

FAMILY PLANNING AND ISLAMIC JURISPRUDENCE

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I am very pleased to have the opportunity today to address you on issues of family planning from an Islamic jurisprudential point of view.

To understand this point of view, we need to understand the basic framework for such jurisprudence. First and foremost, the basic text providing guidance on all Islamic matters is the Qur'an the revealed word of God. No Muslim can adopt a point of view contrary to that of the Qur'an.

But the Qur'an, which provides a rich variety of specific rules and general principles, does not explicitly address every possible situation that may face a Muslim. For cases not explicitly addressed therein, Muslims look to the example and sayings of the Prophet Muhammad (his "*Sunnah*") as a secondary source of guidance. Often, that, too, leaves open some questions of interpretation or application. In such cases, Muslims rely on *ijtihad*, which is the ability to analyze a Qur'anic text or a problematic situation within the relevant cultural and historical context and then devise an appropriate interpretation or solution based on a thorough understanding of Qur'anic principles and the *Sunnah*. This approach results in a highly flexible jurisprudence and is rooted in the Qur'an verse which instructs Muslims who disagree on a matter to seek its resolution by going back to the words of God and his Prophet.

The flexibility of Islamic law is not accidental. It is an essential part of Qur'anic philosophy, because Islam was revealed for all people and for all times. Consequently, its jurisprudence must be capable of responding to widely diverse needs and problems. Furthermore, Islam was revealed gradually. This fact (as well as certain verses in the Qur'an) illustrates the divine recognition of the human difficulty in adjusting to sudden change. Hence, flexibility and evolution are inherent characteristics of the religion. It must be noted, however, that this flexibility has its limitations. It does not extend to the most fundamental tenets of Islam, such as the belief in the unity of God.

Among the fundamental principles of *ijtihad* are the following:

1. Laws change with changes in time and place;
2. Choosing the lesser of two harms; and
3. Preserving public interest.

In discussing issues of family planning, it is important to keep all of these principles and the basic legal framework in mind.

For example, when a Muslim scholar teaches a conclusion about contraception or abortion, it is important for that scholar and the Muslim community he addresses to evaluate such conclusion

in light of their public interest. If the existence or well-being of the community is being threatened for some reason, then the scholar and each member of the community must consider that fact, which is subsumed under Principle (3) above, in reaching their own final conclusions. This is one reason why laws change with the change of time and place.

Family Planning in the Islamic Tradition

Like the other two Abrahamic religions, Islam values the family and encourages procreation. Some Muslims have concluded from these facts that Islam does not permit family planning. Two pieces of evidence are often cited in support of this conclusion. First, that the Qur'an prohibited Muslims from killing their children for fear of want. Second, that the Prophet exhorted Muslims to multiply. But this argument does not do justice to the complexity of the Islamic position and the totality of its teachings. Otherwise, it would be impossible to explain the established fact that the Prophet knew that some of his companions, including his cousin Ali, practiced *al-'azl* (coitus interruptus) and yet he did not prohibit the practice.

To understand the fullness of the Islamic position on family planning, we need to look more carefully at the total picture. Its departure point, of course, is to encourage the life principle. Hence, the Prophet's exhortation to multiply and the Qur'anic prohibition of infanticide, a widespread pre-Islamic practice involving born children which was motivated mostly by economic and gender considerations.

But such a basic position does not necessitate the conclusion that contraception, or even abortion, is prohibited. Indeed, historically, the majority view among Muslims scholars on contraception has been that it is permissible with the wife's consent, though perhaps disliked in certain cases. The wife's consent is required because Islam recognizes the wife's right to sexual enjoyment and procreation.

A leading proponent of this view is al-Ghazali (d. 1111), who bases his conclusions on the well-established principle that what is not prohibited by the Quranic text or an authenticated *Hadith* (words of the Prophet), or by analogical reasoning with respect to either or both, is permissible. As to contraception, he notes, there are no such prohibitions. In fact, the opposite is true. His analogical logic is startling in its simplicity. In one part of his argument, he notes that, despite the prophetic exhortation to multiply, it is nevertheless permissible for a Muslim to remain single. The effect of remaining single on multiplying, he reasoned, is no different than the effect of practicing *al-'azl*. Since the one is permitted, it follows that the other, without more, is also permitted.

