

The Beginning of Life and Abortion

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All praise be to Allah, and may His blessings and peace be upon His messenger.

There are many interfaces between *fiqh* (Islamic jurisprudence) and medicine. After all, the subject-matter of medicine is the human body, which is tasked with religious duties. The rulings of those duties are the subject matter of *fiqh*. *Fiqh* also regulates all human activities of moral value, including the practice of medicine.

Change in the medical field happened quite slowly until the early part of the 20th century, when the pace of advancement began to accelerate until medicine reached its current state of development. Our early scholars of *fiqh* – may Allah have mercy upon them – did not have access to the medical knowledge that we now have. Many *fiqh* rulings rely on the proper knowledge of certain ontological facts, about many of which the physicians of their times differed. These include, for instance, determining the shortest and longest duration of menstruation and pregnancy, the status of intersex persons (hermaphrodites), and the various portals of entry into the “hollow interior” or cavity of the body (*jawf*), are all legally consequential matters that are largely reliant on medical expertise rather than on decisive scriptural proofs.

Thankfully, much of today’s current medical knowledge and practice is based on experiment and certainty, not on doubt and conjecture. Thus, it is vital to revise any traditional *fiqh* positions that had been influenced by outdated medical knowledge. Indeed, such critical but respectful revision is crucial to exonerate the Sharia (Islamic law) without impugning the tradition¹. Sunni Muslims do not ignore mental axioms (universally accepted propositions) and neither do they ignore the empirical evidence perceptible by the senses.¹ In fact, scholars of all orientations, including textualists and rationalists, reinterpret the apparent implications of the

text when such realities contradict the apparent or primary interpretation; they use axioms as well as empirical evidence in judging the authenticity of transmitted reports.² Additionally, the fatwa (edict by a scholar) – but not the *hukm* (Allah’s ruling) – may change from time to time and from place to place according to certain guidelines known to those who are well grounded in such knowledge.² That is, not by the mere change of time and place, but rather because they are vehicles for the circumstantial variables that would result in the change of a fatwa. For instance, the establishment of paternity through DNA testing should now take precedence over *qiyâfah* (physiognomy).

One of the issues being revisited is the ruling of abortion based on our better understanding of embryogenesis. It must be remembered, however, that the *illah* (*ratio legis/ juris* or legal basis) of the emphatic prohibition of abortion in late term pregnancy is dependent not only on embryogenesis, but on the transcendent or metaphysical event of “ensoulment.” Here is a brief discussion of this issue in light of up-to-date medical knowledge. I begin with the rulings on abortion found in the tradition, according to each of the four major Sunni schools of Islamic thought (*madhâhib*, sg. *madh-hab*).

The Hanafi position

The authorized position among the majority of traditional Hanafi authorities is arguably the permissibility of abortion before 120 days from conception.⁴ Ibn al-Humâm (rA: *rahimahu Allâh* – may Allah have mercy on him) opined,

Is it *mubâh* (permissible) to abort after impregnation? It is permissible so long as no [external] features have developed in [the fetus]. And in multiple places, they said: That does not take place until after the 120th day, and this means that by “developing features,” they meant ensoulment (the moment when a human being gains a

soul). Otherwise, this would be incorrect because the development of physical features is observable before that period.⁵

To those who took this position, the husband's consent was not even required, as Ibn 'Âbideen confirmed in his statement, "And they viewed that it was *mubâh* to abort a child before four months, even without the husband's consent."⁶ However, the Ḥanafis are not all in agreement on the permissibility of abortion. Ibn 'Âbideen (rA) cites the author of *al-Khâniyah* (rA) as saying, "I do not hold that it is lawful, since someone in *ihrâm* (state of sacred dedication) – if he breaks an egg of a gamebird – is liable for it because it is the origin of a game animal. So, if he is obliged to expiate in that scenario, then it should be sinful if she [the mother] aborts without an excuse."⁷

