

Issues in Forensic Psychiatry in Islamic Jurisprudence

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There are few other specialties in psychiatry where the cultural nature and social norms of a society has more impact than the specialty of forensic psychiatry. In the Muslim and Arab worlds, Islamic principles govern the foundation of thoughts required to make laws. Those necessarily include legal issues in psychiatry. The impact of these matters on individuals as patients and the community at large can not be overestimated. Those issues will include laws of involuntary hospitalization and evaluation of mental competence toward different life functions such as commercial interaction, writing a will, marriage, divorce, and child custody. Islamic law has a definite position on criminal responsibility as well as other vital matters such as compensation of damages, including medical malpractice. This article discusses problems and peculiarities involved in the canonization of these laws in Islamic communities, considering different arguments presented from one point of view versus another.

Islam is a monotheistic religion, perceived by its followers to involve all aspects of human life, spiritual and environmental, including laws. Islamic jurisprudence, referred to as *Sharia*, has its roots in the scripture (the Koran) as being the word of God, and in the *Hadith*, which is of the sayings of the Prophet Mohammed. Both sources are so divine that they never have been or ever will be affected by whatever changes occur in the universe. The jurisprudence and law derived from these two holy sources (i.e., "Sharia law") are therefore set by God for

mankind to follow for as long as there is human existence on this planet.¹ However, as new lifestyles and social settings evolve, the need to have new laws to deal with new problems is inevitable. The study that deals with the identification of these new events and changing ways of people, deducting specific laws from the Islamic *Sharia* is called *Fiqh*. With the advent of technology and scientific revolution, a need for new Islamic laws to deal with these problems has been recognized and dealt with in a new kind of study called *Fiqh Al-Nawazel*, that is, the "Fiqh" that deals with new events.² Issues such as brain death, organ transplants, fetal/maternal conflicts, autopsies, and the like are dealt with in these new studies.

Psychiatry and the law have converged

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at various stages of their historical development, and Islamic *Sharia* has dealt with both of these disciplines since the beginning of the revelations of Prophet Mohammed. Nevertheless, psychiatric issues have not as yet been dealt with in a systematic way in Islamic law; no publication is known to have addressed these problematic issues in a fashion that would enable practicing psychiatrists, medical or *Sharia* students to understand how Islamic jurisprudence deals with these issues. In this article, an attempt has been made to outline areas of controversies and points of view in situations where Islamic jurisprudence is needed to legislate controversial matters, based on Islamic principles. This article cannot cover all issues in question, but it may offer incentive for more study in this area.

Issues of Confidentiality

Islam supports confidentiality. The Prophet Mohammed maintained a strict stand against the public exposure of unlawful acts. Islam encourages confidentiality by the principle that "God commands us to keep unpleasant deeds confidential" (in Arabic, *rabunna amar bel alsatr*). Islamic history quotes the Prophet as having discouraged people from public confession. The Islamic principles caution "not to expose things that God has meant to be kept confidential."³ If a sinner insists on his own in making his case public by an open confession, then he is choosing a public trial and punishment, or *Hadd*. Confidentiality is sacred under Islamic law; even judges cannot order a psychiatrist to break it. In fact, some sages have declared that if a

physician is forced by a judge to break confidentiality against his will, he can give false testimony and will not be punished by God.⁴

Islamic jurisprudence has not definitively stated a condition in which the breach of an individual confidence can be a matter of public interest. Nevertheless, psychiatrist may breach the confidentiality of a patient when the patient has made his mental condition a basis of his claim. The patient has given implied consent for disclosure and, under such a condition, Islamic law agrees with that breach of confidentiality. When there is a possible danger or threat to a third party, Islamic law gives the psychiatrist full rights to exercise his judgment in weighing the advantage of protecting a third party versus the disadvantage of the breach of confidentiality. This step is taken under the *Fiqh* principle of choosing the least harmful alternative.⁵

The concept of subpoena is not well defined in Islamic law. There is a prophetic statement indicating that a witness should not be harmed. This has been interpreted by some scholars to prohibit forcing court testimony. Some Islamic states such as Saudi Arabia do not have the law of subpoena. Being a witness is, therefore, a voluntary act.⁶ The same principle is expected to be applied to medical records.