Al-Ghazali argues, further, that although contraception is permissible, it is *makruh* (disliked or disfavored) if practiced to avoid, for example, female offspring. One major justification for this conclusion is that preference for male offspring is frowned upon in the Qur'an. Al-Ghazali, however, supports contraception for other reasons such as protecting a woman from the dangers of childbirth, avoiding poverty, and even preserving a woman's beauty.

In the case of family planning through contraception, the wish to avoid poverty does not infringe on the right to life of a born human being. To the contrary, its goal is to preserve a dignified

quality of life for those already born. On the other hand, using contraception to avoid having more females reflects a world view and a value system antithetical to that of the Qur'an. It was thus *makruh* and discouraged by scholars like al-Ghazali.

Other jurists agreed with al-Ghazali's basic position on contraception but disagreed on what constitutes *makruh* behavior. Such disagreement may very well have been founded in their disparate historical and cultural experiences. In other words, these are the kind of differences anticipated and tolerated by the first principle, and perhaps the other principles of *ijtihad* listed above.

Contraception

Semen in Islam has no special value. Alone, it is not life and whether it ever develops into life is a matter of divine omnipotence. The Prophet himself said "not of all the semen a child is formed..." He also told his companions that if God wanted to create a human life, God would do so anyway, whether they practiced *al-'azl* or not. A delicate analogy used by al-Ghazali further illustrates the same point. Al-Ghazali likens intercourse to a contract because it consists of an offer, and an acceptance. Thus, so long as the offer has not been accepted, it may be withdrawn.

Ibn Hazm, who lived in Islamic Spain (d. 1063), represents a minority view on contraception. He adopts an extremely restrictive position arguing that it is a form of hidden infanticide and is thus prohibited by the Qur'an. His argument is based on a report by Judama, a woman who heard the Prophet refer to *al-'azl* as hidden infanticide. Al-Ghazali and many others treat the same report differently. Focusing on the fact that a fetus does not become a living being until it reaches a certain stage of development, al-Ghazali concludes that the reported saying indicates *karahiyah* (disfavor) and not prohibition. In doing so, he relied in part on companion Ali's rejection of the description of *al-'azl* as "minor infanticide."

Among the five major traditional Islamic schools of thought, the majority of Hanafis, Malikis, Ja'faris (Imamis) and Hanbalis permitted the practice of *al-'azl*, subject to the wife's consent. In fact, some Ja'fari and Maliki scholars gave the wife the right to monetary compensation from her husband if he were to engage in *al-'azl* without her permission. But, Ja'faris permitted *al-'azl* without the wife's immediate consent, if she had already consented at the outset. Some Hanafis and Hanbalis, however, differed with the majority view of their school as to the need for the wife's consent. Shafi' is permitted *al-'azl* even without such consent, because in their view, the wife is entitled to intercourse but not ejaculation.

Recently, some Muslim scholars have returned to Ibn Hazm's minority view. Part of the reason may be rooted in their concern for the Muslim Ummah (something akin to a people) whom they feel has become the intended target of population control propaganda by the West. In such a case, however, the proper analysis is not to go back to the controversial arguments of Ibn Hazm. Rather, Muslim scholars should make their position clear to other Muslims by appealing to legitimate jurisprudential principles, such as those listed earlier. This approach would allow them to reach their desired conclusion, while at the same time utilizing full disclosure with other Muslims. It would also preserve the integrity of scholarly religious analysis, relate to the

community on a mature and principled basis, and raise the community's consciousness while leaving room for dissenting personal decisions by the average Muslim.

Abortion

Another major form of population control is abortion. The majority of Muslim scholars permit abortion, although they differ on the stage of fetal development beyond which it becomes prohibited. To understand the differences in their positions, we have to first study what the Qur'an says about this matter.

There are two Qur'anic passages that address this issue. Both of them describe stages of fetal development. These can be summarized as follows: the semen (*nutfah*) develops in the womb, together with the ovum, into a clinging clot ('alaqah), then a chewed lump (*mudghah*) complete in itself yet incomplete, then another act of creation takes place (*khalqan akhar*). At this last stage of *khalqan akhar*, ensoulment occurs.

Scholars agree that abortion at or after the ensoulment stage is prohibited, except to protect the mother's life. They disagree, however, on when this stage is reached and whether abortion at an even earlier stage is permitted. One group permits abortion up to 120 days. Another prohibits it as early as 80 or even 40 days after conception. In either case, many take the view that abortion does not abruptly become prohibited at a certain stage (whether that stage is reached at ensoulment or earlier). Rather, abortion becomes increasingly *makruh* as the fetus develops, until it becomes finally prohibited.

