Qadāyā*, p. 69.
- 41 Krawietz, *Hurma*, p. 218.
- 42 Jād al-Ḥaqq, *Talqīh*, p. 3220.
- 43 For the question who the legal mother is in such cases see at-Ṭantāwī, *Ṭifl anābīb*, pp. 102-106; Jād al-Ḥaqq, *Talqīh*, p. 3213.

- 44 Sharaf, *Ṭifl al-anābīb*, p. 118.
- 45 See Rispler-Chaim, *Medical Ethics*, pp. 24, 132 ff.
- 46 As-Sanbuhaylī, *Ṭifl al-unbūb*, p. 71.
- 47 Jād al-Ḥaqq, *Talqīh*, p. 3228.
- 48 Ebrahim, *Islamic Ethics*, p. 106.
- 49 Skovgaard-Petersen, *Defining Islam for the Egyptian State. Muftis and Fatwas of the Dār al-Iftā*, 1997, pp. 319-334.
- 50 Rispler-Chaim, *Medical Ethics*, pp. 44-49; Krawietz, *Hurma*, pp. 266-277.
- 51 Muḥammad ibn Aḥmad ibn Ismā‘īl, *Adillat taḥrīm al-liḥya*, 4th ed. 1985, p. 36.
- 52 *Arab News*, 26.1.90, no. 60, p. 9.
- 53 Ṭantāwī’s conception according to Skovgaard-Petersen, *Defining Islam*, p. 332; Jād al-Ḥaqq speaks of *ibrāz mā istatara min a‘dā’ adh-dhukūra aw al-unūtha* (p. 3503). Jād al-Ḥaqq, *Jirāḥat taḥwīl ar-rajul ilā imra’a wa-bi-l-‘aks li-d-ḍarūra*, 1981, in *Al-Fatāwā al-islāmiyya* 10 (1983), pp. 3501 f., p. 3501.
- 54 *Arab News*, 26.1.90, no. 60, p. 9.
- 55 Skovgaard-Petersen, *Defining Islam*, p. 319.
- 56 Skovgaard-Petersen, *Defining Islam*, p. 321.
- 57 Sami A. Aldeeb Abu-Salieh, *Les musulmans face aux droits de l’homme: religion & droit & politique; étude et documents*, 1994, pp. 74ff. where he also tells: “la circoncision masculine n’intéresse presque personne.”
- 58 Asma El Dareer, *Woman, Why Do You Weep? Circumcision and its Consequences*, 1982, p. 105. To the contrary Ludwig Eberhard Kaleß, *Die Circumcision. Historie, Indikation, Technik, Komplikationen*, 1983, p. 160: “Die Behauptung, die Circumcision bei Männern sei ein risikoarmer oder gar risikoloser Eingriff, dürfte überzeugend durch die Vielfalt der möglichen Komplikationen, die diesem Eingriff folgen können, widerlegt sein”, and on p. 28: “spätestens nach der allgemeinen Einführung von Wasser und Seife wäre die Circumcision

