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Islam and Current Medical Concerns  
(1)

# HUMAN REPRODUCTION IN ISLAM

The Full Minutes of the Seminar on Human  
Reproduction in Islam, Held on May 24, 1983 A.D.  
(Sha'aban II, 1403 H.)

Supervised and with an Introduction by  
**Dr. Abd El-Rahman Abdulla Al-Awadhi**

Minister of Public Health and of Planning  
Chairman of the Islamic Organization  
for Medical Sciences

Edited by  
**Dr. Ahmad Rajali Al-Gindi**

Translated by  
**M. Muwawer S. Asbahi, Ph. D.**

1989



**ISLAMIC ORGANIZATION FOR MEDICAL SCIENCES  
PUBLICATION SERIES**

**Islam and Current Medical Concerns**

**First Volume**

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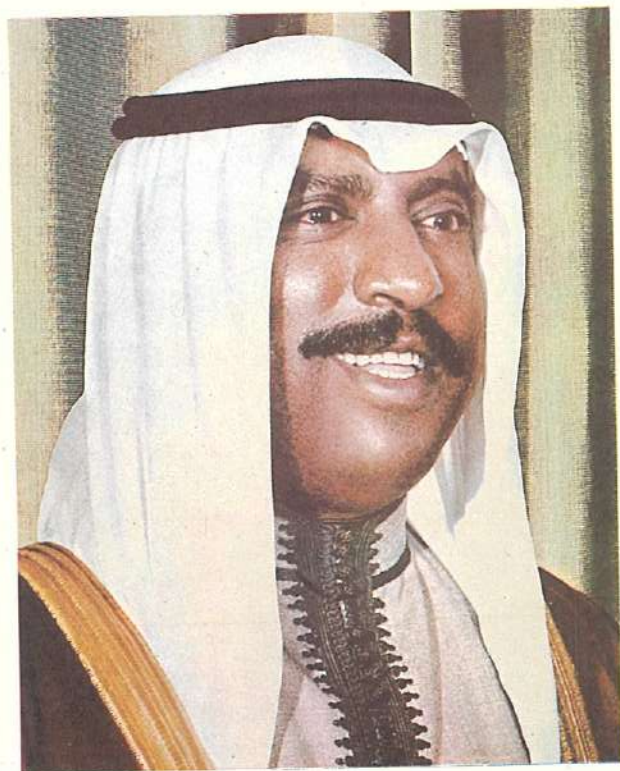
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His Highness  
**SHEIKH JABER AL-AHMED AL-JABER AL-SABAH**  
Amir of the State of Kuwait





His Highness  
**SHEIKH SAAD AL-ABDULLA AL-SALEM AL-SABAH**  
Crown Prince & Prime Minister



*On the directions of His Highness the Amir of the State of Kuwait, Sheikh Jaber Al-Ahmad Al-Sabah;*

*And out of His Highness's keen desire to disseminate culture which combines religion with science in its multifarious fields and to present it to the Islamic nation particularly to those concerned with the Islamic civilization;*

*And as part of Kuwait's contribution to enriching the Islamic library; Kuwait Foundation for The Advancement of Sciences in collaboration with the Islamic Organization for Medical Sciences and the World Health Organization, has completed the translation and printing of this series of books that deal equally well with both Islamic Jurisprudence and Medicine.*



بتوجيه من كريم بن

حضرة صاحب السمو الشيخ  
خابر الأحمد الصباح حفظه الله  
أمير دولة الكويت

ورغبته من سموه في نشر الثقافة الجامعة بين  
الذين والعلم في آفاق المتعددة وتقديمها  
إلى الأمة العربية والعلميين بسؤوف الحضارة  
العربية في العالم ، وساهمة في إثراء المكتبة  
العربية ، قامت مؤسسة الكويت للتقدم العلمي  
بالتعاون مع المنظمة العربية للعلوم الطبية ومنظمة الصحة  
العالمية بتجهيز وطباعة هذه السلسلة من الكتب  
الجامعة بين الفقهاء والعلماء والطب

The papers and discussions published in this volume have been approved by a committee composed of the following participants in the seminar:

Professor Zakaria Al-Berri, Ph.D.

Professor Yusuf Al-Qaradhawi, Ph.D.

Professor Muhammad Al-Ashqar, Ph.D.

Professor Hassan Hathout, Ph.D.

Professor Ahmad Al-Ansari, Ph.D.

Dr. Ahmad Rajaii Al-Gindi, Ph.D.

In the name of God, the Compassionate, the Merciful

## **FOREWORD**

### **The Seminar on Human Reproduction**

Praise be to God to Whom we pray for guidance. Whoever is guided by God can be led astray by no one, and whoever God leaves to go astray shall have none to guide him aright.

The twentieth century witnesses a great revolution in the field of biological sciences. Every day we are confronted with staggering new developments that are particularly a cause for concern to Muslims.

Man is fighting a fierce battle against disease, and in trying to control it, he bypasses all traditions and values. Quite often, his efforts are crowned with success and open the door to a new world of knowledge and progress.

Probably no science has advanced in the course of this century more than genetics. New techniques have been introduced in the fields of botany and zoology, with the aim of increasing production, improving stocks, and ensuring the availability of food. Soon after, Man himself was subjected to some of these techniques for various purposes. Some scientists were aiming at controlling certain hereditary traits, while others, who might prove the first victims of their wicked designs, were hoping to enable one race to dominate others.

What makes the developments we are discussing particularly complicated is the fact that they are taking place in the West, where religious scruples hardly exist.

Most often, these things are commercialized, material gain takes precedence, and conscience becomes numb. Islam, on the other hand, makes clear distinction between what is legitimate and what is forbidden, promoting virtue and censuring vice.

If these innovations are left unchecked, they might lead the world to destruction: lineage might be obscured and kinship severed, which would



lead us, before we are aware of it, into catastrophe.

It is a very serious matter, and unless we are prompt in facing up to it, we will be swept into a current of horrors, the extent of which only God knows. Yet, we have great hope in our Muslim scholars. "Man is an edifice of God, and damned is he who demolishes an edifice of His." It was imperative for us to bring scholars of fiqh (Islamic jurisprudence) and of medicine together to start a dialogue and discuss these new findings of science. A simplified account by Muslim physicians would allow our fiqh specialists to come up with Islamic regulations, and things would be clear for all of us.

This seminar aimed at the following:

1. making the Islamic stand on all these innovations clear, without pressure from any party that seeks a particular decision and might try to influence the discussion;

2. making every Muslim aware of his responsibilities as regards religious legitimacy and prohibition, for as Muslims everywhere might need to resort to one of these medical innovations, they should be capable of making decisions that do not violate Islamic laws;

3. meeting our responsibilities, as Muslims living in Muslim Arab countries, towards the ever-growing Muslim communities in the Western world, by offering them the Islamic viewpoint (in as much as we are enabled by God to do so), because they have to face these developments which are taking place around them; and

4. starting this dialogue between the two parties of fiqh scholars and biologists, so that views may be exchanged and the two sides form one work team, for whose success and continuity we pray.

Such were our aims when we envisioned the seminar, which, praise be to God, did convene and was a significant event in its field, allowing various points of view to be voiced within the framework of an enlightened discussion. Everyone was clear and candid in expressing his opinion, so that the discussion was truly an example of how an Islamic fiqh dialogue should be conducted. The best evidence of this is the interest of the participants themselves, who all made a point to attend every morning and evening session, betraying no sign of fatigue, boredom, or indifference.

We took special care in recording the minutes of the seminar and to offer them to readers all over the world, hoping they would prove to be a

lantern guiding Muslims in this field. Because this is a very serious subject, we formed a committee of some of the participating scholars, all of whom are renowned authorities in their fields, to revise the minutes before publication.

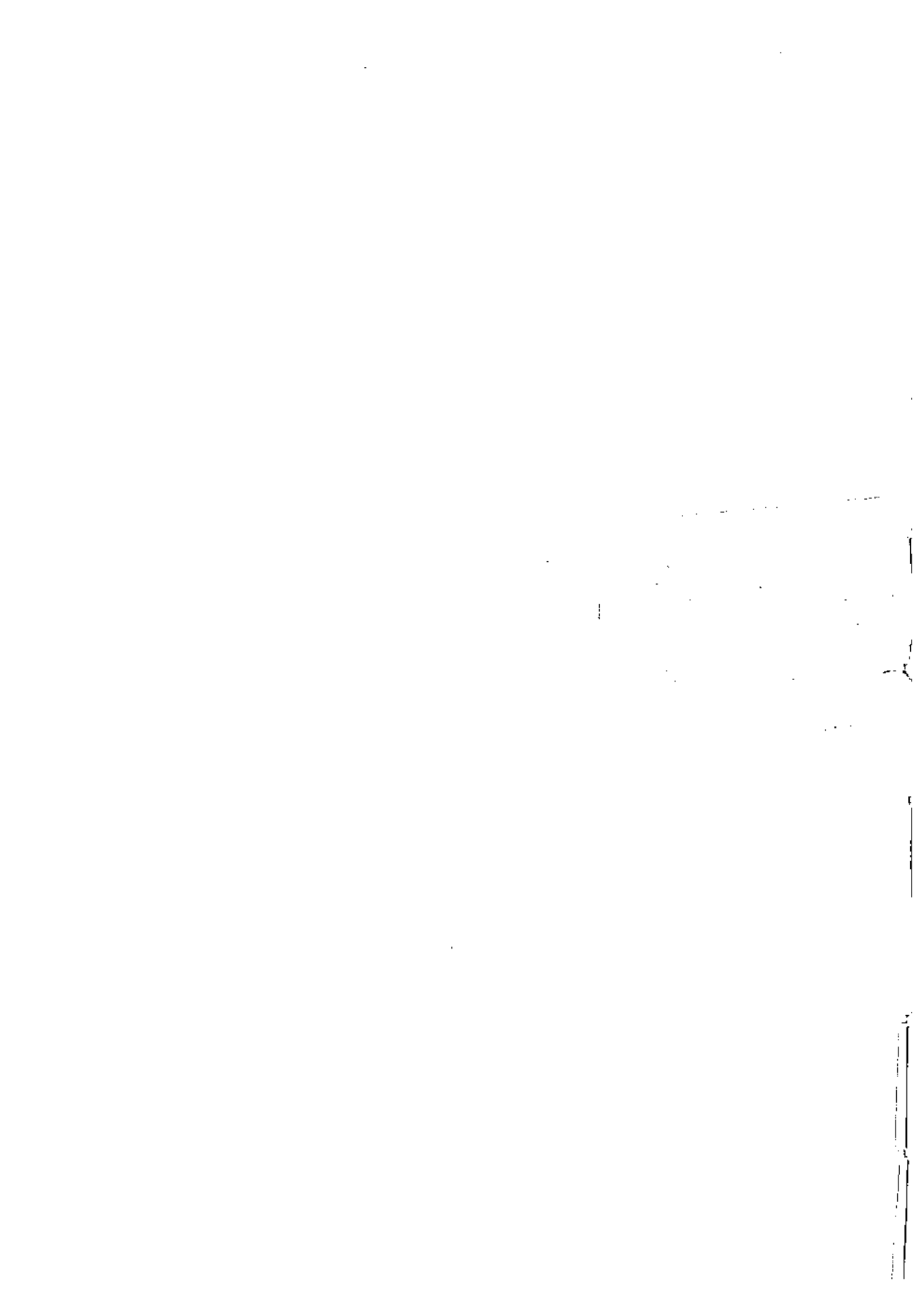
In offering these minutes, we hope that we have managed to make the Islamic position on most of the topics discussed sufficiently clear. We discussed these topics to the utmost of our knowledge and we pray that we have been successful in our endeavour.

“God, do not cause our hearts to go astray after You have guided us. Grant us Your mercy; You are the munificent Giver.”\*

Dr. Abd El-Rahman Abdulla Al-Awadhi, Ph.D.  
Minister of Public Health and of Planning  
President of the Islamic Organization for Medical Sciences

#### **Translator's Note**

\* Al Imran (The Imrans), 8. Translation of the meaning of this and other verses of the Quran are quoted, sometimes with slight modifications, from N.J. Dawood's translation, published as *The Koran* (Harmondsworth, Middlesex, Penguin, 19--).



In the Name of God, the Compassionate, the Merciful

## **EDITOR'S PREFACE**

With God's aid, the seminar on Human Reproduction in Islam was convened, but both hope and apprehension accompanied its opening.

The hope was expressed through prayer to the Sublime and Almighty God to crown its efforts with success. Islam is a comprehensive system that sets straight the mental, spiritual, psychological, physical, legal, and social aspects of human life, both at individual and communal levels. Some people think of Islam as no more than a set of statutes, an image wholly offered by the orientalist.

Islam, however, produces a society governed by Islamic principles and based on the worship of one God, on mercy, and on justice. It is a society which allows individuals to realize their potential and be creative, and in which the ink of scholars is as honoured as the blood of martyrs. Members of this society are merciful with each other: the strong aid the weak, and the rich allocate a percentage of their wealth to the poor, thus purifying their gains. A set of values dominated this society, ranging from the testimony that there is no deity but God to the act of removing harmful objects from the passage of others.

It is a society that takes precautions and sets precise standards to avoid any violation of lineage, allowing for no excuses. It allows man to marry up to four wives, but sets fairness as a condition, and, on the other hand, punishes adultery very harshly.

Perhaps some of us imagined prior to the convening of this seminar, that we were going to face new developments, but, as it turned out, they proved to be old and new at the same time, in the sense that Muslim scholars of the past anticipated many such innovations in detail, although not practised during their lifetime. This enabled our seminar to come to grips with some products of our current century fairly smoothly and at no great difficulty.

If we imagine Islamic law as having body and soul, the body would

have to be society itself, while the soul is the text of the Quran. Unless the two go together, we would have a spirit with no action, or actions that are divorced from thought, which is a state of loss. On the basis of his faith, every individual Muslim has his own pattern of thinking, his personal philosophy, and his awareness that the purpose of his existence is to colonise the Earth, but without violation of God's statutes.

Man is just transient on this earth, during which his mettle is tested and his conscience tried, then he dies and has to account for his deeds, even those of merely looking and listening.

It is true that Islam urges the sick to seek treatment, but only that which is sanctioned by Islamic laws.

Our apprehension arose from the fact that this was the first seminar of its kind, where prominent physicians and fiqh scholars met to discuss such topics as we had on our agenda, all of which being recently introduced in non-Muslim countries. It was feared that some would refuse to discuss such subjects, claiming they are heretical and unnecessary innovations. However, modern mass media have reduced distances so much that an event can be seen or heard of almost the minute it takes place. Consequently, whether we like it or not, we have to face these new issues.

Moreover, it is now easy for Muslims to seek treatment in non-Muslim countries, and, in addition, we who live in Muslim lands have a responsibility towards the ever-growing Muslim communities in both the West and East. We should make the Islamic position on these scientific innovations clear to everyone.

We were also apprehensive lest both sides would take an unyielding stand, allow no one to trespass into their territory, and cast doubts over the qualification of the other side or accuse them of being backward and reactionary.

However, only few minutes after the opening of the first session, the barrier of suspicion was broken. discussion started, arguments were countered with other arguments, and citations from the Holy Quran or Tradition answered with other citations, but all in a spirit of tolerance, sincerity, friendliness, and open-mindedness. Such is enlightened Islamic dialogue, where the purpose is not to decide who wins and who loses, but rather to have everybody work together within the framework of Islamic Law, with all its flexibility and comprehensiveness. Thus the faithful would



enhance their faith, and it would be evident that this religion is solid and that whoever tries to fight it is a certain loser.

The determination of all to reach a positive outcome was quite evident. No topic was concluded before all its aspects were scrutinized and a clear consensus was reached, as reflected in the recommendations of the seminar.

Among the most significant results of the seminar are the following:

1. It was realized that similar meetings should be encouraged to study the vital issues that a Muslim faces and is likely to face in the future, and which are expected to be introduced in Muslim countries, thus calling for a set of Islamic regulations.

Although the question of prohibition and approval is always basic at such meetings, yet scholars have to get together and take their time debating every subject, and hold further meetings when agreement is not reached. What is important is that these conventions should always be held under the umbrella of Islamic Law to arrive at the objective they aim at, which is determining the Islamic ruling on modern innovations.

2. Urgent need was felt to enrich the curricula of schools of medicine with Islamic subjects, particularly in fiqh and its sources. Courses of this kind allow a physician to better judge issues for himself, particularly when he is practicing in a remote area.

3. It was also decided that colleges of Islamic studies should have some courses in human biology or, as we called it, family studies, not only from a legal point of view, but also the medical. In this way, our fiqh scholars can be better equipped to follow the new developments of our age, and the gap between the two sides may be narrowed.

4. Hopefully we furnished the example of a model work team and perhaps made the case for fiqh scholars specializing in this particular field.

5. We have come to the conclusion that it is the upbringing of every Muslim individual that dictates his daily behaviour, and that the nurturing of his conscience is greatly required. Certain issues that were brought up at the seminar have no solution other than to resort to one's conscience. This is known as drawing upon the humanity of Man. It is therefore felt that an Islamic moral code for each of the various medical specialities is urgently needed. Perhaps the code drafted by this organization in its first Conference on Islamic Medicine will serve as a nucleus.

6. It was evident that fiqh scholars had a responsibility towards the teachers and scientists of medicine and biology to provide an Islamic code of research ethics so as not to conflict with Islamic rules.

Dear reader,

The issue is critical and the tide is ferocious, and unless we take the initiative, we might be swept by the current to a fathomless dark sea. Yet, some of the scientific discoveries do have their bright aspects. When they do not violate Islamic laws, they may represent a new hope for those who face special problems and suffer certain ailments and diseases. However, some innovations are likely to lead our society, which is based on mercy and love, into chaos, unless we first scrutinize them with an Islamic eye. It was for this reason that we called for the seminar, took special care to record its proceedings, and asked some of the prominent participants to revise these records.

We place before you the fruits of their knowledge hoping that our seminar has been of benefit.

“God, do not cause our hearts to go astray after You have guided us. Grant us Your mercy; You are the munificent Giver.”

Ahmad Rajali Al-Gindi, Ph.D.  
Editor of The Arabic Version

**PROGRAMME OF THE SEMINAR  
ON  
HUMAN REPRODUCTION IN ISLAM**

**First Day**

**Tuesday, Sha'ban 11, 1403 H.; May 24, 1983 A.D.**

Opening and the awarding of prizes	5:00-7:00 p.m.
Meeting of participants to approve the agenda and select a general committee	7:00-7:30 p.m.
Film on the fetus in utero	7:30-8:30 p.m.

**Second Day**

**Wednesday, Sha'ban 12, 1403; May 25, 1983**

First Session	8:30-11:30 a.m.
Counsellor Abdulla Muhammad Abdulla, Ph.D., Chairman Professor Ahmad Al-Ghandour, Ph.D., Assistant Chairman Ahmad Al-Ansari, Ph.D., Secretary	
Topic: Papers on Genetics and Genetic Engineering	
A. "Banks of Mixed Human Milk," Professor Maher Hathout, Ph.D.	
B. "Fetal Sex Selection," Professor Hassan Hathout, Ph.D.	
Fiqh Viewpoints in This Field, Professor Yusuf Al-Qardhawi, Ph.D.	
Discussion	
Tea Break & Noon Prayer	11:30-12:00 noon
Second Session	12:00-2:00 p.m.
Counsellor Abdulla Muhammad Abdulla, Ph.D., Chairman Professor Ahmad Al-Ghandour, Ph.D., Assistant Chairman Ahmad Al-Ansari, Ph.D., Secretary	
Topic: Additional Papers on Genetics and Genetic Engineering	
C. "Deoxyribonucleic Acid (DNA)"	
D. "Cloning," Professor Maher Hathout, Ph.D.	
Fiqh Papers: "The Dictatorial Techniques of Biology in the Scale of Islamic Law," Prof. Ahmad Sharaf Al-din, Ph.D.	

"How Legitimate Is Control of Heredity Factors,"  
Prof. Abd Al-Sattar Abu Guddah

Discussion

Lunch Break

2:00-5:00 p.m.

Third Session

5:00-8:00 p.m.

Professor Abd El-Aziz Kamel, Ph.D., chairman

Professor Abdulla Basalamah, Ph.D., Assistant Chairman

Professor Khaled Al-Mathkour, Ph.D., Secretary

Topic: Papers on Gynecology

A. "Abortion in Religion, Medicine, and Law" Prof. H. Hathout

B. "Surgical Contraception," Prof. Hassan Hathout, Ph.D.

C. "Test tube Babies and the Surrogate Mother-hood"

Fiqh papers: "Abortion between Islamic Regulations and Medical Findings," Prof. Muhammad Na'eem Yassin, Ph.D.

"Abortion in Islam," Prof. Tawfiq Al-Waili, Ph.D.

Tea Break & Maghreb Prayer

6:30-7:00 p.m.

Discussion

7:00-8:00 p.m.

### Third Day

Thursday, Sha'ban 13, 1403; May 26, 1983

First Session

8:30-11:30 a.m.

Professor Abd El-Aziz Kamel, Ph.D., Chairman

Professor Abdulla Basalamah, Ph.D., Assistant chairman

Professor Khalid Al-Mathkour, Ph.D., Secretary

Topic: Resumption of Papers on Gynecology

D. "Medical Examination of Members of the Other Sex"  
Prof. Hassan Hathout, Ph.D.

Fiqh Viewpoints

Discussion

Noon Prayer break

11:30-12:00 noon

Committee Meetings

12:00-2:00 p.m.

Break

2:00-7:00 p.m.

Second Session

His Excellency Dr. Abd El-Rahman Abdulla Al-Awadhi, Chairman

Professor Abd El-Aziz Kamel, Ph.D., Assistant Chairman

Professor Khalid Al-Mathkour, Ph.D., Secretary

General Discussion of Proposed Recommendations

In the Name of God, the Compassionate, the Merciful

**OPENING ADDRESS  
AT  
THE SEMINAR ON HUMAN  
REPRODUCTION IN ISLAM**

Dr. Abd El-Rahman Abdulla Al-Awadhi  
Minister of Public Health and of Planning  
Chairman of the Islamic Organization for Medical Sciences

In the name of God, the Compassionate, the Merciful. Blessings be on Muhammad ibn Abdullah, the last Prophet and God's most honoured Messenger.

Dear brethren,

God's Peace and Mercy on you.

It is my pleasure to take part in the opening of this legal, Islamic, medical seminar on reproduction in Islam, in which this elite gathering of scientists and scholars from all over the Muslim World participate.

It is also my pleasure to welcome you all. I particularly salute the honourable guests who have arrived here in Kuwait to take part in the seminar, wishing them a pleasant stay in their second homeland, and wishing success to our seminar.

One additional source of pleasure and joy is that today we celebrate three distinguished scholars by awarding them the prizes of the Kuwait Institute for the advancement of science and the Islamic Organization. These scholars have enriched science and learning and therefore deserve utmost praise and commendation. We salute them and wish them continued success in the service of Islam and Muslims. We salute as well the Kuwait Institute for advancement of Science for its benevolent efforts in the field of scholarly research and for its constant sponsorship and encouragement of scientists and scholars.



On this occasion, I would also like to extol the patronage of His Highness the Amir of this country, who is also Chairman of the Board of Directors of the Kuwait Institute for the Advancement of Science, and His Highness the Crown Prince and Prime Minister, for their unceasing encouragement of research in general and Islamic medicine in particular.

Dear brethren

You are certainly aware of the terrible conflict between Man and disease in our contemporary world and of the intensive efforts made to control disease and reduce human suffering and pain.

Towards this end, Man has used all methods of scientific research and has achieved several results that have raised great hope all over the world and are expected to be of great benefit and value.

As Muslims, our attitude towards scientific and scholarly research is positive beyond doubt. God has honoured Man, made him His vicegerent on earth, and urged him to pursue knowledge and to contemplate God's miraculous creation. In fact, God has allowed such an elevated place for learning in his Holy Quran as evidenced by the fact that He made it one of His own attributes.

On this basis, we Muslims, should devote special attention to scientific and scholarly research. Our research system, however, has to be in harmony with the teachings of our religion, so that we might not be led astray from the straight path outlined for us by our Almighty Lord and His Hounored Prophet.

Dear brethren

Medical research has recently taken gigantic steps and achieved impressive results which, as we all know, have taken precedence in the news of this developed world, such as, for example, the test tube baby and surrogate womb techniques, and control of fetal sex and hereditary traits. These and other modern achievements have had a great impact all over the world. Muslims are wondering whether some of these scientific achievements do or do not violate the precepts of our religion.

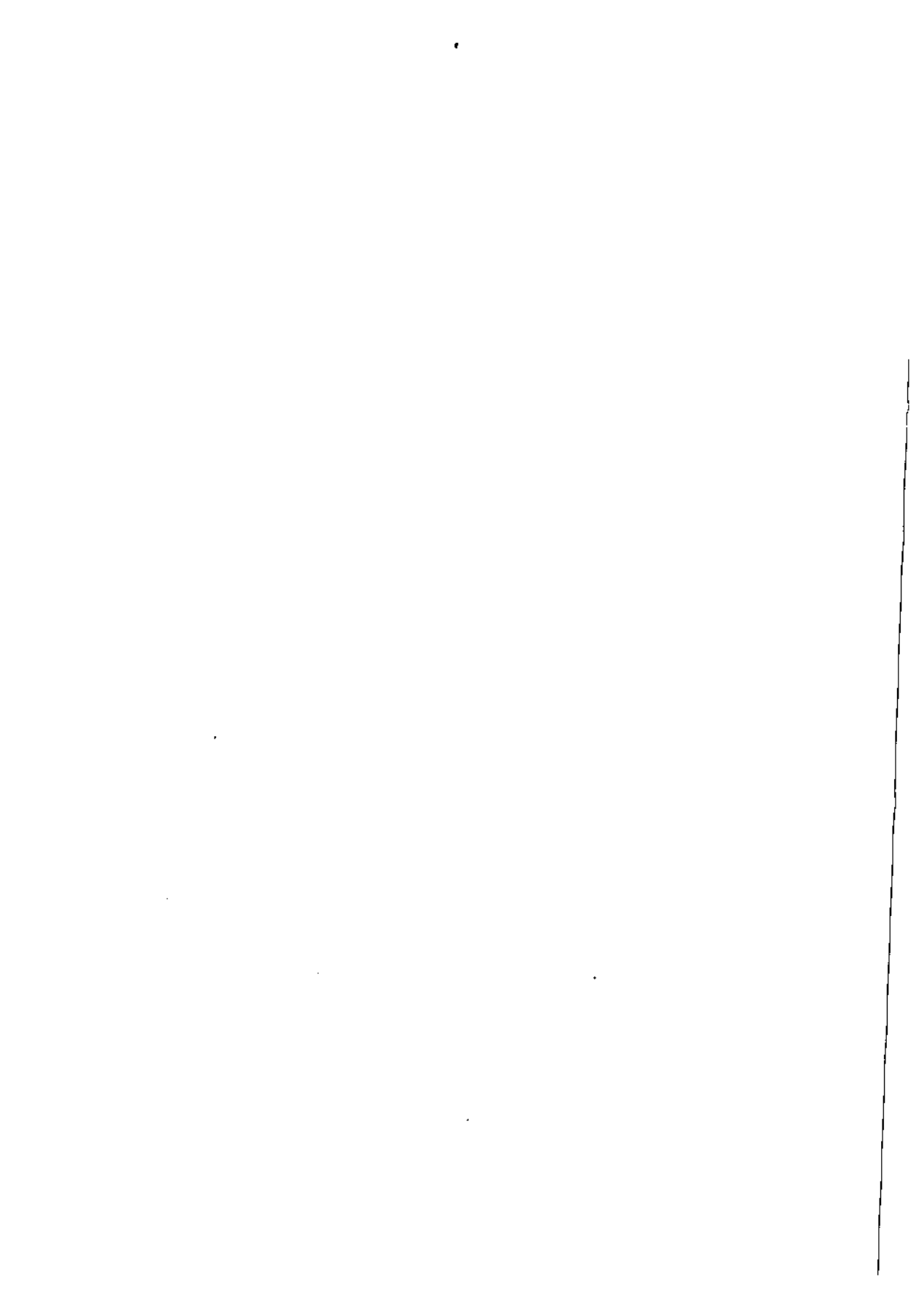
It is imperative for Muslim scholars to consider these developments and come up with conclusions and guidelines for all Muslims. It is for this reason that we have organized the current seminar, in which an elite of Islamic, medical and legal scholars take part in discussing a number of medical questions related to human reproduction in the light of both Islamic and man-made laws. We call this type of pursuit Medical Fiqh. We

pray to God to guide our steps in this effort.

Dear brethren

It gives me pleasure to congratulate the award winners and wish them further success and even greater achievement. I would also like to thank the director of the Institute for his sincere efforts and his constant cooperation with the Islamic Organization of Medical Sciences.

In conclusion, I again pray for the success of this seminar and hope that things will be clear for Muslims, both in their physical and spiritual beings, and I quote the Holy Quran: "Say: Do as you will. God will behold your work, and so will His apostle and the faithful..."



## PART ONE

### PAPERS DISCUSSED AT THE SEMINAR

In the Name of God, the Compassionate, the Merciful

The Seminar on Human Reproduction was held in the period of sha'aban 11-13, 1403 H; May 24-26, 1983 A.D. His excellency Dr. Abd El-Rahman Al-Awadhi, Minister of Public health and of Planning, Chairman of the Islamic Organization for Medical Sciences, was elected chairman, while Professor Dr. Yusuf Al-Qaradhawi, Dr. Khalid Al-Mathkour, and Dr. Hassan Hathout were elected secretaries.

The sessions of the seminars were open only to participants for the following reasons:

A. It was desired that any press coverage of the seminar should be comprehensive rather than fragmentary. The topic of the seminar is of great interest to the Muslim masses, and therefore they should be offered a total account of its proceedings, as its conclusion.

B. Although consenses was sought, this did not exclude the expression of variant views, but this was thought more appropriate to stay within the confines of the seminar.

C. It was also deemed that privacy was more conducive of frankness uninhibited by the presence of a large audience or the media.

It is hoped that this meeting has proved to be of great value and that it will be followed by others in which the two disciplines (medicine and Islamic law) will be similarly represented, so that medical facts can be fully explained and judged.

A General Committee of the conference was formed under the Chairman and session chairmen as members. Selection and recommendation committees were also formed.

This tasks of the three committees were to examine submitted

papers, draft a general plan for their presentation, handle suggestions, write the seminar's recommendations, and submit them to the participants for approval. Morning and evening sessions were held and a chairman, assistant chairman and secretary were chosen for each session. At the conclusion of the seminar, the fiqh and medical papers, together with the records of the discussions, were referred to a special committee for revision and approval. Membership of this committee included Professor Zakaria Al-Berri, Ph.D.; Professor Yusuf Al-Qaradhawi, Ph.D.; Professor Muhammad Al-Ashqar, Ph.D.; Professor Hassan Hathout, Ph.D.; Professor Ahmad Al-Ansari, Ph.D.; and Dr. Ahmad Rajaii Al-Gindi, Ph.D.

Editor



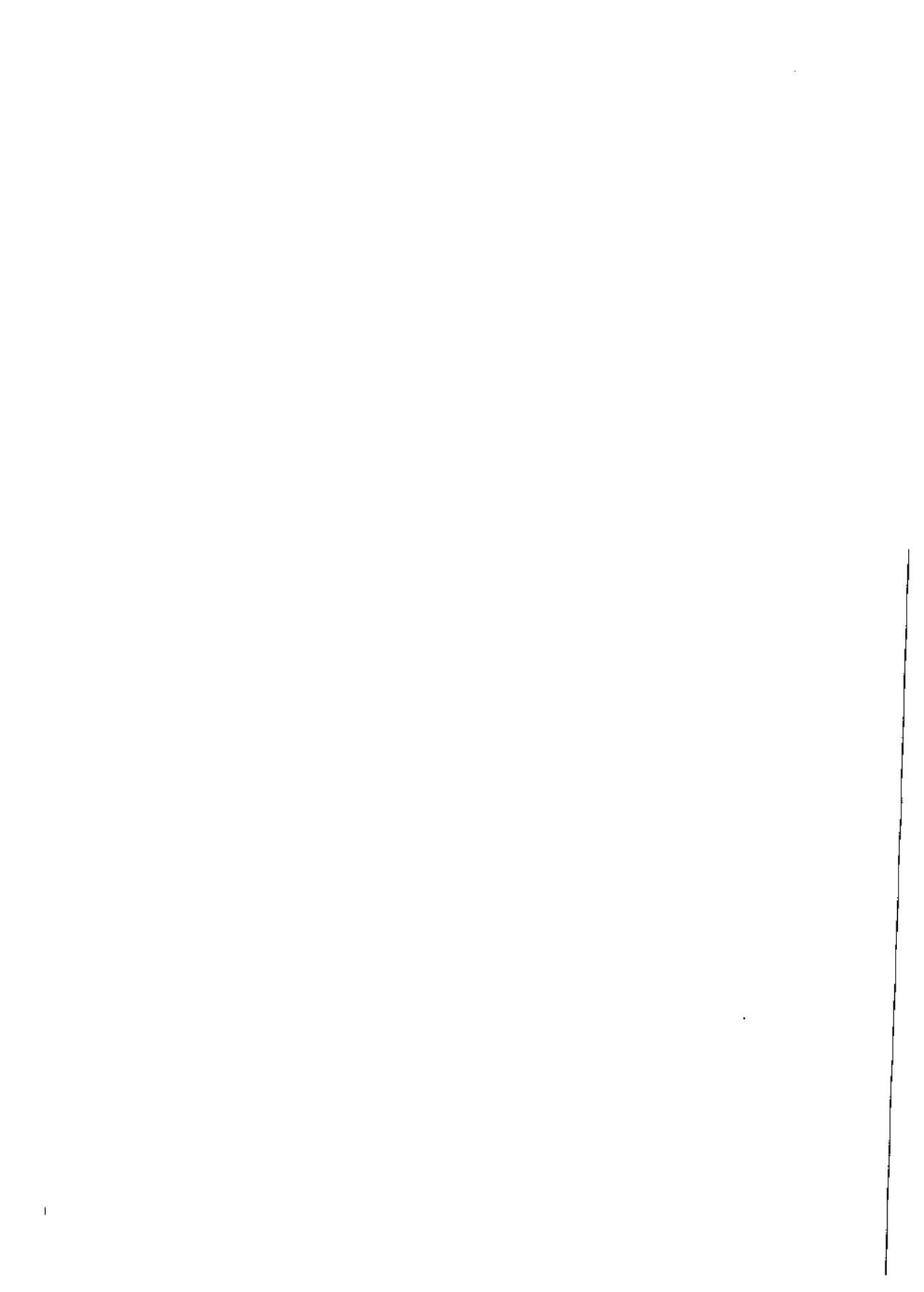
**CHAPTER ONE**  
**PAPERS ON GENETICS AND GENETIC**  
**ENGINEERING**  
**FIRST SESSION**

The first session was chaired by Counsellor Abdullah Muhammad Abdullah, with Dr. Ahmad Al-Ghandour as assistant chairman and Dr. Ahmad Al-Ansari as secretary. Dr. Maher Hathout read a paper on "Mixed Human Milk Banks," outlining the purpose for which such banks were set up particularly in the U.S.A. There followed a medical discussion on the value of these banks and the consequences of cancelling these banks or keeping them.

Next, Dr. Yusuf Al-Qaradhawi read a paper on "Human Milk Banks from a Fiqh Viewpoint." He reviewed the opinions of fiqh scholars and voiced his own point of view. The discussion that followed was to decide whether such banks should be approved, rejected, or held subject to certain reservations.

Dr. Hassan Hathout covered another subject. In his paper on "Fetal Sex Control," he outlined the extent of progress made by modern medicine in this field. Medical questions on the subject were raised and discussed, and then the opinions of fiqh scholars were expressed.

Editor



## OPENING SPEECH

Dr. Abdulla Muhammad Abdullah

In the Name of God, the Compassionate, the Merciful. Blessings of God be on His most honoured Prophet, Muhammad, and on all his kin and companions.

We open herewith the first session of the seminar on Human Reproduction in Islam. The subject of this session is Genetics and Medical Science. Dr. Maher hathout will first speak on "Mixed Human Milk Banks." He will be followed by Dr. Hassan Hathout whose paper is on "Fetal Sex Selection." Later, we will discuss together the medical aspects of these subjects, and then we will listen to a paper by a fiqh scholar. Our fiqh speaker is Dr. Yusuf Al-Qaradhawi who will cover both subjects. General discussion will follow.

With your permission, however, I would like to say a few words. the focus of all papers at this conference is the human being, the wonder of creation, who is not created in vain nor neglected by his Creator. His Lord has established for him the pattern for multiplication, showed him the right way in order to excel, guided his steps to become strong, enlightened his mind to strive for perfection, endowed him with the gift of intuition to be able to increase his knowledge, made him efficient so he may control and possess, taught him speech in order to be inquisitive, and honoured him, saying, "We have bestowed our blessings on Adam's children and guided them by land and sea. We have provided them with good things and exalted them above many of Our creatures." (Al-Israa' [The Night Journely], 70)

God has honoured Man by making him worthy rather than vulgar or despicable. His honour is seen in the origin of his creation and the essence of his existence. This is evidenced in the upright posture and handsome features Man was given. God says, "We have created Man with a most noble image." (Al-Teen [The Fig], 4) Al-Dumairi explains this as man's "uprightness and his limbs being erect. For everything else was created porstrate, while he was created erect. He has an eloquent tongue

with which he speaks and fingers with which he holds things. He is adorned with reason, well-mannered through instruction, and refined by the ability to distinguish things. He holds his food and drink with his hand." (Animal Life, I, 33) Judge Abu Bakr Ibn Al-Arabi is known to have said something worth quoting, as it points out the honours Man has received from his Creator. He says, "God has created no creature better than man, for God has made him alive, learned, capable, planning, and wise and has given him speech, hearing and sight. These are the attributes of God Himself." This fact is evidenced in the Prophet's saying that "God has created Adam after His own image," (1) meaning with His qualities. He further honoured Man by endowing him with feelings, sentiments, emotions, and conscience, by urging him to be chaste and virtuous, and by making him covet parental, filial and family relations.

Actually, the aspects of the honour bestowed on Man are many and this is not the time or place to list them. It is sufficient that God defines Man's place in this universe by saying, "It is He who created for you everything the earth contains." (Al-Baqarah [The Cow], 29) This makes Man master of everything and inside earth. In saying this, God illustrates His own power and His gifts to Man, as well as Man's standing as God's vicegerent on the earth. That should protect him from going astray or being miserable. God taught Adam the names of all things. Another evidence of Man's learning is in the Sura of Al-Rahman (The Merciful), where Allah says, "He created man and taught him articulate speech," (Al-Rahman [The Merciful], 3-4) which means that He gave man knowledge.

It is with this explanation that God declares how He exalted man above other species. Articulate speech allows the creation of verbal expressions, to communicate what one thinks and feels. This gift is also the means by which some people prove to be better than others, because through language one has the chance to learn and gain knowledge.

Islam, since its dawn, urged man to learn. The verses of the Quran and traditions of the prophet which express this are abundant.

One scholar claims that the number of Quranic verses which hint to various sciences are about 750.

Imam Ghazali opens his book *Revival of the Sciences of Religion* with "The Book of Learning." He makes a comparison between the discipline

(1) The quotation is from *The Great Conquest (Al-Fath Al-Kabir)*. The tradition quoted is veritable and is cited by both Al-Bukhari & Muslim.

of fiqh and the science of medicine, trying to determine which is better. He points out the ideal manners of scholars, whether they are masters or students.

Muslims were very active in scholarship, science and translation in the first two centuries of Islam. Both original work and translation activities matured in the third and fourth centuries.