On the other hand, a minority of scholars hold a very strict view which prohibits abortion the minute the semen attaches to the uterus, on the theory that it is already on its way to being ensouled. These scholars also view abortions performed at later stages of pregnancy as yet more serious than those performed at the earlier stages. This position was adopted recently by some Muslim jurists, who relied on scientific evidence in reaching their conclusion. While saluting the various efforts of earlier Muslim jurists on the subject, they concluded "from a review of contemporary medical and scientific advances...that an embryo is a living organism from the moment of conception."

Among the major traditional schools of thought, the majority of Hanafis and Shafi'is permit abortion before the 120 days period. Among the minority of Shafi'is who oppose this view is al-Ghazali who describes abortion as a *jinayah* (crime). Hanbalis permit abortion before 40 days (by taking medicine) while Ja'faris and Malikis prohibit it at any time. Of course, all these views permit abortion for exigencies such as saving the mother's life even after ensoulment.

It is worth noting that Islamic societies have lived for centuries while these widely differing schools of thought thrived in their midst, side by side. All these schools were generally regarded as examples of good and honest *ijtihad*. How a particular Muslim came out on any one of these issues was viewed as a matter of personal conscience. The overall picture of this *ijtihad* is that family planning through contraception is less controversial and hence preferable to family planning through abortion.

If a woman is nevertheless faced with an abortion decision, and if after deliberation she truly finds the reasoning of a permissive group (like the majority Hanafi view) convincing, then she should not be discouraged by the prior discussion on disagreements, and should feel free to take advantage of the license under her preferred view. This advice is based on the Prophet's position of encouraging ijihad and the Islamic scholarly tradition of regarding differences among mujtahids (those who engage in ijihad) as an expression of the mercy of God on Muslims.

Final Considerations

This is a very short overview of Islamic jurisprudence on this topic. The majority view is that a Muslim family is permitted to engage in family planning. The actual answer, however, to today's question of whether Muslim families ought to be encouraged by their institutions to engage in family planning is some what more complicated. The special features of this historical epoch and its technetronic societies must be analyzed carefully so that Muslim scholars and leaders do not lend support to policies which, in the final analysis, turn out contrary to the Islamic spirit or to public interest. For example, while Islam permits a family to plan its growth rationally in order to avoid poverty, this permission should not be distorted so as to discourage or deny poorer people or less technologically developed countries their right to propagation. Indeed, the Qur'an tells us that God takes care of all creatures.

ENDNOTES

*This speech is published in *Family Planning and Islamic Jurisprudence, Religious and Ethical Perspectives on Population Issues*, 2-11(The Religious Consultation on Population, Reproductive Health and Ethics, 1993).

In this speech, the author provides a brief overview of Islamic jurisprudence on the subject matter and does not recommend any particular position with respect to the debate on family planning. The author, however, wishes to emphasize to the reader the importance of correctly analyzing arguments and factors involved in the particular situation under consideration, in light of all relevant communal as well as individual factors. The author also wishes to emphasize the importance of formulating such analysis free from all forms of compulsion and coercion, whether conscious or subconscious, individual or organized, including that of targeted advertising campaigns. For, in the final analysis, each Muslim is personally responsible towards God for her own choices.

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****Since this speech was given at a United Nations forum, and attended by an international audience, I made a special effort to reference my footnotes to reliable English-language works wherever possible. These works provide references for those interested in further research in original Arabic-language sources. My English-language articles, some of which are referred to here, also provide references to original Arabic sources.