Perhaps this disagreement within the *madhhab* is what drove some to reconcile between the positions by saying that the view of permissibility referred to special cases. For instance, Ibn Wahbân (rA), whom Ibn 'Âbideen cited as saying, "The permissibility of abortion is understood to be in reference to cases involving excuse (justification of need) or that it does not incur the sin of murder [but a lesser sin]."⁸ This seems more plausible, because leaving the permissibility unrestricted to include aborting a fetus after its 100th day, which by then has a beating heart, a cerebellum, a face with a recognizably human profile, two feet, two hands, and a trunk, without any justification, is something the spirit of the revelation would not accept. However, projecting our sensibilities onto the foremost scholars in order to reinterpret their unqualified statements is not without risks. Additionally, when we limit the "need" to extreme cases, we would be in defiance of their intent when they left both the permissibility and the "need/excuse" unqualified.

The Mâlikî position

The Mâlikîs hold that the fetus cannot be aborted in any of its phases, and they are the strictest *madhhab* in this regard. Al-Dardeer (rA) stated, "And it is impermissible to expel the semen that is gathered in the womb, even before forty days. And once the soul is blown into it, it becomes unlawful by unanimous agreement."⁹

In fact, the Mâlikîs went even further than this. They prohibited taking medicines that reduce one's potential for progeny. Regarding this, al-Hattâb (rA) cites al-Juzooli's statement, "It is impermissible for a person to drink medicine that lessens his progeny."¹⁰ Few Mâlikîs disagreed with this view. One such was al-Lakhmi (rA),

who supported the permissibility of aborting during the *nutfah* (drop of fluid) phase, but not thereafter.

The Shâfi'î position

Al-Ramli (rA) said about abortion, "And the stronger position is it being unlawful in all cases following ensoulment, and its permissibility before that."³ The disagreement was reported by al-Dimyâṭi (rA) in *I 'ânat al-Ṭâlibeen* as follows:

Al-Bujayrami precisely said, "They disagreed over the permissibility of causing the expulsion of the *nutfah* after it has settled in the womb." Abu Ishâq al-Marwazi said, "It is permissible to expel the *nutfah* and '*alaqah*,' and that [view] has been reported about Abu Ḥaneefah. And in *al-Ihyâ'*, under the discussion on '*azl* (coitus interruptus), is what indicates its unlawfulness. This [opinion] is stronger because once it [the *nutfah*] settles, its outcome will be the genesis which prepares it for ensoulment, unlike '*azl*... And the authorized position is that it [abortion] is not forbidden until after ensoulment."¹²

The official position in the *madhhab* is arguably that of permissibility, as was established by al-Qalyubi (rA) in his *Hâshiyah*, where he wrote, "Yes, it is permissible to expel it, even by way of medicine, before ensoulment, contrary to [the view of] al-Ghazâlî."¹³

The Hanbali position

Al-Mardâwi (rA) presented the Ḥanbali views on abortion, beginning with the authorized position of the *madhhab*, which is to them the permissibility of aborting the *nutfah* during the first 40 days. Then he mentioned the two other positions: the one that prohibits abortion altogether and the one that permits it before ensoulment. He explained, "It is permissible to drink medicine to abort the *nutfah*. This was stated in *al-Wajeez* and before that in *al-Furoo'*. Ibn al-Jawzi said in *Ahkâm an-Nisâ'*, 'It is unlawful.' In *al-Furoo'*, he said, 'The apparent words of Ibn 'Aqeel in *al-Funoon* are that it is permissible to abort it before ensoulment.' He said, 'This is a variant [i.e., not the dominant] view.' Taqi al-Deen [Ibn Taymiyyah] said, 'It is safer that the woman does not use medicine which prevents the semen from entering the cervix'."¹⁴

Some scholars believed that Ibn Qudâmah (rA) leaned toward the position of impermissibility, since he stated, "If the pregnant woman drinks medicine, and expels a fetus using it, then the *ghurrah* is incumbent upon her and she does not inherit anything from it. She must also

free a slave, and there is no disagreement which we know of between the scholars on this statement, except the position of those who do not believe it is mandatory to free a slave.¹⁵

Perhaps what those scholars posited regarding Ibn Qudāmah's view is inaccurate, because we find him stating, "There is no disagreement which we know of between the scholars." This proves that he was explaining the position on the abortion that is unlawful according to all scholars (i.e., post-ensoulment).