The Psychiatrist as an Expert Witness

The Islamic judicial system recognizes the principle of the expert witness. An expert opinion is sought through the direct presence of a psychiatrist in court or

through a medical report, depending on the judicial preference. If the psychiatrist's expert opinion is to be considered as witness testimony, an Islamic legal problem may arise in certain situations. The Islamic court does not qualify a witness to testify against a Muslim defendant unless he is of the same religion. This principle is not limited to criminal cases, but involves civil matters as well. In other words, only a Muslim can testify in court against a Muslim defendant. We may conclude that the psychiatrist should be a Muslim if he is to present an expert's opinion about a Muslim patient.⁷ Muslim and non-Muslim witnesses can testify against non-Muslim defendants who are tried in a Muslim court.

Hearsay

Confession is the cornerstone of Islamic criminal jurisprudence. Moral crimes such as adultery require four witnesses, a situation that rarely if ever can exist. Confession is practically the only means by which a prosecution can be won. The question arises, if a patient or a client confesses to their therapist, will this be considered a legitimate confession by an Islamic court? Most Islamic law scholars will dismiss the therapist's testimony as hearsay. The confession has to be made by the defendant in front of a judge.⁸ Can a psychiatrist's expert testimony be admitted if the defendant has confessed to him? Can that opinion be counted as a testimony of one witness—a question for the Islamic scholars to answer.

Involuntary Hospitalization

Although Islamic literature has no specific philosophy on issues concerning involuntary hospitalization, the concept that the state can take over certain decisions for a person is well known and has been accepted throughout Islamic history. The state can take over a person's financial affairs under the principle of *Al-Hajjer*. The state may appoint a guardian to manage those affairs, which may include signing trading contracts, selling, and buying. It is important to know that *Hajjer* entails a loss of authority over financial matters only and does not affect competence to manage other personal affairs. Under *Abu Hanifa Fiqh*, however, *Hajjer* may include restriction on different aspects of personal behavior and functions beyond financial matters. The appointed guardian will have control over the estate of the individual. *Hajjer* is declared by the judge if an individual is found to act contrary to his own best interests, with or without the presence of mental illness. Can this principle be extended to include hospitalization when the individual is unable to decide on the need for hospitalization? *Qias* is a *Fiqh* principle in which a situation is judged by analogy to another situation. An Islamic rule can be derived from that analogy.⁹ Under Islamic jurisprudence, *Hajjer* is ordered on individuals who are either incompetent to carry on their financial affairs by reason of insanity or by being recklessly involved in an irresponsible dispersion of their finances. The latter is defined as being *Safeeh*. *Hajjer*, therefore, could be carried out under two condi-

tions: (1) mental incompetence, and (2) irresponsibility. Can we take this principle to mean that an involuntary hospitalization could also be ordered against people who are not considered insane by legal standards, such as drug addicts, alcoholics, and some psychopaths? If this principle is accepted, then dangerousness is not the only condition under which involuntary hospitalization could be carried, as is the case in many Western countries. Under Islamic law, dangerousness need not be a major issue in involuntary hospitalization. It has been concluded by some of the prominent contemporary Islamic jurist,⁶ that the principle governing involuntary hospitalization is the "right to care" and not the "right to protect." This eliminates the need to demonstrate dangerousness to self and others.¹⁰

A question might be raised as to whether a commitment order would be considered as testimony, whether a commitment proceeding for involuntary hospitalization should be ruled under the same principles of the testimonial law. If so, then a patient might not be committed for involuntary hospitalization, if the committing psychiatrist was non-Muslim.