In the fourth century of the Hijri calendar, Ibn Al-Nadim introduced the first work in the field of bibliography. In his book *Al-Fahrast (the Index)*, he lists books and translations in all disciplines and offers biographical accounts of physicians.

Centuries later, Ahmad Ibn Mustafa (d. 968 H.), better known as Tash Kubri Zadah, wrote his book *The Key to, and Lantern of, Happiness*,\* which covers various disciplines. Two centuries earlier, Ibn Khaldoun divided the disciplines taught at his time into two main categories.

The first is that of natural disciplines, to which man is guided by his own process of thinking. This category includes gnostic and philosophic studies, one of which is medicine. The second is interpretive disciplines, such as religious and language studies.

In his book, or encyclopedia, mentioned above, Tash Kubri Zadah discussed the various fields of learning, including natural sciences, which he listed. One of these is medicine, which he defines as "a science that deals with the human body as regards its health or sickness, with the purpose of maintaining health and curing diseases. Its usefulness is self-evident and no secret." He adds, "It is sufficient honour for this science that Imam Shafi'i, may God be pleased with him, said about it: 'Science is of two kinds: medicine for the body, and fiqh for religion.'"

With this I conclude to allow Professor Maher Hathout to read his paper.

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\* Translator's Note: It seems to me that there is a printing error in this title as cited in the original Arabic (*Mu'tah Al-Sa'adah wa Misbah Al-Sa'adah*). The title as cited here, however, is a translation of the Arabic as printed.

## **BANKS OF MIXED HUMAN MILK**

Professor Maher Hathout, Ph.D.

### **Preliminary Account**

There might be a need to isolate a premature baby in an incubator for a period that might be long enough for its mother's milk to dry up.

Its condition improves little by little till it reaches a stage which, though still critical, allows it to take milk. It is well known that the most suitable milk for it is human milk.

Certain institutions have resorted to the practice of appealing to nursing mothers to donate some of their milk. "Each donates as much as she is willing to. The milk is collected, sterilized, and made available to those premature children at the critical stage when other kinds of milk might be harmful to them."

The result is that the milk used is a mixture of the milk of scores, and even hundreds, of mothers. In addition to their own children, scores, and even hundreds, of premature, male and female infants feed on that milk. Neither in the present nor in the future, the identity of the donators and recipients becomes known.

Naturally, the feeding takes place without direct contact, i.e. with no breast sucking by the child.

Does this entail a relation of milk brotherhood/sisterhood? Should milk banks be prohibited in spite of their contribution to human life?

If these banks are deemed permissible, on what grounds are they considered so? Is it because of the absence of direct breast feeding? Or is it the impossibility of identifying milk sisters or brothers, who represent a very small minority, a minority that melts away and cannot be traced or identified?

The problem, however, is not as serious as one might first imagine. Manufactured milk usually serves the desired purpose, and human milk

banks serve now only those infants who are allergic to manufactured milk or are unable to digest it.

The percentage of premature children is only 7%, and less than 1% of these take mixed milk, so the problem is greatly reduced in size. I have contacted milk banks in the United States and discovered that their number has been reduced to only three. I have also contacted the Childrens Hospital in Los Angeles and asked how often they had used milk banks within the last two years. The figure they gave me is 'zero'. So, as you see, the problem is very limited, but the possibility is there. The problem might completely disappear, but might also reappear in the future.

## **FETAL SEX-SELECTION**

Professor Hassan Hathout, Ph.D.

There have been two recent scientific achievements. These are:

1. The sex of an embryo can now be diagnosed by extracting some of the liquid that surrounds it out of the uterus with needle. This liquid contains some cells discarded from the embryo's skin, and when they are examined, its sex can be identified.

If it is not the desired sex, the pregnant woman might seek abortion in countries where it is permitted. It is clear that Islam does not sanction this.

2. The differences between male and female sperms have been recognized as a set of characteristics, such as bulk, speed, the ability to penetrate the viscid mucus in the cervical canal, response to chemical reactions of that mucus, etc.

This has been applied to animals and is exploited in animal husbandry. An extensive amount of semen is collected from a large number of males and could be divided into two portions, in one of which female bearing sperms are a majority, while in the other they are a minority.

By using one of the two portions for artificial insemination, the natural percentage of probability is modified. It is usually 50% for each sex, while by using this method the probability of the desired sex jumps to 70%.

The difficulties of applying this to man are clear. One of these is the difficulty of collecting a large amount of a husband's semen. Another is the substitution, under a physician's supervision, of artificial insemination for natural intercourse, with the love, compassion, and peace that accompany it, and that are sought in themselves as legitimate purposes of marriage.

Still, what if man does tamper with the percentage and the members of one sex considerably surpass those of the other, especially since the majority of people prefer sons to daughters. There is going to be a large surplus of men in society, without enough women to provide wives.

If this becomes a common medical practice in the case of human beings, what is the Islamic point of view?



## DISCUSSIONS

### MEDICAL DISCUSSION

#### **Dr. Ahmad Sharaf El-Din, Law School, Kuwait University**

Just one medical question. Dr. Hassan Hathout spoke about controlling embryo sex before the semen gets inside the female body. Is it possible to change the sex inside the uterus?

#### **Dr. Hassan Hathout**

It is not possible to change the embryo's sex inside the uterus; the question is settled once a sperm unites with the ovum. However, I have seen a scientist turning a hen into a cock by removing its ovary and planting a testicle in its place.

I have also witnessed, at a clinic in America, a homosexual who could find a doctor to remove his penis and testicles, in other words to castrate him, so that he could only use his rectum sexually.

I have actually seen that young man, he remains a male. If his chromosomes are tested, they will prove to be of the xy type, which proves he is male.

#### **Dr. Omar Al-Ashqar, College of Islamic Law and Islamic Studies, Kuwait University:**

Dr. Hassan Hathout mentioned that we can control sex up to a percentage of 70%. Since we can tell that a certain sperm is a male or female sperm, why can't we control it 100%?

#### **Dr. Hassan Hathout**

Because in practice we do not move the sperms one at a time. I will give an example. If we have a round tray with rice grains and almonds on it, and it is made to rotate. The centrifugal force would try and push both grains and nuts to the circumference of the tray and even outside it if it has

no frame. But the effect of this force would not be the same in the cases of the grains and the almonds, for the lighter bodies respond more readily and move away from the centre with higher speed.

What is practised in the field of animal husbandry is that the mixed semen is rotated fast. The speed generates a centrifugal force, which drives the sperms towards the wall of the barrel that contains the semen. Since the xx sperm, which is the female, weighs more and is larger in bulk than the light xy male sperm, when the barrel is rotated at a certain speed for a certain period of time and then for a very short period of time holes are opened in the barrel, the semen that comes out would contain a much higher percentage of light, i.e. male, sperms.

The heavy, feminine sperms are like armoured vehicles. They are slow but mighty, while male sperms are like motorcycles. When sperms try to penetrate the viscid mucus, which is the defense line of the uterine cervix, and whose viscosity and thickness vary in a cycle, the "motorcycles" would be quicker to penetrate and reach their goal when the mucus is thin, which means that the probability of a male sperm reaching the ovum is much higher. On the other hand, when the obstacle is thick mucus, an armoured vehicle, though slow, has a better chance to penetrate. That is why physicians advise a husband who desires a daughter to determine the day of his wife's ovulation and to have sexual intercourse with her the following day when the mucus secreted in the cervix is rather thicker and female sperms have better chance to penetrate it.

If intercourse occurs on the day of ova release, or a day earlier, when the mucus is thinner and lighter, the male sperms are faster to penetrate and the chance of having a son is greater. The same chance might be produced if the wife douches with sodium bicarbonates, which dilute the mucus and thus allow male sperms a better chance.

In medical science, this is still not much better than a folk medicine prescription, which is far from guaranteeing the desired result. The practice applied to animals, however, has more certain results. By using the centrifugal force, an amount of semen in which light sperms are much greater in number can be produced. But this is by no means like picking stones, one by one, from a quantity of rice.

**Dr. Abd El-Hafez Hilmi Muhammad, Professor, Department of Zoology, Faculty of Science, Kuwait University**

I just want to comment on the isolation of two groups of sperms, as mentioned by Professor Dr. Hassan Hathout.

What I want to point out is that the difference [between male and female sperms] is in only one chromosome out of twenty three. Because of this the difference in weight is extremely small.

It is well known that there are other components of the sperm. They are not always equal in weight. This explains why the isolation process fails to produce a complete division, since the balancing factor is not limited to the sex chromosome.

This is the physiological aspect of the matter, without going into the social and medical ones. I also want to point out that the isolation process has certain medical risks. In addition there are the social risks. In every semen ejection, there is a percentage of abnormal sperms which have different weight, bulk and characteristics. Because they are very few in number, the probability of their reaching the ovum is also very small.

If, however, we try to separate two types of chromosomes, that is to isolate sperms with the y male chromosome from those with the x female one, we will at the same time, and by our own doing, isolate these sperms that cause a lot of suffering (if they reach the ovum). When we do the insemination, the percentage of abnormal sperms, which we would normally try to avoid, becomes much higher in the semen mixture.

**Dr. Muhammad Hanif Al-Awadhi, Research Scholar for the Fiqh Encyclopedia**

An evidence of the miraculous nature of the Holy Quran, from the scientific point of view, is the verse that says, "Does man think that he lives in vain? Was he not a drop of sperm of ejected semen?" (Al-Qiyamah [Doomsday], 36-37) That is of the sperm of man both male and female are created. Similar verses are found in the suras of Al-Nahl (The Bee), Al-Kahf (The Cave), Ya Sin, Al-Najm (The Star), and Al-Nisaa' (Women). We notice that the beginning of a human being is a sperm rather than the whole semen ejected at one time as some used to think. Is not the discovery that it is only a sperm out of the ejected semen a modern confirmation of what God informed us fourteen centuries ago?

Another miraculous thing in the verse I have just quoted is that it is the sperm that determines the sex of a child, because it carries the different x or y combinations in its chromosomes. So a man is responsible for the sex of his child while a woman is similar to a land that grows what is planted in it. "Your wives are your tilths." (Al-Baqara [The Cow], 223) The womb is actually a fertile land ready to be planted.

The difference is that a plant, though rooted in the earth, is exposed to various dangers, while in the case of a fetus: "We kept it in a safe receptacle for an appointed time." (Al-Mursalat [Those Sent Forth], 21-22) "And We cause to remain in wombs whatever we please for a specified term..." (Al-Haj [Pilgrimage], 5). How could an illiterate person who lived fourteen centuries ago speak about a medical subject which, even today, is known only to the educated. Thank you.

**Dr. Zakaria Al-Berri, Chairman, Department of Islamic Law, School of Law, Cairo University; Consultant, The Kuwaiti Funding House**

God, the High and Supreme, says, "He gives daughters to whom He wills and to whom He wills gives sons. Or He gives both sons and daughters." (Al-Shoura [Counsel], 49-50) Where then does the hermaphrodite phenomenon come from?

I hope this subject will be discussed. Is the hermaphrodite an abnormal male or an abnormal female? Can this abnormality be removed by surgery? Or are there other explanations?

I would like also to comment on what the honourable encyclopedia staff member said about the man determining the sex of the child. This is true, but the woman also determines it in the sense that the mucus she secretes allows one sperm, whether male or female, to penetrate and does not allow others.

Next, our brother here says this is an untranslatable term, while there is no term that cannot be translated. I am for translation, provided that it is scientifically satisfactory. We want all our terms, scientific ones included, to be Arabic. Certain Arab countries and Arabic academies have translated many of these terms into Arabic. At a certain stage, we might need to use both, the Arabic and the foreign terms, to allow Arabic terms to become widely known. But I stress the need for Arabic terms, as a gesture of pride in our language, the language of Islam.

**Dr. Isam Sherbini, Consultant, Ministry of Public Health, Kuwait**

Till now we have not discussed the subject in a way to influence a fiqh ruling on whether we should bypass or modify certain regulations that we have been following for a long time.

**Dr. Hassan Hathout**

About the hermaphrodite phenomenon: There are seven degrees of maleness and seven of femaleness. Every female has seven specific characteristics.

Every male has likewise seven degrees, and if there is any abnormality in one or more, a paradox, that varies in degree, results. A full paradox would be in the form of a human being who has a female body, skin, appearance, softness, and vagina, but has an xy pair of chromosomes as in males. The paradox is that the body indicates one sex, while the chromosomes indicate the other. This is one type of hermaphroditism.

Such a creature, or such a woman, may marry and prove to be a good wife. She might have great feminine beauty, and her marriage may be a happy one. But she cannot bear children.

On the other hand, there is a beardless man, whose testicles might be small, his body greasy like a woman's his penis very small, and his pouch containing no testicles, for the testicles might fail to migrate to the surface of his body and remain in his abdomen as they are in fetuses. His urinary canal might open at the base of his penis rather than at the end.

Many are the infants born this way. The midwife sees something that looks like a penis, but when the baby urinates, his urine does not come out at the end of his penis, but rather at the base. Since the baby's pouch contains no testes it does not convince common people that it is a scrotum. Thus the child is considered a girl. The last case I treated was of a "girl" called Ma'soumah. She wore dresses, attended girl schools, and received her high school diploma. She applied for a job, but when examined by the medical board it was noticed that she was too hairy. She was referred to me, and I found out that "she" was originally a male, that there were two testicles in her abdomen, and that her hairiness and the large size of her clitoris were the products of male hormones.

Since she was raised as a female, she would not be able to function as a male although that was her original sex. I removed the testes from her abdomen by surgery, because there they are susceptible to cancer and

they produce masculine hormones. I also removed the penis, almost completely, and give her feminine hormones, which allowed her breasts to grow. We told her family that when she is ready to get married, she should come back to us to make an artificial vagina for her, in order to have intercourse, but they should tell her proposer, that for some medical reason should would not bear children.

Conferences that last several days are held to cover hemaphroditism, but this should be sufficient for us. The question is: what is the Islamic stand on embryo sex selection?

**Dr. Abdulla Basalamah, Professor of Gynecology and Obstetrics, School of Medicine, King Abd El-Aziz University**

We should go back to our subject, embryo sex selection, as Dr. Hassan Hathout has just suggested. It is practiced with animals, and experiments indicate that its application to man is not far away. However, in recent years, the subject of tube babies has been raised, and in this year, and in fact pretty soon, the topic is going to be discussed. So, this question is urgently calling for the attention of our conference here. As you have heard, a tube baby is the result of fertilizing an ovum, by adding a sperm to it, outside the body.

It is possible now to examine the sex of the resulting embryo before it is placed back in the womb. If it is male, and the parents desire a female, it can be discarded, while if it is female, it is restored to the womb.

The problem then is going to face us soon, and a solution satisfactory to us, gynecologists, in our future work is urgently needed. Thank you.

**Dr. Ahmad Al-Ghandour (the Assistant Chairman)**

We hope the participants will limit their discussion to the two topics raised in this session. We may be able to discuss other points once we cover the role of Islamic fiqh concerning banks of mixed human milk and embryo sex selection.

What do fiqh scholars think of them?

On these two subjects a prominent scholar will be kind enough to talk to you now. He is Professor Dr. Yusuf Al-Qaradhawi, Dean of the College of Islamic Law and Islamic Studies at the University of Qatar, a man to whose extensive knowledge of fiqh and thorough mastery of Islamic studies, we can honestly testify.

Would Dr. Qaradhawi kindly throw some light on these two questions!

## MILK BANKS

Professor Yusuf Al-Qaradhawi, Ph.D.

In the Name of God, the Compassionate, the Merciful  
Praise be to God and Blessings and Peace to his Apostle.

Undoubtedly the purpose which Milk Banks are set up to perform, as the speaker has described them, is a good, noble one, which Islam endorses. For Islam urges that proper care should be taken of the weak, whatever the reason of their weakness may be, and particularly premature infants, that are completely helpless.

It also goes without saying that a nursing mother who contributes some of her milk for the nourishment of this type of baby will be rewarded by God and commended by people. It is even legitimate to buy her milk if she does not wish to give it for free, as it is legitimate to hire a wet nurse, which is specified in the Quran and was practised by early Muslims.

Likewise, it is undoubted that an institution collecting, sterilizing and storing such milk to use in feeding such infants, as a "Milk Bank", similarly deserves reward and gratitude.

What then is the danger of such an activity?

The danger is that when an infant grows into a young man and desires to marry a girl of his community, this girl might actually be his milk-sister. He has no way of telling this, because he does not know the names of the children who shared with him on this collective milk.

More than that, he is also ignorant as to the identity of the milk donors. Any woman may be his milk mother, and he is, therefore, forbidden to marry her, the daughters born to her, her milk daughters, her sisters (who would be his aunts), her step-daughters (according to the majority of scholars), who are considered his step-sisters, and so on.

Here we have to consider two questions that would clarify the issue: (1) the question of the meaning of the "nursing" which entails prohibition, and (2) the question of doubt about nursing.

## The Meaning of Nursing

The majority of fiqh scholars—including the three masters Abu Hanifah, Malik and Al-shafi'i—interpret nursing to mean any milk that gets into the stomach of an infant through the throat, as when milk is given to him through the mouth or, in the opinion of some, through the nose. Some even went as far as to include milk injected through the rectum.

A different opinion is offered by Imam Al-Laith Ibn Sa'd, Imam Malik's contemporary and equal as well as the Zhabiri School of Thought. It is also expressed in one of two rulings given by Imam Ahmad. Ibn Qudamah, a renowned scholar, cites these rulings. The first, which is better known, agrees with the majority of scholars in that marriage prohibition is confirmed when milk is taken through the mouth or nose. For milk taken through the mouth contributes to the growth of flesh and bone and is therefore similar to "sucking." Again, taking a liquid through the nose is sufficient to break the fasting of a Muslim and, by analogy, can be regarded as entailing prohibition, like taking the milk through the mouth.

The other ruling signifies that milk poured into the mouth or nose is not sufficient for marriage prohibition, because it is not exactly "nursing".

Ibn Qudamah says in *Al-Mughni* says that it is also the opinion of Abu Bakr, Dawood and 'Atta Al-Khurasani that milk taken through the nose is not nursing. The prohibition of marriages, as expressed by God and His Prophet, applies to cases of nursing, while taking milk through the nose is similar to something entering the body through a cut or wound.

The author of *Al-Mughni* considers the first ruling to be weightier on the basis of the Prophet's tradition narrated by Ibn Mas'oud as quoted by Abu Dawood: "The only nursing is that which forms bone and flesh."

The quoted tradition is actually an argument against this view, since it describes the nursing that entails marriage prohibition as that which affects the infant's growth by contributing to the formation of his flesh and bone. Thus it rules out minimal nursing, such as one feeding or two, which does not influence the constitution of an infant. The tradition makes it clear that marriage prohibition results from nursing which contributes to physical growth, which means nursing has to actually take place.

The author of *Al-Mughni*, God have mercy on him, adds that since the milk gets to the same place as it does in direct nursing and causes development of flesh and bone, and since liquid taken the same way breaks fasting, it should equally cause marriage prohibition.



But we answer that if the question is the formation of flesh and bone, regardless of the means, we should conclude that a woman who donates blood to a child becomes his mother and marriage prohibition should apply in such a case, because nourishment with blood injected into veins is faster and more effective than nourishment with milk. But religious regulations cannot be interpreted on the basis of assumptions, for assumption is mostly likely to prove false and cannot serve the truth.

What I believe is that the Legislator has based marriage prohibition on "motherhood through nursing", as He says in the sura of Al-Nisaa' in listing unmarriageable women," and your mothers who have nursed you and your sisters through nursing." ([Women], 23).

The motherhood described in the Holy Quran does not come merely from milk, but also from sucking and contact, in which is expressed motherly, tenderness and filial adoration. From this type of motherhood, nursing sisterhood branches. Motherhood is the origin, and the rest follows.

It is essential to reflect on the vocabulary used by the Legislator. All His words are derivatives of the verb "to nurse". The meaning of these words used in the Quran and Sunna are perfectly clear. The verb means to give the breast to an infant, which the infant takes and sucks. It does not mean to feed on milk regardless of the method.

I especially like the interpretation of Imam Ibn Hazm, who did not go beyond the connotations of the Quran verses, and, by doing this, managed to give a truthful explanation.

It is worthwhile to quote a passage of his to show how convincing and well supported it is. He says:

As for nursing that entails marriage prohibition, it is what the nursed [infant] sucks with its mouth alone of the wet nurse's breast. While if it is given the milk of a woman and drinks it from a vessel, or if it is milked into its mouth and it swallows it, or fed to the infant with bread or some other food item or poured into its mouth, nose or ear, or injected into the infant, all this would not cause marriage prohibition, even if that was the only food for the infant through its life. The evidence for this is what the Almighty says: "and your mothers who have nursed you and your sisters through nursing." (Al-Nisaa' [Women],23). The Prophet, Peace be upon him, says, "Nursing entails the same marriage prohibition as kinship." (1) So God and His Prophet do not prohibit any marriage unless nursing takes place.

The only thing we can call "nursing" is that which the infant takes when the nursing woman places her breast in its mouth. We say "to nurse, nursed, nursing." No nursing takes place unless the infant takes the breast with its mouth and sucks it.

We cannot use any derivation of "to nurse" for other activities; we rather speak of milking, feeding, giving to drink, drinking, eating, swallowing, injecting, pouring into the nose, and dropping. God does not make any of these a cause for prohibition.

Abu Muhammad (Ibn Hazm) says:

There is a controversy over this. Al-Laith Ibn Sa'd says, Pouring a woman's milk into the mouth does not entail marriage prohibition, nor does giving a boy a woman's milk with medicine. Neither method is 'nursing', for nursing is to suck from the breast.

This is what Al-Laith says and we agree with it, and so do Abu Sulaiman [that is Dawood, the Imam of Al-Zhahiriyyah] and our people [meaning Al-Zhahiriyyah school.]

He answers those who use as evidence the tradition which says, "Nursing is that which satisfies hunger," (2) by saying:

This is an argument that supports our view, because He, Peace be upon him, makes marriage prohibition result from nursing that satisfies hunger and not from anything else. Thus marriage prohibition does not follow satisfying hunger by food, drink, pouring into the mouth, or other things, unless they take the form of nursing. As the Prophet, Peace be upon Him says, 'Those that transgress the bounds of God are wrong-doers.' (3)

We can therefore see that the view that gives heart satisfaction is that which is in harmony with the evident meaning of the texts, all of which based their regulations on nursing, the meaning of which is linguistically and traditionally clear, i.e. giving through the breast into the mouth.

It is also in harmony with the wisdom of marriage prohibition on the basis of nursing that there should be motherhood similar to kin motherhood, and this is followed by sisterhood and other relationships.

It is clear that this kind of nursing does not take place in the case of milk banks, and so this kind of feeding does not lead to the prohibition of any otherwise legal marriage.

## Doubt about Nursing

But even if we give in to the majority of scholars, that nursing is not a necessary condition for prohibition, there is another factor that rules it out.

That is the fact that we do not know the identity of each of the women on whose milk the infant fed, nor the amount of milk he took from each. We do not know whether he took from a certain woman's milk the equivalent of five filling feedings, which is the amount specified in the most accepted opinion and making most sense, as it is the minimum that affects the formation of bone and flesh. This is the opinion of both the Shafi'i and Hanbali Schools.

Moreover, is mixed milk ruled to be the same as milk taken purely from one woman?

In the Hanafi School, Abu Yusuf says, quoting Abu Hanifah, that if a woman's milk is mixed with another's, prohibition applies to the one which contributes more, because a minority is ruled out by a majority. But in this case, there is no way to tell who has contributed more.

It is known that when there is doubt about nursing, marriage prohibition cannot be confirmed, because the general rule is permission, and its application is suspended only when there is certainty about the particular case.

The renowned scholar Ibn Qudamah says in *Al-Mughni*, "If there is doubt that nursing has taken place, or that the number of feedings has reached the specified minimum, marriage prohibition is not confirmed, because the rule is that there is no such prohibition, and doubt is not sufficient to suspend the application of a certain rule. The same applies to doubt about divorce or the number of divorces." (4)

In *Al-Ikhtiyar (The Choice)*, a book of the Hanafi School, we find:

If a woman has placed her breast in the mouth of an infant but it is not certain whether milk has gone down his throat, marriage is not prohibited (between the child and the woman's daughter).

The same applies when a young woman is known to have been nursed by some of her village women, but their identity is unknown. If a man of the village marries her, the marriage is valid, because the rule is that marriage is permissible, and this does not change with doubt.

Women, however, should not take to the habit of nursing just any boy without a reason. When they do (nurse an infant), they should remember it or take the precaution of writing it down. (5)

It is evident that in this case (of milk banks), what takes place is not really nursing, but even if we suppose it to be nursing, it is done for a necessity, and remembering or writing down who gave milk to whom is not possible, because the milk is anonymous and mixed.

I find the most acceptable tendency in matters of nursing is that which restricts marriage prohibition as the case is with divorce, although extension of the application of both is favoured by some.

### Summary

I see nothing wrong with establishing this type of milk bank, since they serve a legitimate Islamic purpose and meet a need that should be met. I base this opinion on the views of the fiqh scholars I have mentioned, supported by the evidence and preponderance of the quotes I have cited.

Some may say, why do we not take the more cautious attitude and avoid controversy, since such an attitude is more pious and less doubtful.

My answer is that when one is deciding his own affairs, there is no harm in following what seems more cautious and pious. In fact sometimes one may go as far as to leave what is legitimate in fear of what is not.

But when it comes to general rules and to some pressing social interest, it is proper for *mufitis* (scholars who deliver formal legal opinions) to make things easy rather than difficult, so long as they do not transgress the bounds of legislative texts or established rules.

That is why fiqh scholars have considered general affliction as one of the extenuating circumstances, in consideration of people's situation, and as a measure of kindness. Moreover, our current age badly needs facilitation and kindness.

It should be pointed out, however, that the tendency to follow what is more cautious, rather than the easier, kinder or more just in everything, might end with us into turning the rules of Islam into a set of "precautions", which are far from the spirit of flexibility and magnanimity that is basic to our religion. The Prophet, Peace be upon him, says, "I have been sent with a magnanimous, true religion," and "You have been sent to make things easy rather than to make them difficult."

The course we choose in such matters is a middle course of moderation between the strict and the indifferent. "Thus we have made you a middle nation."

It is God who utters the Truth and guides to the straight path.

### Notes

1. The tradition is unanimously narrated after 'Aaisha and Ibn 'Abbas (*Al-Fatth Al-Kabir [The Great Conquest]*).
2. This tradition is also unanimously narrated after 'Aaisha and (*Al-Fatth Al-Kabir*).
3. *Al-Muhalla (The Adorned)* by Ibn Hazm, vol. 10, pp. 9-10. The verse is from the sura of Al-Baqara (The Cow), 229. [Translator's Note: Although the quote within the quote is referred to in the text as a Prophet tradition, it is correctly identified in the note as a text from the Holy Quran.]
4. *Al-Mughni with Al-Sharh Al-Kabir*, vol. 9, p. 194.
5. *Al-Ikhtiyar* by Ibn Mawdood Al-Hanafi, vol. 3, p. 120. Also see Fath Al-Qadeer's Explanation of Ibn Al-Hammam's *Al-Hidayah (Guidance to the Right Path)*, vol. 3, pp. 2-3.

## **DISCUSSIONS**

### **FIQH DISCUSSION**

**Dr. Ahmad Al-Ghandour, Professor, College of Islamic Law and Islamic Studies, Kuwait University**

I am wondering about what Dr. Qaradhawi says. He bases his conclusion that marriage prohibition does not result from nursing which takes any form other than sucking from the breast on the opinion of Al-Zhahiriyah School. As far as I know the Hanafi School does set sucking as a condition of nursing, but, as his honour says, The Maliki and Hanbali Schools have views which cannot be ignored. Besides there are texts from the Quran and traditions of the Prophet, Peace be upon him, as well as reports of numerous incidents here and there, all of which indicate that marriage prohibition is based on milk taken by the infant, whether it takes the form of sucking or drinking.

The important thing is that it should get into the stomach and contribute to the growth of bone and flesh. This is the basis for marriage prohibition as set by Quranic texts and the Prophet's traditions.

Before I go on, I would like to point out that I am neither too strict nor too indifferent. I hope I am moderate.

However, if that is what Ibn Hazm says about the subject, then jokingly I say that he or Al-Zhahiriyah School consider that marriage becomes unlawful if a husband sucks his wife's breast.

In fact there was an incident of this sort. A man told Abu Musa Al-Ash'ari, "I have sucked my wife's breast and milk has gone down to my stomach." Abu Musa said, "I think she is now forbidden to you as a wife." The man went to Abdulla Ibn Mas'oud, and the latter wondered at this opinion of Abu Musa. He went to Abu Musa, and the man with him, and said, "How do you say this, when nursing is limited to a specific period in life, the period when flesh and bone are formed?"<sup>(1)</sup> which is the first two and a half years or over two years, depending on the different opinions of scholars.

I believe that mixed milk banks would cause many to commit what is

prohibited, because there would be general confusion. A man might marry a woman on whose milk he might have nursed or he might have nursed on her daughter's or mother's milk. Ignorance and the failure to take precautions in such matters might lead to negligence of the rules of fiqh. For this reason, people are called upon to hold to the opinion that as long as milk gets to the stomach, contributes to the formation of bone and flesh, and is taken within the two year period, then it is what prohibition covers, whether it is sucked, which is the original meaning of nursing, or drunk.

I say that if the milk of a woman is mixed with another's with ewe milk, with water, or with medicine, prohibition is confirmed if the woman's milk constitutes the greater part, even if this is drunk.

I felt that I should make this clear. However, I would like to thank his honour for his opinion and for pointing out that there are various points of view on the subject, out of which he has chosen the easiest one for Muslims to follow.

However, we should be thankful to God that artificial milk is available everywhere in Arab and non-Arab countries.

With due respect to our professors of gynecology, whenever I think that the daily amount of a woman's milk is no more than half a cup, I find it hard to conceive the establishment of milk banks. But perhaps I should stop here.

This was merely an expression of my opinion, not an objection to something already established.

**Dr. Yusuf Al-Qaradhawi**

Actually I did not base my opinion on that of Al-Zahiriyyah School alone, but on two other factors as well.

The first is the definition of nursing, which I said is subject to controversy, and I chose to go against the majority of scholars, but many are the cases in which we go today against the opinions of the majority in financial and economic affairs and in Islamic banks, and often we ignore the opinions of scholars in family affairs, such as marriage and divorce.

There are now many questions on which the opinion of the majority of fiqh scholars is abandoned in preference for the opinion of a small number of early scholars.

I said that this is the opinion of Imam Al-Laith and Imam Ahmad, according to one of two rulings. Imam Ahmad is one of the four great scholars, and some of his disciples follow this opinion. It is also the view of

Al-Zhahiriyah School, and we have no reason to reject their views.

Certain of their opinions, however, have to be rejected, as in the question of nursing an adult, which is the interpretation of 'Asisha, may God be pleased with her, and is based on the case of Salem and Saleem: "Nurse him and you are forbidden to him." (2) It is a well-known case, but we cannot always regard the views of Al-Zhahiriyah School as insignificant, or ignore them altogether.

The second factor is the question of mixed milk, which is mentioned in the Hanafi School; if a woman's milk is mixed with another's the rule of marriage prohibition applies to the one who has contributed the greater part.

The doubt as to the identity of the donors and recipients is settled by the fact that the general rule is permission, which is a certainty and cannot be cancelled on the basis of doubt. This is how I reached my conclusion.

The question then is whether the setting up of milk banks serves a public interest, and it is left to our physicians to decide what is needed and what is not.

If they are needed, we sanction them because they serve a public interest, and if they are not, then they should not be set up.

**Dr. Khalid Al-Mathkour, Chairman, Department of Islamic Law and Islamic Studies**

I am in agreement with Dr. Al-Qaradhawi, may he be rewarded for the pleasure he has given us by citing the evidence of tradition and of common sense. But I would like to take the subject up from the medical point of view.

In various conferences, physicians have warned that manufactured milk is hazardous to an infant's health. Everybody seems to concur in this point, because that milk is stored, transferred and exposed to the environment.

But this milk stored in banks, though it comes from human mothers, would likewise be subject to dehydration, storing, transfer, and the influences of the environment.

Both Islam and health requirements encourage natural nursing, where the child sucks the milk which comes out of the mother's body with the best specifications of temperature, sugar percentage and purity, as physicians admit.

Therefore I am not concerned now with the legal aspect, which was



discussed thoroughly by Dr. Yusuf Al-Qaradhawi, with convincing evidence, but rather with the medical. For the milk of banks will be subject to the same influences as manufactured milk. Thank you.

#### **Dr. Abd El-Aziz Kamel, Counsellor at the Emir's Court**

I do not wish to discuss the subject, but rather the method we should follow in our dialogue and discussion. We have only two days: today and tomorrow, and we have nine topics on our agenda. This morning session is supposed to cover two subjects. I have a certain conception on how we should proceed, and I want to propose it, hoping it will be approved and will help us to conclude our business.

Some of the topics are extremely serious and wide, such as the question of abortion, with its various implications, which are not merely medical or social. Sometimes it has political implications as it influences the size of a nation's population, whether it is Muslim or non-Muslim. To be specific, I propose the following procedure:

Our medical colleagues have spoken, and specified exactly the nature of the raised question. Dr. Maher Hathout has spoken about milk banks, and defined the size of this problem. This was followed by objections and inquiries that cover two points: whether they are recommended from a medical point of view and would not cause harm while they are supposed to be of benefit, as Dr. Khalid Al-Mathkour has wondered, and whether they are permissible in Islamic Law.

Since this has been the pattern, then we should define the medical aspect of the problem. Following that, we can discuss the risks that we may think of or the tests that should be made, whether they are medical, religious, or any other risks or tests we may think of. After that, we move to the fiqh regulation that covers the subject.

If the question was a subject of controversy in the past, we should not imagine that a unanimous opinion must be reached at this seminar. It is sufficient for us, if the topic was previously discussed, to cite the views of our predecessors, and the committee may decide which opinion is most acceptable.

We may mention the factors that call for permission and those that call for prohibition.

If we find, after all this, that certain subjects need to be postponed for further consideration, we might refer the medical description of the problem and the fiqh regulation about it to such future discussions.

The fiqh aspect can be divided into two parts. The first is the opinion of earlier scholars, and the other is what the committee decides, either favouring one of the earlier points of view or coming up with a new opinion.

**Dr. Omar Al-Ashqar**

On the question of nursing, since Islamic Law does not prohibit any person to get someone to nurse his child, whether it is one woman or more, it is not right for us to say that we should disallow any form of nursing.

The Islamic Law discussion should only address the consequences of nursing. This is what a Muslim scholar has the right to discuss, for if nursing takes place, it entails certain regulations.

Another point mentioned by Dr. Yusuf Al-Qaradhawi is the subject of the Islamic regulation, whether it is milk that gets into the stomach or milk that is taken in a particular way, that is, by sucking the breast.

I believe that Dr. Qaradhawi is being too technical here. If we insist that marriage prohibition results only when the breast is sucked, how about a situation where a two-ended teat is used, with one end attached to a woman's breast and the other placed in an infant mouth? Would the regulation be different?

What if a woman puts a child on her lap and gives him a feeding bottle, which, in some cases, may contain her own milk, which the woman has put in the bottle for one reason or another? For me the criterion is whether an infant is given five filling feedings from a woman's breast, even if the milk is taken from the woman and then given to the child.

However, I agree with Dr. Yusuf Al-Qaradhawi in his conclusion about cases where the milk is mixed, as in milk banks. Since neither the identity of the donating women nor the amount each has contributed can be known, I believe his opinion is valid.

**His Excellency Sheikh Ibrahim Al-Dasouqi, Minister of Waqfs,  
Egyptian Arab Republic**

I want to thank the Honorable Professor Yusuf Al-Qaradhawi for the abundance of information and quotations with which he has provided us covering the subject we are discussing. There is no doubt that when something of this sort is evaluated in Islam, the evaluation is based on the relevant results.

Early Muslim scholars, may God be pleased with them, were very careful and cautious when they handled any text, whether from the Holy Quran or the tradition of our Prophet, Peace and Blessings be upon him.

Whenever they came up with a definite ruling on a certain question, it is certain that they only did so after they had considered all the implications of the texts and applied them to the particular case. It is those same scholars who picked the texts, called on people to understand them correctly, and reached a particular conclusion, which is prohibition of marriage when milk goes down the throat into the stomach one way or another.

On the other hand, we find in our countries that many clinics have nurseries, and in some of these there are sometimes children that have nobody to nurse them. In such cases, the clinic recruits women to nurse these infants and supply them with the milk they need.

Muslims today are in need of regulations that govern their behaviour and the way they conduct many of their affairs. If we leave the door open today, this might be taken as relaxing the rules, because in everything we do we declare that Islam is easy and flexible and does not impose any hardships.

No, we are not too strict, and I wish Muslims today were. Many of our values would have been maintained.

Still, dear brothers, I do acknowledge the effort of our professor and brother, the Honourable Dr. Yusuf Al-Qaradhawi, in his presentation.

I hope that, with God's Will, we will give this subject due care and take a middle course. But this is only possible by warning people that "Nursing entails the same prohibition of marriages as kinship." (3) Nursing is milk which gets to the stomach through the throat and contributes to the formation of flesh and bone. Once we make this clear, we are not going to face in Islamic countries any problem that requires us to make this [the setting up of milk banks] permissible on the basis of a widely practised wrong. If it spreads widely, which we pray will never happen, we hope, by God's Will, we can find other remedies. Guidance comes from God. Thank you.

### **Session Chairman**

We thank His Excellency the Minister of Waqfs, Egyptian Arab Republic. Now it is the turn of Dr. Muhammad Al-Ashqar, Expert at *The Fiqh Encyclopedia*.

## **Dr. Al-Ashqar**

I propose that on the question of establishing a milk bank in Kuwait or other Muslim countries, we can follow a course that is in harmony with our religion and that keeps us away from doubtful or reprehensible things.

Is it not possible to keep the milk in labelled bottles, on which the names of the donor and the recipient are mentioned? Such a measure would spare us the likelihood of committing what is prohibited.

Still, there is no reason why we should not discuss the question of foreign milk banks. If an infant receives such milk, what is the rule?

I believe that Dr. Yusuf Al-Qaradhawi has taken the subject beyond the domain of Al-Zhahiriyah School, because he points out the rationale that when an infant takes the breast from a certain woman while she holds it to him, a relationship is established.

Al-Zhahiriyah School, however, does not go into the rationale; they merely interpret the text without committing themselves to any particular justification.

Once we point out a rationale, we go beyond Al-Zhahiriyah school of thought and supply our ruling with justification. This, however, gives validity to the less common viewpoint»

As for the question of doubt, this is a highly valid point. The tradition which makes the prohibition of marriages mentions this explicitly. The Prophet, Peace be upon him, mentions "five verified feedings." (2) So in order for marriage prohibition to follow, the nursing should be verified. When there is doubt, there certainly can be no prohibition.

What supports the interpretation that the question is not that of milk getting into the stomach is that two infants may feed on the milk of the same ewe, which does contribute to the forming of flesh and bone, and yet there is unanimous agreement that in this case there is no prohibition of marriages within their families. The same thing applies to milk which is stored and gets to the stomach but not through breast-feeding, being taken from an unknown woman or source. No relationship ensues.

This indeed makes us tend to take the less common interpretation.

I am not saying that the more common viewpoint is entirely mistaken, but rather that sucking the breast is an important factor in leading to marriage prohibition.