In summary, the scholars unanimously agree on the prohibition of abortion after ensoulment,¹⁶ except if it poses risk to the mother's life, in which case it is permissible according to the stronger view. They also agree that ensoulment takes place after 120 days. Aside from that, their differences fall into three main views:

1. It is unlawful to abort in all phases, and this is the authorized position of the Mālikis and Dhāhiris. It is also the position of some Ḥanafis, Shāfi 'is, and Ḥanbalis.
2. It is unlawful to abort after the first 40 days, and it is permissible during them. This is the authorized position of the Ḥanbalis and the position of some Mālikis.
3. It is unlawful to abort after ensoulment, and it is permissible before that. This is arguably the authorized position of the Ḥanafis and Shāfi 'is. It is also the position of some Ḥanbalis.

The positions of contemporary Sunni scholars

Modern-day scholars and *fiqh* bodies do tend to concur with the authorized Ḥanbali position, albeit with emphasis on the requirement of some sound motive for abortion in the first 40 days. They largely do not consider the fear from poverty to be a sound justification. They also all agree on the impermissibility of abortion after 120 days, when it becomes an act of murder unless the mother's life or health are in real danger. As for the period between those two terms, they differ on whether it may be permitted to abort for a very significant cause. For instance, the Fiqh Assembly of the Muslim World League has permitted abortion during this intermediate term when there is a major fetal deformity incompatible with dignified life.¹⁷ This category certainly does not include the mere absence of some of the limbs or senses. According to some scholars, instances of rape may be

considered a justification during this period of 41 to 120 days.

Has our new understanding of embryogenesis affected our choices with respect to rulings on abortion? It is possible. We have observed that modern scholars tend to be more conservative in this respect. However, the issue is not that simple. We should not rush to think that our traditional scholars did not observe the obvious features of a human embryo aborted before 120 days from conception. As we have shown from the statement of Ibn al-Humām (rA), at least some of them did observe that. It is also obvious that, regardless of their positions on the ruling of abortion, they all agreed that ensoulment takes place at 120 days post-conception. Those scholars also all agreed that abortion after ensoulment would be graver, equating it in some regards to murder. Much, then, depends on ensoulment, and that in turn depends on their understanding of a particular hadith. So, let us briefly discuss the issue of ensoulment and the controversy around this hadith.

Ensoulment and the beginning of human life

Ensoulment (*nafkh al-rooh*), which is sometimes referred to as personhood, is an event that takes place in the womb at a particular moment, according to the confirmed consensus of all Muslim scholars and the definitive implications of the prophetic traditions. According to another consensus, reported by al-Qurṭubī, al-Nawawī, and Ibn Ḥajar, the soul is breathed into the body after 120 days post-conception.¹⁸

However, the latter consensus is not as credible as the former, and some of the contemporary scholars claim it is not verifiable. The basis of this consensus is the following hadith of Ibn Mas'ood (rAa: *raḍiyaAllāhu 'anhu* – may Allah be pleased with him) that was reported in various wordings. In al-Bukhari's version, the hadith goes as follows:

«إِنْ خُلِقَ أَحَدُكُمْ يُجْمَعُ فِي بَطْنِ أُمِّهِ أَرْبَعِينَ يَوْمًا وَأَرْبَعِينَ لَيْلَةً، ثُمَّ يَكُونُ عَلَقَةً مِثْلَهُ، ثُمَّ يَكُونُ مُضْغَةً مِثْلَهُ، ثُمَّ يُنْعَثُ إِلَيْهِ الْمَلَكُ، فَيُؤَدِّنُ بِأَرْبَعِ كَلِمَاتٍ، فَيَكْتُبُ رِزْقَهُ وَأَجَلَهُ وَعَمَلَهُ وَشَقِيٌّ أَمْ سَعِيدٌ، ثُمَّ يَنْفَخُ فِيهِ الرُّوحَ...».