1. Qur'an 4:59. This and other Qur'anic cites in this paper refer first to the appropriate surah (chapter), and then to the relevant ayah (verse). The author recommends the translation by A. Yusuf Ali (Amana Corp., Brentwood, Maryland, 1983), although she does not abide by it here and prefers to use her own.
2. For more on this and other concepts discussed in this introduction, see "Islamic Constitutionalism and the Concept of Democracy," by the author, published in *The Case Western Reserve Journal of International Law*, vol. 24, n.1 (Winter 1992), pp. 3-10.
3. *Ibid.*, pp. 8-10. See also Subhi Mahmassani, *Falsafat al-Tashri' fi al-Islam* [The Philosophy of Islamic Legislation] (*Dar al-'Ilm lil-Malayin*, Beirut, 1961), pp. 200-207, 480.
4. Qur'an 17:31, 6:151.
5. Abu Daud Sulayman ibn al-Ash'ah al-Sijistani, *Sunan Abi Dawud* [The Sunnah's of Abi Dawud] (reprint, *Dar 'Thya' al-Sunnah al-Nabawiyah*, Beirut, 1980), v. 2, p. 220. See also, Abdel Rahim Omran, *Family Planning in the Legacy of Islam* (Routledge, London, 1992), pp. 100-101. Omran's book is an excellent work in terms of scholarship and knowledge of the tradition. The Hadith contained in it has been authenticated by a committee of scholars at al-Azhar. For those interested in a detailed analysis by the author of this paper of the nuances of some of the arguments discussed here or of the original Arabic texts, see an article co-authored with other religious scholars (heretofore entitled, forthcoming) in which *al-'azl* is discussed *Loyola of Los Angeles International and Comparative Law Journal*, v. 16, n.1.
6. Abu Hamid M. al-Ghazali, *'Thya' Ulum al-Din* [Reviving Religious Studies] (reprint, *Mustafa al-Babi al-Halabi wa awladuhu*, Cairo 1939), with an authentication of the sayings of the Prophet by Hafiz al-Islam al-Iraqi in the margin, vol. 2, p. 54; Omran, pp. 118-19.
7. The Qur'an refers to this principle in several contexts. See, for example, Qur'an 6:119, 5:90, 66:1, and 3:50. For al-Ghazali's argument, see al-Ghazali, *ibid.*, v. 2, p. 53. See discussion by Subhi Mahmassani of this point in *Muqaddimah fi 'Thya' Ulum al-Shari'ah* [Introduction to Reviving Islamic Juristic Studies] (*Dar al-'Ilm lil-Malayin*, Beirut, 1962), 20-21. See also B.F. Mussallam, *Sex and Society in Islam* (Cambridge University Press, Cambridge, 1983), p. 17. This is another excellent book, in the English language, on this topic. Another short discussion of this important principle appears in Omran, pp. 75-76.

8. Al-Ghazali, *ibid.* But al-Ghazali adds here that contraception is not like abortion which he views as a *jinayah* (crime) even at the earliest stages of pregnancy. Mussallam, *ibid.*
9. Qur'an 16:58.
10. Al-Ghazali, v. 2, p. 53.
11. *Ibid.*, v. 2, p. 53.
12. Muslim ibn al-Hajjaj al-Qushayri, *Sahih Muslim* [The Authentic *Hadiths* Reported by Muslim] (henceforth, *Muslim*) (*Muhammad Ali Sabih wa Awladuhu*, Egypt, 1963?), v. 4, p. 159. See also, Omran, p. 120.
13. *Muslim*, p. 158. See also, Omran, p. 122.
14. Al-Ghazali, v. 2, p. 53; Mussallam, p. 18.
15. Abu Muhammad ibn Hazm, *al-Muhalla* [The Adorned Treatise] (reprint, Maktabat al-Jumhuriyah al-Arabiyyah, Cairo, 1970), v. 11, pp. 291-92; Omran, p. 136; also mentioned in al-Ghazali, p. 54, who calls her "Juthama." Omran contests the accuracy of the name used by al-Ghazali and others. See Omran, p. 130. For more on Ibn Hazm's views, see also *al-Muhalla*, vs. 10 and 12. In the latter volume, he discusses appropriate awards for torts resulting in miscarriage at various stages of pregnancy. The discussion gives a clearer picture of Ibn Hazm's views.
16. Al-Ghazali, v. 2, p. 54; Omran, p. 133.
17. Wahbah al-Zuhaili, *Al-Fiqh al-Islami wa Addillatuh* [Islamic Jurisprudence and Related Evidence] (Dar al-Fikr, Damascus, 1984), v. 7 pp. 331-332. See also Abd al-Halim Abu Shaqqah, *Tahrir al-Mar'ah fi' Asr al-Risalah* [Liberating Women in the Age of the Revelation] (Dar al-Qalam, Kuwait, 1992?), v. 5, pp. 196-97, and Omran's discussion of these various positions, pp. 152-167. See also the author's forthcoming paper, referred to in footnote 5, for further discussion on the subject of this paragraph. Also, please note that the Shi'i schools of *ijtihad* are many, and their *ijtihad* tradition is very rich and varied. We shall treat here only the Imami Ja'fari tradition.
18. Omran, pp. 155, 165; Mussallam, p. 32.
19. Omran, pp. 153-54, 162-63; Mussallam, pp. 31-32.
20. Omran, p. 159; Mussallam, p. 31-32.
21. Omran, p. 159; Mussallam, p. 31.
22. For quick outline of the various points of view on this point, see Omran, p. 190-193. See also Muhammad al-Bar, *Mushkilat al-Ijhadh* [The Problem of Abortion] (*Al-Dar al-Saudiyyah lil-Nashr wa al-Tawzi'*, Jeddah, 1985), pp. 5-45.