**Sheikh 'Izz-el-Din Touni, Research Worker, The Fiqh Encyclopedia**

If the opinions expressed in favour of allowing milk banks to be established are based on the principle of doubt, this is quite legitimate. For the majority of fiqh scholars, including followers of the Hanafi School, rule that marriage prohibition is confirmed even if breast sucking does not take place. To follow the Zhahiriyah School, one ruling of the Hanbali School, and the view expressed by Al-Laith Ibn Sa'd would be against the position taken by the majority. The justification given is the relationships of motherhood.

But does this relationship develop in two years or just after five verified, filling feedings?

If we claim that motherhood develops after five feedings, our claim does not make sense. The real justification of marriage prohibition then is the milk when it gets inside the baby's stomach and the consequences manifest in the development of flesh and bone.

As long as milk banks can be sanctioned on the basis of doubt, I see no reason whatsoever to state that one of the bases of sanction is the absence of breast sucking, which only Al-Zhahiriyah and others consider to be the basis of marriage prohibition, while the majority of scholars disagree.

Since we have another basis, we have no call to follow the minority.

What I want to arrive at is that no *fatwa* (religious ruling) should be made that the absence of sucking negates marriage prohibition, because if this is generally applied, especially in my country, it will lead to heinous acts. What happens in my country is that I and a relative of mine, let us say, have infants. With our knowledge, each of our wives nurses the other's infant.

It is quite frequent in our rural areas that nursing does not take the form of breast feeding. The milk is often poured through the mouth, served in a vessel, or something of this sort. Everybody knows that a certain girl is the milk sister of a certain boy.

If a ruling of this sort is applied, that is when it is known that a certain infant has nursed from a certain woman and we do not apply marriage prohibition in their case, there will result a lot of depravity. Thank you.

**Dr. Isam Al-Sherbini**

It is clear that from what we have heard so far there are two points of

view. The opinion of the majority and the one that Dr. Yusuf Al-Qaradhawi so aptly summed up and supported.

I hope, however, that we do not depart from the question of whether we should allow or encourage the setting up of milk banks or not. This is the point of discussion.

Islam has set means to establish relations among people, such as marriage, and patterns of such relations, such as applied in the case of inheritance. In addition to marriage, inheritance, and nursing, there is the pattern implied in God's saying: "... and your step daughters who are in your charge, born to your wives with whom you have lain....." (Al-Nisaa' [Women], 23).

This step daughter is unlawful for the step father to marry, although she has neither been nursed nor was party to a marriage. So relations that are established through nursing have their benefits and their distinguishing features. When we, at the Ministry of Health, give manufactured milk for a baby to feed on, we deprive him of much of what motherhood signifies.

Moreover, by giving him such milk, we also deprive him of much of what milk motherhood signifies. For this type of relationship also has many benefits. It is not always something tangible. I believe that milk brotherhood/sisterhood has its own benefits and is sought in itself.

Therefore we should seek a clear ruling that only applies in the case of urgent need, and I do not say absolute necessity.

We should make a point in our opinion and recommendation not to encourage the establishment of such banks, and always to try the best we can to make sure that a baby is nursed by its own mother or, when she is not available, by a substitute mother, rather than with substitute milk. Thank You.

**Sheikh Abd Al-Rahman Abd Al-Khaliq, Kuwait Ministry of Education**

The truth is that we have a unanimously-accepted regulation, which is that in Islam the same marriage prohibition that applies to kinship applies to milk relations. The point of controversy, however, is whether breast sucking is a condition for this prohibition or not.

Now we have this innovation, the collection of the milk of thousands of mothers and serving it as a mixture.

The justifications on which Dr. Yusuf Al-Qaradhawi has based his

conclusion that this new method should be permitted with no restrictions consists of three points:

The first is that in this method no sucking takes place. He supported his argument with the opinions of Imam Ibn Hazm, Imam Al-Laith and others who set breast sucking as a condition for prohibition.

Yet this condition is not based on a reasonable understanding of the matter, but rather on a technicality, for it is confirmed that breast sucking in itself does not entail prohibition, as the case is when the breast has no milk.

Dr. Al-Qaradhawi himself mentions that if an infant sucks a man's breast, marriage prohibition does not apply, even if it is assumed that such a breast may have milk. Marriage prohibition is caused by feeding on milk which is specified to be a woman's and to contribute to flesh and bone formation.

Thus I cannot see how sucking affects the rule of prohibition.

As to the claim that no [milk] motherhood is established when milk is received from a bank, because motherhood results from embracing the child, this also has nothing to do with the rule of marriage prohibition. If a woman embraces an infant and feeds him the milk of another woman or of a cow, this tender woman is not considered a milk mother of the infant although she has embraced and fed it. So this concept of motherhood does not affect marriage prohibition.

The third point on which Dr. Al-Qaradhawi bases his conclusion that this type of nursing is permissible is that the milk is mixed, and therefore there is doubt on whether a particular woman has contributed to it or not.

But the truth is that this is not only a matter of doubt that can be cleared; in certain cases it is a matter of high probability or even certainty. For what we have is an infant who receives thousands, sometimes dozens of thousands, of feedings from five, ten or even a thousand women. The point is that there is a definite number that might not exceed five.

In Kuwait, for example, the number of milk donors might not exceed 100, so it would be a definite number. The recipients would also be a limited group of immature babies, perhaps one hundred or two hundreds.

Thus the whole operation is limited to a number of donating women and receiving infants, and doubt here is not real doubt at all. The identity of participants might be certain. Doubt might exist if we were to import this milk from somewhere else.

Even in this case, we find that on the particular question of nursing, Islamic Law bases marriage prohibition on the greater probability. A man came to the Prophet, Peace be upon him, and said, "Apostle of God, this woman claims she has nursed me and she is now my wife. I do not know whether she is telling the truth or lying." The Prophet said: "Divorce her," He then added, "How [can you go on being her husband], while this claim is made." (5) Although the Prophet and this Companion were both aware that there is doubt in the matter, the Prophet ordered that the man and his wife should separate.

I want to draw attention to an important point, which is that the question of nursing and the resulting prohibition of marriage is a transcendental, rather than tangible, matter. I mean it is a divine question. When God, exalted be He, makes it unlawful for a man to marry a woman who has breast-fed him five filling times, He does not pose a geometric problem so that we can, by mathematical reckoning, discover the true rationale for this prohibition. We do not know the real rationale. Two infants might feed on the milk of an animal, and yet they do not become milk brothers, although from the scientific point of view, the situation is the same [as being fed by the same woman]: they have shared the same milk, that of the goat or cow. As I said, this is a divine matter, and we should understand it as such and accept the rule of Islamic Law.

Another point: What can be the consequences of this? If we are going to adopt a very superficial approach to Islamic rules, taking them purely at face value, we undermine the regulations of Islamic Law on such matters. The consequences might be that soon enough it will be claimed that mixing semen is not restricted by and does not influence the Islamic regulations, and later, since we have allowed the birth of children whose fathers are unknown, we might accept the insemination of women who have no husbands to bear fatherless children.

We might even allow what is now going on in the West. When a man accepts the idea of adopting children, he might as well adopt a child born to his wife. As long as he cannot have children of his own, he might adopt the child of some other man.

Many other things might be based on this, such as the origination of new stocks of geniuses and the like.

This might be justified by the claim that it is a necessity at present, because our nation needs scientists, and the West is ahead of us in this field; it has originated new stocks, and we need to do the same. So we take semen from certain men and ova from certain women, and the



resulting confusion would be the most terrible thing. The door of doubt is very wide and can admit what should not be permitted. Perhaps even now some of the listeners already endorse this proposed method.

We may pull the wall down tomorrow. And there will be future conferences to permit such things. In short, the question of sucking is entirely irrelevant, and this is proved by the fact that if an infant sucks the breast of a non-nursing woman, she does not become its milk mother.

Motherly emotions have nothing to do with this, and the question concerns the actual feeding and the actual milk that goes into the baby's stomach and causes its formation. This is a divine matter that only God understands.

### **Dr. Zakaryya Al-Berri**

We do need such seminars and gatherings of both those who desire to make things easy and those who favour precaution. We complement each other.

The method used by Dr. Yusuf Al-Qaradhawi is one hundred percent valid and includes no dangers.

All that is left is that we need to complement it with some additions, as the one suggested by Dr. Al-Ashqar, which in fact I myself have jotted down to propose it.

That is, we, as a Muslim society, have our religious regulations that determine what is sanctioned and what is prohibited and that regulate affairs of marriage and of nursing. Other nations have no similar regulations, so they are free to have milk banks in the form they are known to take.

But since we have marriage prohibitions in this matter, in our banks we should make a point to identify milk donors, so that it would be possible for the infant and his family to know that it has fed on the milk of a particular woman. Many risks can thus be avoided.

As to the claim that the question of nursing is a transcendental matter, this is something I cannot accept. We resort to such a conclusion when the human mind proves incapable of comprehending the rationale and justification of a certain matter. But usually Islam addresses the mind, and only the brainless cannot be addressed, neither by God nor by other people. It is with the brain then that we understand Islamic Law. If one suspends his brain when trying to comprehend the Law, he suspends the

object of divine address.

We cannot claim, when considering matters like these, that they are transcendental and close our minds against comprehending the Divine wisdom.

We may correctly arrive at the rhyme and reason and we may err. But in both cases we will be rewarded by God, since we have done our best to comprehend the rationale and to discover the Islamic regulation.

The rationale behind prohibition, as seen by early and later scholars is twofold.

First it is to honour a wet nurse as a mother, which is a moral aspect.

The other aspect is hereditary laws, of which I can only give a general idea as I am no specialist.

Dr. Hassan Hathout did well by using the term "hereditary cipher" in referring to those laws, because they are complex, even in the eyes of specialists. As God forbids marrying one's mother, to honour her and to avoid the limitation to progeny within a certain circle, which would lead to their deterioration while Islam desires Muslims to be strong, He applies the same rule to a wet nurse, because, after the blood mother, she is another mother. The only difference is that the first bears and feeds and the other nurses and feeds.

On this basis we tell Professor Yusuf Al-Qaradhawi that we adopt the idea of setting sucking as a condition [for marriage prohibition], and that, for the sake of some people, we should take the precaution of identifying each milk donator.

I fear that if we fail to establish a bank of this sort, and physicians, within whose field the question lies, find that we need it, we might be compelled to import foreign milk, and this has its own risks. If we accept that hereditary factors are involved, and if foreign milk would influence our Arab traits, which we like to preserve, I believe we need to establish a bank of this type but under the condition I have mentioned.

Another point is, and I say this to Sheikh Abd Al-Rahman, that the question of semen is a completely different one, and the distance between the two is like that between heaven and earth. The question of semen is one of blood relations, with clear-out Islamic regulations governing them, and there is nothing that makes it necessary at all.

The question of nursing, on the other hand, is open to interpretations. We must not consider the two similar, because the difference is great, and they share nothing in common.

Some people have mentioned the case of breast feeding an adult. I hope it is made clear that we should not bring up everything that is mentioned in our old books and keep on repeating it. I believe that fiqh scholarship has already rejected such cases.

I just cannot imagine that these stories about breast feeding an adult are true. (6) I cannot imagine it can be said in Islam that if you desire a certain woman not to veil before you, you should suck her breast to become her milk son and for marriage with her to become prohibited to you.

Islam can never say such a thing. After all sucking such a woman's breast is unlawful, so how can it be performed?

We have to be extremely careful with stories of this type. We should never take them seriously, nor repeat them, because they are likely to cause us problems which we need to avoid.

In doing so, we would not be depreciating the value of our heritage, but would rather value our religion, heritage and reason. And peace be upon you all.

#### **Dr. Ahmad Al-Ghandour**

Would Dr. Hassan Hathout, after Sheikh Badr speaks, address the meeting on the subject of embryo sex selection.

I believe the subject calls for discussion, but it is time for the Noon prayer now. As Professor Abd Al-Aziz Kamel says, let us focus on the subject we are discussing so that we get some benefit out of our discussion.

#### **Dr. Hassan Hathout**

The Companions of the Prophet, Peace be upon him, would sometimes differ in opinion concerning any particular subject, but this never spoiled their friendship.

We are grateful that brotherhood motivated by the love of God has been reached and that Muslim physicians and Muslim fiqh scholars are meeting here for discussion in a closed seminar, so that nothing would leak out that might cause confusion or worry to the general public.

Each of us is aware as he speaks that he might be right and might also be wrong, for we are all human beings. Therefore it is with calm objectivity that we conduct our discussion.

It would make me happy if it becomes known that while we can have our differences, we observe the good manners of differing and avoid heated argument. A person in anger is like one under the influence of drink, and I always feel gloomy when the temperature or argument goes up.

Therefore, and to best serve our Lord, I hope we will keep our discussion calm.

It makes me happy that each of us is so sincere in expressing his point of view, and none argues just to prove he is right. We are not discussing the subject of milk brotherhood/sisterhood in general, and the government of Kuwait is not considering a milk bank project. Nor are we discussing the question of breast feeding an adult.

So I hope we would restrict ourselves, and this is the only type of restriction I favour, to the subject raised here. Namely, if a medical need calls for serving mixed milk to infants that need it and cannot take any other kind of milk, is this permissible or not?

If this subject was likely to meet with only one opinion, we would not raise it. But it was evident that there are two sides of the question.

I was hoping that we would unanimously favour one point of view.

Personally, after hearing the different arguments, and while I am fully convinced that we should be very cautious in matters of religion and beware of what might corrupt it, I tend to favour the opinion of Professor Al-Qaradhawi, may God reward him. But I would like to also thank those who expressed a different opinion. May God guide us to the truth.

We will be happy now to listen to our professor, Sheikh Badr.

**Sheikh Badr Al-Mutwalli Abd Al-Basset, Secretary of The Fiqh Encyclopedia, Ministry of Endowments, Kuwait**

Dear brothers, the question does not call for this difference of opinion, because it is very simple.

First, it is well known to traditional jurists, and even to fiqh beginners, that when a rule is made correlative to a certain condition this indicates that the condition is the reason for the rule.

To explain this I say that God, for example, has made certain rules for adultery. When He says "The female and male adulterers," (7) the reason for the ruling, which imposes a penalty by whipping, is adultery. Again, in the case of "the male and female thieves," (8) the ruling provides for hand amputation and the reason is theft, and so on.

If we examine the Quranic verse and traditions related to our subject, we find that the rules are, as Dr. Yusuf Al-Qaradhawi has said, correlated to breast feeding. Breast feeding is not merely putting the breast in an infant's mouth, but rather, as it has been indicated, consists of two things: putting the breast in the mouth of an infant and its taking what is secreted.

So motherhood does not result from merely placing the breast in the mouth, but also from taking the milk. Of course, motherhood is the original cause of marriage prohibition. It is when the nursing woman becomes the infant's mother that her sister becomes its aunt, the sister of the nurse's husband also becomes its paternal aunt, the husband's children who are born to him from another wife, according to those who believe that the milk of a male leads to marriage prohibition, (9) become its half brothers and sisters, and so on.

However, if we take the precaution suggested by Sheikh Muhammad Al-Ashqar, that would be excellent.

But if we do have mixed milk, as Dr. Hassan says, do we apply the rule to it.

Professor Abd Al-Rahman has raised a very important point, which is the question of doubt. Ninety-nine percent of fiqh rulings are based on the higher probability, so this problem is taken into consideration in Islamic Law.

While very few rulings are based on absolute certainty.

As fiqh scholars who are aware of this fact, if we set certainty as a condition, we would be cancelling a major part of fiqh.

In fact, the existence of doubt should be allowed very serious consideration.

But we would be cancelling a venue allowed to us by the Almighty God if we go as far as supporting the view of some scholars who say that a man is prohibited to marry any woman from a certain village if he knows that an unidentified lady of that village has nursed him.

We should go too far neither in sanctioning nor in prohibiting.

I believe that if such a bank does exist, the type of milk it offers entails no prohibition, particularly if it is mixed and needed. How can we determine that five filling feeds [from a certain donor] have been given to an infant, and how can we determine other factors? All these things have to be taken into consideration.

Therefore, I tend to support the conclusion reached by Dr. Yusuf Al-Qaradhawi, but it would be better if we can identify the donors, though I do not think it is possible.

### **Sheikh Abd Al-Rahman Abd Al-Khaliq**

Dr. Hassan Hathout has raised a number of points, and I hope he will accept my point of view concerning them in the right spirit.

First of all, concerning difference in opinion, I hope, with God's Will, this difference does not reflect on us. There is no doubt that all the participants here desire to arrive at the truth.

As for our session being closed, this is something which I object. The decisions we reach here are going to be applied to actual cases, and this means that Muslims will bear the consequences, whether good or bad, of these decisions. Therefore, I believe all Muslims who are concerned with this subject should be given the chance to take part.

The third point is that Dr. Hassan says he is convinced with, and intends to apply, Dr. Yusuf Al-Qaradhawi's point of view. I have no objection to his being convinced with a certain opinion on this issue, because this is something between him and God, and he is responsible before God, the Almighty.

There is nothing, however, that says we should have only one point of view or we should have more than one. There is also nothing against the participation of all in the effort to arrive at the truth on such subjects that concern society as a whole. For the second time I say that this issue has a transcendental nature though it is subject to discussion. It is true that religion addresses the mind, as Dr. Al-Berrisays, but it does address it on many things it cannot, and will never, comprehend. Many transcendental things on which religion addresses us do not seem to make sense when we try and reason about them. For in religion there are certain devotional matters and certain matters hidden from us, and we are requested to accept them without argument. Even in this subject we are discussing, the question of nursing, we find that modern science is still trying to determine

the factors of heredity, the dimensions of which are still undiscovered. In the future, we might learn things about nursing which are hidden to us now. So, faced with the religious regulation, we have no option but to obey God's orders.

Once again, I hope we would look at this subject as a religious rule and realize that discussion of such matters would open the door in the future for things which are worse. For this reason I say that we have no compelling reasons [to follow a particular course]. Legitimate religious solutions can be found, and we have not yet given up on such solutions to resort to questionable ones. As Dr. Ashqar says, donated milk can be labelled with the identity of the donor, and this can go into the hospital records with the identity of the infant who feeds on it, if it is feasible. Thus a person can tell who actually has nursed him. But we cannot leave things just like that, and I hope we would reconsider.

**His Excellency Dr. Abd Al-Rahman Al-'Awadhi, Minister of Health, Kuwait**

I wanted to raise a small point which I consider important. I am happy with this meeting, because I have listened to hear valuable arguments on the subject, and we have started to follow in our dialogue the manner we have hoped for. This, God willing, will allow us to achieve a lot in drawing a future image of how many of the things we are discussing should be handled.

I believe this is the simplest topic we have on our agenda. Still, I believe I detect agreement, although some have expressed the view that at present there is an urgent need for milk banks, for things have not got that desparate. On a very limited scale, there might be such a need, namely for immature babies at modern hospitals. But there can be clear entries of the name of the donor and of the recipient, so that things are quite clear, and a record can be made available to any concerned party.

There is now a call for natural nursing, that is for infants to be directly nursed by mothers rather than to be given artificial milk. International symposia have urged the encouragement of breast feeding. In developing countries, artificial milk has been causing many health problems among infants, and often it has led to death. This calls on us to encourage natural feeding. In developing countries there is now a large-scale effort to encourage such nursing.

The day has not arrived when we feel we need to import bank milk,

which has many risks. Nor are we in a hurry to reach a decision, since there is some difference of opinion. But even if there is an absolute consensus of opinion, we still are in no hurry. Again I believe this issue is simpler than the ones we will discuss this afternoon and tomorrow morning.

We can reach a conclusion recommending the discouragement of establishing such banks, except when there is an extreme necessity for immature babies. Nursing should be clearly recorded and both donor and recipient identified. I hope the discussion would address this point.

### **Session Chairman**

We thank His Excellency Dr. Abd Al-Rahman Al-'Awadhi, the Minister of Health.

Would Dr. Yusuf Al-Qaradhawi, who is leaving the country after he finishes here, kindly comment.

### **Dr. Yusuf Al-Qaradhawi**

I thank those who have endorsed my opinion, but before them, I thank those who have disagreed. Undoubtedly, no hard feelings result from differences among scholars, and I hope I am considered one. On the contrary, I like having several points of view, and since I give myself the right to differ, I should graciously accept differences with my point of view. So Dr. Hassan Hathout should have nothing to worry about on that score.

Some of the things said have already been answered by other speakers, particularly by Professors Zakaria and Badr Abd Al-Basset. There are few things left for me to point out.

First, some of us support their views by saying that the majority of scholars have reached this conclusion, but the agreement of the majority does not commit us to adopt a certain opinion. Is their agreement an authoritative source? Nobody claims so. And if there are some differences about the probability, the actuality and the justification of this agreement, what do we make of the opinion of the majority then? And how often have we followed the opinion of the minority in ordinary things?

The second point is that if we follow Al-Zahiriyyah School on this subject, we have to understand that nursing is sucking milk out of a breast and not merely sucking a breast as Dr. Abd Al-Rahman says. This is the definition given in all dictionaries. So, if we take the evident meaning of



what the Quran and Sunna say about the subject, we find that the ruling is made correlative to breast feeding, which is made a reason [for marriage prohibition]. So the approach of Ibn Hazm is valid, and his evidence is quite persuasive if we consider the reason and justification given.

I beg to differ with Sheikh Abd Al-Rahman who says that this is a devotional matter. No one at all has made such a claim, and if we look at the question from a historical point of view, we find that nursing was familiar to Arabs [before Islam]. Nursing is the essence, and those Arabs regarded a woman who had nursed a certain person as his mother. God says, "and your mothers who have nursed you" (Al-Nisaa' [Women], 23) and not "those who have nursed you." Motherhood, therefore, is an essential point. That is why it is said that if two persons feed on the milk of one ewe, that does not make them brothers, because brotherhood/sisterhood follows motherhood, which does not exist in this case. To say that ewe is a mother of a certain person and a ram is his father would make no sense. Motherhood is not a devotional matter, but Islamic Law has a rule [for nursing] in order to confirm motherhood.

Although I usually follow the Hanafi School, on this subject I favour the interpretation of the Shafi'i and Hanbali schools of thought. Both insist on five filling feeds, because that is the minimum that develops flesh and bone.

There is also the other question, regarding doubt, for which there is a basic principle in Islamic fiqh. It is the principle that "certainty cannot be negated by doubt." When permission is certain, it applies as long as there is no other certainty of its non-application. When we have doubts, we keep on following the general rule. This is different from the case of higher probability which Sheikh Badr, may God grant him long life, has mentioned.

That is what I want to say. Still, if we avoid such a situation, as long as there is no need for it, that is fine. This way we spare ourselves the controversy and questionable decisions. But if the need arises, let us take the precautions proposed by Sheikh Al-Ashqar and supported by others, which is to make a list of the names of milk donors. I have nothing against such a precaution. On the contrary, the more we are able to keep Muslims reassured and their consciences clear, and to avoid what arouses differences and follow what meets with agreement, the better it is.

If the need arises, however, we should not be strict, but rather try to facilitate things.

I say all this and pray for God's forgiveness for me and you and for

God's Peace and Blessings for our Prophet Muhammad, his Companions, and his Kin.

**Dr. Ahmad Al-Ghandour**

For myself and on behalf of the audience, I want to express gratitude and appreciation for the Honourable Professor Yusuf Al-Qaradhawi, may God reward him for his honesty and dedication in the service of Islam and Muslims.

Now, Dr. Muhyi Saleem will speak for few minutes only so we can begin to discuss fetal sex selection.

**Dr. Muhy Saleem**

It was said that milk might carry some hereditary traits, but in fact it does not. It is in essence the nourishment of infants and does not only contribute to physical build-up, but also provides the child with immunity. As Dr. Abd Al-Rahman Al-'Awadhi has mentioned, the general tendency now is to encourage mothers to perform the second motherly function, the motherhood of nursing.

Motherhood is two types: the motherhood of bearing the infant and that of nursing it. The two types are important, and we cannot take one and ignore the other.

It is for this reason that the prohibition of marrying the children of a milk mother is decreased. I believe that marriage prohibition is not made to encourage such nursing [by a woman other than the mother], but to make things difficult for the blood mother. For every wet nurse, there is a mother who fails to nurse her infant, so probably the rationale for marriage prohibition is to encourage blood mothers to perform their second function.

It is certain that many of the problems suffered by the Second World War generation are the result of negligence of milk motherhood. Thank You.

**Dr. Ahmad Al-Ghandour**

Thanks to Dr. Muhyi.

Now we open discussion of the paper submitted by Professor Hassan Hathout on fetal sex selection. So the subject now is open for discussion: Should man interfere in deciding the sex of a pregnancy? And what is the position of Islamic fiqh on this point?

## Notes

1. This is not a direct quote but rather the general meaning. The story is related by Abd Al-Razzak as it occurs in *Kanz Al-'Ummal* 6, 280, where it can be referred to. The tradition quoted is verified. It is narrated by Ahmad in his collection of traditions "Al-Musnad", with a chain of transmitters going up to Ibn Mas'oud (*Kanz Al-'Ummal*, 6, 74). (Dr. Muhammad Al-Ashqar's Note)
2. The tradition quoted here is listed by Muslim and Abu Dawood. There is a story behind it. When God's edict "Call them after their fathers" was revealed, Salem was a slave of Abu Huthaifah. The latter and his wife had adopted Salem, whom they had raised, and he used to go into the presence of Abu Huthaifah's wife as if she were his mother. When God disallowed adoption, this family had only one house and the situation was trying to them, as Salem had turned into an adult. The Prophet, Peace be upon him, told the wife to nurse Salem five filling times so that she would become unmarriageable to him. See *Kanz Al-'Ummal*, 6, 285.
3. This is the text of a Prophet tradition which is listed by Ahmad, Al-Bukhari, and Muslim on the authority of 'Aisha, and Ahmad and Muslim on the authority of Ibn 'Abbas. *Kanz Al-'Ummal*, 6, 271.
4. It is narrated, on the subject of marriage prohibition that 'Aisha, may God be pleased with her, said, "It was, as revealed in the Quran, that ten [filling feeds] cause marriage prohibition," then they were replaced by five. The tradition, "Ten verified feedings cause prohibition..." is listed by Muslim, as quoted in *Fatth Al-Bari*, 9 (Egypt: Al-Maktabah Al-Salaffiyah Publications). (Muhammad Al-Ashqar's Note)
5. This tradition is related by Al-Bukhari, Abd Al-Razzak, and Ibn Abi Shaibah on the authority of 'Uqbah Ibn Al-Hareth. *Kanz Al-'Ummal*, 6, 281, and *Fatth Al-Bari*, 9, 152.
6. This is a reference to the tradition concerning nursing an adult, which is the one listed by Muslim and others and related to the story of Salem, as explained in note 2 above. It is a verified tradition, and most of the Companion scholars, as well as later ones, believe it applies only to Salem, the slave of Abu Huthaifah. None doubted its authenticity as narrated by 'Aisha, since it is authentically reported through her. Ibn Taimiyah concluded (as is clear in *Al-Ikhtiyarat*, 283)

that if a family face a similar trying situation as faced by Abu Huthaifah, his wife, and Salem, the woman is allowed to perform the nursing, which entails marriage prohibition. This *fatwa* solves problems faced by many families. (Muhammad Al-Ashqar's Note)

7. "The female and male adulterers: give each of them a hundred lashes." (Al-Nour [Light], 2)
8. "And the male and female thieves: cut off their hands..."

(Al-Ma'idah [The Table], 38)

9. This means that the nursing woman's milk came to her through her husband, through getting pregnant by him and bearing his child, so the milk is attributed to him, in his capacity as her husband. Nursing, therefore, entails milk relations on his side. For example, his children born to him by another woman become milk half brothers and sisters to the infant nursed by the wife.

#### **Ibn Rushd says**

On the question of whether the man to whom the milk is attributed, that is the husband of the woman, becomes a father for the infant, and whether marriage prohibition applies in their case as in the case of blood fathers and children, Malik, Abu Hanifah, Al-Shafi'i, Ahmad, Al-Azra'i, and Al-Thawri all say such prohibition occurs. And so do Ali and Ibn 'Abbas. Another group, such as 'Aisha, Ibn Al-Zubair, and Ibn Omar, say it does not.

The unified personal statute project of Egypt and Syria favours the opinion of those who say that marriage prohibition on the husband side does not occur. Article 22 says, "Marriage prohibition resulting from nursing is the same as that resulting from blood kinship. This prohibition applies only on the nursing woman's side." (Zakariya Al-Berri's Note)

## **DISCUSSION ON FETAL SEX SELECTION**

### **Dr. Ahmad Sharaf Al-Din**

I realize that this point is related to other points which I am going to raise in my paper. But is it going to cause problems related to religious feeling and to social systems? I want to address certain questions on the fiqh aspect of the subject to our honourable professors.

First, can fetal sex selection be regarded as interference with the Divine Will? Do we regard it as mutation of the essence of things? The normal pattern is to keep things as they are as long as nothing occurs that calls for their change. Is the interference of a doctor or a biologist to change the formula to be considered an interference in the normal? In other words, does it reflect on the question that "His indeed is the creation" and interfere with causes and effects? Is it alright from the Islamic point of view for man to modify the elements of the formula and, by doing so, to change the result?

These are just general questions that may be put to other applications. In particular I want to ask whether sex control is a defiance of God's Will. Thank you.

### **Dr. Abdulla Muhammad Abdulla**

Let us listen to Dr. Al-Qaradhawi's point of view.

### **Dr. Al-Qaradhawi**

The religious feeling, that is such feeling among Muslims, referred to by Dr. Ahmad Sharaf Al-Din, regards wombs and what they have inside them as something with which human beings have no business to meddle. It is quite well known that an authentic tradition says, "Five things are known to God alone," (1) and it lists the five things as the same mentioned in the last verse of the sura of Luqman:

God has the knowledge of the Hour of Doom. He sends down the rain and knows what wombs contain. No one knows what he will earn

tomorrow; no one knows in what land he will die. God alone is all-knowing, all-aware.

Because of this, if some Muslims are informed that it is possible to tell and to control the sex of an embryo, their religious feeling is shocked, for they believe that knowledge of what wombs have in them is God's alone. Likewise in the sura of Al-Ra'd (Thunder), God says:

God knows what every female bears, and every change within wombs. He plans all things. He knows the unseen and the visible. He is the Supreme One, the Most High. (8-9)

Some scholars interpret the meaning of God's knowledge of what wombs conceal as the knowledge of embryo sex. Should we support such an interpretation?

The restriction of God's knowledge of what wombs contain to whether an embryo is male or female has nothing to support it. God knows everything about what wombs conceal. He knows whether a fetus will survive until it is born or will be aborted, whether it will turn into a strong or a weak, an intelligent or a stupid, a happy or a miserable, person. God knows everything about it, while man can only learn what God allows him to know. It is God who gave man the knowledge to tell the sex of a fetus. I do not think that there is anything in this that contradicts our faith, and that is what I am considering at this point.

The same thing is true about man's ability to decide fetal sex. Is such control possible? Does it negate the belief that it is God Who creates and wills? Does this mean that man is imposing his will against God's? Or is man acting in such cases according to God's Will? "You cannot will, except by the Will of God" (Al-Insan [Man], 30, and Al-Takwir [The Cessation], 29). Actually, everything done in this area is by God's Will and within the system of causes and laws on which He has built this universe. One thing is left to discuss: is it alright for people to interfere?

The method described by Dr. Hassan Hathout, that is mixing the semen of a number of men in one vessel and choosing from the mixture, is, from an Islamic point of view, absolutely rejected. The process of mating, fatherhood and motherhood has to be followed. There is no doubt on this score.

On the other hand, should control be allowed to man? According to Professor Cressey Morrison in his book *Man Does Not Stand Alone* (translated as *Al-'Ilm Yad'ou Li-l-man [Science Leads to Faith]*), "one of

the proofs of the existence of the Almighty God is the balance maintained between males and females throughout the ages." The percentage remains 50%, going up or down within a small margin. How has this balance been maintained through all these millenia, the number of which only God knows? This is an evidence of God's existence, Wisdom and management of the universe. If man does interfere, what is he going to do? Many things might result from such an action.

In such matters I tend to favour the natural order to remain as it is. "The upright nature with which God has endowed man. God's creation cannot be changed." (Al-Rum [The Romans], 30) (2) If people do interfere in God's natural order, change God's creation and exercise control, a lot of harm may result.

It is therefore better to leave such things to the Will of God. (3) If any interference should occur, it must be for a necessity that is given due evaluation. May God's Peace and Blessings be on Muhammad, his kin, and his Companions.

#### **Professor Abdulla Basalamah, Ph.D.**

I want to add a biological or scientific point, namely, that God's Will is still dominant. I believe that all the attempts made up till now are no more than attempts at concentration. The ultimate truth, however, is that even if you inject one hundred sperms with the y chromosome and only two with the x, the scientist is helpless to guide a y sperm [to penetrate the ovum] and restrain the x ones. Once they are injected, a Will other than his controls their movement and determines which will reach the ovum. As some scientists have said, the desire to be a father or a mother is one of the virtues or characteristics of man, and the day will not come when this desire is removed from him.

The formula according to which man is created makes some people prefer to have sons, others, daughters. Man's attempt will have to confront this factor, which still exists. The final decision is for God alone to make.

#### **Dr. Abd Al-Hafez Hilmi, [Professor, Zoology Department, Faculty of Science]**

I do not want to support a certain point of view, but rather to make some comments.

First, concerning the idea of defiance to God, the Sublime and Most High, I believe that once one believes in God, such an idea should never

occur to his mind. It does not make sense for me to believe in an All-Powerful, Everlasting God who tends to His creation, and to believe at the same time that I am capable of defying Him. Either I do believe or I do not. If I do, then the idea of defiance is negated. If I do not, God forbid, then the situation is different.

Second, concerning the Divine Will in this particular matter, I am not a scholar of fiqh, but I am learning. If we apply analogy to the Prophet's tradition in which he says, in answer to a question about coitus interruptus, "Apply coitus interruptus as you will; what is destined for her will get to her," we find the answer. The tradition implies that one can do what he wants, and strive as much as he can, but the Will of God dominates. God will fulfill His Will. That is the whole point.

Third, is it true that trying to have a male child is legitimate, and acceptable or not? What I want to say is that people try this in various ways. But since science is getting close to making this possible, the question becomes very urgent. Over the ages, man has been striving to fulfil this desire one way or another. Is not prayer a form of desiring and striving? When one prays to God to give him a son, which is desiring and striving, I say that this form of desiring, by asking God, is legitimate. Yet, when it comes to a stranger's semen, the prohibition here is quite clear. But it is God who has the true knowledge.

As for the husband's semen, it is believed that the techniques used at present to process large quantities might be capable of processing a smaller quantity in the very near future, as the case has been with all chemical actions that are called micro-treatment. God knows best, but there is a real likelihood that science will be able to raise the probability of one type [of sperms] over the other. That is, as already mentioned, it will be possible to isolate the x or the y chromosome from their counterparts. But we have to remember the risks we have already pointed out, that, while doing this, we might, unwittingly and against our will, be hurting ourselves.

The last point concerns changing the natural order, and I am speaking about biological order alone, that is about desiring a son, rather than a daughter for example. Some of the prophets themselves, Blessings be upon them entertained the same desire. Therefore, I would not blame an ordinary human being for wishing for a male child, nor if he strives for it, because in his eyes, it might be an urgent necessity. He might think that his wife is the reason of his failure to have a boy, so he would marry a second, third and fourth time, which is not unfamiliar in our communities.



God has set a law that keeps the percentage fixed. That is the proportion of x chromosomes to y ones is nearly one to one, which means that males and females are almost equal in number. It is a simple and clear scientific rule and I do not believe anyone would question it. What we want to discuss is the situation where one man has two sons, another two daughters, or similar situations.

If true scientific methods are carried further, a technique might be reached to make one type predominant. This would do not harm to society as a whole. This is now practiced on animals, where the effort is to increase females, because, since one male can mate with thousands of females, productivity is highly increased. But human society is different. It is one husband and one wife that procreate, and the only satisfactory proportion is that of one to one. With animals we may speak of a male and a female, but with human beings we speak of a husband and a wife. This is the natural order, and it, God willing, is going to continue till eternity. Preserving the percentage is necessary, but is upsetting a partial proportion for an acceptable reason to be permitted? I hope we will focus on this point and search for the truth, and we pray to God for guidance.

#### **Dr. Maher Hathout**

About two years ago, Dr. Omar Al-Alfi, Professor of genetics, and I submitted a paper to the Islamic Medical Conference under the title "Burying Girl Infants Alive in the Twentieth Century."

Dr. Alfi's wide experience was greatly useful. At that time efforts were being made in American society and were still unfamiliar in the East. With the means of discovering the sex of a fetus available on a wide scale, great numbers of parents started to go to clinics and hospitals asking to get rid of a particular sex by abortion. The puzzling thing is that there was a unanimity, or almost a unanimity, among them in desiring male children rather than female, and this in a society extremely liberal, where the two sexes are treated to a large degree as equal. Still, in the great majority of cases, parents wanted to keep the fetus if it was male and to drop it if female. In our paper, we pointed out that the situation is exactly the same as the practice of burying girl infants alive. Only the means were much more advanced. But the mentality of pagan ignorance (*Jahiliyah*) is still being transmitted from one generation to another and from land to land, as though the devil has strong forts within human nature. I believe that Islam deliberately, and in expression of Divine Wisdom and Justice, came to fight this tendency to prefer one sex over another.

Fetal sex selection is a very old practice; the burying of newborn females was nothing but an attempt of such control.

When the birth of a female is announced to one of them, his face grows dark and he is filled with inward gloom. He hides himself from people because of the bad news: should he keep her in disgrace or bury her under the dust?

(Al-Nahl [The Bee], 58-59)

If he opts for sex control, he buries the infant in the dust. Otherwise, he keeps her in disgrace. The context of this Quranic verse clearly implies a condemnation of this practice of injustice against a particular sex, namely the female. I believe that Muslim scholars should stand against this.

Although I am by no means strict, nor even half-strict (in fact, if anything, I am usually accused of liberal, and even sometimes of negligent, tendencies; "Not that I claim to be free from sin; man's soul is prone to evil..." [Yusuf, 53]). On this particular issue, I find the Islamic attitude well-defined: preferring one sex to another is prohibited. It is very regrettable that the old or new form of burying female infants or of sex control and the desire to cancel women socially and as entities, after they have been made [by Islam] good members of society, should characterize the way of thinking among Muslims and dominate most Islamic societies.

I believe that all this is contrary to the spirit of Islam and of Divine Justice. The attitude continues from the embryo while still a mystery, to the fetus when it turns into a reality, to the infant when it is born, to the female in her adulthood. I pray to God for forgiveness. Thank you.

#### **Dr. Hanif Al-'Awadh**

Natural and universal law favours balance and proportionality. Often after wars, women bear more male children and balance is restored. American statistics departments, for example, have published official international documents of the results of a census they have made showing that women give birth to a great number of male children and fewer females after every war, because the majority of war victims are men.

Balance and proportionality exist in everything, even inanimate objects, such as gold, silver, mud, stone, etc. It is impossible for man to

interfere, and if he does, the consequences will be terrible for him. God will certainly discipline him. Thank you.

**The Honourable Dr. Tawfik Al-Wa'ii, Research Worker, The Fiqh Encyclopedia**

In the Name of God, the Compassionate, the Merciful, and God's Peace and Blessings be on the most honoured Apostle, our Prophet Muhammad, and all his kin and Companions.

The practice of fetal sex selection is prohibited when it takes the first form, the form of a mixture of sperms in a way that makes them untraceable. The second form is injection into the womb. Wombs are subject to certain Islamic regulations, and such an injection is a form of adultery if it is not certain that the sperms come from the husband, but rather from many men. The question is fetal sex selection if it is limited to the sperms of the husband in the case of isolating two sperm groups, one predominantly male, the other female.