Each of you is gathered in his mother's womb for forty days, then becomes a clot of blood (*alaqah*) for the same period; then it becomes a clump of flesh (*mudghah*) for the same period. Then the angel will be sent to it and will be commanded regarding four matters: he will record its livelihood, its span of life, and its felicity or damnation

[in the afterlife]. Then he will breathe the spirit/soul into it...

The vast majority of scholars understood this to mean that the *nutfah* (drop) phase will last for 40 days, followed by *'alaqah* (clot of blood) for 40 days, then *mudghah* (clump of flesh) for 40 days, then the blowing of the soul (*nafkh al-rooh*) takes place at 120 days.

In Muslim's report of this hadith, however, it says, "then becomes a clot in this for an equal period." The deictic phrase "in this" should refer here to the forty-day period itself, because "40 days" was the last semantic element mentioned before the deictic. This leads to the understanding that all of the three stages of the drop of fluid (*nutfah*), clot of blood (*'alaqah*), and clump of flesh (*mudghah*) occur in that very period of the first forty days. These three stages together may also not take the entire span of the 40 days.

Advances in medical sciences supported an earlier understanding by some scholars, such as Ibn al-Zamlakâni (rA) from the 7th – 8th century AH, that the three phases of embryogenesis mentioned in the prophetic traditions are completed by the fortieth or forty-second day after conception. After all, since the 20th century we have known that the first heartbeat happens about 21 – 24 days post-conception.¹⁹

The minority position of Ibn al-Zamlakâni is also supported by the following hadith reported by Muslim from Hudhyfah (rAa):

«إِذَا مَرَّ بِالنُّطْفَةِ اثْنَتَانِ وَأَرْبَعُونَ لَيْلَةً بَعَثَ اللَّهُ إِلَيْهَا مَلَكًا فَصَوَّرَهَا وَخَلَقَ سَمْعَهَا وَبَصَرَهَا وَجِلْدَهَا وَلَحْمَهَا وَعِظَامَهَا ثُمَّ قَالَ يَا رَبِّ أَذْكَرٌ أَمْ أُنْثَىٰ فَيَقْضِي رَبُّكَ مَا شَاءَ وَيَكْتُمُ الْمَلَكُ ثُمَّ يَقُولُ يَا رَبِّ أَجَلُهُ فَيَقُولُ رَبُّكَ مَا شَاءَ وَيَكْتُمُ الْمَلَكُ ثُمَّ يَقُولُ يَا رَبِّ رِزْقُهُ فَيَقْضِي رَبُّكَ مَا شَاءَ وَيَكْتُمُ الْمَلَكُ ثُمَّ يَخْرُجُ الْمَلَكُ بِالصَّحِيفَةِ فِي يَدِهِ فَلَا يَزِيدُ عَلَىٰ مَا أَمَرَ وَلَا يَنْقُصُ»

When the *nutfah* has attained forty-two nights, Allah sends the angel and gives it shape. Then He creates its sense of hearing, sense of sight, skin, flesh, and bones. Then [the angel] asks, "My Lord, would it be male or female?" And your Lord decides as He desires and the angel then records that also and then asks, "My Lord, what about its lifespan?" And your Lord decides as He wishes, and the angel records it. Then [the angel] asks, "My Lord, what about its livelihood?" So, your Lord decides as He likes, and the angel writes it down; then the angel leaves [the womb] with the scroll of destiny in

his hand and nothing is added to it, and nothing is subtracted from it.

This position is also supported by Allah's statement,

(ثُمَّ خَلَقْنَا النُّطْفَةَ عَلَقَةً فَخَلَقْنَا الْعَلَقَةَ مُضْغَةً فَخَلَقْنَا الْمُضْغَةَ عِظَامًا فَكَسَوْنَا الْعِظَامَ لَحْمًا ثُمَّ أَنْشَأْنَاهُ خَلْقًا آخَرَ فَبَارَكَ اللَّهُ أَحْسَنُ الْخَالِقِينَ.)

[Then We made the sperm-drop into a clinging clot, and We made the clot into a lump [of flesh], and We made [from] the lump, bones, and We covered the bones with flesh; then We developed it into another creation. So blessed is Allah, the best of creators.) [Sūrat al-Mu'minūn, 23:12-14.]