- weltweit in Vergessenheit geraten und nur noch aus medizinischen Gründen, zum Beispiel bei der Phimose zur Anwendung gekommen”.
- 59 Aldeeb, *Droits de l'homme*, pp. 78 ff.
- 60 Krawietz, *Hurma*, p. 222.
- 61 Aldeeb, *Droits de l'homme*, p. 73. Cf. art. Khafd in *EP* IV, pp. 913f., p. 913.
- 62 Aldeeb, *Droits de l'homme*, p. 76; Anne Cloudsley, *The Women of Omdurman. Victims of Circumcision*, p. 121.
- 63 Cloudsley, *Victims of Circumcision*, 1981, p. 97.
- 64 *Ibid.*, p. 84.
- 65 Dareer, *Woman*, p. 2; Rispler-Chaim, *Medical Ethics*, p. 88.
- 66 Cloudsley, *Victims of Circumcision*, p. 84.
- 67 Dareer, *Woman*, p. 3.
- 68 Cloudsley, *Victims of Circumcision*, p. 79.
- 69 *Ibid.*, p. 84.
- 70 Aldeeb, *Droits de l'homme*, p. 77. For distribution in different countries cf. Dareer, *Woman*, p. 101.
- 71 See Dareer, *Woman*, pp. 30-37; Aldeeb, *Droits de l'homme*, pp. 83f.; Rispler-Chaim, *Medical Ethics*, pp. 90 f.
- 72 Dareer, *Woman*, p. 48.
- 73 Aldeeb, *Droits de l'homme*, p. 83.
- 74 See Krawietz, *Hurma*, p. 231; Jād al-Ḥaqq, Khitān al-banāt, 1981, in *Al-Fatāwā al-islāmiyya* 9 (1983), pp. 3119-3125, p. 3123.
- 75 Krawietz, *Hurma*, pp. 224 f.; Dareer, *Woman*, p. 72.
- 76 Art. Khitān, in *EP*, V, pp. 20 ff., p. 20; Jād al-Ḥaqq, Khitān al-banāt, p. 3119.
- 77 Dareer, *Woman*, p. 72; *al-khitān sunna li-r-rijāl makruma li-n-nisā'*, Abū Bakr 'Abdarrāziq, *Al-Khitān. Ra'y ad-dīn wa-l-'ilm fī khitān al-awlād wa-l-banāt*, 1989, p. 49.
- 78 Rispler-Chaim, *Medical Ethics*, pp. 88 f.
- 79 'Abdarrāziq, *Khitān*, p. 50.

- 80 Dareer, *Woman*, pp. 72.
- 81 *Majallat al-Azhar* 54 (1981), p. 215.
- 82 *Ibid.*, p. 215; cf. *Liwā' al-islām* 5 (1951), pp. 48 f., pp. 51 f.
- 83 Cloudsley, *Victims of Circumcision*, p. 80; 'Abdarrāziq, *Khitān*, p. 71.
- 84 Jād al-Ḥaqq, Al-Khitān, in *Buḥūth wa-fatāwā* 3 (1994), pp. 43-64, p. 51.
- 85 Maḥmūd Shaltūt, Khitān al-unthā, in *Al-Fatāwā. Dirāsa li-mushkilāt al-muslim al-mu'āṣir fī ḥayātihi al-yawmiyya wa-l-'amma*, 12th ed. 1983, p. 333; Krawietz, *Hurma*, pp. 228 f.
- 86 Is There a Difference Between Circumcision in a Male and Reduced Circumcision in a Female, in *Al Raai al Aam*, 1.11.1991, no. 135, p. 5.
- 87 Maḥmūd Sālim in *Liwā' al-islām* 5 (1951), p. 51, Krawietz, *Hurma*, p. 227. The *EP* article on *khitān*, p. 20 speaks of the “value attached to it in popular estimation.”
- 88 Al-Būfī, *Baḥṭh*, p. 2.
- 89 Mentioned in the ruling of the Supreme Administrative Court in Cairo no. 5257/ 43 from December 28, 1997, p. 5. It is also “far from being a surgical operation meant to prevent abnormal deviations of the genitalia, but is rather a *rite de passage*”, art. Khafd, in *EP*, p. 914.
- 90 No. 140/ 360, May 20, 1997.
- 91 Cf. his interview in the magazine *Der Spiegel* 28 (1997), p. 135. An article in *Cairo Times*, 6th-18th August 1998, p. 7 describes Badrī as “known for launching nuisance suits that rely on extremist interpretations of Islamic doctrine”.
- 92 For details see Kilian Bälz, Verbot der Geschlechtsverstümmelung an Frauen (Excision) bestätigt/VO des Gesundheitsministers mit Sharī'a und staatlicher Verfassung vereinbar, in *Europäische Grundrechtezeitschrift* 25 (1998), pp. 24-27; Kilian Bälz, Human Rights, the Rule of Law and the Construction of Tradition. The Egyptian Supreme Administrative Court and

Female Circumcision (appeal no. 5257/ 43, 28 December 1997)
(forthcoming in *Egypte / Monde Arabe*, Fall 1998).