As Dr. Hassan Hathout has pointed out, this is still a possibility of the future. Up till now scientific techniques have not been able to affect complete isolation of male and female sperms. If this becomes possible and is put into practice in a certain society, there will be a form of upsetting the balance designed by God in that society and the favouring of one sex over another. Islam has prohibited such interference: a woman is forbidden to change her features, trim her eyebrows, and interfere in God's Creation. It has forbidden many forms of such interference. God says:

To God belongs the kingdom of heavens and the earth. He creates what He wills. He gives daughters to whom He wills and sons to whom He wills. To some He gives both sons and daughters, and He makes whom He wills sterile.

(Al-Shura [Counsel], 49-50)

It has also prohibited us to favour women over men or men over women.

Therefore, since this method has not yet become a reality within the realm of science, let us take our time with this issue until many things are clarified and until the rationale of such a practice is evident to all. We should not be too anxious to adopt every innovation, and then try and

come with a justification for it based on fiqh.

If it does enter within the realm of science, is this to be regarded as mutation of God's Creation? That is one point. Is it going to change the demographic structure of the [Muslim] nation? If it is needed, as some speakers have suggested, as in the case of a man who wants to divorce his wife because she has given birth to five, six or more daughters while he desires a son, would there be anything wrong with it? If a woman has not born a son, it might be alright to allow her being inseminated by a male sperm of her husband. The same might apply in cases of war and other similar situations.

Since all these things are still future possibilities, let us wait a little until the signs are clear and our discussion can cover actual situations and have a solid basis. We pray for God's Guidance. Thank you.

#### **Dr. Omar Al-Ashqar**

In my opinion, this is not a form of mutation of God's Creation. The sperm is still a sperm, the ovum still an ovum. There is, however, an interference on the part of man to have an ovum inseminated with a particular sperm. But Creation and Will belong to God. It is He Who creates the sperm and the ovum. Man's interference does not change that; it is rather within the domain of the statutes of Islamic Law. In other words, considering this issue on the basis that it is a mutation of God's Creation is incorrect. Still, the case of a man's sperm being used to inseminate a woman other than his wife is prohibited by Islamic Law.

The second case, when a particular sperm of a man is used to inseminate his own wife, needs to be considered, but not on the basis that it is a form of mutation. It should rather be discussed on the basis of other considerations suggested by some of the speakers.

#### **Dr. Zakariya Al-Berri**

In the name of God, the Compassionate, the Merciful.

It is clear that when we consider this issue carefully we find that it is by no way related to mutation of God's Creation, nor with defiance of the Divine Will. Till now we have no certain knowledge concerning the embryo and what [sex] it is going to be, so how can we say that the method goes against the Divine Will?

Without preliminaries, the situation we should consider is that of a

man who comes to a doctor and says that he has eight or ten daughters and wants a son, and he asks whether the doctor would help him. The desire is one hundred per cent legitimate in all societies. All people since the creation of the world have desired to first have a son. It is the dominating tendency of all societies. Yes, the man has eight or ten daughters and would like to add a son to them. Does he not have the right to have one if science can help him? I say that whoever helps such a man will be rewarded by God.

The subject has other aspects: introductions, preliminaries and appendices, about which I do not want to speak right now. But, as Dr. Hassan Hathout said in the previous session, I want the discussion to be focused. Is it possible for medical science, or for a Muslim physician, to help a Muslim individual to get a son by using modern techniques? I say, Yes, indeed. Thank you.

**His Excellency Sheikh Ibrahim Al-Dasouki, Minister of Waqfs,  
Egyptian Arab Republic**

As our religion teaches us, there are means and consequences. We are ordered to use the means, but can we say the consequences (of using the means) are inevitable? This is something beyond our control, for God decides everything.

The issue at hand concerns the practice of physicians in helping the conception of a male embryo. This is like a farmer sowing seeds in the earth; he cannot tell whether they will grow or not, and whether, if they do, they will bear fruit or not. He only uses the means and then leaves the consequences to the Creator of means. So, concerning our subject, I say that God, the Most High, has determined the destiny of all creatures before the creation, and He knows what every female bears, whether the baby will be a boy or a girl, whether it will be happy or unhappy, etc. All the things we might do fall under the category of using means, which is quite legitimate. We are even required to use them. The important thing is that we should never think that we can affect a change; we should use the means and leave the consequences to God.

Next, we come to what Dr. Maher Hathout described as the burying alive of female infants in the twentieth century. I do not understand what he is referring to: is it choosing the male sperm and excluding the female, or what? Within this context I recall the answer of Imam Ali, may God be pleased with him and please him, when asked about the small-scale form

of burying an infant alive; he said, "It would not be burying-alive unless it [the infant] had passed through the seven stages..." referring to the stages mentioned in the sura of Al-Mu'minun (The Believers), where God the Almighty says:

We first created man from an essence of clay: then placed him, a living sperm, in a safe enclosure. The sperm we made a clot of blood, and the clot a morsel. We fashioned this morsel with bones, then clothed the bones with flesh, thus bringing forth another creation. Blessed be God, the noblest of creators. (12-14)

I do not precisely know whether this is the burying-alive he speaks of or not. Therefore, as long as we have mentioned it in our discussion, we might as well define what burying-alive means and whether the isolation of a male sperm is considered burying alive. It is something we can decide as we move along.

### **Session Chairman**

We are thankful to His Excellency the Minister. We are going to conclude this session after listening to Dr. Hassan Hathout. We will have a break, and after the Noon prayer, the session will re-convene and we will resume our dialogue to cover what other questions we may have.

### **Dr. Hassan Hathout**

Burying-alive in the twentieth century is not the isolation of a sperm that carries a certain sex for the purpose of inseminating an ovum. What my brother Maher means is the case of a four-month pregnant woman who asks for abortion when she discovers that the fetus she is bearing is not of the desired sex.

Human fetal sex selection is, according to the evidence we have, a matter of the near future. I expect it to be put into practice within five or six years or even sooner. I personally do not believe this is a matter that should shock religious feeling, because although God says that He gives daughters to whom He wills and sons to whom He wills, gives some both, and makes sterile whom He pleases, religious feeling is not disturbed when a sterile woman goes to a physician for treatment.

This future practice, which is possible in theory, practiced on animals and imminent for human beings, is a medical process which cannot in itself be subject to sanction or prohibition. Prohibition has to be on the

basis of a specific text, and we have no text forbidding this practice. The initial rule is permission of all things, and this method neither requires nor leads to something that is prohibited. Thus, on the individual level, we cannot say it is prohibited. But there is another aspect which requires our attention before we reach a conclusion on the question of permission or prohibition.

This other aspect, which some speakers have already mentioned, is the balance between males and females throughout history, a balance which has been scientifically documented. The initial sex proportion at the time of fertilization, that is when the embryo is just one cell resulting from the union of a sperm and an ovum, is 130 males to 100 females. During pregnancy, the proportion of naturally aborted male embryos is greater than that of female. That is, world-wide male mortality during pregnancy is much greater, and in statistics for the world as a whole, the proportion at birth is 106 males to every 100 females. This has been the proportion throughout verified history. At the end of the first year, the proportion becomes 103 males to 100 females, as mortality among males is a little higher than among females. Starting with the age of puberty, the proportion becomes equal, then the scale tips once again in favour of females before death.

Statistics show that at every stage of life, male wastage is greater in number than female, and at every stage, the number of widows is greater than that of widowers. For this reason I believe that what is called by others nature and by us God's natural order for His Creation, or what I believe to be the Divine Will, designs an almost equal proportion at the age of marriage. It is part of this design that a certain person has ten daughters, another ten sons. When a certain person is favoured by God with ten daughters and come to me because he desires to add a son to them, he would be satisfied if I could fulfil his desire. Of course he would have preferred to start with a son and then other children, whatever they are, may follow.

But I want to say that if we go from the individual level to that of the human race as a whole, it is noticeable that, in general, people prefer having sons to having daughters. If the desire of all people were answered, the inevitable result would be to have a huge surplus of males and a very small number of females. Once we take the first step on this road, the last step would lead to a great shortage of females in the world.

A surplus of women is no problem. A man may marry more than one

woman without difficulty or confusion of lineage. It is an aspect of human civilization that a person has the right to know who his father is. Even with some pet animals, pedigree is important. In raising horses or dogs, for example, lineage is recorded and is important to horse and dog lovers. In Arabic literature, there are works devoted to horse pedigrees. Man's lineage should not be obscured. When a man marries more than one wife, the lineage of his children is not obscured. If a woman were to marry more than one man at the same time, it would be guaranteed that all children born to her would be hers, but their lineage on the father side would be confused. To call children after their fathers is a sign of man's progress and civilization and a practice urged by various religions.

What may be permitted on an individual basis might, if practiced on a large scale, lead us to a world where men are a majority and women a minority, and the consequences should be evident. Thank you.

#### **Session Chairman**

Thanks to Dr. Hassan Hathout and to all scholars and doctors. We adjourn for the noon prayer, after which our session will resume to conclude, within a specific time limit, our discussion of this issue. Thanks again and God's Peace and Mercy be upon you.

#### **Sheikh Mahmoud Al-Makadi**

Al-Laith Ibn Sa'd, God's Mercy be upon him, concluded that nursing which entails marriage prohibition is only milk directly sucked by the infant from a woman's breast. No such prohibition follows taking a woman's milk when it is offered in a vessel, poured into the mouth or nose, or fed with bread. This opinion was adopted by the latest project of Personal Statute Legislation in Egypt and endorsed, more than ten years ago, by the Islamic Research Academy.

Therefore, the answer on this issue as described in the submitted paper is not legal brotherhood/sisterhood and there is nothing sinful about milk banks. The better approach is to permit, and even encourage, their establishment to save the lives of premature infants. We recommend sanction according to the definition of nursing leading to marriage prohibition by Imam Al-Laith and those who agree with him. Thank you.

#### **Dr. Abdulla Muhammad Abdulla**

Before we begin the items on the second session agenda, we will



devote twenty minutes to resume the discussion on fetal sex selection. Any person who has a question or an inquiry may ask it now.

### **Dr. Abd Al-Rahman Abd Al-Khalliq**

Praise be to God and Peace and Blessings on Muhammad, His Apostle.

In the opinions expressed before the noon prayer on this subject, that is choice of maleness or femaleness through the methods explained, there was almost a unanimity among the speakers that this matter is not related to religious faith and is neither interference in, nor mutation of, God's Creation. If we go back to the quoted verse, which is the definitive text on this subject, we will notice that the question is for God to decide. The verse says:

To God belongs the kingdom of heavens and the earth. He creates what He wills. He gives daughters to whom He wills and sons to whom He wills. To some he gives both sons and daughters, and he makes whom He wills sterile. Mighty is God and all-knowing. (Al-Shura, 49-50)

I do not want to give a detailed interpretation of this verse, but I beg to quickly point out certain things.

God begins with asserting that the kingdom of heavens and the earth is His; He handles it the way He pleases. Part of His method of handling His Kingdom is that He gives, for that is His prerogative. He started with daughters. Undoubtedly there is an evident point here: the implication of the statement is that He gives these daughters in spite of people's desire, and I do not say natural inclination, to have sons. He started with females to emphasize that they are a gift from God and part of His Will and Might, so that the upright nature with which God has endowed man would not be shocked as it was by the practices of pagan ignorance (in the Pre-Islamic period) when females were killed right after birth.

I second Dr. Maher Hathout's statement that this new practice will open the door to modern pagan ignorance, with girls being killed before they are born. I do not doubt that we all agree that killing is the same whether before or after birth.

As for fetal sex selection through injecting male sperms, there is no doubt that this also will open the door wide for people's desires. It is not going to be limited to the cases such as the person who has ten sons and wants a daughter, or has ten daughters and wants a son. I mean the

question is not like this, or should not be presented this way. People's desires, old and new, will find an outlet in this, if research reaches its goal and a form of fetal sex selection is actually introduced.

On this subject I say that it is a matter that concerns faith and has to be reconsidered. Moreover, it is certainly a form of mutation of God's Creation. Mutation does not mean that a new creation is introduced; the Creator is God, and we can create nothing. But the Prophet, Peace be upon him, has called mutation of God's Creation a woman's mere act of plucking her facial hair or of indenting her teeth. He speaks of female "mutators of God's Creation," although he only speaks of things that deform the beauty of a woman; he says, "God's damnation is to the woman who tattoos and the one who asks to be tattooed, the woman who plucks her eyebrows hair and the one who asks for her hair to be wigged (lengthened) by hair from another woman and women who indent their teeth for beauty," and then he speaks about "mutators of God's Creation." Thus mutation is interference in God's creation by changing its natural order. God, blessed be He, has established this balance, and He wants it this way. There is a Divine purpose in it. Likewise, God wants one man to remain sterile, another to have only sons and a third only daughters. "In this there are signs for every steadfast, thankful person." (Ibrahim, 5, & Lukman, 31) One person receives abundant gifts from God and he is thankful, and another is deprived of one of these and he is steadfast and patiently accepts God's decision.

God tries us with good fortune and bad.

I hope we do not neglect the aspect of this question related to faith and completely obliterates it, claiming that the issue has nothing to do with faith, nor with mutation of God's creation, being merely a matter of means and consequences. We would be tampering with God's Will, and that's where the issue lies. Balance is set on purpose, and this pattern of creation has a purpose, which, I propose, we have no business to interfere with because balance is naturally achieved. I say that the extreme case of someone having ten sons and no daughter and desiring to have a daughter is wished by God. It is a case wished by Him and so is the case of a sterile person. Sterility is wished by Him, so that the person will accept his situation with patience. Certain things are wished by God, the Most High.

Moreover, there can be no doubt that once these methods are introduced, a lot of sin and evil will follow in the form of what I call "toying with semen." This toying with semen is something that we should consider

with extreme care, because it will lead to great corruption and to confusion of lineage. I therefore hope things would maintain their right, legitimate form, which is that semen should get inside the vagina of a woman only in the legitimate way defined by God, Blessed and Sublime is He. We should never resort to any form of toying with semen which would destroy the human structure. God's peace and blessings be on our Prophet Muhammad and his kin.

### **Session Chairman**

We have four other speakers. We begin with Dr. Muhammad Hanif.

### **Dr. Muhammad Hanif**

Islam is a religion of easiness rather than hardship. "Make things easy, not difficult; bring hope to people and do not frighten them away." The story of Mu'ath Ibn Jabal is well-known. People went to the Prophet and complained that Mu'ath, who let them in prayer, used to prolong. The Prophet, Peace be upon him, called him and said, "Are you seditious, Mu'ath? (6) Abdulla Ibn 'Amr was an extremely pious man, who wanted to spend the night in devotion, fast during daytime, and abstain from women. The Prophet, Peace be upon him, called him and said, "Is it true what I have been told that you stay up at night in devotion?" Abdulla said, "It is, God's Apostle. I am strong enough to do it." "Nay, nay," said the Prophet. "But sleep a part of the night] and stay up [the rest], fast [on certain days] and do not fast [on others]. Your body has a claim on you, and so have your wife and yourself. You should meet each claim." (7) The Prophet also saw a man dragging himself between two sons of his. When the Prophet inquired about him, he was told, "This man has made a pledge to perform the pilgrimage on foot." The Prophet told the sons, "Nay. Make him ride a camel, for God has no need for this self-torture." So they got him a camel and made him ride it. (8) Again, this is a religion of easiness; there is no hardship in it. The best course is the middle course, and extremeness is wrong. The middle is the best in everything. Oh God, guide us to the straight path, the path of those whom You have favoured.

As for sperms and sperm control, there is a tradition of the Prophet which says, "Choose well for your sperms, for blood will tell." It seems that the Prophet means here that a fetus acquires traits from the parent sperm and ovum, and thus the child resembles his parents physically and perhaps mentally, sometimes to the extent that it is regarded as a carbon copy of the parents. Have you not noticed how Jews inherit, from one

generation to another the traits of coveting money, revenge and evil? What I am driving at is that, within limits, we do have some choice in this matter of control. Thank you.

### **Professor Omar Al-Ashqar**

In the Name of God, the Compassionate, the Merciful.

I begin by addressing the question of whether this matter is related to faith. Is it? Is it a matter of fiqh? And is fetal sex selection, within the range that man can exercise so far, contrary to God's Will?

Suppose an American, European or other physician could, through a certain method, exercise such control, would that mean that his will had defeated God's? I think it is feared that to believe so is to lose one's Islamic faith. God's Will is dominant, and the final outcome of anything that takes place is determined by God's Will. We resort to whatever means are available to us or contrived by us, but it is God the Almighty Who has made it within our reach and Who has led us to the outcome, which is achieved with His full approval.

Whoever thinks different does, I believe, commit a major sin by believing that we are capable of effecting a change in God's universe against His will. This shows that the issue is by no means a matter of faith. The question is merely whether this is permitted to us or not, and whether there is evidence to show that it is prohibited. If there is not, the question then is whether there are any benefit, jeopardized, or corruption realized, by such selection to make us refrain from exercising it. Such approach is strictly within the realm of fiqh and has nothing to do with faith, except when it comes to correcting the belief of anyone who thinks that he has defeated the Will of God, the Supreme. A correction of this sort would be made out of concern for that person and as a kind of advice. On the other hand, his faith is sound who exercises such selection while believing in God and convinced that whatever he does he will never transgress the Divine Will. The only question that remains is whether his action is permissible or not, whether there is any prohibition of it in Islamic Law.

The Islamic ruling seems to me to consist of two parts. The first covers attempts and treatment before conception, as when a husband and a wife choose a specific time for intercourse, take some medicine before intercourse or certain drugs to improve their physical fitness or anything of the sort, or follow a certain timetable recommended by physicians. As explained in a book I read ten years ago and confirmed by some speakers

here, from the medical point of view, if intercourse takes place before the date of ovulation, it is more probable for a male child to be conceived. After ovulation, a female has a better chance. This is an attempt that can be made before conception, and I do not think a single scholar would claim that the method is prohibited. A man follows a certain course that serves his interest, and that, to the best of his knowledge, yields the desired result. He believes that having a son would serve him best and he strives to get what he wants.

As one speaker has pointed out, man prays to God to give him a son, as Prophet Zakarriya, Peace be upon him, did when he said, "Grant me an heir who will succeed me." (Maryam, 5-6) And Maryam (Mary), Peace be upon her, who prayed for a son but God granted her a daughter. There is no harm if one tries hard when he believes a certain outcome is in his interest.

As for sex selection after conception, the rule is that which covers abortion, the discussion of which will follow. This will be included in the question of whether abortion is allowed in certain cases and at certain stages.

But we can look at the subject as a matter of a general state policy. Should this [practice of sex selection] be the policy of a Muslim state, a Muslim society, or the like? Is it proper? What interests are jeopardized if we prohibit it? I believe it would have been better had the colleagues who submitted papers given more details in presenting the issue and its social and various other implications in an Islamic society. What do we lose by contraception or this kind of medical procedure? What interest do we serve? What harm is likely to take place in society due to its application or non-application? I believe more elaborate examples should have been given. Therefore I second Dr. Tawfik Al-Wa'ii's suggestion that further study should be made and more time should be allowed for this question. Thank you.

### **Doctor 'Isam Al-Sherbini**

I sympathize with physicians diving into the rich sources of fiqh, which are unquestionably deep and full of treasures. In my opinion fiqh is man's most refined discipline. I would like to inquire about two points.

The first is about interpretation of texts. When God says, for example, He gives daughters to whom He wills, and to whom He wills He gives sons. To some He gives both sons and daughters, and whoever He wills He makes sterile. (Al-Shura [Counsel], 49-50)

does that mean I should not seek treatment to get a child or resort to coitus interruptus or to contraception to avoid having a child?

We may also cite God's saying that "God alone is the Munificent Giver, the Mighty One, the Invincible." (Al-Thariyat [Winds], 58) Does that mean there is no giver but God? Does that prevent my striving to make my living through all available means? This is the point concerning the interpretation of texts.

The second point which I beg fiqh scholars to take into consideration when talking to us is to make clear the difference between what is sanctioned and what is prohibited, and what is permitted within limits set by God and should not be transgressed by us, nor should be substituted with other limits. It is a human desire to wish for a boy. In Islam, particularly in the Sunna, Muslims are greatly urged to take care of girls. "Whoever supports two daughters until they are of age, he and I will be in Heaven like these [two fingers]." (9) But that does not prevent my seeking a son through prayer or by following a method recommended by a physician. It is not prohibited for me to do so. As it has been mentioned, on the question of milk, there is a certain ruling advanced by certain scholars and it is, as we have learned, adopted by the Academy of Islamic Research, which indicates that what Dr. Maher has mentioned is permissible. Yet in spite of the permission we can make certain recommendations, and so on. Thank you.

### **Professor Abdalla Basalamah**

In the Name of God, the Compassionate, the Merciful.

I will try to be as brief as possible. It seems to me, as a doctor, that the question has been pinned down to three points. The first is that our dialogue before the Noon prayer reached the conclusion that such scientific procedure is not to be considered a mutation of God's creation. The second point is that selection is permissible on the individual level or for a family with a large number of sons that desire to have a daughter, or with several daughters and desire a son. If scientific techniques can make this possible, it is not prohibited.

The third point, which was the subject of the larger part of our discussion, is that of apprehension about community at large. What happens if a certain sex, which we are all convinced will be the male, is preferred? I believe that preferring male children is not 100% dominant. We can all cite examples. A family with a large number of sons might

desire to have daughters; it is also part of human nature to desire a combination of both sexes. It might seem that there is a stronger preference of male children, because, as Dr. Hassan Hathout has pointed out, in the law of creation devised by the All-Powerful God, the proportion at the time of conception is 130 males to 100 females. Then at birth it becomes 106 to 100, and later it becomes equal. The proportion is made like that at the time embryos begin to form to assist an artificial preference of males over females to surface. Thus, if the practice (of sex selection) is introduced world-wide, we will find that, after the first wave, many people will be inclined to have children of the other (female) sex. Therefore the problem is relative, rather than religious, and does not directly concern us. What is important to us is whether the practice is to be regarded as interference and mutation of God's creation, and whether it is permissible on the individual level for man to seek fulfillment of his desire through scientific methods. Thank you.

#### **Sheikh 'Izz el-Din Muhammad Tunji**

The question has nothing to do with faith; it is rather based on the principle of consequences as the honourable doctor has pointed out. On the subject of livelihood, all of us know that God is the Munificent Giver. We strive, but I cannot say that I make my living by myself. It is God Who determines when a person dies, so if someone fires a revolver at another person and kills him, do we say that his death has been determined by the person who has fired at him or by God? This question, whether a murdered person dies at his appointed time or not, has already been discussed and settled.

At these facts show that the question of fetal sex selection is a question of means, and that the prevailing will is that of the Almighty God. Perhaps all of us are in agreement that this is not a question of faith. Next comes the question of practice, which, truly as Dr. Abdulla has pointed out, has two levels: the individual and the state or society. On the individual level, a person may wish for a son or a daughter. Such a desire is not disallowed in Islam, and there is nothing in it that calls for prohibition. So, if an individual goes to a physician who can, with his own methods, let that person have a son or a daughter, this is not prohibited by fiqh or Islamic Law. But there is still the question of the nation as a whole.

There are certain actions that are allowed on the individual level and disallowed on the community level. Coitus interruptus or other methods of contraception, for example, are allowed on the level of individual families

according to their circumstances, but forbidden on the states level. In other words they should never be imposed by any legislation or regulation. Abortion is likewise allowed even after the early months of pregnancy if a necessity calls for it, as when a mother's life is endangered by the fetus. Thus, necessity makes it permissible for an individual to do what might be forbidden. So how about things that are allowed to start with? In short, on an individual basis, a family, a man or a woman is permitted to desire and seek help to have any number of sons and/or daughters.

What calls for discussion and careful deliberation is the practice at the community level, the level of a state, or of the whole world. For this, we need, as Dr. Muhammad Al-Ashqar has mentioned, to determine the harm a nation suffers if it refrains from following these methods or if does follow them. It is a matter that calls for a careful thinking. Thank you.

#### **Dr. Omar Al-Ashqar**

I asked Dr. Hassan Hathout at the beginning of the morning session whether absolute selection of sperms was possible, and he gave an indefinite answer. During the break I asked him again if it was possible to tell whether a given sperm was male or female, and I got the impression that it was very difficult. Consequently, and as far as I understand, up till now science cannot control whether a certain man gets a son or a daughter. One hundred per cent control is not yet possible, and therefore the invocation of the verse "He gives daughters to whom He wills and to whom He wills He gives sons" is invalid here. Nor is the claim that there is mutation of God's creation in such a practice correct. As I see it, this is very far from being the case, since science has not reached that far. Thank you.

#### **Sheikh Mu'awwadh 'Awadh Ibrahim**

In the Name of God, the Compassionate, the Merciful.

"O man! What has enticed you from your gracious Lord Who created you, gave you an upright form, and well-proportioned you? In whatever shape He could have moulded you according to His Will." (Al-Infitar [The Cataclysm], 6-8) "It is He who shapes your bodies in your mothers' wombs as He wills." (Al Imran [The Imrans], 6) This world (Will) is repeated frequently in God's revealed Book, and I do not need to go on citing examples. Nor am I going to address the subject directly. I wonder, however, does everything that takes place in one corner of the earth, whether in the East or West, require us to meet and discuss whether it is



something that affects faith? or whether it is something that a doctor may exercise as some people or others have done? When they do things, they are naturally unaware of what is important to us, that it should not touch our faith nor interfere with God's Will. There they have no guidelines; they do what they please and act as they will, without worrying whether it does or does not interfere with the Divine Will.

I would like to get to something else. When it is within our power to practice sex selection and decide what sex a certain pregnancy will be, or whether a certain man or a certain woman will have a son or a daughter, let us do it on a very limited scale and only when there is a compelling need. This will be one of the means that can never stop the Will of God, who shapes us in wombs as He will.

I am anxious to get to a certain point, because a lot of things have been said about it. We have been very unfair to Dr. Maher Hathout when we have taken an issue he has raised as a problem, although he has concluded that its usefulness has not been proved and there is no confirmed need for it. Why should we then discuss and deliberate, and try and establish Islam's stand on that issue.? Dr. Yusuf and other speakers have pointed out that there is nothing in Islam against it as long as we take the precautions suggested by Dr. Muhammad Al-Ashqar. (10) I believe we could have asked ourselves whether we should try and find justification or support for everything introduced in the West or East and whether we should follow them in what they do and then try and accommodate it within the framework of Islam and fiqh. Thank you.

### **Sheikh Badr Al-Mutawalli Abd Al-Baset**

In the Name of God, the Compassionate, the Merciful.

The fact is that discussion of this subject has covered several aspects, and that there is an almost unanimous agreement on some of these.

First, on the question of whether, if this sex selection is put into practice, it would be contrary to God's Will, the great majority of speakers have agreed that it would not, because it is God who enables his creatures, or some of his creatures, to do so. The result of what they do, if they do it, is destined by God. So Destiny here, whether God would give a certain person a son or a daughter, is conditional. There is no defiance at all in following such methods, and if we do follow them, it will not be against God's Will nor contrary to His decision, which is already known to

Him, to give daughters, sons or both to whom He will by whatever method he pleases. This question then is settled.

We come next to practice, which we discuss on two levels. First we take the individual level, and here we have to distinguish whether a husband and a wife or two unmarried people are involved. Concerning the first case, I asked Dr. Hassan Hathout whether it would be necessary, where this method is applied in the case of a husband and a wife, to take the fertilized ovum to a laboratory, and he answered that it would. I want to tell you very candidly that if laboratories are involved, you know very well what may happen. The cases in which they make mistakes are almost more than those in which they do not. An incoming sample is labelled in the name of a certain person, and the result comes out under the name of another. I give you the example of a lady I know. A sample of hers was taken and the result was that she was not pregnant. Her physician performed a curettage for her, and she bled. Later it was discovered that she had indeed been pregnant. Thus, if taking precautions is one of the rules of Islam, there should be extreme care if we permit this on an individual level when it involves a husband and his wife.

If on the question of milk, we tended to approve the precautions suggested by Dr. Al-Ashqar, I believe that negligence in the question of lineage is one thousand times more serious than in milk. If you tend to consider this permissible on the limited scale of families, precautions are absolutely necessary. A specimen must be clearly labelled with the name of the person to whom it belongs. Further measures of great precaution should also be taken, because the Legislator has set very elaborate precaution in matters of lineage. I hold doctors who would perform such a thing responsible, and it is a great responsibility, because the slightest error with specimens would cause great harm.

When the method is collective, we have heard Dr. Hassan Hathout say that a mixture of the semen of thousands of men and thousands of women [sic!] would be used, and it will be a big muddle. I believe there is no Muslim who would question the prohibition of this. a woman would conceive when fertilized by the semen of someone other than her husband, and no woman is allowed to admit into her womb the semen of a stranger, whoever he may be. It is similar to adultery, though not exactly adultery and does not call for the punishment of adultery. There is no doubt, however, about the resulting confusion of lineage and the dangers involved. To allow such a thing would cause more ill than good.

I believe things are clear to us now, and the relation of this subject to faith is also clear. That is, there is nothing here that affects faith. "You cannot will, except by the Will of God." (Al-Insan [Man], 30) If anything of this sort is practiced, it is only by God's Will.

Of course religious scholars are not going to obstruct scientific progress. But scientists should experiment with animals, because at present there is a shortage of meat. Instead of experimenting with man, they should try and meet the world's needs of meat. I say this and pray God to forgive us all.

#### **Dr. Hassan Hathout**

To be very brief, the issue, as it now stands, concerns control in the case of a husband and a wife, applied with all the precautions that man can take and that can definitely prevent any confusion of lineage. I believe that in such a case, the tendency is to regard such control as permissible.

As for demographic consequences on the world level, there are two different points of view. The first is that whatever we do, the proportion of men to women at the age of marriage will remain equal. Another point of view is that, if this control is practiced on an extensive scale, it will result in a world with a majority of males and minority of females, with all the risks inherent in such a situation, because most people will desire to have male children.

Therefore, I believe that control is permissible on the individual level, while on the community level we need to consider the matter carefully before we risk the consequences. Thank you.

#### **Dr. Ahmad Al-Ansari**

God, and Peace and Blessings upon the most honoured Apostle, Muhammad, and all his kin and Companions.

I see no necessity for medical sex selection and find no great urgency or medical justification for discussing this subject.

## Notes

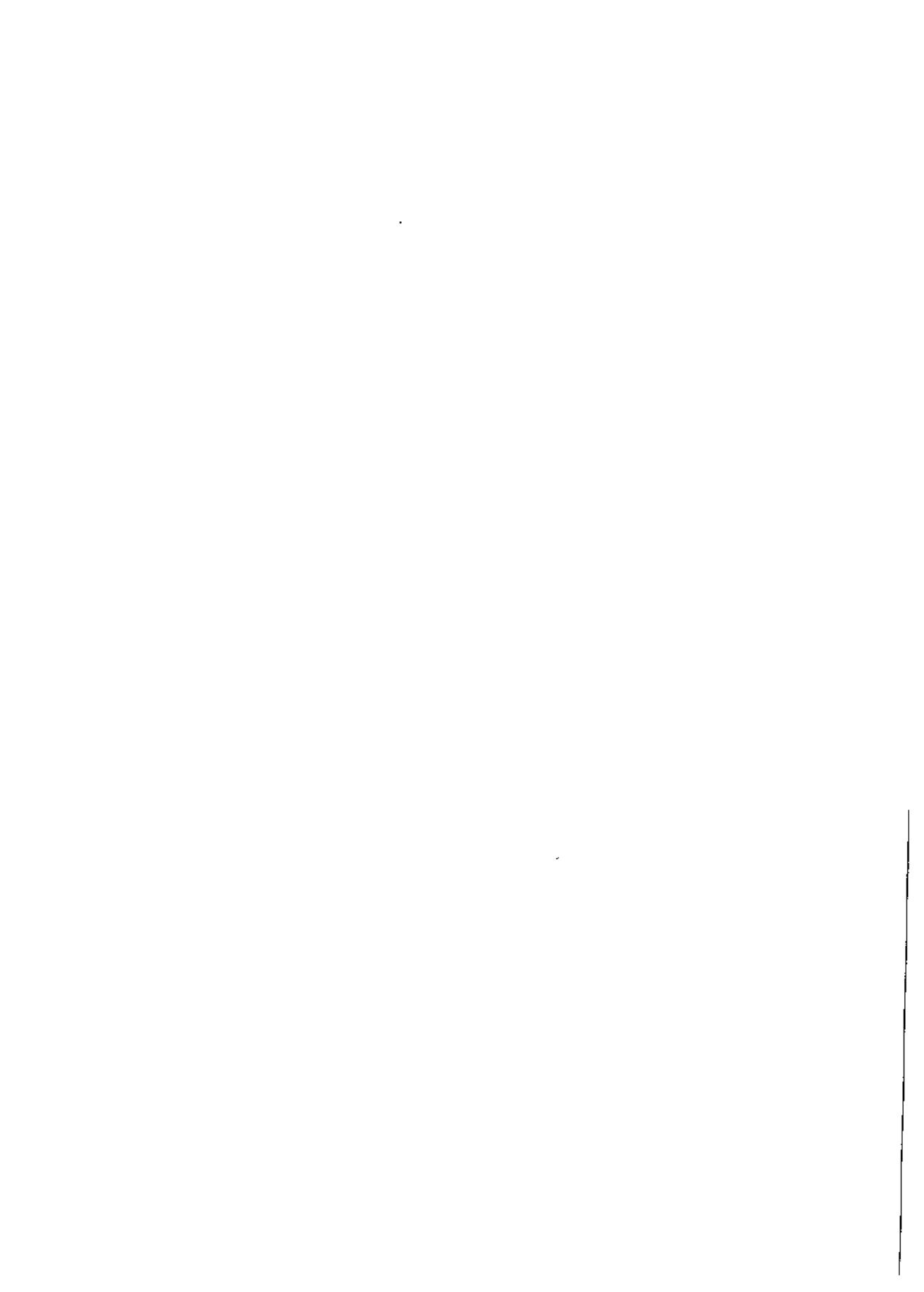
1. A authentic tradition related by Al-Bukhari and Muslim (Sahih Al-Jami' Al-Saghir [The Little Compiled Collection of Verified Traditions]).
2. The subject of this verse, however, is religious faith, and the upright nature is God's religion, Islam and the worship of one-and-only God. It begins with, "Therefore stand firm in your devotion to the true faith, the upright nature...." (Dr. Muhammad Al-Ashqar's Note).
3. It should be noted that the Honourable Dr. Qaradhwai says at the beginning of his address that everything people do is done with God's Will, and yet here he seems to imply that some actions by people are contrary to the Divine Will. I believe that what he says at the beginning is the right view, and therefore prohibition on this basis is invalid. (Dr. Muhammad Al-Ashqar's Note).
4. The tradition is related by Muslim.
5. This refers to an authentic tradition related by Al-Bukhari and Muslim. (Sahih Al-Jami' Al-Saghir).
6. This refers to the tradition, "If you lead men in prayer, read [the suras, of] 'The Sun' and 'Daylight'." It is narrated by Jaber and related by Muslim. (Sahih Al-Jami' Al-Saghir).
7. A tradition narrated by Abdulla Ibn Amr.
8. A prophet tradition.
9. This tradition is narrated by Anas and related by Muslim and Al-Tirmithi.
10. The speaker is clearly referring to the earlier discussion on milk banks. (Translator's note).

## THE SECOND SESSION

This session started at 12:00 noon and was adjourned at 2:00 p.m. Dr. Maher Hathout spoke on "Deoxyribonucleic Acid," "Cloning", and modern applications in these two fields. He outlined the achievements of modern medicine in applying the new findings to human beings and the future of research in the two fields. The applications, together with inquiries made, were discussed. This was followed by a paper by Dr. Ahmad Sharaf Al-Din on "The Dictatorial Techniques of Biology in the Scale of Islamic Law" and another by Dr. Abd Al-Sattar Abu Ghudah on "How Legitimate Is Control of Genetic Factors."

Fiqh discussions of the two papers, in light of the positive and negative scientific aspects that had been discovered so far, followed, with the aim of determining the Islamic fiqh stand and its scholarly formulation.

Editor



## DEOXYRIBONUCLEIC ACID

Dr. Maher Hathout and Dr. Omar Al-Alfi

### Definition

Deoxyribonucleic acid (D.N.A.) is the large molecules which carry the basic system of producing hereditary and functional traits in most living creatures.

One of the most striking properties of this type of molecule is its ability to recombine itself if it decomposes and to reunite if it breaks apart. These processes automatically take place in the cells as soon as they divide, as we see in gametes and zygotes. But this property is not limited to the nucleic acid of homogenous cells; the D.N.A. of different species of cells may unite or recombine, as in the case of phages, which invade certain bacterial cells, and their D.N.A., which is called plasmid, is seen within these cells, mixing with their D.N.A. and changing their characteristics. As a result these bacterial cells become capable of resisting antibiotics that they could not resist before.

This may happen to any D.N.A. molecule, whether it belongs to bacterial or animal cells. It may be invaded and then the new cells it produces, as well as subsequent generations, will adopt the genetic pattern of the invader.

Scientific research has made it possible to produce a type of bacterial enzyme which can divide a D.N.A. molecule at points determined on the basis of the sequence in which the organic bases are repeated within the molecule. Actually the traits carried on every division could be detected. With this scientific breakthrough, it is possible to take a D.N.A. molecule from a certain source and divide it into sections each of which carries a particular type of traits. These sections, as already mentioned are capable of uniting together or with other D.N.A. molecules, and to keep copying themselves, so that specific traits are produced in abundance. This way, matters that are rare can be made more available, depending on the requirements of research or industry.

Another property of the D.N.A. molecule concerns its form which takes the shape of two intertwined strands making a double helix. The two strands could be unwound but when circumstances allow, obstacles being removed, they reunite into a helix once more.

This property has been exploited for many scientific purposes. If we take a molecule and expose it to radiation which would leave a mark on it, then we unwind its strands and introduce it into any number of cells we wish, each strand would search for its mate to reunite with. We can follow the process by virtue of the mark on the strands, which makes it easy to identify them.

This allows a study of the components of invaded cells, as well as the ancient origins of the plasmids we see here and there. The same method has been used to diagnose blood diseases of fetuses in the womb, such as sickle-cell anemia and thalassemia, as the strand producing deficient haemoglobin can be identified by its mate.

All these breakthroughs of science have opened for scientists new horizons never imagined by man before. They have created potentials and possibilities the extent of which only God can tell. All the knowledge we acquire is uncovered for us by His Will.

It is quite exciting to know that for a long time diabetics were treated with a type of insulin extracted from animals and different from human insulin. But now scientists have been able to isolate the D.N.A. of bacterial cells and introduce instead the D.N.A. of human insulin-producing cells. The bacteria have multiplied according to the new pattern, producing human insulin in great abundance to be used to serve, for whom God has created what the earth and the heavens contain.

There are plans to use the same technique to produce other materials. We are even able now, and for the first time, to conduct studies on viruses by studying their D.N.A., and thus discovering their properties and solving their mystery.

### **Summary on D.N.A.**

Fertile mating of different species of animals is impossible because of the differences in their cell structures and genetic codes, though D.N.A. is the basic component in all cases. The only exception is the intermarriage of horses and donkeys, which is possible because of the similarity of their genetic codes, and which produces sterile mules.



But science has now something new. It has been possible to isolate genetic micro-strands and chemically cut them apart. At the point of the cut, the strand can unite with a similarly-cut strand, even if it has a different genetic structure. The result would be a new helix that combines the two genetic structures. When this replicates, it produces units (individuals) which are in fact new creatures with traits from both original creatures, in spite of their difference.

What has actually been achieved is the union of a genetic strand of a microbe with a human one, and the result has been a new creature, neither the original microbe nor a human being, but with traits from both.