23. Qur'an 22:5 and 23:12-14.

24. Omran, p. 191.

25. Madkur, Muhammad Salam, *Al-Janin wa al-Ahkam al-Muta'allikah bihi fi al-fiqh al-Islami* [The Embryo and Rulings Related to It in Islamic jurisprudence] (*Dar al-Nahdhah al-Arabiyyah*, Cairo, 1969), pp. 301-302 (describing the Hanafi view which permits abortion at that stage even without the husband's permission; also noting that many Hanafis regard abortion during that early period as *makruh*, if without good reason). Omran, p. 191; al-Bar, p. 42.

26. Omran, pp. 190-192. Dr. Osman and Drs. Hassan Hathout and Maher Hathout hold the view that differences as to the number of days before which abortion is permissible was a function of the state of knowledge at the time the specific *ijtihad* took place. Dr. Osman also adds that it was a function of the dominant culture. Dr. Hassan Hathout views the controversy as based on differences in determining the stage at which fetal life begins. He argues that such determination should not be confused with the determination of when ensoulment takes place, i.e. when the *ruh* (soul) enters the body. For evidence, he cites the Qur'an 7:85, which states that only God knows about the *ruh*. He argues that ensoulment takes place in a living being and that it is impermissible to perform abortion on a living being even before ensoulment. For more on this point of view, see endnote 29 and related text.

27. See for example al-Ghazali, p. 53. While he views abortion as prohibited from the moment of conception, he nevertheless argues that abortion at a later stage is an even greater *jinayah*.

28. Madkur, p. 302 (describing the Maliki view). See also, Omran, pp. 190-193; al-Bar, pp. 40-41.

29. Abd El-Rahman al-Awadhi, ed., Human Reproduction in Islam: The Full Minutes of the Seminar on Human Reproduction in Islam, held in Kuwait on May 24, 1983, Ahmad al-Gindi, trans. (Kuwait, 1989), p. 276. The point of view of jurists meeting in Kuwait is both interesting and worthy of further discussion. For one, it may have unnecessarily technologized the issue of abortion and reduced it to a medical determination about the beginning of life. For another, it may not have sufficiently taken into account the controversies that exist even today, in medical as well as non-medical circles, on the question of when life begins. (For a preliminary discussion of the role of medicine in Islamic jurisprudence, see Madkur, pp. 89-103.) I would like to address the issue in greater detail in the future. Finally, it is also worth noting that this modern view coincides in its conclusion (though not reasoning) with the view of al-Ghazali. (See endnotes 8 and 27.)

30. Madkur, pp. 87, 301-305 (noting that some Shafi'is disagreed on what constitutes a good reason for abortion prior to 120 days). Omran, *ibid.*, pp. 190-193.

31. Al-Ghazali, v. 2, p. 53.

32. Madkur, p. 304-305 (noting that Hanbalis did not treat this subject in great detail; also, noting that another Shi'i group, the Zaydi's, have no problem with abortion up to the stage of *mudghah*, the last stage before which the fetus is ensouled). See also, Omran, pp. 191; al-Bar, p. 40. See also, Muhammad Al- Hurr al-'Amili, Wasa'il al-Shi'a [The Methods of the Shi'a] (reprint, Beirut, n.d.), v. 19 p. 15. Note that the Hanbali scholar, Ibn Rajab, shares al-Ghazali's view. Al-Bar, p. 40.
33. Omran, p. 191; al-Bar, p. 44.
34. For a discussion of this point, see my *Islamic Constitutionalism and the Concept of Democracy*, *supra* note 2, pp. 5-7. See also Mahmassani, Mukaddimah fi 'Ihya' 'Ulum al Shari'ah, *supra* note 7, esp. pp. 13-31.
35. Qur'an 11 :6.

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