Testamentary, Contractual Capacity and Competence

Islam has laid down very strong basic laws of inheritance. Shares of certain percentages are clearly stated in the Holy Koran and in *Hadith* for each member of the family. These shares are not to be changed or altered, even by the person who owns the estate and is writing the will. Writing a will does not entail changes in the shares that any of the heirs

are entitled to by Islamic law. A will cannot deprive any heir from a share of his inheritance, or raise or lower a share to another. Writing a will may include leaving part of the estate (not to exceed one-third) to any person, agency, or interest that does not include the heirs; that is, an individual has the right to leave a maximum of one-third of his estate to interests outside the natural heirs.¹¹

Islamic jurisprudence does not recognize a will that has been written by an individual who has been declared mentally incompetent.¹² The law also states that mental incompetence should be declared at a time antedating the writing of the will and must continue throughout the rest of the subject's life. Islamic jurisprudence does not characterize any type, grade, or degree of mental incompetence. To what extent a person is considered mentally incompetent to write a will, using specific parameters or standards, is left to be judged by the evaluator, who is expected to be the psychiatrist. Therefore, specific tests or standards as to the mental capacity to write a will are left undefined.

Islamic jurisprudence does not recognize and accept an action conducted by a patient during the illness that immediately precedes death, if this action is judged to have affected his natural heirs unfavorably. This restriction includes only changes in the will that would unfavorably alter certain interests of the heirs. This restriction involves the one-third of the estate that an individual is allowed to leave to a party other than his heirs, unless that bequest has been approved by his heirs. That is to say, as long as the will is written during the time of the illness that

leads to a person's death, any decision that might affect the heirs "unfairly" can only be carried out with the consent of the heirs.¹³

Suicide

Suicide is a condemned act in most of the known religions of the world. Judaism, Christianity, Hinduism, and Buddhism all condemn suicide. Islamic carries that further and declares that people who commit suicide will be condemned to hell. With this stand against a person taking his own life, Islamic scholars have maintained the position that suicide is an unforgivable sin.¹⁴ In some Islamic countries, where the Islamic law is held to rule all aspects of life, confusion has erupted over the difference between completed suicide and attempted suicide. A situation may occasionally call for some prosecution of people who attempted suicide. This has led to a formulation of rules, regulations, and hospital policies that limit confidentiality so that attempted suicide can be reported to the police for investigation.¹⁵

We herein ask Islamic scholars to take a stand against such a practice. Attempted suicide should not be equated with completed suicide. There are no strong Islamic principles against such a practice. The Islamic condemnation of suicide implies actual or completed suicide. This is the word of God; no human being can expand God's will to include attempts. Prosecution of a person for attempted suicide implies that the prosecution knows the intention of the defendant was to take his own life, which is not always true. Islam has maintained a strong position

against assuming other people's intentions. The Prophet Mohammed himself, to strengthen this principle, refrained from punishing hypocrites who actually plotted against him. He refused to act against them based on their intention, although he knew that they were hypocrites. He left the real prosecution to be carried out by God, who knows exactly what is inside a human being's mind. According to Islam, in a suicide attempt by a mentally disturbed person, he or she will be covered by the rule of insanity in which Islam holds strongly that an insane person is not responsible for his acts. If we consider the principle of the *Safeeh* that was discussed earlier, where a person recklessly and irresponsibly acts against his own best interests, Islam has given the state the right to make decisions for this person. We can by analogy (*Qias*) propose that a suicide attempter is acting against his own personal interests and should be protected from himself through a voluntary or involuntary hospitalization.

Child Custody

The principle of the best interests of the child is frequently used, based on a child psychiatrist's opinion as to which parent would provide the child with a better mental and physical quality of life. Islamic jurisprudence has outlined strong and clear principles and policies regarding child placement and custody. In general, Islamic law will place a child under the age of seven years with the mother. The father will have the right to have this child under his custody after the age of seven. A boy can choose to reside with

either his mother or father, regardless of his age. This choice is not given to a female child.¹⁶

A question can be raised for Islamic scholars to answer as to whether a father should be denied custody under circumstances based on mental competence or insanity? The father may be disqualified from having custody based on another principle, such as acting or behaving in a reckless manner so as to hurt his own or his child's personal affairs (i.e., the "Safeeh principle"). In this condition, his right to custody could be denied because he is an alcoholic, psychopath, or a drug addict, or for behaving in an unacceptable fashion.

Criminal Responsibility

Mentally incompetent individuals, termed *Majnoun*, are protected under Islamic law as being not responsible for their actions. Islamic jurisprudence does not delineate exactly what is covered by *Majnoun*, which also means insanity, and what specific kinds of mental incompetence make a person not responsible for his action. The broad definition of insanity has sometimes included some obsessive disorders.¹⁷ Taking that into account, the mere presence of mental illness might make the person in question eligible for acquittal. To find relevance between the nature of mental illness and the crime committed will not be necessary.