### **Benefits at the Practical Level**

1. The new creature, with the body of a microbe and with a human genetic strand, produces the insulin hormone, needed to treat diabetes. Patients are now injected with this insulin instead of the animal insulin that was used earlier. Animal insulin is very costly and of limited benefit. Because microbes multiply fast, the new creature will be a generous source of human insulin.
2. The same technique was used to produce a material used in the treatment of certain tumours.
3. Research is being made in an attempt to eliminate certain hereditary diseases by removing the section of the human genetic strand that carries them and replacing it with an identical, but sound, section.

### **Foreseen Dangers**

1. It is feared that microbes, which are up till now unknown to exist in nature, and that may be fatal and resist familiar medications, may be produced and used in bombs in what is known as biological warfare. It is believed that such a device has already been in practice for several years, but it is still a military secret.
2. It is also feared that there will be attempts to produce new human breeds with specific mental, physical or social qualities, such as excessive physical strength, servility, or fighting tendencies. In such cases, personal will and hereditary systems will both be unbalanced, and the principle of personal responsibility might be invalidated, not to mention other applications which may ignore human traditions and moral values.

These things are not achieved through D.N.A. transfer, but rather through other techniques of genetic engineering, such as selection and cloning.

## CLONING

### Definition

Cloning is the attempt to produce a creature, a cell, or a molecule, which can, without any addition to, or subtraction from, its hereditary traits, multiply through a method other than fertilization.

Most research in this field is not as concerned with the production of identical beings as with the production and isolation of certain sections of the D.N.A. molecule which carry particular hereditary traits. Research aims at producing these in quantities sufficient to conduct research and to subject them to practical usage.

Therefore we may hear of the cloning of certain bacterial cells to produce large numbers that carry out a certain function. As for the cloning of a multi-cellular creature, it is a different matter that may prove too intricate, complex and difficult.

In the early sixties, research was directed towards extracting the nucleus of an adult intestine tissue cell, which was introduced into an ovum whose nucleus had been removed. After several attempts, the ovum produced generations of embryos identical to the creature, in this case a certain type of frog, from whose intestine tissue the nucleus was extracted.

Experiments on higher creatures are fewer and the degree of success is smaller, probably because hereditary traits are too intricate to understand and arrange. In a higher creature, however, the D.N.A. may be re-programmed to produce or stop producing several types of cells which are more or less different from each other, as in the case of the genes of cells which produce antibodies.

Recently, however, attempts have been initiated to take the nuclear marrow of early mouse embryos, process it, plant it, and produce new generations that promise a new breakthrough.

As for research concerning the planting of embryos outside the womb in order to experiment with them in the hope to bypass some stages of development and arrive at reproduction by means other than fertilization — such research has been controversial and stumbling, especially since

the usefulness to man which can justify the expenses and effort required is not yet clear.

In spite of the scarcity of experiments and of the hesitancy of scientists, particularly in this area, people have been fascinated by the reports published in scientific journals and popular magazines on this type of research, creating the impression that it is an easy possibility, as if the cloning of creatures is an established fact rather than a theory that may or may not prove. People seem unaware that all this is still a hidden mystery, and falls within the category of the theoretically probable that might prove to be practically impossible. God utters the truth when he says, "You cannot will, except by the Will of God," and "He creates what you do not know."

## **Summary on Cloning**

### **Preliminary**

1. The nucleus of every human cell has forty-six chromosomes, which carry all the hereditary traits of a certain human individual.
2. Every human cell divides into two cells which are exact duplicates of the mother cell, each with forty-six chromosomes. Division continues, and generations of identical offspring are produced.
3. Mature sperms and mature ova are an exception; each has only twenty-three chromosomes. When they unite they form a zygote, the first stage of human development, which now carries forty-six chromosomes.
4. A zygote is also different from all other cells in that when it divides, it does not produce identical cells, but rather generations of different cells. That is, instead of producing billions of identical copies, its division leads to the shapping of a new human being.

### **Illustration**

If a frog skin cell, for example, is placed in a proper nutritional environment it keeps on duplicating itself, through division (mitosis), producing millions of skin cells. If we, however, take a sperm cell of a male frog and unite it with an ovum cell of a female frog, the division (miosis) of the united cell does not produce duplicates; it produces a new frog.

### **Scientific Innovation**

If we extract the nucleus of a frog skin cell and introduce it into the cytoplasm of an ovum whose nucleus has been removed, the new cell starts a process of meiosis that produces a new frog. This frog, however, is an exact replica of the original (parent) frog.

The scientific achievement then is reproduction without male-female mating and the production of an exact copy of the original frog through a process that can be repeated any number of times.

This has been actually practiced on frogs, and application of the method is theoretically bound to include other creatures. The question is: what if that becomes possible in the case of man?

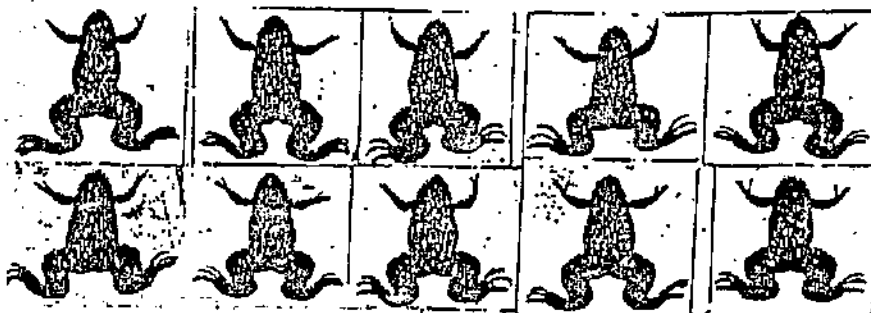
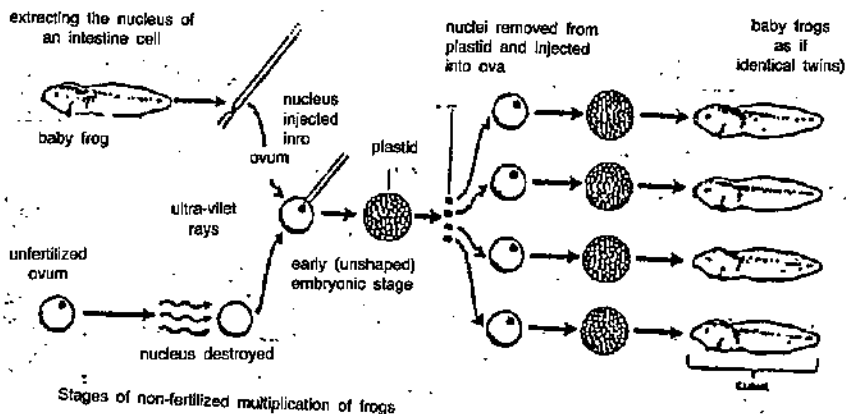
### **Possible Positive Result**

Large numbers of talented individuals and geniuses may be cloned.

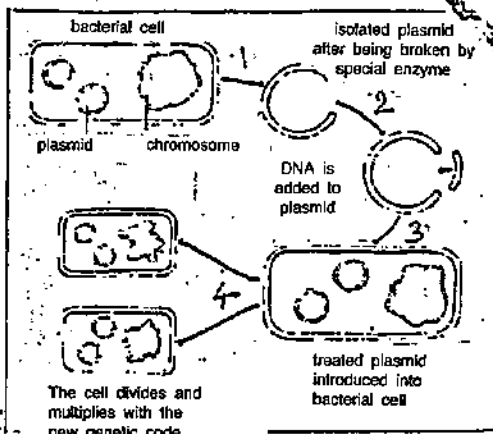
### **Possible Negative Results**

1. Reproduction without fertilization will become possible.
2. Talents and virtues are not the outcome of inherited traits alone.
3. Disease or infections may affect all individuals produced through cloning. It is well-known that genetic mutations are an element of protection of the human race.

## Genetic Engineering Experiments



Ten of twenty frogs produced in a cloning experiment



Introduction of genetic material into a bacterial cell



This mouse has two fathers and two mothers (as well as a "foster-mother" in whose womb it was carried). It was produced of two ova fertilized by different males and placed in the womb.

## **THE DICTATORIAL REIGN OF BIO- TECHNOLOGY IN THE SCALE OF ISLAMIC LAW**

Professor Ahmad Sharaf Al-Din, Ph.D.

Progress in basic and applied sciences has raised a number of questions that may be grouped into three major areas. The first concerns the effects of the new techniques introduced into these sciences on human life. The second deals with the natural laws controlling the life processes that affect man in his body and life. The third deals with the legitimacy, from the Islamic point of view, of adopting these techniques of scientific progress.

In recent years, these subjects have particularly raised a number of problems concerning the relationship between the branches of medicine and biology on the one hand and Islamic and general law on the other. This was due to the fact that the discovery of certain new possibilities in the fields of medicine and biology has led to the changing of certain traditional bases of those natural laws mentioned above. Moreover, the application of the new possibilities discovered by science, or even the mere thought of it, has raised other new problems not directly covered by the texts of the Holy Quran and Prophet tradition.

The seriousness of these problems is due to the fact that they concern man's rights and interests, such as issues related to his individuality, his offspring and his mind. The Great Legislator gives special attention to the regulations governing these issues, the maintainance of which is one of the basic purposes of Islamic legislation.

It is for this reason that great importance is given to studies which determine the limits within which the new findings in medicine and biology can be practiced on human progeny without violating the basic rules of Islamic Law or jeopardizing the interests with which its statutes are concerned.

When one reads specialized studies in the fields of genetic

engineering and cell fusion, he realizes that the amazing progress in science (biology in general and embryology and genetics in particular) might lead one day to essential changes in man's biological nature. If medical and biological potentials do move out of laboratories to be actually practiced on man, they would lead to results that stagger the mind and turn upside down the premises on which provisions of the law are based.

I will limit myself in this paper to highlighting the problems that will result from the mutation of man's biological nature through procedures that aim at controlling man's heredity and personal traits, in the hope that existence will be restricted to individuals who have immunity against disease and enjoy certain desired characteristics such as high intelligence or servility as called for by circumstances.

I like to point out that no scholar can, at such an early stage of research, come up with a convincing Islamic ruling. It is not sufficient to merely refer to general, abstract rules. Things are not that simple. To arrive at well-defined and specified conclusions requires on the one hand a knowledge of medical and biological innovations to understand their background and implications, and on the other hand profound study of the books of Islamic fiqh, with their encyclopedic nature, to search within their treasures for relevant details. I believe all of us are aware that such a study would require one to devote himself almost entirely to it. What makes me more convinced of this is the difficulties I have faced in writing my book on Islamic Ruling on Medical Achievements.

I will give some examples of the possibilities of toying with human life so that we can realize the extent of the resulting chaos expected in the structure of the current social order, particularly in the field of family relations. This will allow us to outline the method of Islamic and legal regulation of these medical and biological innovations.

### **I. Man's Biotechnological Future and the Premises of Social Order**

Scientists in the fields of medicine, biology, and chemistry have discovered some of the secrets of the living cell mechanism and formulated certain scientific laws which govern the work of a cell's genetic code. They started after that to engineer the genetic future of living species, either through the breaking up of cells (genetic engineering) or cell fusion.

They used these techniques to control the structure and development of cells. There is, for example, the somatic cell replication, as it is called.



Scientists are hoping to turn an ordinary body cell into an embryonic cell that can multiply the same way as a zygote. This can be done if they manage to break the cell's chemical lock that prevents it from duplicating its mother cell. One of the conceived usages of this somatic-cell reproduction is the replication of a person's biological identity. To achieve this they clone an exact duplicate of the person whose cell is being used. It is said that the same result is possible even if the cell is taken from a corpse, as long as the cell itself is not dead yet. This method would make it possible to keep geniuses alive so that humanity will benefit more from their achievements.

There is no harm in mentioning another possible application of modern biological discoveries, which have broken the barriers separating different species. Scientists are considering the idea of fusing human cells with plant or other animal cells to produce a chlorophyllic or a ruminant man. The purpose is to arrive at new human stocks that carry certain plant or animal traits, such as making man manufacture his own food the same way a plant does in the process of photosynthesis. Scientists are also contemplating the production of a new human type through the somatic-cell reproduction technique which depends on cell fusion. If this new type proves successful, it can then multiply through the normal sexual method.

Toying with life has not been limited to the organic level. Modern scientific thought hopes to contrive methods to electronically control man's will, and thus produce an electronic man whose needs and desires can be fulfilled by pressing buttons on his body.

In spite of the claims that such reproduction technology is still a matter of imagination and so far it is no more than wild dreams, the success of its application to plants and animals has encouraged scientists to consider applying its scientific laws to the human race. Embryo plants and test-tube babies are an evident embodiment of man's ambition to control his physical make-up and his traits. Perhaps scientific efforts in this field represent man's desire to find the elixir of life, to acquire immortality and to conquer death, which is a destiny ordained by God on His Creation. It is worth mentioning at this point that one millionaire has asked to be duplicated, expressing his willingness to finance somatic-cell multiplication research. This way of thinking has many implications which can easily be discerned by every intelligent person.

Once we overcome the initial dizziness experienced when one first learns of the capabilities of the man of the future, we realize that such

biological innovations are going to cause great chaos in the current social order.

All what I can offer at this stage of initial study of the consequences expected from the shocks of man's biotechnological future is a number of questions. How are relationships going to be regulated between the clones produced through somatic-cell multiplication and the original "copies" who come to life through sexual multiplication? Has man, who wants to become immortal through this new method of multiplication, not realized that the idea clashes with the certainty of death, and that one of its consequences is suspension of the laws of inheritance? Is man unable to understand that sex selection would upset the natural balance guaranteed by the Divine Will and its natural laws? I do not think that scientists have been entirely unaware of these consequences. Moreover, they expect risks of deformity in these attempts to produce a new creature by toying with somatic and sex cells.

Does man no longer need to find love and kindness in the relationship of marriage, which is considered in Islam the basis for procreation.

By another sign He gave you mates from your own selves, that you might live in joy with them, and planted love and kindness in your hearts. Surely there are signs in this for people who think.

(Al-Rum [The Romans], 21)

Does not man in this age suffer enough from racial discrimination, which is based on considerations of appearance, such as colour? Do we need to add biology's new type of human beings, who, due to their inner make-up, have such qualities that they can easily crush the current human race, as leftovers from outmoded ages? Does man fail to understand that his trespassing on God's creation and his vanity because of his secular knowledge might lead him, out of vanity, to deny his being a slave of God?

Does there not pass over a man a space of time when his existence is a blank? We have created man from the union of two gametes so that We may test his mettle. We have endowed him with sight and hearing.

(Al-Insan [Man], 1-2)

Has man not realized that his dream of immortality is inspired by the devil? "But Satan whispered to him, saying: Adam shall I show you the Tree of Immortality and an everlasting kingdom?" (Taha, 120).

These are just examples of the consequences of man's attempt to control his physical make-up. It is an attempt that will, if it does succeed,

take man into what can be termed the age of biological dictatorship, which should remind us of Hitler's regime.

Thus medical biology, due to scientific progress, has become more effective and ambitious than traditional medicine. At the same time, it has become more powerful and more dangerous. Perhaps we can imagine from what I have covered so far some aspects of the chaos that will result from biological findings, particularly in the field of reproductive technology, and upset traditional principles which consider the sanctity of one's body and individuality a corner stone of the prevailing social order. If these discoveries are left unchecked, they will cause a change in traditional values and ideologies as well as in moral codes. Fiqh scholars must therefore be ready to combat these innovations and subject them to Islamic regulations, so that they would not go off limits and clash with God's ways, "and you shall find God's ways unchangeable." (Al-Fatth [Victory], 23) God has ordered us to keep away from anything that might violate Islamic Law and its purposes: "Take heed lest they should turn you away from part of that which God has revealed to you." (Al-Ma'ida [The Table], 49.

## **II. Method of Islamic Regulation of Medical and Biological Innovations**

It is true that Islam encourages scientific and scholarly research, which is regarded as a means to discover the marvels of God's creation and, consequently, admit that he is the one-and-only deity. "From among His servants those who know do fear Him." (Fater [The creator], 28) But science has its goofs and slips which might not be acceptable within the framework of Islamic Law. Therefore it is necessary to scrutinize the findings of modern science in the light of the rules set by the Omniscient Legislator.

Therefore give judgement among men in accordance with God's revelations and do not yield to their fancies or swerve from the truth that has been made known to you. (Al-Ma'ida, 48)

I say this because our current circumstances have compelled us to import the applications of modern science. We have become followers of those who do not believe in our religion, but we should never follow them in our attitude towards these applications, particularly when they relate to God's creation. Our religion warns us against allowing reproduction to divert us from obeying God. "You are diverted by reproduction until you get to

graveyards...." (Al-Takathur [Multiplication], 1-2)

It does not make sense to expect Islam although it does encourage every scientific progress that serves humanity, to bow to the new possibilities in science, with their potential harm. Modern man seems unaware of their terrible consequences for the future of the human race, but the Legislator, in His great Wisdom, "knows what is before and behind them. They can grasp only that part of His knowledge which He wills. His throne is as vast as the heavens and the earth." (Al-Baqarah [The Cow], 255)

The applications of reproductive technology to animals and plants may prove of benefit to man and, consequently, is permissible in Islam, for everything contained in earth and heavens has been placed by God in the service of man: "He has subjected to you what the heavens and the earth contain; all is from Him." (Al-Jathiyah [Kneeling], 13) Yet the mere idea of applying them to man calls on us to determine the religious stand concerning this application, so that Muslims can be guided by it. "But if they reject your judgment, know that it is God's wish to scourge them for some of their sins. Many of them are wrongdoers." (Al-Ma'ida [The Table], 49) Let man understand that his rudeness with God's natural laws and his ability to mutate the biological nature of animals and plants does not mean that he has the right to toy with human life and mutate the nature God has ordained for the human race:

As the earth adorns and beautifies itself and its tenants believe they are able to master it, down comes Our scourge upon it, by night or in broad day, laying it waste, even though it blossomed but yesterday. Thus We make plain Our revelations to thoughtful people. (1)

Thus the necessity to determine the limits which man must observe in his attempts to change himself and to define the required restrictions of the applications of biotechnological techniques to mankind becomes evident. These restrictions guarantee that only what serves human nature, as God wants it to be, is allowed.

Perhaps this initial study of the technology of reproduction gives the impression that such techniques are prohibited in Islam, because they clash with some of its legislative sources. Yet, it should be made clear that there is quite a possibility that when sufficient time is devoted to scrutinize the nature and effects of the new technologies it will be discovered that some of them do serve some legitimate interests, once conditions are set to guarantee that there is no conflict between the applications of such

methods and any Islamic texts where the meaning is quite well-defined.

It is my belief that such a study is badly needed in this age in which scientific findings are progressing with a staggering speed. Common sense calls on us not to wait until man is too fascinated with these biotechnological advances and starts to use them wantonly without consideration of the religious rules that pertain to them—all because of our failure to act and make these rules known to one and all.

On the other hand I believe it is not right for us to pronounce a judgement concerning these scientific methods before we fully grasp their implications, whether useful or harmful to human life. There is nothing easier than to claim that every innovation in medicine and biology is prohibited just because it goes against mainstream of traditional human thought. The real challenge lies in comprehending these new methods thoroughly and then testing them against the sources of Islamic Law, which are faultless. As the Great Legislator urges us to uncover the secrets of His creation--“Say: ‘Roam the earth and discover how God originated Creation’” (Al-Ankabut [The Spider]), --He demands from us, by implication, to find rules for them according to the benefit and harm they are likely to yield and to authentic texts and the general aims of Islamic jurisprudence.

Let no man think that the process of exploring our legislative sources ends with a ruling (fatwa) pronounced here or there and expressed in few lines. The outcome of such exploration can be valid only if it is based on an objective scholarly system which, rather than yielding to emotion, faces the shocks of the future with reflection and deliberation.

The first step in such an undertaking is cooperation between specialists in medicine, biology, fiqh and law in the form of exchanging information and holding discussions. One judges things on the basis of how he understands them. Only after fiqh scholars fully grasp the dimensions of man's biological future, they can turn to the task of setting rulings for the new scientific techniques according to the approved methods of Islamic legislation.

I would like to point out here that serious and fruitful efforts in legislating for medical and biological innovations call on us, after fully observing the definite texts on every subject they cover, to come up with our independent judgement rather than adopt an established one and fully commit ourselves to the decisions of old scholars. As they made independent judgements suitable to their time, we have the right to do the same, as long as our judgement, like theirs, is based on the original

sources of Islamic legislation.

This by no means implies that we should not be guided by their methods of arriving at independent judgements. In fact we should, so that our decision will not be affected by our personal sentiments. It is expected that, although we observe these restrictions, the judgement of a traditionalist will be different from that of an innovative scholar. Unlike the former, the latter makes his independent judgement, the result of hard and diligent work, only after he comprehends these innovations and fully understands their benefit and harm. Every new event requires new fiqh, based on the original sources of Islamic Law, the Holy Quran and the Prophet's tradition, for fiqh judgements, which are merely opinions and interpretations of these original sources, may change with the passage of time. The sources themselves are the only thing that does not change.

In addition to the difficulties faced by creative fiqh scholars when they stumble against traditional views, they have to contend with practical problems which consume much of their time and effort. I am referring to their attempt to relate certain fiqh details which concern man's life in general and medicine in particular to fundamental rules that can serve as a guiding light for them in their effort to reach a judgement concerning modern scientific discoveries. The emphasis on the necessity to give a scholar sufficient freedom and security to be creative does not imply that we are urging him to support every new scientific idea that glitters on the surface: "for all these are but the fleeting comforts of this life. It is the life to come that God reserves for those who fear Him." (Al-Zukhruf [Ornaments of Gold], 35) It rather means freeing him from conservative, traditionalist inclinations which stand against our formulating judgements that suit our time, for which we have to be committed only to those inexhaustible sources of legislation, namely the Quran and the Sunna.

Therefore hold fast to that which is revealed to you: you are on the right path. It is an admonition to you and to your people. You shall be questioned all. (Al-Zukhruf, 43-44)

This matter touches on permitting what is prohibited and vice versa without considering what God has revealed to His Prophet, and therefore it requires our time, deliberation, careful study and avoiding generalities which may drag us to transgression.

Do not falsely declare: 'This is lawful and this is forbidden,' in order to invent a falsehood about God. Those who invent falsehoods about God shall never fare well. Brief is their enjoyment of this life, and grievous the

punishment that awaits them. (Al-Nahl [The Bee], 116-117)

Last of all, I would like to explain that the purpose of this paper is not to advance a definite judgment concerning those activities which influence man's biological nature. It is still too soon for such a thing, which needs so many years for full understanding of those activities and such a great effort to assimilate them and examine them carefully. All what I aim at is, on the one hand, to express my point of view on how Islamic Law can regulate the new achievements of medicine and biology, and, on the other, to stress that any failure on the part of fiqh scholars to deal with new situations is not due to inadequacy in the sources of legislation in Islam. It is rather due to two reasons. The first concerns the scholar's way of thinking. Most often, he is conservative and inclined to follow his predecessors, who did not live long enough to witness the conflicts of our age and subsequent ages. The second relates to the fact that the social circumstances of the scholar hinder his creativity, which, to mature and yield the desired results, needs time, effort and security which are probably beyond his reach under these circumstances.

We are, however, full of hope that we will be able, at this time when certain Muslim countries such as Kuwait are patronizing scholarly progress within the framework of our spiritual sources, to have fiqh scholars who specialize in the various sciences and enjoy an environment which promotes their creativity.

This would be no more than following the same encyclopedic approach established by the early pioneers in the heyday of Islam, such as Al-Razi and Ibn Sina (Avicenna), in the fields of medicine, chemistry and philosophy, and Ibn Al-Haitham, who specialized in mathematics, astronomy and medicine.

We have a great example in Ibn Al-Nafis, whose works are regarded as masterpieces of his age. They dealt with a great variety of subjects, such as medicine, biology, philosophy, sources of the Prophet's tradition, and fiqh.

When one refers to one of Ibn Al-Nafis's books, as *Fadhel Ibn Nateq* or *The Kamili Dissertation on the Prophet's Biography*, he finds that the author discusses subjects which are considered within the domain of future forecasts and also takes a philosophical approach to discuss the future of humanity. He even refers in one of his chapters to the technique of subjective, or automatic, multiplication. Although this reference can only be taken as a type of science fiction, it reveals that the author has

pondered the possibility of non-sexual procreation, which is what scientists today are trying to achieve.

Ibn Al-Nafis points out in the *Kamili Dissertation* that the bases of faith can be arrived through scientific discoveries, and therefore, he finds no contradiction between science and religion. What is especially relevant to our subject is that Ibn Al-Nafis--who is considered by Al-Subki, in the latter's book on major Shafi'i scholars, as one of those who never accepted the views of anyone, whether in medicine or fiqh, without subjecting them to careful examination.

The papers submitted to The Second Conference of Islamic Medicine show that Ibn Al-Nafis did not hesitate to disagree with his medical teachers, such as Ibn Sina (see in particular Dr. Abu Shadi Al-Robi's valuable paper read at the conference).



## Note

(1) Yunus (Jonah), 24.

The interpretation of the verse advanced here, however, is questionable. The assumed mastery is not usually interpreted as a mastery of human nature in particular. Interpreters read this as an indication that life on this earth will come to an end when God orders Doomsday. This will happen after civilizations are deep-rooted and greatly advanced. The same is true of plants in a land whose owners take their ability to harvest it for granted, but it might be exposed to fire or storms that completely destroy it in accordance with God's Will, or storms that completely destroy it in accordance with God's Will.

[Muhammad Al -Ashqar's Note]

## HOW LEGITIMATE IS CONTROL OF HEREDITY FACTORS

Abd Al-Sattar Abu Ghudda, Ph.D.

### **Preliminary: Heredity In Medicine and in the Fiqh Heritage**

Although writings about heredity are not abundant, it was not ignored by old masters, whether physicians, fiqh scholars or those who wrote on closely related subjects. There is a reference to heredity in a Prophet's tradition related by both Al-Bukhari and Muslim, in which the Prophet says to a man who finds it strange that his son does not resemble him but resembles instead one of his grandfathers: "Perhaps your son revealed a trait." This tradition was a stimulus to those writers who dealt with heredity. Their contribution, however, ends with the recognition of heredity traits, and their ambition does not go as far as to contemplate the possibility of controlling it. In this latter field, modern medicine has made significant progress, which has allowed sex selection, control of traits, mutation and substitution. In some of these areas, the desired results have already been reached, while in others they are expected to be reached in the near future or are at least considered to be actual possibilities, as specialists claim.

There is an obvious need to determine the Islamic position on the types of sex control that are now in practice or are expected to be quite soon. Physicians, who are the specialists in this field, have performed the task required before a judgment can be made, which is to make a presentation and give details that explain these scientific achievements, in order to make it easier for us to understand them and know the procedures--as well as the hopes, benefits and risk--involved.

If a definition of heredity is required before discussing any action or treatment related to it, or determining the legitimacy of such actions, we can say that heredity is "the transmission of traits from parents and grandparents to offspring, and it involves, in addition to characteristics, diseases that can be transmitted from parents to children." (1)

Before concluding this preliminary account, it should be pointed out

that acquiring knowledge of this field and its findings, exploring the form and essence of man, and recognizing how the great universe is enclosed within his limited sphere--all this falls within the response to God's invitation to introspection and recognition of the marvels of the human form. Through such introspection one learns a great lesson: "... and in yourselves; Can you not see?" (Al-Thariyat [The Winds], 21) The lesson in turn is followed by contemplation of God's creation, which leads to belief in the Creator and to a stronger conviction of His Power and Wisdom and His being the one-and-only deity.

In the studies which relate to the nature of science a distinction can be made between the useful and the harmful, but this is only in order to discard certain sciences which are based on slighting the human mind or challenging his instinctive faith in God. On the other hand, the type of science which, in addition to its practical usefulness, serves as a means for man to contemplate the universe and marvel at its creation is a requirement and an obligation.

### **Progeny Protection as One of the Purposes of Islamic Law**

Questions of heredity gain importance because they are closely related to one of the purposes of Islamic Law, which is the protection of progeny and sustenance of lineage, as this is one of the five general areas which Islamic legislation aims to safeguard. These are religion, life mind, offspring and property. To properly guard and protect them, all kinds of rules have been stipulated, some of which, being "necessities", must be observed, while others, "needs", come next in importance. There is also a third group: "complements and embellishments". All these serve as a strong wall which surrounds the five general areas, including offspring, and which is supplied by an early warning system and by protective means to keep them from harm.

The space allowed here does not permit more than this reference to the extreme care given by Islamic Law to everything that protects man and his assets and further honours the human race, which is favoured more than many of God's creatures.

Such good care is taken by Islamic law in order to stress the duty of preserving man's health and the distinction with which it is favoured, of careful consideration before taking any step that might affect this basic aspect of man's life, and of abiding by the normal methods, which are inherent in human nature, in seeking the sound and goodly offspring that

are the gift of God. It was He Who created you from a single being. From that being He created his spouse, so that he might find comfort in her. And when he had lain with her, she conceived, and for a time her burden was light. She carried it with ease, but when it grew heavy, they both prayed to God their Lord: 'Grant us a goodly child and we will be truly thankful.' (Al-A'raf [The Heights], 189)

This verse and others similar to it indicate clearly that marriage is the safe way, which God has inspired to his creature, for the survival of mankind. It is the only way in which comfort, love and compassion are realized. Abandoning this way exposes the basic general area, the protection of progeny and sustenance of lineage, to violent shakes which would uproot it. With it go important institutions upon which the survival and happiness of human society are based, such as the paternal and maternal relations with all their association, the regulations of support and inheritance, and the system of mutual responsibility within the family, which is regulated by the personal statutes.

### **Types of Control of Heredity Factors**

The types under discussion here are three: (1) cloning, which is the production of human duplicates through non-sexual methods; (2) the combination of certain traits and characteristics in a certain being by controlling its genes; and (3) the selection of creatures of a certain sex by allowing only embryos of that sex to survive. These types, however, are not the only possibilities of control. It is better, therefore, to classify them into different categories according to their purposes, whether they are preventive, therapeutic or other. All these types have been introduced as a result of progress in genetics and the discovery of the genetic code.

### **Heredity and Therapeutic Purposes**

It has already been mentioned that God's Law includes special statutes to protect progeny against whatever endangers their safety or causes them serious harm. These statutes include two types of care. One is preventive, providing for means to avoid or lessen any possible risks. The other is therapeutic and is called for in the event of sickness or the threat of destruction. This type is covered by texts dealing with cure and treatment for ailments and diseases by means that include nothing prohibited.

In the case of preventive measures, the door is wide open. Man is free to do whatever is likely to protect him from harm, whether it is congenital or

incidental, affecting his natural, sound condition. Prevention and caution are an obligation that should be pursued in any healthy method devoid of suspicious ingredients. The Islamic texts on this are many, but I will cite only three examples which are closely related to human reproduction and which explicitly urge us to do everything likely to start safeguarding our offspring from the first step in the process of heredity, which is marriage, where two parties unite and beget children.

The first example is urging the two parties to be selective when choosing their mates. It is the husband who is usually addressed because he is the party that proposes and expresses desire of the marriage. In a tradition transmitted by many, though not very reliable, sources, the Prophet says: "Choose for your sperms, and marry your equals, and give them [your daughters] in marriage." (2) In a version quoted by Ibn 'Adi and Ibn 'Asaker, he adds, "because women give birth to children who resemble the women's brothers and sisters." Al-Baihaqi lists this version: "People are like metals, and blood can tell. Bad manners are the same as a base strain." The version quoted by Al-Dailami says, "Marry from good households, because blood can tell," and the one quoted by Abu Musa Al-Madini says, "Be careful in what abode you deposit your child, for blood can tell."

The second example concerns avoidance of the marriage of relatives, as it weakens the stock. [The Second Muslim Caliph] Omar Ibn Al-Khattab is quoted as having told Al-Sa'ib family, "You are thinning down, so marry strangers." A tradition, whose authenticity is not unanimous, says, "Marry strangers and you will not thin down." This concept was familiar to Arabs and repeatedly expressed in Arabic poetry. One poet says, "Bilal was not disgraced by his mother;/his uncles on his father's and mother's side did not unite in marriage." Another says, "I chose her, being a stranger, for my offspring, and she bore a child with a healthy body, marvelous as a full moon."<sup>(5)</sup> On the hazards of marrying a relative, a third poet says:

There is 'Obaid who mated with Mai.  
I wish he gave her a son;  
She would have born a thin, sickly child.

The third example deals with avoiding infections and hereditary diseases, particularly when one intends to marry, unless diseases which children are likely to inherit are cured before the marriage. A verified tradition says, "No sick person should approach a healthy one."<sup>(6)</sup> Another says, "Avoid infections, bad omens, the fatally diseased, and jaundice, and flee from a leper as you flee from a lion."<sup>(7)</sup>

### **The Significance of the Purpose of Genetic Mutation**

An Islamic judgment on the procedures or actions in the field of genetics differs according to the purpose they aim to serve. Evaluation of interests and disadvantages is the basis for evaluating the end here. It is an evaluation urged by Islam, on the basis of the assertion made by scholars of the sources of Islamic Law that there is seldom a thing of interest or benefit without some inherent disadvantage affecting one's religion, body or property. Judgment, however, is made on the basis of predominance, that is when the benefit is greater than the harm, [the thing is sanctioned] on the basis of accepting the lesser of two evils to avoid the greater.

### **Considering the Soundness of the Means**

Not only the end should be legitimate, but it should also be taken into consideration that the means is also permissible and likely to spare someone the risks of heredity. To seek what is useful is something we are ordered to do in many Islamic texts, such as the Prophet's tradition: "Hold to what is of benefit to you, seek God's support, and do not be helpless...."

It is clear that Islam's concern to combine noble ends with noble means stems from regarding God's commandments as including both mental and physical actions and judging means and procedures on the same basis as intentions and purposes. The idea of a good end justifying a corrupt means is unacceptable in Islam. Worship and devotion include both intention and action. This does not mean that every procedure should be devoid of all risks, but rather that the interest served should be basic, that the resulting benefit should be greater than the undesirable results and that the means to reach the end should in itself be lawful, regardless of the purpose it is supposed to serve.

This makes it clear that desire for offspring, sexual desire, frivolity and corruption can on no account be regarded as legitimate ends. It should be noted here that such ends characterize most experiments and procedures in this field, as they are undertaken in environments that pay no attention to religious permission and prohibition.

From the above, we can conclude that there are guidelines that should be observed in any control aimed at in the field of heredity. Perhaps the most important is avoidance of anything that might affect human nature, such as procedures which add to or reduce the original form with which man was created with the pretext of beautification or any other

illegitimate excuse. Such a change is described in Islamic texts as a response to the devil's instruction: "I shall order them to tamper with God's creation." (Al-Nisaa' [Women], 119) This does not include things that aim to spare a human being certain harm or certain congenital deficiency which makes him different from other human beings. In other words, it does not include anything that is done for prevention or as treatment.

Warning should also be made against changing the inclinations inherent in human nature, with their potential of good and evil, being susceptible to good, as well as corrupting, influence. This means the condemnation of any tampering with human nature in any way other than legitimate methods of correction. Such tampering would deprive man of his nature, in which inclinations are in a state of equilibrium, and turn him into a coward and servile, or a wayward and rebellious, creature.

### **Cloning**

Although specialists have offered a comprehensive account on this subject in the papers submitted to this seminar, still a brief definition would help to establish a connection between the method and Islam's position concerning it.

Through cloning, specialists are attempting to produce a living cell or molecule which can multiply without fertilization and without any addition to or reduction of the genetic content.

When this method is applied in the field of animals or plants, its purpose is increasing production of what God has placed under man's disposal and an extension of its exploitation, without any torture or frivolous mutation of creation. Some of these methods were familiar at the time Islamic legislation was revealed and were included under a rule which sanctions them on the basis that administration of animals and plants is administration of property in a way that increases and improves it. God has given man the gift of horses and mules, although the latter are a hybrid breed resulting from a mixture of species. Muslims are also encouraged to use male animals of the best pedigrees in mating and producing choice stocks. There is no creation involved in such mating, which is merely a procedure followed for material gain, and its results are willed by God. The whole universe is placed under man's disposal, and God guides him to exploit it and enjoy its yields.

But in the case of man, lineage, one of the five areas we are urged to safeguard, is one of the essential methods of regulation which allow us to escape unlimited, uncontrollable risks.

The danger of looking at man's reproduction as a commodity for investment is evident. So is the danger of tampering with the firm relationship which God has placed in marriage and which results in the begetting of children and protects their geneological identity.

To apply cloning to man is nothing but obscuring lineage and severing sexual multiplication, which God has made the basis of all types of kinship. Prohibition has included many forms of obscuring or viciating lineage such as:

(1) Denial of established descent, whether by the descendant himself when he has no reason to suspect it and his denial is an intentional falsehood of the type known in Pre-Islamic ages as reprobation, or by someone else, which calls for the punishment of false accusation of adultery, one of the punishments stipulated in Islamic Law:

Those who accuse chaste women (of adultery), and cannot produce four witnesses shall be given eighty lashes. No testimony of theirs shall ever be admissible, for they are great transgressors...." (Al-Nur [Light], 4)

(2) The failure of a person to look after those he has to support. In a tradition related by Muslim in his authentic Collection, the Prophet says, "It is a grave sin to deny sustenance to those you should support." A version related by Ahmad says, "It is a sufficient sin for a man to fail those he must support."

(3) Adoption, which, instead of basing lineage on legitimate facts, subjects it to claims and desires: "Nor [does he regard] your adopted sons as your sons. These are mere words you utter with your mouths..." (Al-Ahzab [The Confederate Tribes], 4)

(4) Confusion of lineage, whether through adultery--"You shall not commit adultery, for it is foul and indecent." (Al-Isra' [The Night Journey], 32) --or through marrying a woman who is a divorcee or a widow who is still in her waiting period. The Prophet, in a tradition related by Abu Dawood and Al-Tirmithi, says, "No person who believes in God and Resurrection shall water with his semen what someone else has planted," which means to lie (marry) with a woman pregnant with somebody else's child.

(5) Everything that might lead to the severing or reduction of progeny, such as castration, monastic life, and any kind of homosexuality which prevent one from enjoying what God has allowed him to enjoy.

In addition to these should be added the injunction to honour mankind, at whose service God has placed the whole universe, by keeping it above



anything demeaning to it.

It is evident then that cloning, when practised on the human race, is prohibited, and so are all attempts and experiments in this field, except when the end is treatment and cure.

### **Substitution**

Perhaps this word describes adeptly the experiments being made in the field of genetics to introduce substitutes of man's original traits and characteristics, which he would retain unless they are interfered with. It is a substitution of what is inferior to what is better, although the purpose seems to be the contrary.

As experts have defined it, substitution exploits D.N.A. properties, particularly that of fusion when a molecule is cut, allowing the substitution of genetic traits through complex processes, which would not be successful without those properties. On the basis of what we have mentioned earlier of the necessity to take the end into consideration, judgment of such procedures differs with the intended purpose. If substitution serves as cure or treatment of a hereditary disease or a deficiency in quality or quantity which deviates from the norm, then it falls within the category of legitimate actions, and is permissible or even required, being of the nature of seeking treatment, urged by Islamic Law, which calls for repairing damages, protection from corruption and seeking and retaining every useful thing.