The development "into another creation" mentioned in this verse is reported by 'Ali (rAa) to be a reference to the ensoulment – an interpretation that is widely accepted. In the verse the clump of flesh (*mudghah*) and the ensoulment are separated by two other developments: the formation of bones and their envelopment by flesh. This is contrary to what the majority understood from the hadith of Ibn Mas'ood stating that ensoulment happens right after the end of the *mudghah* phase.

It is thus clear that much of the process of embryogenesis (*takhalluq*) takes place within the first forty days from conception. This knowledge has caused many contemporary scholars to question not only the traditional understanding of embryogenesis based on the hadith of Ibn Mas'ood, but also the consequent position that ensoulment takes place at 120 days. While I agree with their first conclusion, I am not compelled to agree with the second.

The consensus on the blowing of the soul, while it is *sukooti* (tacit) and therefore not *qat'i* (definitive), should be at least treated as a speculative proof that should not be dismissed unless it is outweighed by a stronger one. This is one of many positions concerning this type of consensus, but it is the position closest to the middle of the spectrum on this issue. We must also remember that a definitive positive consensus after the era of the Companions is implausible. We also know that consensus is an independent source of Sharia, thus textual substantiation is not needed to cite it as a proof. Nevertheless, according to the majority position consensus would not happen without some textual proof. This proof, however, may be known to some scholars but not to others,²⁰ and it may even be known to some generations but not to others.²¹

Here are additional reasons why this consensus and the 120-day mark should still be respected:

The lag between *takhalluq* and *nafkh al-rooh* is established in the scriptures. The Arabic article *thumma* (then), used in the hadiths above to separate between the stages of development and ensoulment, means that the events occur in succession, with some delay in time between them. Moreover, in the verse cited above from Sūrat al-Mu'minūn, *thumma* is used to separate between the different stages of embryogenesis, and between embryogenesis and ensoulment. In addition, the formation of bones and their envelopment by flesh is mentioned between the first three stages of development and the reference to ensoulment. We showed earlier that observant scholar like Ibn al-Humâm pointed out the lag between embryogenesis and ensoulment.

Moreover, while ensoulment is a *ghaybi* (transcendent or metaphysical) event, there may be medical signs corroborating the reported consensus of the scholars that it takes place at 120 days post-conception. The legal debate over abortion and personhood has caused many disputants to invoke certain events in fetal development to support their various positions. Some hold that personhood starts from fertilization, which is when the paternal and maternal genetic codes combine to form a unique cell. Others posit that it starts upon implantation, which happens about 1-2 weeks from fertilization,²² about the time the cell cannot divide anymore to produce twins.²³ Others argue that it should begin with the first heartbeat, which happens about 21-24 days post-conception.²⁴

Still others contend that it should start with the first voluntary movements, which take place around 120 days post-conception.²⁵ Shortly thereafter, around the end of the twentieth week, the thalamus develops, and that is the region of complex thought.²⁶ This is also the lowest age for independent fetal viability outside the uterus.²⁷ If the soul departs from the body when that body is no longer able to host it, should it not also be true that the soul would not be blown into the body until that body is able to host it?

From this discussion, one may argue that the blowing of the soul into the fetus indeed occurs well after the completion of embryogenesis. The 120th day of post-conceptional age is still the threshold of ensoulment that is most rational and that engenders the most widespread agreement amongst the scholars.

Allah knows best.

References

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19. See: Abu 'Abd Allâh Muhammad ibn Ahmad al-Qurṭubî, Tafseer al-Qurṭubî, 2nd ed. (Cairo: Dâr al-Kutub al-Miṣriyyah, 1384/1964), 12:8; Yaḥyâ ibn Sharaf an-Nawawî, Ṣaḥeeḥ Muslim bi-Sharḥ an-Nawawî (Beirut: Dâr Iḥyâ' at-Turâth al-'Arabî, 1392/1972), 16:191; Ahmad ibn 'Ali ibn Ḥajar al-'Asqalânî, Fath al-Bâri fî Sharḥ Ṣaḥeeḥ al-Bukhârî(Beirut: Dâr al-Ma'rîfah, 1959), 11:481.
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