Competence to Stand Trial

The concept of competence to stand trial could be applied practically only on the condition that the defendant has committed a specific crime at a time when he

was not recognized as mentally incompetent (or had not actually been diagnosed as such during the time when the crime was committed). A mentally incompetent person cannot properly argue his case, cannot use a lawyer, and cannot actually understand the charges against him. Such an individual, under Islamic law, could not be put on trial, based on the strong principle of Islamic justice that a defendant should have the same access to the judge as a plaintiff. If this condition cannot be achieved, which may be the case for mentally incompetent individuals, then a trial cannot be conducted.¹⁸

Medical Malpractice

The Prophet Mohammed declared that no one should practice medicine without having knowledge and thorough training.¹⁹ Further, he stated that if a person practices medicine without adequate knowledge, he is completely liable for the injury that he causes. The injury that results from mistreatment will be considered an assault. Furthermore, a physician who practices without adequate training and credentials is required to guarantee a cure for his patient. If he does not deliver a cure to the patient, he is liable to compensate the patient for not having achieved the desired result from the treatment. On the other hand, Muslim scholars throughout the ages have recognized that a physician with adequate training and knowledge, who is equal to his peers at the time and place of his practice, is not required to guarantee the results a patient expects (i.e., a cure). He is only expected to do his best and help his patients. Nevertheless, Islamic law requires a physi-

Forensic Psychiatry and Islamic Law

cian to be liable for any medical error that results in damage to the patient. He has to give adequate compensation to the patient or his family in case of death.²⁰

Through the teachings of the Prophet, Islam has specified the amount of money required for an organ or total body compensation. The amount rewarded is called *Diya*.²⁰ That specific amount of money, *Diya*, rewarded for total body compensation was stated by the Prophet as being worth the cost of one hundred camels. Islam further specifies what each organ of the body is worth by a simple formula. If a person loses an organ that he has only one of, such as a nose or a mouth, then he is entitled to the whole amount of *Diya* (i.e., the whole body's worth). So if a person loses an organ that he has only one of, he is entitled to "total body" compensation, as if he had lost his life altogether. If he loses an organ such as an eye, an ear, or a lung then he is entitled to half of the full amount of *Diya*.²¹ There are also certain percentages for each finger and each toe. If an individual suffers partial damage to an organ that he has only one of, then the percentage of the compensation would be calculated on how much of that organ function was damaged.

There is an interesting precedent for this kind of compensation: when the Caliph Ali had to decide on the amount of compensation a person was entitled to when he suffered damage to his tongue, he declared that the amount of total body compensation should be divided into several divisions whereby each division should be equivalent to one sound a person can utter. If he was able to pronounce 50 percent, 20 percent, or 30 percent of

the Arabic language sounds and letters, then he would be entitled to that percentage of complete compensation.²²

The Islamic scholars have also declared that if damage is caused to a person's mind, then he is entitled to a full and complete compensation for the whole body. We can also deduct by analogy that, if a person loses his mental capacity, then some kind of percentage could be equated in terms of the kind of loss. This percentage should be determined by a psychologist or a psychiatrist. Caliph Ali, in the precedent cited above, asked an expert to evaluate the amount of damage.

A loss of function of a particular organ does not always mean a specifically defined compensation, since certain organs can be more valuable to some people than others (e.g., losing three fingers for a surgeon would be far more valuable than losing a whole hand for someone in another profession). Although Muslim scholars to date have not addressed this issue directly, there is precedence to indicate that the amount of whole body compensation is in no way limited. People have been awarded several-fold the total compensation by losing certain functions of different body organs at the same time. This is based on a judgment by Caliph Ali, a close companion of the Prophet, who awarded *Diya* compensation equivalent to several-fold the total body compensation because of damage to the brain, eyes, and other organs in the body.²³ One can propose, by using this analogy, that the judge is entitled to award a percentage more than the stated fixed amount of total body compensation if the loss of a function of the body part is

worth more to the individual and is found to be more essential to his ability to work and earn a living.

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