But what can be the Islamic attitude if the purpose is, or the means leads to, mutation of God's creation or changing human nature for frivolous or corrupt reasons? This might be achieved by seeking an extreme, such as seeking excessive gentility and mild temper, to make man as good as an angel; tampering with the natural equilibrium of human inclinations and opting for helplessness, cowardice and involuntary obedience; or indulging in evil tendencies which turn man into a creature as lowly as demons and evil spirits. All these would be violations of man's nature as created by God, which has equal potential of good and evil and remains so until exposed to an influence: " ... the upright nature with which God has endowed man. God's creation cannot be changed." (Al-Rum [The Romans], 30)

There is no doubt that substitution involves changing human nature, which is prohibited in Islam. God has made unlawful anything that influences true human nature, whether with controlled material means like inebriating or drugging a person or forcing him to do something against his will, or with other, special means such as employed by magicians,

conjurers, evil-eyed enviers, spreaders of evil rumours, evil promoters and those who frustrate good deeds by exploiting wild desires, evident recklessness, carelessness and naivety. All kinds of negative, corrupting mental and moral influences are prohibited. Not less dangerous is the effect on man of those laboratory processes and medical procedures. All equally follow the devil's instructions which promote actions that cause such changes. God has associated means and causes. Whenever a cause-and-effect relationship exists, judgment covers the causes as well as the actions themselves.

### **Islamic Stipulations on the Mutation of Creation**

These stipulations are given in One Quranic text and two traditions, all of which are explicit in asserting that any mutation of God's creation is a response to the devil's orders which aim at seducing people and leading them astray. The Quranic verses say:

...they pray to a rebellious Satan. But god has laid His curse on Satan, for he had said: I shall entice a number of Your servants and lead them astray. I shall arouse in them vain desires and order them to slit the ears of cattle. I shall order them to tamper with God's creation.' Indeed, he who chooses Satan rather than God for his protector ruins himself beyond redemption. (Al-Nisaa' [Women], 117-119)

These Quranic verses indicate that tampering with God's creation by slitting the ears of cattle or by plucking the eyes of creatures is prohibited and is prompted by the devil.

The first of the two traditions is narrated by 'Ayyadh Al-Mashaji'i, who quotes the Prophet Peace be upon Him as saying in a Divine (*qudsi*) tradition, in which He (PBUH) serves as God's spokesman:

I have created all My servants as true believers. Then devils came to them and led them away from their religion, prohibiting for them what I have allowed them, instructing them to claim partners to Me that I have never recognized, and ordering them to tamper with My creation. (B)

The other tradition is narrated by Ibn Mas'oud. In it the prophet Peace be upon Him says,

God's damnation is to women who tattoo and those who ask to be tattooed, women who pluck their eye brows and those who ask for their brows to be plucked off their faces, and women who indent their teeth for beauty--mutators of God's creation. (9)

A group of interpreters, including Ibn Mas'oud and Al-Hasan Al-Basri,

believe that it is tattooing and similar actions that aim at enhancing beauty that are meant by mutation. Tattooing is making cuts in the skin with a needle and then filling them with kohl or grease vapour to turn green. Similar to tattooing is plucking eye brows and tooth indentation, which is carried out by older women to look younger.

The reason for prohibiting these things is that they tamper with God's creation, as maintained by Ibn Mas'oud, whose interpretation is considered the most valid by Al-Qurtibi, who finds it more acceptable than those who try to force a meaning and maintain that the reason for prohibition is that these actions constitute fraud. Moreover, such actions are still included in what the verse refers to as mutation, as it is interpreted by some to mean what has happened to some creatures, which were created to serve man but were idolized in accordance with Satan's instructions. Prohibition, however, only covers permanent changes, while temporary changes, such as applying kohl and makeup, are permissible.

Although branding animals with hot metal on any part of their bodies other than the face is excepted from the rule of prohibition, scholars differ over the permissibility of animal castration. Still, they all agree that human castration is strictly forbidden, because it constitutes a mutation. The same, according to Omar Ibn Abd Al-Barr, applies to the amputation of any part of the human body, unless that be a legitimate punishment.

Imam Al-Tabari points out that this tradition is an evidence that "a woman is prohibited to mutate any part of herself as God has created her, whether by addition or reduction." Included in this are changes made to enhance beauty, either to please a husband or someone else and whether it is in the form of indenting or parting her teeth, cutting off an extra tooth with which she was born, or cutting down her teeth because they are long. The devil promised to order people "to tamper with Your creation." (Al-Nisaa', 119) All these things are sins encouraged by the devil.

Citing Al-Tabari, 'Iyadh says that "it is unlawful for a person created with an extra finger or organ to cut it or pluck it-off, because it would be a mutation of God's creation, unless it causes him pain, in which case it is lawful to cut it off, as Al-Tabari [and others] say." (11)

## **Selection**

Probably this word conveys the meaning of control after the sex of a fetus is determined, because it is a process of selecting one sex rather than the other.

If this control is done through lawful means, it is as allowable as prayers for a child of a certain sex: It is established that prayer for something forbidden is itself forbidden. Zakariya, Peace be upon him, prayed God for a son to be his heir and successor as a prophet. Scholars specialised in fiqh and Quranic commentary cite [without censoring] examples they witnessed of what means people used to follow in the hope of getting what they desired, regardless of how useful these means are.

Efforts like these, when made on the individual level, have nothing wrong with them. Nor should we imagine that there is here a contradiction with restricting the knowledge of what wombs contain to God, as one of the five things the knowledge of which He keeps to Himself. God's knowledge is not acquired by a specific means, and it does not come after ignorance. Nor is it in the nature of assumption and uncertainty as people's knowledge is. Moreover, the verse concerning this knowledge is meant as a warning to seers and fortune tellers, indicating the risk of claiming that theirs is a certain, inspired knowledge. If prediction is in the form of a habit or arrived at through specific means, then it is not denied by God. As Al-Qurtubi, the eminent commentator on the Quran, says, "Experiments might differ, habits might be broken, and God alone retains His knowledge...." (12)

Another doubt might arise concerning opposition to God's Will and, as it has been claimed, setting obstacles against it. This is a curious claim, because man can only find out what God intends to happen after it does happen. He has His Will, and nothing can stand against it. Such is the essence of true belief in fate and destiny. Previous knowledge of what is going to happen is God's alone, and fate is included in this. What does happen, regardless of the circumstances that led to its happening or prevented the occurrence of something else, is what has been destined to happen, whether we acquire knowledge of its happening directly by witnessing it or after certain unfamiliar methods, different from normal developments, are resorted to, as the things done to guard against evil or bring good omen. Genetic laws after all are universal systems with which God has endowed His creatures. He can lift or stop them at any time He chooses, whether this lifting is done through a forbidden or a lawful act. It is what Muslims feel inside them as Divine instruction and as a power deterring them from disobedience, rather than compulsory deterrence in the form of miracles or imminent punishment, which keeps them from committing what is prohibited to them.

Divine Will is of two types. The first is a universal will that is realized without the need for the commission or omission of any act by any person.

God provides the necessary means for that realization. The other is a legislative type, stipulated by orders and warnings expressed in the Holy texts. This type is realized when the orders and warnings are heeded and suspended when they are disobeyed or neglected, because it is conditional, being the subject of instruction and commandment.

Ibn Taimiyah is amongst the scholars who explained the difference between the two types and explains the confusion resulting from failure to make the distinction. A valid example is the question of pregnancy control through coitus interruptus. A tradition narrated by Jaber says that a man approached the Prophet, Peace be upon him, saying, "I have a slave girl who acts as our servant and our palm contractor. I sleep with her, but I do not like her to get pregnant." The Prophet said, "Apply coitus interruptus if you will. She will have what is destined for her."<sup>(13)</sup>

It is following the West, where religious prohibition and permission are not taken into consideration, which hinders us from dealing with such matters at the outset, before they spread, to determine and welcome what is clearly lawful, and warn against the avoid what is clearly forbidden. There would be some suspicions left, and we can guard against these and keep away from them to keep our faith pure and safeguard our attributes of virtue and chastity, as we are urged to do in the well-known Prophet's tradition.

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We get our solutions and the means to deal with results and consequences from our Islamic Law, with all the richness it has when its rules are observed and its texts, as well as their rationale, are fully understood. It never falls short of any new development or occurrence. Just to mention an example, the Islamic formulas that cover the issues we are discussing are the rules concerning the confirmation or denial of parenthood; the rules of the oaths confirming and denying an accusation of adultery made by a husband against his wife; the decisive role of birth in determining parenthood in a natural manner, regardless of the circumst-

ances of conception, even if a sperm is injected in, as scholars have mentioned; and the rule that a baby belongs to the marriage bed [on which it is born], "an an adulterer bites the dust," as expressed in an authentic tradition and considered the leading text in formulating this significant group of Islamic stipulations.

## Notes

- (1) Dr. Shawkat Al-Shatti, "A History of Medicine" (Damascus: Damascus University Press), p.110.
- (2) Related by Al-Hakem, Al-Baihaqi and Ibn Majah.
- (3) Related by Ibrahim Al-Harbi in "Gharib Al-Hadith (Unfamiliar Traditions)" and Abu Na'im in "Fadhi Al-Nafaqah (The Merit of Support Money)".
- (4) Al-Zubaidi, "Sharh Al-A Ihya' (Explanation of Living Beings)," 348.
- (5) Al-Khattabi, "Gharib Al-Hadith," 2, 549.
- (6) Related by Al-Bukhari and Muslim.
- (7) Related by Al-Bukhari and Ahmad in Al-Musnad.
- (8) Related by Muslim.
- (9) Also related by Muslim.
- (10) Al-Qurtubi's "Commentary," 5, 391.
- (11) Ibid., 5, 393.
- (12) Ibid., 7, 2.
- (13) Related by Muslim in his collection of authentic traditions.

## DISCUSSION

### **Sheik Badr Al-Mutawalli Abd Al-Baset**

I believe this is the gravest issue raised or to be raised at this conference. I hope therefore we will be patient and give it the time and deliberation it deserves.

I have listened first to the paper submitted by Dr. Maher and then the two papers by the honourable scholars who commented on it, and I have made the following conclusions.

This matter of genetic engineering and recombinant DNA technology has certain beneficial aspects which no Muslim should hesitate to exploit in the interest of humanity. We have heard Dr. Maher say that D.N.A. has been used to produce insulin and that it is possible to exploit its properties in combating certain kinds of cancer. I do not believe any Muslim can claim that such exploitation of this great discovery is prohibited.

When it comes to matters of human conception and reproduction, we have to be extremely careful. We should not be content with merely general rules. Each procedure should be considered separately. Dr. Abd Al-Sattar Abu Ghudda has made things easier for us by pointing out that there are two distinct types of regulations. The first, that which stipulates requirements and determines whether something is lawful or unlawful. The second, the circumstantial, deals, according to fiqh scholars, with the consequences of a certain action. Circumstantial regulation is not man-made; it is rather made by God to deal with a certain situation; that is, it is legislation that covers the consequences of that situation.

Of course concerning the first way of taking advantage of this thing, which is the test tube baby, I find nothing wrong with it, when it means fertilizing a woman's ovum with her husband's sperm and restoring the zygote to her uterus after it has been kept for a while in a test tube. This is a form of treatment. I still say ultimate care should be taken in this matter to avoid any confusion of lineage, because I cannot shake off my distrust of laboratories. If extreme care is taken, I believe it is alright as far as permission or prohibition is concerned. There is nothing unlawful about it;



it is permissible, and might even be recommended, as long as precautions are made. In the case of a test tube baby, all the rules involved in a normal birth apply, including the waiting period [for a widow or a divorcee], the confirmation of parenthood, and other rules.

The second method, in which a woman's ovum is fertilized by her husband and then planted in the womb of another woman, is categorically forbidden as it allows into the womb of a woman the semen of a man other than her husband. But, as Dr. Abd Al-Sattar Abu Ghudda points out, we should also determine circumstantial regulations. Although this procedure is forbidden, if it is nevertheless, followed by people who are indifferent to what is lawful or unlawful, what is the ruling concerning the baby born to those people?

It is an issue that we should not determine in haste. Dr. Sharaf Al-Din has raised the question of motherhood and whether there could be more than one father and one mother. Absolutely not. The question is answered by the Prophet, Peace be upon him, and the problem is solved. He says, "A baby belongs to the marriage bed, and the adulterer bites the dust." (1) The father of a test tube baby then is the owner of the marriage bed, if it has an owner. If not, it is quite clear that the identity of the baby's father is unknown, and it is in the same category as a foundling. Although it is unknown that the baby is the outcome of fertilizing a certain woman's ovum with a certain man's semen, and although such a procedure is forbidden, the Prophet has settled this problem in a definite manner. The child belongs to the marriage bed. If the "surrogate" mother has a husband, the child is called after him. The question might be raised on how is it possible to call a child after a man when it is known that this child is not the outcome of his semen. The answer is that the Legislator scans the situation and gives the poor husband, whose marriage bed has been violated, his chance. He can, if he wants to, take the oath of accusation of adultery, denying that the child is his, and the question is settled: the child is called after his mother and regarded as fatherless. It is not regarded as a foundling.

We can in no way say the child belongs to the man who has produced the sperm. Planting a man's sperm in a womb other than his wife's is unquestionable adultery. The child then is a child of real adultery, and although the identity of his father and mother is known, the Legislator cancels the fatherhood and the bed of the father and regards that relationship invalidated. The child, [if denied by the husband of the mother who gives it birth,] cannot have a father. The real mother is the one who has given birth to the child. "Mothers shall nurse their children."

(Al-Baqarah [The Cow], 233) The word used here (2) means those who give birth and whose blood nourishes the child during nine months of pregnancy. Such a woman is the real mother. The verse does not refer to her as a "surrogate mother." Walida, i.e. mother, literally means the one who gave birth.

The woman who has produced the ovum has nothing to do with the child at all. The relationship is terminated. In no way it is possible to see the child as hers. Otherwise, rich woman, who would like to have as many children as a hen, can have a child every month. She produces a monthly ovum and hires a poor woman to bear the child for her. I believe this makes things quite clear, and therefore I suggest that each case should be discussed on its own.

It has been made clear that this genetic engineering can be exploited in beneficial, ideal ways, with results that are needed by humanity, such as the production of insulin and the prevention and treatment of cancer. Experiments with frogs and any other experiments aiming at the good of the human race are welcome. But to experiment with man, by using a man's semen to fertilize ova which are then planted into the wombs of a number of women, is something we have to stand against. I pray to God to guide us so that we can take resolutions that would prevent such procedures.

#### **Dr. Zakariya Al-Berri**

I would like to back Professor Badr in what he said. I propose the following rule as a summary of his opinion. Everything that may facilitate reproduction for a married couple is acceptable, and everything that may lead to the confusion or obscuring of lineage, whether on the father's or the mother's side, is forbidden. This general rule covers all the cases raised here.

Since we have a case to which the rule of child born as a result of an adultery may apply, I want to add something concerning adultery children. (3) All four fiqh scholars, (4) as well as others, have denied lineage to an adultery child on the basis of the Prophet's tradition on the subject. I believe though that Ibn Taymiyah says such a child is to be called after the adulterer, on the basis that Islamic Law recognizes lineage on the mother's side although she is an adulteress, so the father's lineage should also be recognized. The fact that the child is the result of an illegitimate relationship calls for the punishment of both parents but does not cancel parenthood. This is a point of view I want to bring to your attention, because it makes some sense.

Concerning the question raised by Dr. Ahmad Sharaf Al-Din on the rejection of a suit when parenthood is denied, this is not a purely man-made regulation. (5) It is based on Islamic Law, and devised by leading scholars at Al-Azhar University and Islamic courts at the time. It is justified by a stipulation of the Hanafi School which allows recognition of parenthood in a case where the man lives far in the east and a woman in the far west. They said the husband might be endowed by God with miraculous powers of instant travel for long distances and make other nonsensical claims. On this basis and to deal with cases of this sort, they say a suit of denying fatherhood to a child of a woman who has not met with her husband should be rejected.

If we want to discuss this subject, then some of these stipulations have to be amended. We should say, for example, that a suit by a husband denying fatherhood to a child of a wife he has not met with, or been fertilized by, him should be turned down.

I told Dr. Abd Al-Sattar, concerning his paper, after we had left here, that mutation of God's creation does not include all kinds of change. The mutation meant in the Quranic verse is deformation or mutilation. The text concerning mutation is preceded by "to slit the ears of cattle," (Al-Nisaa' [Women], 119) and this is the forbidden type of mutation. Change that aims at restoring human form to the norm described by God as "a most noble image" (Al-Tin [The Fig], 4) is perfectly alright. More than that, there is nothing wrong at all with change for the purpose of beautification; God Himself "is beautiful and loves beauty." (6) I read the Prophet's tradition concerning "women who pluck eye brows and those who ask for the hair on their faces to be plucked" to mean a prohibition of fraud. I believe I have read such an interpretation by ancient scholars. But if I say to a young woman who has lost all her hair while still in her prime that the Prophet, Peace be upon him, says, "God's damnation is to those who tie to the hair of a woman that of another as a wig, and to the woman who asks for such hair to be tied to hers" (7) --if I say that to her, I would ruin her life. I cannot imagine the Prophet, well-known for his mercy, to mean something of this sort. I am by no means denying the tradition; I am only reading it as a prohibition of fraud. It might be said that the tradition also includes "women who indent their teeth for beauty." I say that fraud is meant here as well. A man wants to see a woman before he proposes, and she indents her teeth and offers him an image of herself different from her real one. (8)

**Dr. Abd Al-Hafez Hilmi**

I am like a man who comes into a courtroom while a serious case is being tried. I see myself as a witness before venerable judges, offering my opinion but making no judgment. It is out of my understanding of the spirit of Islamic Law, which safeguards lineage, that I make this scientific testimony. When a fertilized ovum is deposited within the uterus of another woman, the uterus is a surrogate one. The real mother is the woman who produces the ovum. This is a scientific fact. You make the judgment, but I am bound to make this testimony. The transplanted ovum has all the genetic traits which God, the Most Sublime, has deposited in the uterus that produces it. These traits are carried by the fetus. God knows best, but the owner of the surrogate uterus in my opinion should at best be regarded as a milk mother, because the fetus is nourished by her blood, grows in her womb and her belly. She has rights to claim on him, and let these rights be determined by fiqh scholars. But I repeat that at best she can be regarded as a milk mother, but never as the real, legitimate mother. There is, however, no argument about the father. It is an established fact that an embryo is half sperm and half ovum. (9)

On the question of the transfer of genes from one creature to another, I say if there is anything that should be called mutation of God's creation, this is it. To put the matter very simply, if I do something to myself that makes me three-eyed, this trait would end with my death. All my children, if I have any, would be two-eyed, because no one would inherit the effects of incidents that happen to me. So there is a distinction between heredity and the outside appearance which is the result of heredity. If I am able to change my genes, I would beget three-eyed sons and daughters. This mutation of the genetic code is the question under discussion. Such a mutation of the genetic code is the question under discussion. Such a mutation is transmitted to offspring. So, if there is anything that deserves to be called mutation of God's creation, whether it is legitimate or illegitimate, desired or undesired, this is the real mutation, because it is hereditary.

Several other issues have been raised which I would like to combined into just three points.

Concerning the transfer of genes, this is done from one species of the minute creatures known as bacteria to another. One species for example has the trait of decomposing oil and thus removing oil spots. This trait is copied from one species and introduced into another. In any case, nothing

is invented. The only thing introduced is the combination of these traits in one minute creature. The person who devised this method wanted to get a legal patent, but objections were raised and legal problems ensued.

The second point concerns the transfer of a trait from a low to a higher creature. It has not happened yet. Some children might be unable to digest milk. Experiments have actually been made to transfer the gene which produces the enzyme that digests milk sugar from a virus to a species of bacteria or vice versa, and then through the virus it has been introduced into the cells of the sick child, which have become capable of producing the enzyme. If the child's cells themselves are treated, they can produce the needed enzyme, and this would be a form of self treatment, but this time the transfer would be to a human being.

The last point is the transfer of human genes to lower creatures, such as the insulin producing gene mentioned by Dr. Maher. This is a productive process, in the sense that it has wonderfully good results. It might also be applied in agriculture and so on.

As for non-sexual reproduction, which has been called "cloning," I would like to clarify certain points. Cloning is not a method of multiplication; that is a creature does not produce another, [different creature] by non-sexual means. The produced creature in this method has all the genetic traits of the producing one, which is not what happens in sexual reproduction, where half the traits come from the mother and the other half from the father. In cloning, all the traits come from one parent. If this happens, the traits should all come from the father, so the cloned child would have all excellent traits. (?)

This has moved from the realm of imagination into reality. Twenty frogs were cloned in one experiment, and they were all considered twins of the father, because they were identical copies of his, only younger since they were produced twenty or forty years later. Still, they were exact duplicates like identical twins, which makes the issue very serious. To explain how grave it is, I would like to mention that a suit was actually filed against a British scientist for seven million dollars in damage, because a writer published books in the years 1976-78, making certain claims and naming a person who had farms in Africa, whom he claimed to have undergone an experiment that produced a cloned child. This was a widely publicized case in the West. The deliberation ended with the decision of making tests for the child on the basis of which a verdict could be made. The tests proved that the whole thing was a fabrication and a case of fraud. The writer was pronounced an imposter who made use of the name of an honourable scientist in a false story.

of an honourable scientist in a false story.

What I want to say concerning the case of test tube babies is that in practical application, it is not impossible. Thank you.

**Sheikh Muhmoud Makadi**

A point has been raised. Dr. Zakariya has mentioned the wearing of wigs in the light of the Prophet's tradition. In fact, the opinion of the Maliki School, which we currently follow in Kuwait, finds nothing wrong the wearing wigs, so he can rest assured. (10)

**Dr. Omar Al-Ashqar**

I cite what the Prophet, Peace be upon him, says: "God's damnation is to women who pluck their brows and those who ask for their hair to be plucked off their faces, and women who indent their teeth for beauty--mutators of God's creation." (11) This is a text on the subject, and there is no room for independent judgment when a text is available.

## Notes

- (1) This tradition is authentic; related by Al-Bukhari and Muslim on the authority of Aisha and Abu Hurairah. "(*Sahih Al-Jami' Al-Saghir*)"
- (2) *The Arabic word "walidah,"* which is synonymous with "*umm*" (mother), is derived from the root "*walada*" (to give birth). (Translator's Note)
- (3) An adultery child is a child born to a mother as a result of committing adultery. Its lineage on his mother's side is recognized, as his relationship to her is proved beyond doubt. But on the father's side lineage is not recognized, according to the majority of scholars, even if the adulterer father admits his sin and claims the child to be his, because fatherhood is a blessing, and so it is denied to a sinner who only deserves censure and punishment.  
Isshak Ibn Rahaweih, Ibn Taimiyah, and others say that fatherhood is recognized when adultery does not involve a married woman, on the basis of the material fact established with the act of adultery. As motherhood is granted to the adulteress, so fatherhood is granted to the adulterer, in order that the child's lineage would not be obscured and it would not suffer for a crime it has not committed. No one should suffer for the crime of someone else. Fiqh scholar Ibn Al-Qayyem supports this view and quotes Isshak Ibn Rahaweih as saying that if an adultery child is not born to a marriage bed and claimed by the husband, it is called after the adulterer if the latter claims it. He adds that the Prophet's tradition that "A baby belongs to the marriage bed, and an adulterer bites the dust," applies when conflicting claims are made by a husband and an adulterer. The same opinion is held by Al-Hasan Al-Basri as quoted by Isshak, who cites the story of a man and a woman who committed adultery. A child was born, and the adulterer claimed it. Al-Basri ruled that the adulterer should be whipped and given the child. The same view is advanced by 'Urwah Ibn Al-Zubair and Sulaiman Ibn Yasar, who are quoted as saying, "A child is the son of any man who claims it to be his, having committed adultery with its mother, if the child is not claimed by anyone else." Sulaiman offers as evidence the example of Omar Ibn Al-Khattab, who used to call any pre-Islam children to any Muslims who claim them. One can see that this opinion is based on strong and clear evidence, while the majority of scholars have nothing to support their opinion other than "A baby belongs to

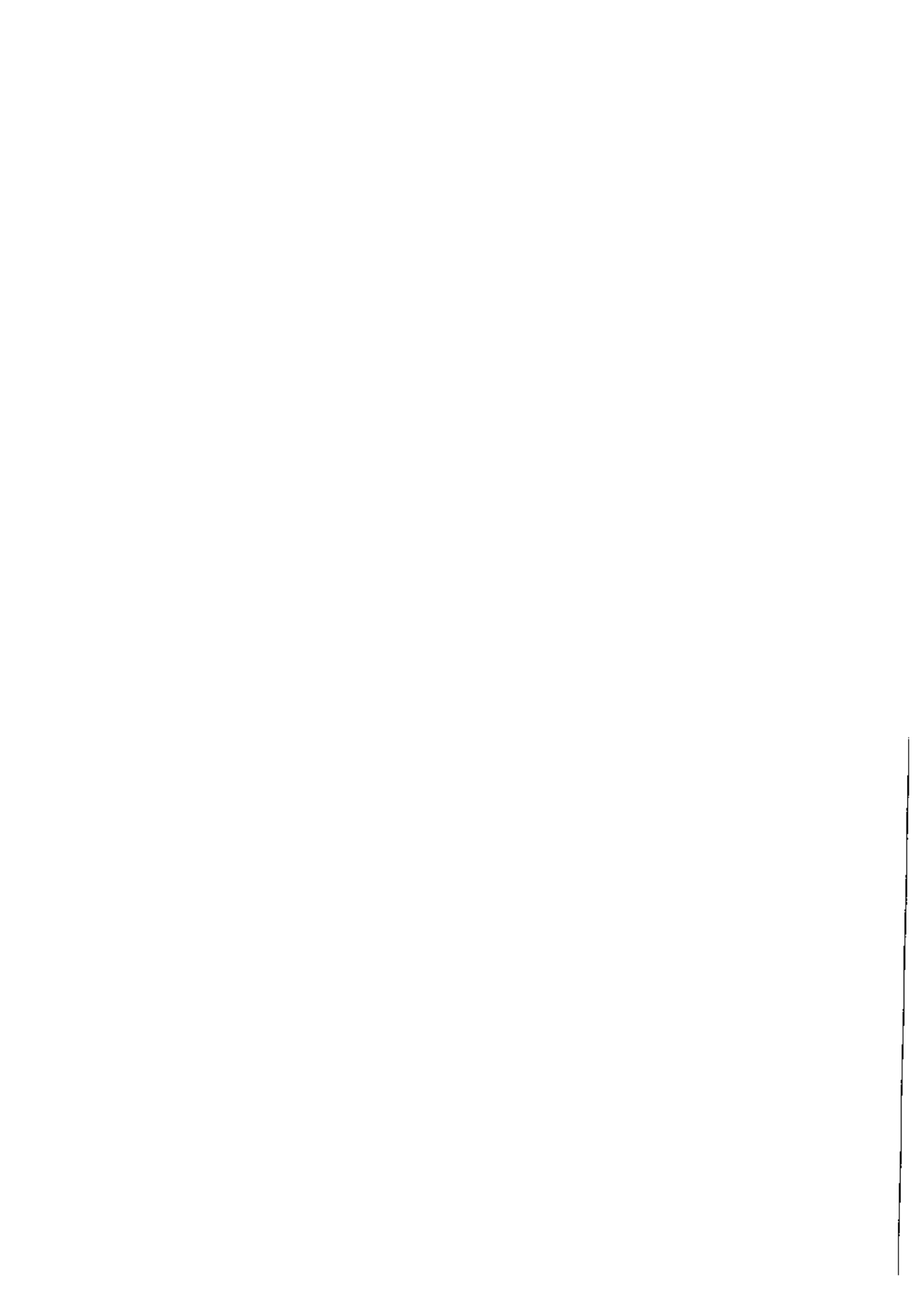
the marriage bed." This opinion was advanced by the founder of this school of thought first. Valid analogy proves it. The father is one of the two people committing adultery. So if lineage on the mother's side is recognized, and the child is called after the mother, it has the right of inherit her, and its kinship to her family is established, in spite of the fact that she has born it through committing adultery, an act which she has shared with the father and they both claim the child to be theirs, why should it not be called after the father, when no one else claims it?

Juraij asked a child whose mother had committed adultery with shepherd, "Who is your father, little boy?" The child replied, "It is the shepherd." It was given the ability to speak by God, so there could be no lie in what it said. (*Zad Al-Ma'ad [Provisions for the Hereafter]*, vol. 4, p.233) Also see *Al-Ikhtiyarat Al-'Ilmiyah (Scholarly Choices)*, p. 165; *Al-Mughni*, vol. 6, p. 266; the story of speakers in the cradle in *Taysir Al-Wusul (Making Arrival Easy)*, vol. 4, p. 75; and *Al-Wasit Fi Ahkam Al-Tarikat Wa Al-Mawarith (The Intermediary to Regulations of Legacies and Inheritance)*, p.281. (Zakariya Al-Berri's Note)

- (4) The four scholars are the founders of the four schools of fiqh, which are called after them. (Translator's note)
- (5) The term "*hukm wadh'i*" is used in two senses here; one means "circumstantial regulation," while the other refers to a "man-made rule." (Translator's note)
- (6) The tradition is related by Muslim and Al-Tirmithi and narrated by Ibn Mas'oud. "*(Sahih Al-Jami' Al-Saghir)*"
- (7) The tradition is unanimously related by Al-Bukhari and Muslim on the authority of Ibn Omar. "*(Sahih Al-Jami' Al-Saghir)*"
- (8) Mustaf Muhammad says in "*Al-Fawakeh Al-Dawani 'Ala Risalat Ibn Abi Zaid Al-Qairawani (Ripe Fruits: on the Dissertation of Ibn Abu Zaid Al-Qairawani)*" that, according to Malik, prohibition for women to tie other hair to theirs is addressed to those who make it a habit when their hair thins, falls, or turns gray to tie to their hair that of other women. In the last case, black hair is tied to the graying hair, so that black becomes the dominant colour, to decieve husbands. (Dr. Zakariya Al-Berri's note).



- (9) The speaker comments here on the Arabic translation of the word "nucleic." Since this comment concern Arabic speakers, it was omitted in translation. (Translator's note)
- (10) According to "*Al-Fawakeh Al-Dawani 'Ala Risalat Ibn Abi Zaid Al-Qairawani*", "the word 'tying' implies that if no tying is involved, i.e. if a woman wears the hair taken from someone else on her head, without tying it to hers, it is permissible, as Judge 'Iyadh says, because in such a case it is similar to braided thread, such as the braids of wool or silk which are worn by women as finery. There is nothing wrong in doing so, and prohibition does not apply in this case, which is regarded as a type of makeup.
- (11) See note (7) above.



### **THIRD SESSION**

The third session was scheduled to be held from five to eight p.m., on Wednesday, 25 May, 1983. It was chaired by Dr. Abd Al-Aziz Kamei and attended by Professor Abdulla Basalamah and Dr. Khaied Al-Mathkour, who acted as secretary.

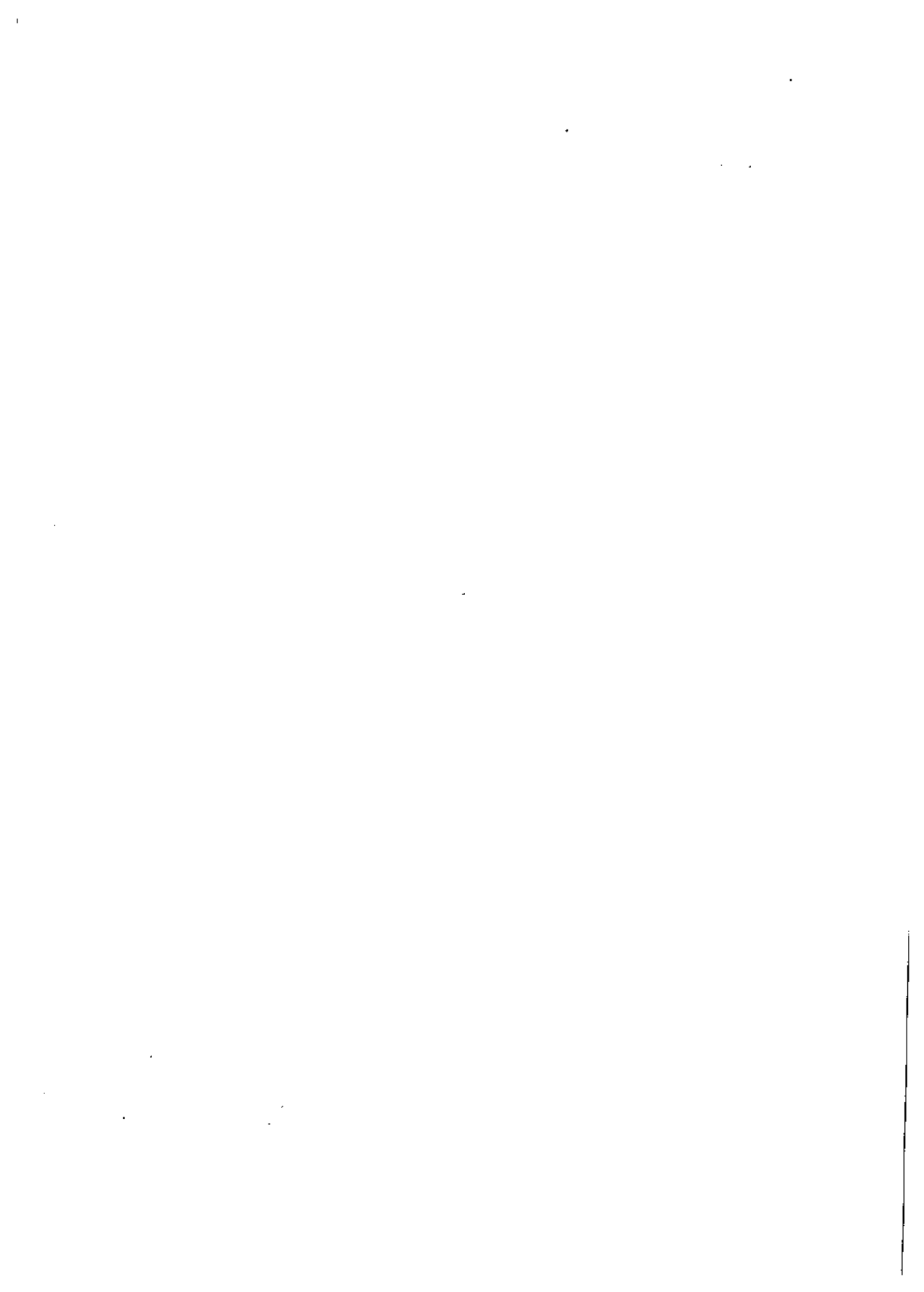
The session opened with the discussion of a paper submitted by Dr. Hassan Hathout on "Surgical Contraception," which pointed out the difference between it and other types of contraception, as well as the risks to the woman who undergoes such surgery, the prospects of reversal of the operation being unguaranteed. Social complications and family risks are inherent in a situation of this sort. Discussion focused first on the medical aspects involved and then turned to the fiqh aspects.

In the same session, Dr. Hassan Hathout gave details of the test tube baby procedure, the chances of success, and the possibilities of cheating using foreign gametes. Certain medical questions were asked. Religious aspects were then discussed. The discussion stressed the necessity of strict accuracy in laboratory procedures and the need for great caution to guard against any confusion of lineage.

The subject of the "surrogate motherhood" was also debated, both from a medical and an Islamic point of view. After pointing out the grounds for prohibiting this procedure, it was agreed that prohibition is the Islamic ruling in this case, and that when this procedure is followed, the child belongs to the woman who bears it and not the one who has produced the ovum.

The session was adjourned at 9:30 p.m.

Editor



## OPENING ADDRESS

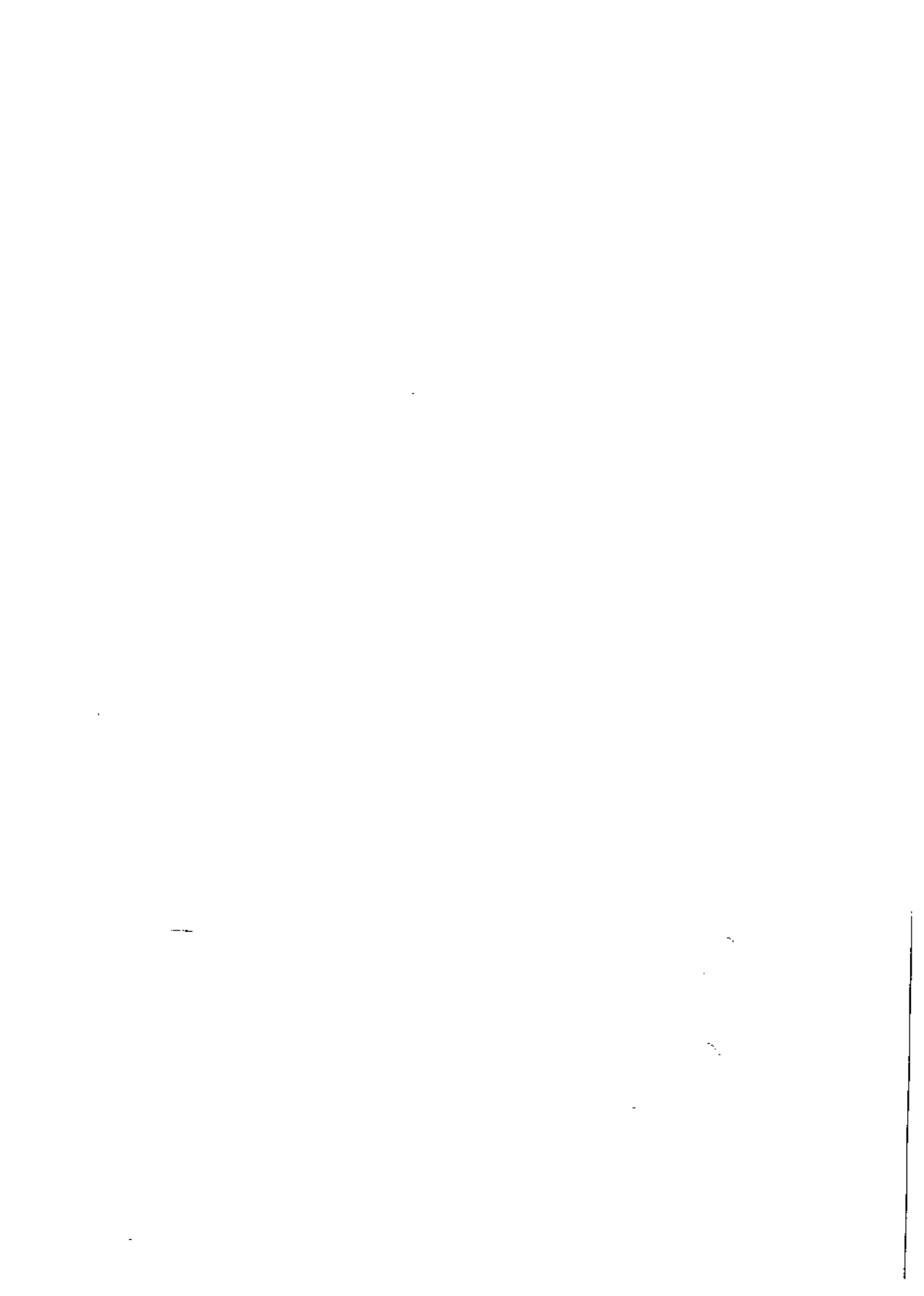
Professor Abd Al-Aziz Kamel, Ph.D.

I hereby open the third session of this seminar, and it gives me pleasure that I am assisted by Professor Abdulla Basalamah in chairing it.

Professor Abd Al-Sattar Abu Ghuddah, Ph.D., will act as secretary, because Dr. Khaled Al-Mathkour has been held up by some business at his college. We hope he will be able to join us later.

We will listen in this session to three papers and a comment. The first paper is on "Abortion in Religion, Medicine, and the Law," the second on "Surgical Contraception," and the third on "Test Tube Babies and the Surrogate Motherhood." All three are by Professor Hassan Hathout. These will be followed with a taped comment by Dr. Muhammad Na'eem Yasin on the subject of "Abortion between Islam and Medicine."

I would like to say an introductory word that aims at organizing our discussion. The first paper, "Abortion in Religion, Medicine, and the Law," deals with three aspects. If the speaker would kindly define the questions to which he is seeking legal or Islamic answers, this can be followed by inquiries addressed to the speaker with the aim of clearing an ambiguity or elaborating a point. In the discussion that follows, when someone makes a well defined comment, I hope whoever replies to it would make his answer well-defined as well. That is he should make it clear whether he is speaking from a religious, medical or legal point of view. This would make the work of our colleagues, who will draft a report, much easier. Although we only have this evening and tomorrow, I do not want to set a time limit for every speaker but, I hope everyone voluntarily limits himself. Comments should not take more than five minutes. The first speaker, Dr. Hassan Hathout, however, can set his own limit, because he is the one to raise the issues to be discussed.



## **CHAPTER TWO**

### **PAPERS ON GYNECOLOGY AND OBSTETRICS**

### **SURGICAL CONTRACEPTION: AN ISLAMIC POINT OF VIEW**

Professor Hassan Hathout

There is nothing in the Quran, Sunna, Consensus of scholars, and Analogy, which are the sources of Islamic legislation, that deals with contraceptive surgery known as sterilization, performed on a majority of women and a minority of men. Such operations are innovations of our contemporary age, and therefore Islamic regulation covering them is the responsibility of our generation.

I would like to point out at the outset that these surgeries are different from castration operations, which were familiar to, and denounced by, our ancestors. Sterilization does not affect sexual desire or sexual performance. It only prevents the ability to have children.

Sterilization is merely a surgical operation. As such it is a generality that can apply to man or to woman and that cannot be pronounced forbidden or permissible except upon application. When appendectomy, for example, is performed by a surgeon to protect a person's life and health, it is not only permissible, but is also an obligation. But when it is done just for the sake of a fee while no necessity calls for it, it is forbidden and constitutes a betrayal of trust.

I am not convinced by the argument that says contraceptive surgery is categorically forbidden because it is a mutation of God's creation. Otherwise all surgical operations—including tonsillectomy, circumcision, and the surgical removal of cancerous tumours—would be equally forbidden.

This so far has been an introduction related to the operation itself. Something should also be said about the surgeon who performs such as

operation. In Islamic Law, a surgeon of this type must be reliable to have sufficient knowledge of, and to observe in his practice, the rules of Islam. If he is deficient in knowledge and/or experience, he would not fit within the frame of Islamic medical practice and is not worthy of being trusted as a person capable of making Islamic decisions and a doctor who is aware of the texts and spirit of Islamic legislation, and is therefore fit to determine medical necessities and to anticipate their consequences.

Such is the ideal Muslim physician. The difference between him and "just any other doctor" has started to acquire special importance within the last decade, as certain practices have been introduced into the medical profession, such as the insemination of women with semen other than that of their husbands, the implanting of embryos in wombs other than those of their mothers, the abortion of fetuses when they are not of the desired sex or when they are undesired altogether, and other practices in a list too long to go through here.

Now that we have cleared these important points, we can discuss sterilization. Sterilization is of two types. The ruling is clear enough when it comes to the first type, which is when it is evident to a physician that another pregnancy by a certain woman is virtually a sentence of death on her, provided that the doctor reaches such a conclusion with a clear Islamic conscience. Technical details, known to specialists, are involved in a case of this sort, and I see no reason to go into them. Among such cases, however, are those women who cannot resort to contraceptive or who have no hope that a proper treatment of some disease will be discovered during the span of their fertile life.

These are cases in which a doctor should perform contraceptive surgery if the woman in question and her husband agree, after listening to the doctor's detailed explanation and advice. Otherwise, the doctor, with clear conscience, resorts to the next best alternative.

The second type is not as critical. It includes family planning, where a husband and his wife are satisfied with the number of children they have and desire no more. These cases are of different shades, some of which are darker than others. Take, for example, the case of woman who has born ten children or more and, nearing forty years of age, i.e. has only a short period of fertility left. She believes (and she is quite right) that bearing new children has special risks, both during pregnancy and at the time of delivery, which she wants to avoid. This is different from the other extreme, vis the case of a young lady of twenty who has born only one or two children and goes to a doctor asking to be sterilized, being under the



influence of a "political, social, economic, and medical" campaign which actively calls for "immediate sterilization at a younger age and fewer children."

A Muslim doctor is exposed in his daily work to the whole wide range of such cases from snow white to pitch black and with all the shades in between. In my opinion, and I see Islamic medicine as a trust and a worship, Islam calls upon a doctor not to reach a final decision before carefully and with insight considering a number of points. If he fails to do so, his decision would be hasty and deficient from an Islamic point of view. These points can be summed up as follows:

1. He should consider each case independently, and should not allow himself to take part in any international or regional sterilization campaign.
2. He should keep in mind that circumstances may change. Every one of us, doctors, has come across cases of female patients who underwent surgical sterilization with full conviction, then circumstances changed either with a change of husband or the death of children. These are truly sad cases.
3. He should not be over-reassuring in telling a patient that an operation to reopen the tubes is certain to succeed. Moreover, tube reopening operations are very expensive, whether performed in developed or underdeveloped countries. This is something that should be made clear to the patient at the very beginning, even if she does not inquire about it.
4. [He should be aware that] the efforts made to improve the results of reversal surgery to reopen tubes that have been surgically obstructed are in themselves an admission of misjudgement in making the original decision of sterilization.
5. He should make it clear to the woman that she may be exposed to physical and psychological complications, if her conviction of sterilization wavers, whether in the immediate present or in the unforeseen future.
6. He should tell his patient that several alternatives, in the form of non-permanent contraceptives that do not require surgery, are available.
7. He should use a style of explanation, when pointing out these things,

which the patient and her husband can fully understand.

8. He should refrain from operating in every case where he personally is not convinced that sterilization is the best, even if the patient takes full responsibility and is ready to pay the fees.

Let me add that I myself have been observing these points in my practice, and I have found that many men and women back out of their request once these points are made clear to them. This is what is called in medicine "informed consent," and it is a medical duty to make it available to patients. I have noticed that I have declined to operate in many cases and have not regretted it, nor have I regretted operating in cases where surgery was necessary.

There is another Islamic aspect which goes beyond individual physicians and individual patients. When efforts are being made around the clock to bring about a demographic change in certain areas of the world, so that non-Muslim minorities turn into majorities and Muslim majorities into minorities, new horizons of thought, which are closely relevant to the question of permission and prohibition, present themselves in the form of exploring present situations and foreseeing future developments.

I have paid a visit to a religiously critical area and have been shocked to find out in records that all sterilized women are Muslim at the same time that the other religious community is instructed to procreate even more.

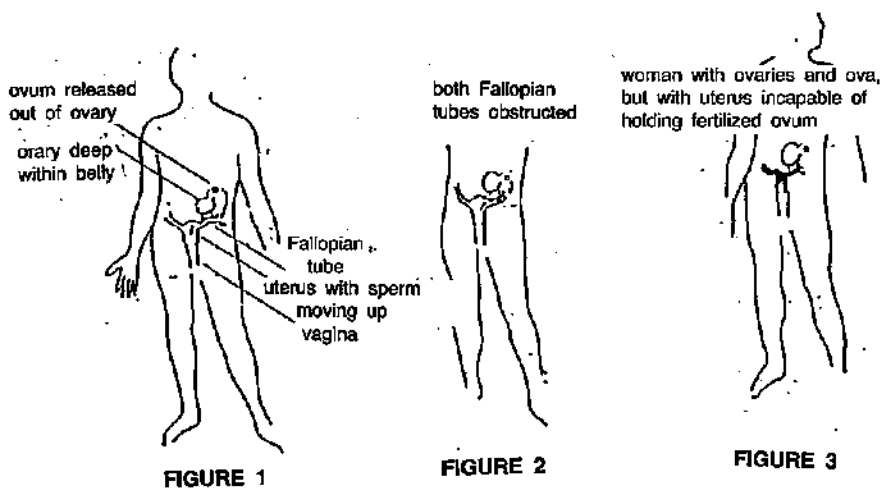
So this is sterilization. It includes permissible cases, though it is a most guarded permission, and overtly unlawful cases. The decision is a serious one. When it is certain that sterilization is the only option, then it has to be done. Otherwise, other options are available, because this procedure destroys a vital life function, perhaps irrevocably though revocation may be needed. What I have offered is the opinion of a Muslim physician, which I expect will be endorsed by every person with Islamic faith.

We have bestowed the Book on those of Our servants whom We have chosen. Some of them do themselves injustice, some follow a middle course, and some take the initiative in good deeds: that is the Supreme Blessing. (Fater [The Creator], 32)

And God always says nothing but the Truth.

# TEST TUBE BABIES AND THE SURROGATE MOTHERHOOD

Professor Hassan Hathout



1. Normal, sound condition. The road is clear for a sperm going up the vagina to unite with an ovum released out of an ovary inside a woman's belly and on its way to the Fallopian tube. If they meet in the tube, they fuse together, like two halves, to make a whole, and continue the trip to the uterus where the zygote is implanted to complete its growth.
2. Both Fallopian tubes are obstructed. The sperm and ovum are fully blocked from each other. Treatment:
  - a. The ovum is sucked out of the ovary and outside the body.
  - b. It is exposed to the husband's semen to allow fusion with a sperm.
  - c. The resulting embryo is implanted into the uterus through its vaginal opening, where the embryo continues to grow.

This is what is called a test tube baby, because its inception takes place in a tube outside the mother's body.

I believe there is nothing wrong with the procedure when the sperm and ovum belong to a husband and his wife.

3. The deficiency is not limited to the Fallopian tubes; the uterus is incapable of bearing a child, because it does not exist altogether, it is solid or atrophied, or it suffers some other deficiency. A treatment for such a situation is now in practice:
  - a. The ovum is sucked out of the ovary and outside the body.
  - b. It is exposed to the husband's semen to allow fusion with a sperm.
  - c. The resulting embryo is implanted into the healthy uterus of another woman, who bears it throughout the period of pregnancy and then delivers it.

In other words, the ovum here belongs to a woman, while the womb that bears and delivers the child belongs to another. That is surrogate motherhood.

In my opinion such a procedure is unlawful.

## DISCUSSION

### Session Chairman

We thank Dr. Hassaan Hathout for this presentation, and, with your approval, I would like to divide the topic into two distinct parts. The first, with which we start, includes the easier issues which, expecting to reach a quick decision on them, we can easily dispatch. I propose that we begin with surgical contraception and then move to test tube babies. We can keep the issue of abortion until later. First we deal with purely medical questions, and then we move to the other aspect, that of Islamic legislation.

### INQUIRIES:

#### Dr. Ahmad Sharaf Al-Din

Dr. Hassan Hathout, would you kindly explain what you mean by saying that contraceptive surgery is neither permissible nor forbidden. Can we not discuss whether it is lawful or not?

#### Dr. Abd Al-Hafez [Hilmi]

Two questions! First, on the subject of surgical contraception, Dr. Hassan Hathout discussed female operations only and said nothing about male surgery, which, as far as I know, is performed for one of two purposes: either to avoid certain hereditary abnormalities or, as a means of contraception, to deal with what is called "population explosion." It is worth mentioning that in the case of male patients, the probability of restoring the spermatic cords to normal is greater.

The second question concerns the test tube baby procedure. I would like to mention that abortion is often involved, because what usually happens is that more than one attempt is made. If one attempt succeeds, the remaining ova are probably discarded. When the fertilized ovum of a successful attempt is deposited into the woman's uterus, Steptoe and Edwards ask, as I have read, for a written consent by the couple to submit to abortion if it is established that the fetus is deformed. We would like Dr. Hassan to kindly go over this point.

### **Dr. Abdulla Basalamah**

With your permission I have a few additions to make concerning this issue. Let us first take surgical contraception, i.e. sterilization. I believe it is of two types.

The first, which is reasonable, is the case called for by necessity, a woman's life being threatened if she gets pregnant. I do not believe this type is the focus of Dr. Hassan's presentation, but rather the type regarded as one of the various methods of contraception, usually for social reasons.

To be more specific, there are several points which I believe should be added to the discussion of test tube babies. First, concerning deformities, the latest statistics, released two weeks ago by the British Royal Academy, indicate that up to the date of filing the report on the subject, there have been 130 test tube babies, and that out of these, one of two twins has some deformity, which is not attributed to the method itself. So the percentage is one out of 130, while the normal percentage of deformity is 1.5 to 2 percent.

Another point that should be taken into consideration takes us back to the subject raised this morning, the burying alive of embryos. In the case of test tube babies the parents have a choice, for after insemination takes place outside the uterus, the physician tells the parents what sex the child will be and asks for their opinion. This is an aspect we have to consider.

One more point is the cryo-preservation (i.e. freezing) of living surplus embryos, for over a year or two, or sometimes even till after the husband is dead. After that, the embryos can still be restored to the womb. I believe an embryo has actually been deposited in its mother's uterus after having been frozen for a period of time.

Another subject is what goes on in the West now, namely surrogate motherhood. A comparison is made between this type of pregnancy and adoption, and the general Western view is that this procedure is more acceptable to a married couple than the process of adoption. I believe we should also discuss this issue.

### **Dr. Ahmad Shawqi Ibrahim**

Concerning the question of whether a fetus is alive, rather than dead, before its fourth month, the Prophet, Peace be upon him, says, "The creation of one of you in the belly of his mother takes forty days, then for a

similar period he is a clot of blood, then again for a similar period he is a morsel." Then, as the Prophet says, an angel is sent to it to breathe spirit into it and is ordered to write four words--etc. (1) From this tradition we can conclude that God, the Most Sublime, endows the fetus with spirit after the fourth month. "They ask you about the Spirit. Say: The Spirit is my Lord's concern. Little indeed is the knowledge given to you." (Al-Israa' [The Night Journey], 85) The question of spirit is related to that of life. A fetus is alive before and after spirit is breathed into it, but life differs after the breathing-in. Now the fetus turns into a human being, which it is not before human spirit is breathed into it. It is only human then in the sense of what it will turn into. Concerning the creation of Adam, God says, "When I have fashioned him and breathed of My spirit into him, kneel down and prostrate yourselves before him." (Al-Hijr, 29, and Sad, 72) The prostration of the angels was linked to the breathing of spirit into Adam, not to fashioning him. So, a fetus is alive even before spirit is breathed into it in its fourth month. Spirit and life are not one and the same thing. Therefore when a person dies, God says, "O serene soul! Return to your Lord, joyful and blessed." (Al-Fajr [The Dawn], 27-28) Life is a question of self rather than spirit. This is a point I wanted to make and I hope Dr. Hassan would comment on it.

#### **Dr. Ahmad Al-Ansari**

There are in fact three points I want to inquire about and find solutions for. The first concerns test tube babies. As a physician in the Department of Thyroid Glands, I am often faced with problems related to this subject. One of these took place three weeks ago. I was with the Dr. Fayzah [Yusuf], and a patient was referred to us after the medical board had decided that the solution for her case is a test tube baby. We referred her papers to officials at the Ministry [of Health], who were kind enough to refer the subject to the Ministry of Waqfs. The answer was that if the physician who would supervise the test tube baby procedure is Muslim, it was alright and nothing would be wrong with it. But the procedure should be rejected if the doctor is non-Muslim. A sterile person is, as it is said, like a drowning person reaching for a straw. The social and psychological implications of sterility are well-known.

There, in Britain or Australia for example, the question of religious permission and prohibition is not given due consideration. But here in Muslim countries, we have to take it into account. We explained to the patient that if there is a Muslim physician to undertake her case, there would be no objection, and she accepted this verdict. Her case, however,

has been suspended till after this seminar, so we appeal to our scholars to shed light on the question with their opinion.

Another problem that we face is that of male sterility. Certain cases were referred to hospitals abroad about five years ago, and test showed that sperms did not exist in these cases. But one doctor suggested that since the testes did exist, though they produced no sperms, a testicular transplant could be considered. We would like to know the opinion of the honourable scholars on this question of testes transplant in cases of male sterility.

The last question is about semen banks. I do not want to speak at length about it since Dr. Abdulla has covered it in detail. I do not want to go into cases [where insemination takes place] after the husband's death. What is being done in Britain and the United States now relates to cases of men who have cancerous tumours and are going to be subjected to radiology treatment, which may affect, or even stop altogether, the functioning of testes. Against the possibility of inability to produce sperms in the future, semen of such a person is deposited in a semen bank for a period of time, after which it is used for insemination.

### **Session Chairman**

Would Dr. Hassan Hathout kindly give the explanation requested in these inquiries.

### **Dr. Hassan Hathout**

Dr. Ahmad Sharaf Al-Din asks what I mean by saying that sterilization as an operation cannot be pronounced permissible or forbidden in itself. Some fiqh scholars also tried to associate this kind of operation with mutation of God's creation. What I mean is that taking a scalpel, cutting the belly open, getting hold of the tube, cutting a piece off, and tying what is left is a surgical procedure which is lawful when done for the right reason and unlawful otherwise. I even say that an appendectomy is a mutation of the human body by removing one of its parts. It is, however, an operation which is lawful, and even mandatory, when performed to save a patient's life, while if a doctor performs it under false pretexts, just to collect fees from the patient when the appendix suffers no inflammation, it is a robbery and a forbidden action.

Sterilization of men is possible. A man has two spermatic cords, which are ligated in such an operation. Sometimes, however, a revocation



is desired, but no doctor can say to a man or a woman that he is going to operate on them and guarantee to restore things to normal in case circumstances change. No physician in the world can bind himself with a promise that he will be able to reverse the sterilization. The chances of success differ in different centres. But why do we not spare ourselves the trouble of opting for this course if there is the slightest chance or the faintest possibility that circumstances may change and we may desire a reversal?

The procedure followed now in test tube babies includes an abortion stipulation. From the legal point of view, Steptoe is afraid that a baby born with deformity may sue him in the future, claiming that the procedure caused the deformity. Therefore, when a married couple opt for a test tube baby attempt, it is the habit that the concerned party would make a written statement that they accept abortion if the doctor deems it necessary as a result of the tests he makes. These include ultrasound, amniocentesis and other procedures for prenatal fetal diagnosis. Not all diseases can be diagnosed, but in case one is discovered the written statement, signed by the couple, allows the doctor to perform abortion.

The attempt is not made by implanting one zygote and waiting for a fruitful result. Several gametes are exposed to the process of fertilization, and more than one may be fertilized, which creates a surplus of zygotes. A zygote is an early embryo. What does the doctor do with the surplus? Are they kept for women who need them and planted in their wombs? or preserved for scientific experimentation? If lawful, experiments might shed some light on many human ailments and diseases, such as deformities, cancer, and so on. But it is greatly unfortunate that for every successful embryo, there is a discarded surplus of zygotes.

I also have read in the Royal Academy Letter that out of the 130 test tube babies only one was deformed. I wished the number were multiplied by 10,000, because such a figure might give a better statistical validity than 130.

The freezing of embryos is also possible and practised. A man may reproduce after his death, if his semen had been kept frozen in a semen bank. If his wife survives him, she may be inseminated artificially with her husband's semen. But although the semen used is the husband's, I believe marriage terminates with the death of either spouse, and therefore this insemination is not lawful. Otherwise, a father may die, and a hundred years later, after his children and grand children inherit him, someone

would come and claim to be another child of his, actually being the product of his long stored semen. This would be a problem with no solution. "Say: The Spirit is my Lord's concern. Little indeed is the knowledge you are given." (Al-Israa' [The Night Journey], 85) I cannot speak about the spirit, but if we do discuss it there might be more to say. Suffice it to mention that a fetus is alive even before the fourth month of its fetal life, that is before spirit is breathed into it as the Prophet's tradition says. If it is aborted alive, it has the right to inherit and be inherited, even if it dies following the abortion. (2) If a pregnant woman is sentenced to death, execution is postponed so the fetus inside her would not die. This is a clear evidence that an embryo, even in its earliest stage, is alive and has the right to live.

Concerning the case mentioned by Dr. Ahmad Al-Ansari of the patient whose only hope to conceive is the test tube baby procedure, and who wants to go abroad, but the Ministry of Waqfs says the operation must be done by a Muslim doctor, I believe the response of the Ministry is unacceptable. In Medicine it is trust, rather than which religion, (3) that counts. I personally have great reservations against the employment of non-Muslim doctors in Muslim countries, particularly in the field of obstetrics and gynecology. We have witnessed many undesirable incidents in practice and have cleared our conscience by reporting them to the proper authorities. But if an operation, like the test tube baby procedure, is only done by non-Muslim physicians, the decisive consideration is whether the doctor is trusted or not. I want to remind the honourable audience that the Prophet, Peace be upon him, trusted Abdullah Ibn Uraiqet with the secret of his migration [to Medina] and asked him to serve as guide, although he was not a Muslim. The trip was kept secret from all but few Muslims, who included Abu Bakr, his daughter Asmaa', and Ali Ibn Abi Taleb, as well as Abdullah Ibn Uraiqet, who, though non-Muslim, undertook the most important job in the trip. The prophet trusted him.

With regards to testicular transplant, it is practicable to remove a testis from one man and plant it in another. It will produce sperms, but that would lead us to the same peril mentioned by Dr. Abd Al-Hafez, for the sperm produced by the testis will always carry the genetic material of its donor, never of its recipient.

I have to point out that as the real mother may differ from the legal one, if it is possible to call a woman a legal mother when she is not the real one, the same thing is true with the father. The evidence is that the "child belongs to the marriage bed," which means that if a married woman conceives and delivers the child of a man other than her husband's, the

child is called after the husband, not the real biologic father.

Scientific facts are not always the same as legal facts. The dialogue between Moses and Al-Khidhr narrated in the sura of Al-Kahf (The Cave) shows us that certain things are acceptable although they are legally looked upon as crimes. We, as physicians, may prove that the real mother is the one who produced the gamete or ovum, but the legal mother is the one who bears the child in her uterus and goes into labour to deliver it.

### **Dr. Abd Al-Aziz Kamel**

In the next part of our session, we can go through surgical contraception, to which I call on scholars of Fiqh and law to address themselves. But before we start, I would like Professor Abdulla Basalamah and his colleagues to facilitate things for us by defining the exact question to which they seek a definite legal, or fiqh, answer. For example, we can discuss surgical contraception in general and then move to more specific points.

We know that surgical contraception has sometimes an individual nature. A case of an individual patient suffering a specific disease might be treated with this surgery to deal with this particular situation. At other times, however, it takes the nature of a general policy imposed on a helpless nation, as the case is in certain Middle Eastern countries. Sometimes the target is not a certain nation but rather a certain religious community. There are actual examples of all these cases. Therefore, we have to be very careful; we are crossing a thorny path or a mine field. Whatever we say has to be very definite and very carefully phrased if we decide that this operation, surgical contraception is permissible in circumstances where it is performed only on an individual basis after a careful study of the circumstances of the mother, the father, the whole family, and so on and so forth. We have used here the expression "surgical contraception"; do we insist on this term? Can we use a word other than contraception, such as "pregnancy control" or "temporary suspension", or some term other than "Family planning"? I am merely making suggestions to open the discussion.

Now after a distinction has been made between individual and general cases, with all the social, political, economic, and ideological implications, is the question as Dr. Hassan has clearly phrased it? I asked many U.N. people with whom I had official business while I was in

my Ministerial post, and none of them could affirm that there was a 100% chance of success for reversal surgeries in cases where surgical contraception had been performed. There was a chance, they said, but not a 100% chance.

It is now 6:30, so let us have a tea break after the prayer, and then we can come back here to resume our dialogue over the issues raised before us. Dr. Abdulla Basalamah, as an obstetrician, will kindly put to you the question that doctors are seeking an answer for in this topic of surgical contraception.

#### **Dr. Abdulla Basalamah**

I hope I shall be successful in explaining the problem concerning contraceptive surgery, and I wish my medical colleagues, foremost among whom is our professor Dr. Hassan, will assist me. >

First let us agree on a definition. As I understand it contraceptive surgery is a termination, rather than control, of the ability to have children. If the operation is performed, no pregnancy is possible, and it is not always feasible to restore things back to normal. This makes surgery different from other contraceptive methods, which control, rather than stop, the ability to reproduce. Perhaps Dr. Hassan has something to add to make things clearer, before we ask the honourable scholars for their opinion on practical issues.

Would Dr. Hassan therefore explain whether this prevention is final or temporary, so that fiqh scholars can base their opinion on a clear definition.

#### **Dr. Hassan Hathout**

"Contraceptive surgery" is a synonym of the word "sterilization." It is a surgical procedure where the two Fallopian tubes in the case of a woman, or the two spermatic cords in a man, are wilfully obstructed. When this was first introduced it was for the case of women who have taken a final decision. Some female patients, however, burdened doctors with a new demand, for which a market was created. After taking their final decision and authorizing a doctor to go through with this procedure, with the understanding that it is irrevokable, they ask for a reopening of the tubes, due to a change of circumstances. A woman of these might have married another man or lost her children. This has led to a new surgical initiative which seeks ways to attempt reopening what has been

obstructed. The new type of surgery has achieved a certain degree of success, but still no doctor can undertake, before performing contraceptive surgery, to reopen the patient's tubes if circumstances change. It is impossible. The more reasonable course is for the doctor to resort to a method other than this, one that is revokable, instead of resorting to something so decisive and final and then facing the task of revoking it, sometimes with, and sometimes without, success.

In my opinion, sterilization, or contraceptive surgery, is an operation which may be performed in cases of extreme necessity, where no alternative is available. If there is an alternative which allows for change of opinion, surgery should be avoided. It must be performed to protect the life of a patient when it is absolutely established that a new pregnancy would threaten her life, and no alternative--such as contraceptive pills, the diaphragm, or any other familiar method--is available. The danger is that this type of surgery might be exploited to combat population explosion. The danger is for a Muslim doctor to take part in an international campaign that strives to sterilize as many women at the earliest possible age and with the smallest number of children possible. There are such campaigns. I would like Muslim doctors to be aware that among the types of war waged against Islam is demographic war. In certain communities where every individual counts as a vote, a strategy is planned to turn minorities into majorities and vice versa. We know that Jews in Israel are greatly disturbed by the high birth rate among Arabs, and perhaps you have heard rumours of certain types of poison that cause sterility in young women. I can also cite an example from my personal experience. I went to Asyut in the Arab Republic of Egypt to learn sterilization with the endoscope. There is an expert colleague and a training centre there. Asyut is a unique city, because its population are 50% Muslim and 50% Christian. It occurred to me to look at the register, and in this community where Muslims amount to 50%, I found out from the names of patients that all those who had been sterilized were Muslims. Not a single non-Muslim woman had asked to be sterilized. This is an additional factor that goes beyond medical considerations.

#### **Dr. Abd Al-Aziz Kamel**

We would like first to distinguish between two things. What you conclude might be exploited on the national or the ideological level to help a certain group against another, which is something we should thoroughly guard against. When things concern one family alone, rather than a nation or a religious community, we have three possibilities to go through in case

family planning is desired. First we begin with safe, or reasonably safe, methods, such as pills and so on and so forth. If these do not work, the family might resort to different methods other than surgery. If nothing else works, surgery is performed as a last resort made necessary by the failure of all other means. That is how I put the question to our fiqh scholars.

**Dr. Abdalla Basalamah**

If you allow me, Mr. Chairman, I, as a doctor, would like to phrase the problem in a way different from the one you have been kind enough to offer. I am not offering surgery as an alternative for other methods of contraception, but to me sterilization is of two types. One is permissible in my belief, and that is when a new pregnancy endangers the mother's life. We would like to listen to whether scholars agree with this, which is actually being practiced at present.

The other is one on which we are seeking a ruling, which might be reached now or the subject might be taken up later. It concerns sterilization as an alternative for other means of family planning that have side effects from which a woman may suffer, like the effects of the pill or the diaphragm. In short this is another method, or another option, of family planning. I do agree with Dr. Hassan, who doubts whether this is one of the cases in which a doctor should go along with the patient's desire, but let us listen to what the honourable sheikhs have to say on the subject.

**Dr. Abd Al-Aziz Kamel**

If the medical aspect is clear enough, we can move now to the fiqh discussion.

**Dr. Kamal Al-Qasabi**

As a Muslim doctor, there is something I would like to know very specifically. Many people come to us for sterilization by tying the tubes with the endoscope. This is a simple operation, a matter of a few minutes. Their motives are social; they are concerned about having too many children. We face a difficulty in such cases and would like to listen to an Islamic ruling on this particular procedure. It is, as I have said, a simple operation, and can often be reversed with microsurgery. I have been practicing this type of surgery for over two years. It offers a chance of success of 80-90% for reopening the tubes, though such an operation would take a long time and great effort and requires a group of doctors

who have received training to do it. But if the new method of sterilization is used, the possibilities of success in reopening the tubes is as I have mentioned.

#### **Dr. 'Isam Al-Sherbini**

I believe we are using two different languages when we use the word "necessity." For fiqh scholars, "necessity" has a certain definition and is subject to specific criteria, while for doctors, it is a very general, non-specific concept. Therefore, I shall cite an example so you can tell us what the ruling in such a case is. In a similar seminar, there has been a debate. At that time, I had a patient at the hospital, a mother of several children, who suffered from hemiplegia resulting from a clot in a brain artery. This patient is married and is still young enough to conceive. We cannot give her pills and an intrauterine device might cause her a hemorrhage. Is it alright to sterilize her or not? Can we obstruct her tubes? Is this considered a necessity according to the Islamic legal definition?

#### **Dr. Ahmad Al-Ansari**

There is a point I would like Dr. Abdulla Basalamah and Dr. Hassan to explain, citing a story which Dr. Fayzah Yusuf has told me. Two weeks ago there was, at the Maternity Hospital in Kuwait, the case of a woman whose Fallopian tubes had both been surgically tied, not cut. Still, she did get pregnant. Medically speaking, the point that was tied recanalised and reopened, allowing her to conceive, though the pregnancy was ectopic. What is the Islamic legal opinion on such a case?

#### **Dr. Muhammad Al-Ashqar**

First, we would like to know whether contraceptive surgery follows one method only, or are there several, like removing the uterus, for example, or any surgical procedure other than the one mentioned? Also, in the method used now to obstruct the tubes, are there any pathological complications? I mean are there certain congestions, or any harm resulting from this procedure? Is the harm certain to follow? The second point is: Where do the ova or the semen go if the tubes or cords are tied?

#### **Dr. Hassan Hathout**

I shall answer these questions, then, by God's Will, we can move the fiqh discussion.

With regards to the first question, Dr. Ahmad Al-Ansari says a lady whose tubes were tied got pregnant. Well, every type of operation has a margin of failure. In this case, after the tubes had been cut and obstructed, the two obstructed parts fused again, and nature allowed the tube to canalise at the point of obstruction, which made it possible for a sperm to unite with an ovum, and so on. All this falls within the failure margin, which is inherent in most cases. The important thing for a doctor is not to be known for a high percentage of failure in the sterilization operations he performs.

As for the woman whose case has been mentioned by Dr. 'Isam Al-Sherbini as having hemiplegia and, since she is still young enough to conceive, she may get pregnant and give birth in spite of her disease. This is quite common with the hemiplegic. If both sides are paralyzed, birth may be painless, but precautions are taken, because the lady might deliver the child while nobody is aware. The question of pregnancy in such a case is not decisive, but if it is deemed that in a case of this type, it is better for the lady not to conceive, that is if a uterine device causes hemorrhage and there is the risk that pills might cause blood coagulation, there are other means, such as things which are locally placed in the vagina. Exposed to them, sperms are killed. If a barrier is inserted in the vagina; the husband also used a barrier, which we call condom; and we place in the vagina some of these spermicidals, there would be three defense lines, which, together, are in effect equal to pills, if not more effective, and are free from complications or side effects such as mentioned by Dr. 'Isam. But for any patient who is likely to desire in the future to get pregnant, sterilization by tube ligation is the wrong option, and whenever a doctor opts for this kind of sterilization he has to be honest with himself and only resort to tubal ligation when it is clear that the lady should never get pregnant. If there is the possibility that she would want children in the future, it would be wiser of the doctor to opt for a temporary contraceptive measure.

Concerning the third question, the removal of the uterus, generally speaking, prevents conception, but I believe that, for the desired result, such a measure is too extreme. The uterus is removed in certain disease cases, but to remove it as a means of contraception would be like killing a fly with a bullet. When we desire to reach a certain result by surgery, we are supposed to take the minimum possible procedure.

Sterilization is done by tying, burning or cutting the Fallopian tubes or some other method, such as mounting a constrictive rubber ring around it, or mounting a device that resembles a clothes peg. Some surgeons just tie



them, and some cut a piece off. These are different methods to reach the same end, just like using different letters in writing: roman, boldface, italics, and so on.

### **Session Chairman**

There is still Dr. Ashqar's question whether the obstruction of ova or semen entails any complications.

### **Dr. Hassan Hathout**

There are no pathological complications for tubal sterilization. When an ovum is produced, it can be fertilized within twenty-four hours only. After that, it is either released through the Fallopian tube to the uterus, when it is discarded, or it goes into the abdomen, where it is absorbed. But there might be some other complications. If the surgeon makes too many knots in tying the tubes, blood circulation may become disturbed causing some pelvis congestion.

Practically we have found that these complications are simple and admissible, and cannot in themselves be a reason to refrain from the procedure. But one of the most important things that we should undertake before an operation is a psychological evaluation of the patient. When a patient still feels convinced after the operation that she has taken the right decision and has no regrets, she is usually safe from complications. But a patient who starts to brood after the surgery, even if she keeps her feelings to herself, will suffer psychosomatic complications that have certain symptoms.

### **Dr. Abd Al-Aziz Kamel**

I believe we have covered the medical aspect of the issue and we should turn now to the fiqh aspect.

### **THE FIQH ASPECT:**

#### **Sheikh Badr Al-Mutawalli Abd Al-Basset**

Dr. Hassan has raised two issues in this session, test tube babies and sterilization by surgery. I begin with the first.

I already discussed the test tube method but some new points have been raised. One speaker says there has been a fatwa (ruling) by the

Ministry of Waqfs allowing the test tube procedure. No reservation has been made other than to recommend that a Muslim doctor should do it.

First of all, I am the chairman of the fatwa committee at the Ministry, and two of the committee members are present here. I made sure by asking them and they confirmed that they had neither taken part in such a ruling nor known anything about it. We wish the speaker who has mentioned the incident to tell us or inform the Ministry of the source of the ruling, because it is a very serious matter to attribute to the Ministry or the Committee something they did not say. We have to be extremely careful, especially in matters of this type, and I believe it is my right to make this statement.

The second point is that on the issue of test tube children, I would like to repeat what I have mentioned as to being very careful and avoid what might lead to sin, especially after I have been told by Professor Ma'moun of the School of Medicine that his practice has turned into a prospering business in the West and it involves a great number of problems. An English woman wanted a test tube embryo implanted in her womb but made it a condition that the semen of a white man should be used. Yet, when she delivered, she was surprised that the baby was black. This is the danger I have foreseen from the very beginning and that has made me tell you that we have to be careful. Even if a certain thing is lawful in itself, the means should be limited [to avoid unlawful situations], and this is of great importance. So, we have an additional reason to be extremely careful even when the test tube method involves only a married couple. Now, with a clear conscience, I favour prohibition of this method altogether until better precautions can be taken than what is possible at present, especially that fatal mistakes can be made.

There is one more point concerning the test tube baby. It was raised by one of the medical colleagues who said that the ovum producer is scientifically the real mother. Islamic Law bases its stipulations on facts rather than theory. As Dr. Hathout has said, sometimes there is a real father but not a legal one. The Prophet, Peace be upon him, called the son of Zam'aa's female slave after Zam'aa, although he was certain Zam'aa was not the real father. At the same time, the Prophet told his wife Sawdah, who was Zam'aa's daughter, "Sawdah, do not appear before him without being fully dressed," although officially and legally the boy was her brother. (4) Thus the mother of a child is the one who bears it and delivers it. In many cases the producer of the gamete or sperm is not considered at all, because a [marriage and delivery] bed has to be

legitimate. Although I may be repeating certain things, I feel I should mention this point.

Now we move to the final issue, surgical sterilization. Keep collective sterilization out of this, because I believe not a single Muslim can endorse it, particularly after it has been revealed to one and all that a campaign against Islam and Muslim countries is waged through this particular method. As it has been mentioned, a certain church warns member physicians against writing any prescription of contraceptive pills to women of the same denomination. Therefore, you, doctors, should not undertake anything, even prescribing pills or other contraceptives, except for valid indications.

I want to be very candid and say that the question of population explosion and that of earning a living have nothing to do with family planning at all. I am against the opinion that relates them to each other, and I say very frankly that this is a foreign concept being promoted within our nation with the purpose of reducing the number of Muslims. Therefore, contraceptive pills should not be taken for just any reason, particularly not for the reason advocated by journalists and people of wicked designs.

As for making a living, we have seen children born with golden spoons in their mouths, and yet ended in utter destitution. On the other hand, many are the children born in extreme poverty and turned into great persons. So this question of earning one's bread should by no means be considered in the matter of planning. If planning cannot be avoided, let other means be used. Since Dr. Hassan has explained that it is almost impossible to restore things to normal after contraceptive surgery, it should not be performed except in the most limited cases and when there is legitimate Islamic necessity. By 'legitimate necessity' is meant that there is no other means to protect a woman's life. If it is confirmed that any child a woman might deliver would be demented, this type of surgery might be permissible.

I am in favour of permitting sterilization if the likelihood of giving birth to a demented child is overwhelming, rather than when it is a mere assumption. In such a case I say it is alright to sterilize a woman or a man, but this should be practised on a limited scale and only after other alternatives are exhausted. Great caution should also be taken in applying other contraceptive devices. Keep out financial considerations and the worry about earning bread. This complaint of "How am I going to feed and clothe them?" is alien to us. I pray for God's guidance to all of us, his kin, and his supporters.

### **The Honourable Sheikh Ibrahim Al-Dasouki**

It is understood that sterilization may be temporary or final. Temporary sterilization allows a woman or a man to regain her or his ability to have children. It is also my understanding that final sterilization terminates the ability of a man and/or a woman to reproduce. Then this is surgical sterilization.

The first type of sterilization is lawful because it is similar to family planning. Final sterilization, however, is definitely forbidden and unlawful.

As for surgical sterilization, since we are saying that it is an operation with no guaranteed results, why should we resort to it? I support those who believe it should be forbidden, particularly as it has been established that this type of surgery is being exploited, in an ugly way, by people who have no conscience and have evil designs against a certain group or community in a certain country.

I believe, after Dr. Hassan has informed us of what he has seen, that this aspect of the issue should be born in mind, together with the danger it poses, so we would not fall in the trap. Thus we can guard ourselves or at least make Muslims aware of the danger of undergoing such a procedure.

### **Dr. Omar Al-Ashqar**

I believe that consulting Islamic jurisprudence would make it clear that a Muslim is not allowed to dispose of his body in any way other than what Islam sanctions. This has been made clear in the paper read by Dr. Abd Al-Sattar Abu Ghuddah in which he cited texts forbidding the mutation of God's creation, as well as Satan's statement, addressed to God, the Sublime, "I shall order them to slit the ears of cattle. I shall order them to tamper with God's creation." (Al-Nisaa' [Women], 119) We also heard the Prophet's tradition that damns "mutators of God's creation."

### **Dr. Abd Al-Aziz Kamel**

We have agreed that it would be better to keep the question of abortion, one of the main subjects we have, till next morning. Yesterday, we went through the two subjects of surgical contraception and test tube babies. We divided the latter into two parts, the first covered test tube babies, and the second, surrogate motherhood.

In the course of discussion yesterday it was clear that the general consensus was against surrogacy although allowing in vitro fertilization

between husband and wife. If there is a minority of a different opinion, this can go into the minutes, on the basis that our discussion was focused on the immediate family: a father and a mother. But I would like to hear something from you on the subject of the surrogate motherhood, so that we can have it in writing. After that, we will move to the question of abortion.

I have received a note from the seminar's administrative committee concerning organization. The first says that there is a pressing need to hold another session, and the following is suggested:

We go back now to the issue of surrogate motherhood. As I have said, the general tendency is towards prohibition. But I would like to hear your opinion, expressed briefly, so we can move to the critical, wide, and many-sided subject of abortion. Is there any one who favours permission of surrogate motherhood?

**Sheikh Mahmoud Makadi**

I am going to go backward. This subject is not as new as we might imagine. Muslim scholars in the [nineteen] forties discussed it, taking their own initiative, as we find in books such as that of Sheikh Mahmoud Shaltout, which was endorsed in an official fatwa (ruling). Other opinions also followed, all agreeing that anything outside the husband wife relationship is nothing but adultery, which can by no means be sanctioned. I suggest that we adopt his [Sheikh Shaltout's] opinion, which is also Sheikh Hassanain Makhlof's, and publish it.

In my view the question here is clear and needs no discussion. The speaker's conclusion on the subject is a sound one: the practice is absolutely unlawful.

**Dr. Abd Al-Aziz Kamel**

This means you want to address Muslims alone, that is, we are not concerned with non-Muslims. After all, they know nothing about milk relationships, and if we talk to a Non-Muslim about them, he would hardly understand what we are saying. Therefore, we should really be aware, when we talk, that we are acting on the basis of our faith, and that we are addressing our people in matters concerning what we believe in.

**Dr. [Muhammad] Na'eem [Yasin]**

I want to address two medical questions to our doctors on this subject. The first is about the nature of the object that is formed by the union of a

sperm and an ovum and to what extent it is related to the sperm before the union. Is there any similarity, or is the resulting object a new one that completely differs from the ovum and the sperm before their union?

The other question is: Can a doctor transfer an embryo from the belly of a pregnant woman to that of another woman when there is a necessity, such as when the mother dies and the situation allows such a transplant? Has medicine reached that far, or is it theoretically possible in the near or far future?

These are two medical questions on which I can base a legal Islamic ruling.

### **Dr. Hassan Hathout**

A sperm and an ovum are like the two blades of scissors; neither can cut by itself, but together they make the instrument. When a sperm, with twenty three chromosomes which are the father's contribution, and an ovum, with twenty three chromosomes which are the mother's contribution, unite, they form one cell with forty six chromosomes. This zygote is the beginning of a human being. The next step is that the cell divides into two, then four, eight, sixteen, thirty two, sixty four, 128, and so on. Gradually, cells that are rather big, cells that are rather small, middle-sized cells, cells that go upward, and cells that go downward--all begin to differentiate. The naked eye cannot notice this gradual change, but within two months, a little human being is formed. By the third month, this little creature starts to grow. Nothing new forms; it only grows. This answers the first question.

Concerning the transplant of an embryo from one womb to another, if we are speaking about human beings, the answer is in the negative. so far, it has not been possible to remove a live embryo from a woman's uterus, because removal would certainly kill it. But when the embryo is formed outside the uterus, in a test tube, out of the union of a sperm and an ovum resulting in a zygote with forty six chromosomes, the zygote divides into two and then into four and then eight. The eight cells mass can be planted in the uterus of another woman and has the chance to survive. The pregnancy would then go on as normal until a baby is born. This infant is called a test tube baby because it began in such a tube, but it is actually the child of the woman who has given it birth.

Embryo transplant from one female to another has been done in animals. A female sheep may be artificially inseminated, and as soon as it

gets pregnant, her belly is opened, her uterus is cut, and the embryos are removed and planted in the uterus of a rabbit. The rabbit may then be transported to another place, where its belly is opened and the embryos are transplanted to the uterus of another female sheep, where they survive. With human beings, this has not been possible so far.

#### **Dr. Zakkariya Al-Berri**

Sheikh Makadi has said, and I believe he is right, that there can be no difference over the prohibition of surrogacy. But there is still another point. What is the ruling when this thing is practised in spite of the prohibition? We have to point out the ruling when something takes place, although it is forbidden by the Legislator.

I want to think aloud, with Sheikh Makadi and the other scholars sharing my thought. If a Muslim does submit to such a procedure, whose child is the baby? I say it is the child of the woman who delivers it. The "walidah" (birth-giver) is the mother, as mentioned in the Quran, when God says:

We have enjoined man to show kindness to his parents, for with much pain his mother bears him and he is not weaned before he is two years of age. We say, Give thanks to Me and to your parents. To me shall all things return.... (Luqman, 14)

And when He says:

We have enjoined man to show kindness to his parents. With much pain his mother bears him, and with much pain she delivers him. He is born and weaned in thirty months. When he grows to manhood and attains his fortieth year, let him say, 'Inspire me, Lord, to give thanks for the favours you have bestowed on me and on my parents.... (Al-Ahqaf, 15)

And when He says:

Mothers shall nurse their children for two whole years if the father wishes the sucking to be complete.... A mother should not be allowed to suffer on account of her child, nor should a father on account of his child. (Al-Bakarah [The Cow], 233)

This procedure has been imported from abroad, and we cannot endorse it. It is similar to adultery. If it does take place, however, I would consider the child to be that of the "surrogate" mother. Thank you.

**Professor [Muhammad] Na'eem Yasin**

There is a basic ruling, which is that the planting of a test tube baby in the uterus of a woman foreign to the producers of the sperm and ovum is forbidden, and all scholars subscribe to this view. But if this thing happens, the person who submits to the procedure should be punished for committing an unlawful thing, but naturally he does not deserve the stipulated punishment of adultery.

This thing, as I see it, is not the same as adultery, and differences between the two exist, which should reflect on the secondary ruling concerning the baby born by the surrogate mother. As I see it, since Islam, as Sheikh Badr pointed out yesterday, seeks the confirmation of lineage, and since it will be known to everybody that a certain embryo actually belongs to a certain father, I believe, though only God has perfect knowledge, that to call the child after his original father and his mother who produces the ovum makes more sense from the Islamic point of view than to attribute it to the woman who bears it. There are differences between this procedure and adultery, as I have pointed out. First, it is guaranteed that no confusion of lineage is possible in this case. Second, the matter implanted in the woman in this procedure is different from that in adultery, where sperms are ejected by a man into the body of a woman, and each of them is likely to unite with an ovum released from the ovary and on its way to the uterus. The difference is great. The role of the surrogate mother, about which I inquired yesterday, is completely different from that of an adulteress. The former plays a role similar to that of a wet nurse. When I asked Dr. Hassan Hathout about it he told me that she, [the surrogate mother], gives the child no hereditary traits, only nourishment. With this great difference between this situation and that resulting from adultery, since the parenthood of the child has to be established, let it be attributed to its scientifically confirmed parents, and at the same time let persons involved in such practice be punished.

I have said enough. Thank you.

**Dr. Ahmad Shawqi [Ibrahim]**

I want to comment on two issues. The first is the surrogate motherhood. All stages of the creation of a human being--which take place in the mother's womb, from the beginning of the zygote, through all phases of development, until birth--are attributed to the mother. This is evident in six Quranic verses: in the sura of Al-Najm (The Star), "... when you were embryos in your mothers' wombs" (32); in Luqman, "... his



mother bears him" (14); in Al-Zumar (The Hordes), "He moulds you in your mothers' wombs...." (6); in Al-Ahqaf, "With much pain his mother bears him, and with much pain she delivers him," (15); in Al-Nahl (The Bee), "God brought you out of your mothers' wombs ..." (78); and at the opening of the sura of Al-Mujadilah (She Who Pleaded), "Their mothers are those only who gave birth to them." (2) The Prophet, Peace be upon him, says, "The creation of one of you in the belly of his mother ..." to the end of the honoured tradition. All this confirms to us that the stages of creation, from sperm to birth, take place inside the womb. It is also clear that the surrogate motherhood is entirely excluded from any consideration in the Quran and the Sunna, inspired by God. This is one point.

The second point concerns motherhood, which is based on the creation of a fetus in the womb of its mother, one stage after another, and its being nourished by her blood, and then delivered by her, as in the sura of Al-Zumar: "He moulds you in your mothers' wombs...." and in the Prophet's saying, "The creation of one of you in the belly of his mother as a seed takes forty days, then he is a clot of blood..." to the end of the honoured tradition. Motherhood is also based on giving birth, as in the sura of Al-Nahl, "God brought you out of your mothers' wombs ..." (7), and the sura of Al-Mujadilah, "Their mothers are those only who gave birth to them." (2) Likewise, motherhood is based on nursing, as the concept of a milk mother, mentioned in both the Quran and the Sunna, implies. In determining motherhood, although hereditary traits are of great significance in forming a new creature, they are by no means the only factors. Both scientifically and from the point of view of Islamic legislation, motherhood is much more than that.

### **Professor Muhammad Al-Ashqar**

It is common to exclude cases of necessity from every rule of prohibition, but I am not sure whether such cases are conceivable in the question of surrogate motherhood. If there are, allowance should be made for them as it is in every ruling of prohibition.

Another point concerns motherhood. Who is the mother? She is the woman who bears the baby not the one who produces the ovum. If we accept this view, the child has no father. Yet, there should be some kind of restriction based on analogy with milk relationships, because although the father is ruled to be a certain person rather than another, and the same is true about the mother, there is no reason to prevent marriage prohibition rules based on the relationship between the child and the producers of the

ovum and sperm. Since such a relationship is not less close than a milk relationship, marriage prohibition is confirmed by analogy. As we have mentioned yesterday, nursing is what contributes to the growth of bone and flesh, and since we have no doubt that the child has resulted from a certain ovum, this has to be taken into consideration. A child, for example, is not called after an adulterer, but if it is a daughter, a marriage relationship between her and the adulterer is forbidden.

#### **Dr. Abdulla Abd Al-Shakour**

These topics introduced to us by Dr. Hassan Hathout, who we hope will be rewarded by God, deal with issues foreign to us, being developed in non-Muslim environments. We thank Dr. Hassan for keeping up with these topics almost since the 1950's as his paper says. Those environments where the new practices have been developed are different from ours in their attitude, traditions, and the place allotted in them to religious teachings.

In the Islamic environment, we have a special position for woman with which no one should tamper. She is allowed all the appreciation due to her as a daughter, wife, and mother. But when we come to discuss the planting of a woman's ovum in the womb of another, we have to remember that we are in an Islamic environment that has its own legislation and its own evaluation of the issues involved in such a practice.

In surrogacy, the woman involved is either married or unmarried. In the former case, the planting of an ovum in her womb would lead to the discord resulting from lineage confusion. We know that our scholars of fiqh and Islamic Legislation have taken a strong stand on this issue, which all of us remember. If the woman is unmarried, she will be subject to ill reputation when she gets pregnant, and thus she suffers harm. Even if harm is not greatly expected, the probability is there: either ill reputation or confusion of lineage, both of which would affect the woman concerned. I remember Dr. Hassan using an expression, when talking about the chaos resulting from sexual emancipation, which I like. He said women suffer an injustice in these situations. So since this procedure is imported from an environment alien to us, and since a woman would suffer whether she is married or not, I want us, when seeking the legal ruling on this issue, to keep in mind that we are discussing its application in an Islamic environment and that Muslim women are involved.

**Dr. Abd Al-Hafez [Hilmi]**

Probably I have already used the comparison of myself to a witness giving his testimony before a special court.

First of all, I do not want to speak about prohibition and permission, for I am not qualified to do so. I neither support nor oppose any point of view, and this is not what I want to discuss. However, all what we are talking about is a hypothesis on which we are called upon to give our opinion. It is on this basis that we are debating the issue; otherwise, there is no need for this discussion altogether.

I want to speak about the last point raised, that this is going on in the West. I would like to say that the first successful fertilization of a mammal ovum took place in 1934. It was a long time, from 1943 to 1978, before human ova were involved. Research has been going on from 1978 to the middle of 1983. Now we hear that 130 babies have been born this way. So we should note that progress in this field is going on with the speed of lightning. Its being practiced in the West should not keep us from voicing an opinion concerning it, or else it will invade us one way or another.

Many people go abroad for treatment, and in the future, this practice may be regarded as a form of treatment. So we have to point out the dangers, draw the line between what is permissible and what is forbidden, and give a ruling on the subject. This is what is expected of us. Islamic Legislation tells us that cases will develop among people, and they will not be a matter of imitation. We have heard the tradition, "The forming of one of you in his mother's womb...." Well, now a human creature is formed out of its mother's womb, which means this is a new development. It is formed in a glass vessel. That is the first point.

Another thing is the question of necessity, which is for religious scholars to determine, and not for me. But I may try to understand the spirit of Legislation, and it seems to me that the question here is that of determining lineage and allowing no confusion in it. This is what Islamic Legislation safeguards, setting controls and standards for it. On this basis, I declare, and repeat, that the only true and sound lineage is that of the woman who produces the gamete. It is in this that heredity is involved; the baby will inherit her traits as well as those of the father. If there is any formal point, then that is another matter, but I am speaking about what the true ruling should be in light of the benign Legislation as I understand it in spirit, not merely in texts.

**Dr. Abd Al-Aziz Kamel**

A question to Dr. Abd Al-Hafez: Is the only relationship between a fetus and the womb of the surrogate mother that bears it that of nourishment and the disposal of waste? Is that the only relationship?

**Dr. Abd Al-Hafez Hilmi**

What is scientifically known now is that it is a relationship of exchange of nutrients and oxygen and disposal of waste and some harmful materials. That's the gist of it. Thank you.

**Sheikh Badr Al-Mutawalli Abd Al-Baset**

In fact I have already spoken on this subject and I was hoping not to have to go back to it, but Dr. Na'eem has attributed to me the saying that legislation seeks to confirm lineage. That is true, but what lineage? The lineage confirmed has to be based on a sound marriage contract, or at least a contract which is believed to be sound. But to confirm the lineage of a fetus which is not related to the producers of the gametes by a marriage contract, or what seems to be a contract, is something entirely rejected in Islamic Legislation. More than that, I can cite a very peculiar example of fiqh. If a man ejects his semen as a result of an unlawful practice, such as by using his hand, and then deposits this semen into his wife's womb, lineage is denied to a baby born this way by Shafi'i scholars. They argue that since the practice itself is prohibited, it cannot be used as the basis of establishing lineage. If we reject something of that sort, how can we say it is sought in Legislation?

Dr. Ahmad Shawqi has spared me the task of citing evidence which is definite in saying that your mothers are those who deliver you, rather than those who conceive you, raise you, or whatever.

Islam considers any man-woman relationship which does not have a legitimate foundation by marriage an invalid one. Although the Prophet was certain that the son of Zam'aa's slave was a child of adultery of an unlawful relationship, he confirmed the fatherhood of the man to whom the marriage bed belongs, because he considered that the marriage bed is the basic criterion. All this supports what Dr. Muhammad Al-Ashqar called for when he said we had to take the question of marriage prohibition into consideration. Although Zam'aa's son was formally and legally a brother of Sawdah, the Prophet's wife, the Prophet asked her to be fully and properly dressed in his presence as a measure of precaution. It is on this

basis that I call on Dr. Na'eem Yasin not to generalize in declaring that Islamic Legislation seeks to confirm lineage. This is not an absolute rule. It is true only when legitimate basis exists, but to attribute lineage just like that is something that Islamic Legislation cannot approve. I have told you of the opinion of Imam Al-Shafi'i. Although the situation is simple in itself, he ruled that the semen in this case loses its value and is no longer a valid basis to establish lineage, in spite of the fact that the semen is the husband's and the womb is his wife's. Just because the method of depositing the semen into the uterus is unlawful, Al-Shafi'i considers lineage invalidated. Thank you.

### **Sheikh Mahmoud Al-Makadi**

When Islam seeks to establish lineage, it is careful that this lineage should be pure and unblemished. Any blemish or impurity is sufficient to invalidate or deny it. This means that Islam does not blindly seek to confirm lineage. This is something we notice in our practice in courtrooms, particularly in adoption cases.

I go back to the surrogate mother question to say that the Prophet, PBUH, prohibited any man from irrigating with his water what was planted by another. (6) The semen used in fertilization in this procedure is placed in the womb of a woman prohibited to the man who has produced it. This settles it.

If the woman is married, her husband would "water" the embryo, which is planted by another man, with his semen. If she is unmarried, she would be exposed to suspicion, as Muslim scholars were alert enough to note several decades ago. Because of this, I take every argument advanced by the various speakers here as good intentioned, but the case we are discussing cannot be regarded other than a case of adultery as defined in Islam.

### **Dr. Najib Al'Othman**

During our discussion of this issue, a case occurred to me which I wished was raised at the beginning. If the womb of a certain woman is removed for one reason or another, and later a uterus transplant was performed for her, and if the woman gets pregnant, the ovum would be hers, and she would suffer the pain of pregnancy, labour, and delivery. The only confusion would concern the womb in which the fetus grows. I believe such a case is related to the issue under discussion, and I hope we will discuss it if time allows.

**Dr. Abd Al-Aziz Kamel**

I would have liked to talk this over with Dr. Najib, since there are several points which concern surgical transplants of different organs. Dr. Ansari has also raised something of this sort, and we have said that we will include it towards the end of our discussion if we have time left by God's Will, because the subjects are interrelated. Otherwise, we will consider it when we finish what we have.

**Dr. Fawzi Faidh Allah**

It seems hard for someone like me to stand up against a most venerable scholar like Sheikh Badr Abd Al-Baset, and to oppose the ruling and opinion he has offered. Still, I might be right in what I want to say on the subject, which is that the Prophet, PBUH, says, "A child belongs to the marriage bed, and an adulterer bites the wind." The bed here can only mean the legitimate marriage of a man and a woman, and the child is none but the product of the union of the man's sperm and his wife's ovum. That is how a marriage becomes fruitful: a sperm and an ovum. Now, if we do get a sperm and an ovum, place them in a test tube or in a vessel, to whom do they belong? Of course to the husband and wife in this case. We have agreed that such a practice is permissible for a man and his wife. We all agree that when a baby is born from a test tube sperm and an ovum of a legitimately married couple, it is called after them, because they are the source of the two gametes. What is the difference then between the fertilized ovum in a tube and the one in the womb of another woman? Is the result not the same? The sperm is the father, and the ovum, the mother, regardless of how the fetus grows.

Yes, we rule that the whole procedure is unlawful, because the fetus receives in its growth nourishment from someone other than its mother, but it still belongs to its mother, and the surrogate mother is like a milk mother, and regardless of how much nutrition either gives the child, whether with her water or milk, she cannot be the real mother. The real mother is the ovum producer.

**Dr. Abd Al-Aziz Kamel**

Usually in the morning we are very active and full of energy, but later, efforts begin to slow. We have now five minutes to finish with this subject. After that we have the issue of abortion, which is a stormy ocean. It is of great importance because it confronts us in a most serious manner. What I

would like to say is that we have differed over the subject of the surrogate womb and it does not seem we will reach an opinion to which we all subscribe.

I would like to hear again what Dr. Muhammad Al-Ashqar has to say on the subject. If there is compelling emergency that makes this necessary (and I underline the word "this" because no man can resort to it except in necessity) and if all precautions are taken, are the father and mother the same as the original ones, [i.e. the sperm and ovum producers]?

**Dr. Muhammad Al-Ashqar**

I believe the subject consists of two issues. The first is whether the procedure of surrogate motherhood is permissible. I believe that in Islamic Legislation, it is not, and a test tube baby is lawful only when a man and his wife are involved.

The second issue concerns what our verdict would be if non-Muslims, who have followed this procedure, appeal to our courts. Is the father the sperm producer or the husband of the surrogate mother? Is the mother the ovum producer or the woman with the incubating womb? In fact this is a matter to be settled by fiqh and the law, rather than by medicine. We can postpone the medical aspect until we determine the extent to which physicians need to follow such a procedure. As for the legal and fiqh aspect, I think we should better forget about it for the time being, because discussing it would take a very long time, and we might not be able to reach a final decision.

Tentatively we say that the father of a test tube baby is the bed owner if there is one. I am not sure about the mother, but most probably she is the ovum producer.

**Mr. 'Iz Al-Din [Touni]**

There is an almost unanimous agreement that the method of surrogate mother should be forbidden except in cases of necessity.

**Dr. Hassan Hathout**

I offer a scientific explanation that might help the discussion. I am a doctor in Kuwait, an Islamic country. I believe what we need to hear a ruling on cases such as that of a woman with obstructed Fallopian tubes who goes with her husband abroad. A number of such patients have actually been referred to Steptoe. I believe we have said the method is

lawful if only a husband and his wife are involved.

The other point which we keep arriving at might be illustrated with an actual example, so that Dr. Abdulla Abd Al-Shakour may know that this is not a future or irrelevant issue. Here in Kuwait, I have a patient whose womb cannot hold a baby. She literally told me, "Doctor, I have an Indian maid, whose husband is in India, and she will be overjoyed if I give her 1,000 dinars to bear and deliver my baby and give it back to me." What am I to say to her? Is this lawful or unlawful? This is something we are experiencing, so give us one word that settles the whole thing: is this permissible or forbidden. This is a necessity; the woman has no children. It has been agreed that the practice is lawful only in a case of necessity, which can only be the absence of children.

**Mr. 'Iz Al-Din [Touni]** (resuming his question)

It has been agreed that the surrogate mother method is unlawful; does that apply even if a man has two wives and wants to have children?

**Dr. Hassan Hathout**

Question: Suppose a man has two wives. A zygote can be produced out of his semen and the ovum of one wife and planted into the other's uterus. Of course there is a necessity, and I hope we do not have to mention necessity again.

Answer: In my opinion, if it is unlawful to use the semen of a stranger to beget a child, it is also unlawful to use a stranger's ovum. A woman should not bear the ovum of another.

**Dr. [Muhammad] Na'eem [Yasin]**

I have had the same case in mind, assuming that the two wives of the same man only bear a child through the surrogate mother method, one having productive ovaries but no uterus, and the other has a uterus but produces no ova. Suppose the man marries the first woman, but is incapable of bearing children. He marries the other, and she is also sterile. He goes in Dr. Hassan, for example, and the latter tells him, "This one has no ovaries, and that one, no uterus." Is it alright to implant an ovum of one in the womb of the other? Is it lawful when the man has no children and he strongly desires to have a child? Suppose he marries a third woman and a fourth, and they turn out to be the same, should he marry a fifth time?



**Mr. Mu'awadh [ʿAwadh Ibrahim]**

We have two issues. The test-tube baby issue has been settled, so we should not go back to it, except to say that it should only be in cases of necessity and after the precautions we have mentioned, are taken.

As for the surrogate mother, I believe that after the explanation given by Dr. Hassan, we should strictly rule against it, and there should be no differences over this. When we take an ovum from one wife and give it to the second, we have surrogate mother, a matter which is forbidden and unlawful. If it nevertheless happen, the baby is called after the surrogate mother, rather than after the ovum producer.

**Dr. Abd Al-Hafez Hilmi**

I have a word to say, out of the desire to shoulder my responsibility towards our fiqh scholars, which is the function we performs here. The rule is that "A baby belongs to the marriage bed, and an adulterer bites the wind." I want to point out that if we rule that the child belongs to the surrogate mother, we would be ruling for the adulteress, or the woman who commits an action similar to adultery, and against the real producer of the ovum. If that is your verdict, it is up to you. You are the fiqh scholars, and we are merely witnesses, and I say no more.

Thank you.

**Dr. Maher Hathout**

A very simple scientific explanation might make Dr. Na'eem feel a little better. Regardless of the origin of an ovum, a baby is not merely the result of genetic chromosomes. It has been medically established, and that is the new trend in medicine, that a human being is the outcome of genetic factors and the way they interact with the environment around them. There is no environment more enveloping than a mother's womb, so although the chromosomes carry the genetic code, genetic behaviour is influenced by the environment. A person with diabetes-bearing chromosomes might not become a diabetic, unless his environment encourages this disease to develop in him. A fetus may carry the chromosomes of the original ovary which has produced it, but its existence, its moulding, its physical, hygienic, and (God only knows) perhaps psychological make-up are all influenced by the womb that bears it. Thus, medically it is not strange that the child should be called after the woman who bears and delivers it.

### **Dr. Hassan Hathout**

I want to give some reassurance to Dr. Abd Al-Hafez. The tradition says, "A child belongs to the marriage bed," and this applies even when in actuality it does not belong to it. It still applies in the case of a man who is married to two women and takes from one and implants in the other. The child cannot belong to both beds. Therefore, conceiving the gamete produced by a strange woman is unlawful, and a child can only belong to one bed.

### **Dr. Abd Al-Aziz Kamel**

I thank you all, and I move now to the subject of abortion. But I take your permission to talk for a few minutes, because in the morning, while Dr. Hassan was addressing us, I felt that the gap between medical and fiqh studies is a real one. I would not like this seminar to come to an end before we talk about this particular subject, on which I would not like us to be satisfied with a passing recommendation. I feel now that our physicians should be more aware of religious teachings than they are now, and that our fiqh scholars should be more aware of medical facts than they are at present. We are living in a world where these [medical] studies keep on developing, and issues are raised before us and brought to our doorsteps, whether we like it or not. There are Muslim communities living in the West, and they have the right to expect from us answers to their questions, because they are living on remote islands in a raging sea of Western civilization, which is alien to them and has customs and traditions different from theirs.

Perhaps a recommendation should be phrased to say that in the curricula of schools of medicine better attention should be paid to Islamic studies. I am not speaking about studying the surface aspects of the Islamic culture, but rather about fiqh problems and sources as well, so that when a person is in a remote place, he can find the truth for himself.

Likewise, religious colleges and departments, whether they are called colleges of Arabic, Islamic Law, or Religion Fundamentals, should provide education in, or what we have called family studies, which are not restricted to personal statute, but include medical aspects as well, which would help to increase their awareness and their comprehension. What makes our discussion take such a long time is that we stall at a certain point and call upon Dr. Hassan, Dr. Abd Al-Hafez, or Dr. Maher to explain medical facts, and only when they answer, we are able to judge whether a certain thing is lawful or not. We listen to another opinion, let us say from

Dr. Hafez, and we ask again for an explanation before we can make a judgment. Then Dr. Maher, for example, says he has something to add, and we have to modify our judgment. This means that papers submitted to future seminars should be clearer and more detailed, with the aspects that require the attention of fiqh scholars well defined. Scholars should be given the chance months ahead so they can consult their books and references, as well as each other, holding joint meetings, so that when we come here we would not need to read one word of the things submitted to us, having well comprehended every point and prepared a response to it. Thus our conventions would truly be, as Dr. Al-Ashqar has said, a dialogue of viewpoints, not a mere application of established opinions to issues raised. I hope that if you agree with me on this point, the conference will make recommendations on seminars and how they should be prepared for, and on university education in both sides with the aim of setting up bridges between them.

Now we move to the question of abortion. Allow me to ask Professor Basalamah, who is now acting as Assistant Chairman, to take the chair, and I will act as his deputy, because I intend to talk to you later as a fellow member.

#### **Dr. Abdallah Basalamah (now Chairman)**

Since now I hold the chair, I can have the lion's share in the discussion.

In fact, the subject of abortion is of social, medical, scientific, and Islamic legal interest. Allow me a couple of minutes to go over certain scientific points and over interpretations that arise every now and then, due to new scientific discoveries, to the traditions available to us and the already established legislative rulings.

The first question, for example, concerns the sanctity of a fetus, or the permissibility or unlawfulness of abortion. When does the sanctity of a fetus begin? Does an embryo's right to live begin with the beginning of life or of movement? If we answer, "with the beginning of life," does life begin at the moment when an ovum unites with a sperm, which is the common view now? Science has already established that a sperm is alive before fertilization, an ovum, before union. A union of a sperm and an ovum might result in hydatidiform mole, rather than a human being. Hydatidiform mole is not an embryo, but rather a group of cells that have the shape of a bunch of grapes and form nothing in particular. After a period of time, the uterus

contracts, discarding these cells, which though resulting from the union of two gametes, have nothing to suggest life or human form.

Thus the new definition now should be that the sanctity of an embryo starts when it assumes human form. A Quranic verse reads:

We first created man from an essence of clay: then placed him, as a living sperm, in a safe enclosure. The germ We made a clot of blood, and the clot a lump. This we fashioned into bones, then clothed the bones with flesh.... (Al-Mu'minun [The Believers], 12-14)

When one examines embryology books, he discovers that the morsel stage is actually the beginning of the formation of vertebrae, when the embryo is no more than a morsel, as if the verse is an anatomical description in a medical volume of what goes on in these stages.

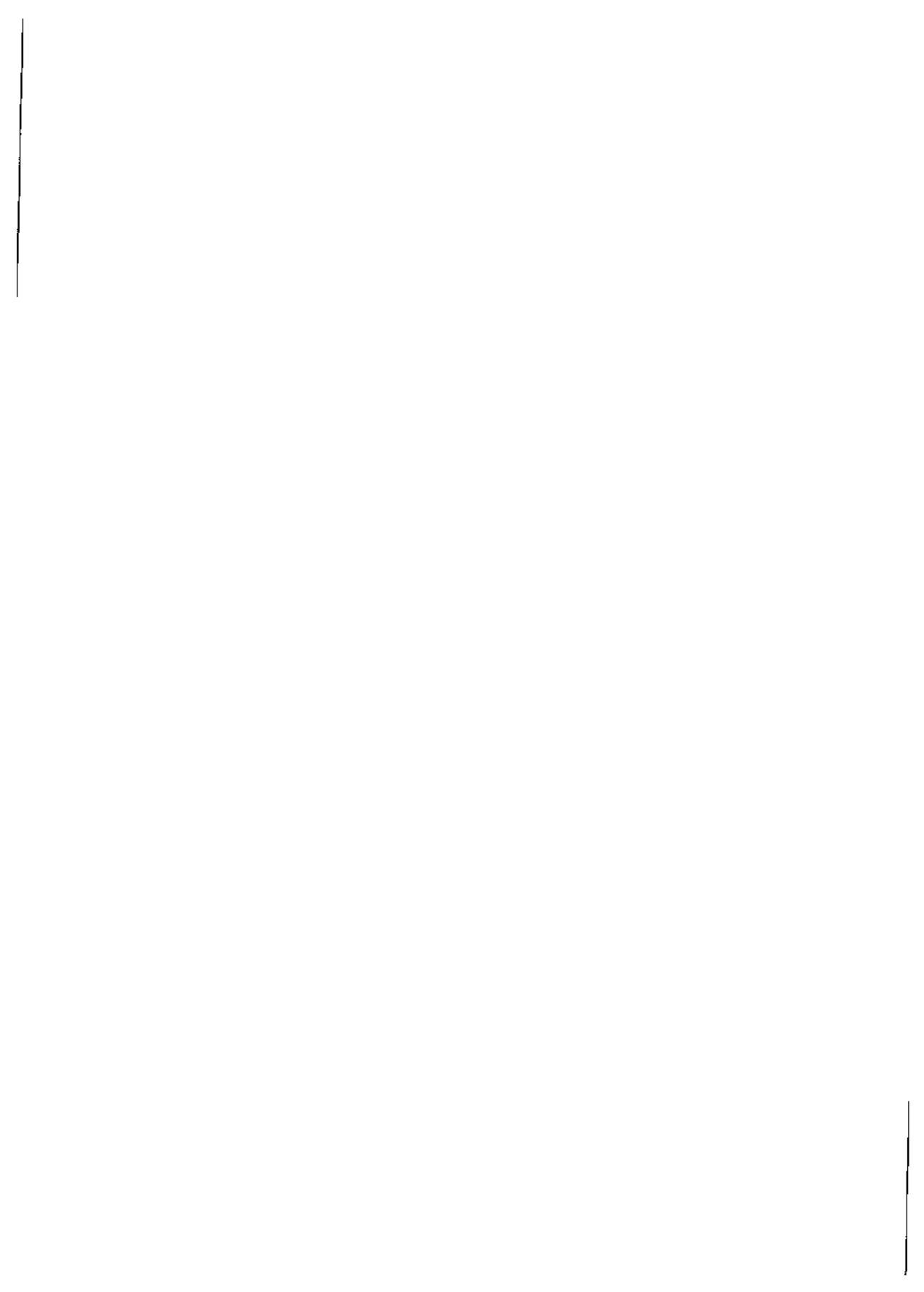
This we fashioned into bones, then clothed the bones with flesh, thus bringing forth another creation. Blessed be God, the noblest of creators. (Al-Mu'minun, 14)

As we have seen in the film, this period of forming, begins in the sixth or seventh week. The film does not show the period of the first to the sixth weeks, when the embryo is a set of tissues. It shows it after the sixth week. After the first forty days, it starts to take form; a head and limbs begin to form, and a new creature is set forth. In my opinion, there is life even before the gamete union, and the sanctity of an embryo starts when it takes human form, which is after the first forty days. As Dr. Hassan and others have pointed out, what takes place after this period in which the essence of limbs starts to form, that is after the sixth week, is merely growth where nothing new is formed. Thus the tradition which specifies the first forty days, and which we based our rulings on, is right. When modern science introduced ultrasound devices and the heart beat of an embryo could be heard, the tradition was ignored and it was said that the sanctity of an embryo begins with the moment of conception. Now we have realized that life is not the criterion in the creation of man, and sanctity seems to me to apply when an embryo turns into a human being. The question before us then is: Do we accept that tampering with a fetus's creation is forbidden after the first forty days, or we keep to the earlier view that it is forbidden as from the beginning of life, which is the moment of fertilization?

Thank you.

## Notes

1. This tradition is reported by Ibn Mas'oud and related by Al-Bukhari and others.
2. An aborted fetus does not have the right to inherit unless it cries at birth or reveals a sign of life, which, to my knowledge, cannot happen at all before the fourth month of fetal life. (Muhammad Al-Ashqar's Note)
3. Perhaps what the speaker means is trust concerning skill and ability, rather than telling the truth. The latter kind of trust depends on religion and honesty. (Muhammad Al-Ashqar's Note).
4. See the earlier note concerning the Arabic word walidah (mother). (Translator's Note)



## FOURTH SESSION

The fourth session was held on Thursday Sha'aban 13, 1403 H.; May 26, 1983 A.D. It opened at 8.30 a.m. and was chaired by Assistant Chairman Dr. Abdalla Basalamah, with Dr. Khaled Al-Mathkour acting as secretary. The session had three topics on its agenda:

- "Abortion in Religion, Medicine, and Law"
- "Medical examination of patients of the Opposite Sex".
- "Diagnosis of Fetal Disease and Consequent Feasibility of Abortion"

Because of the importance of the first two subjects, they took so much time that the conference was unable to discuss the third, which was postponed to a future seminar, God willing.

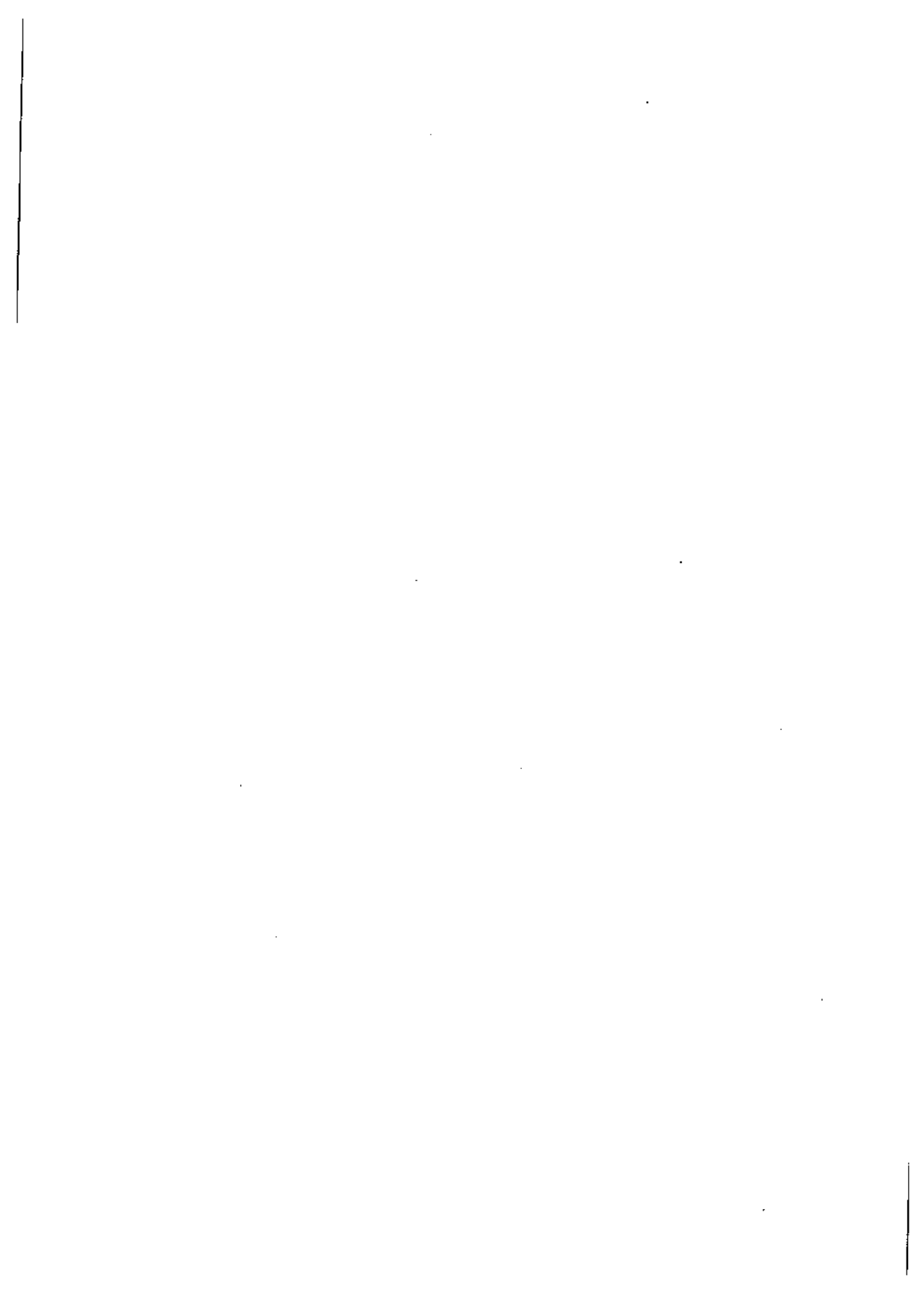
Dr. Hassan Hathout was the first speaker on the subject of abortion, and he pointed to the many attempts, whether by government or certain groups, to sanction it and make it legitimate, explaining that in many instances Muslim countries and communities are the target of these attempts, which are made under various mottos.

Professor Muhammad Na'eem Yasin and Dr. Tawfiq Al-Wa'ii submitted two papers on the subject, showing the point of view of Islamic Legislation on the question of abortion. The issue, particularly the Islamic position on abortion before spirit is breathed into an embryo, was the subject of long discussion.

Later, Dr. Hassan Hathout spoke on the subject of "Medical examination of patients of the Opposite Sex," pointing out its importance, especially since the numbers of female physicians in the various medical specializations are limited, and in some fields, like orthopaedic surgery, there are no female specialists at all, even in developed countries.

The session was adjourned at 12:30 p.m.

Editor





## **ABORTION IN RELIGION, MEDICINE, AND LAW**

Professor Dr. Hassan Hathout

In dealing with the question of abortion, I have conceived three different approaches and decided to use them all.

The first is a reference to a story I have read in "Kalila and Dimna" about three fish. One was smart, one smarter, and one helpless. The three were told that a fisherman was heading to the brook where they lived. The smarter one took an immediate decision and moved to another brook, as if leaving what is potentially dangerous what is not.

The smart fish, upon seeing the fisherman's net dropping into the water, maneuvered around, turning this way and that, until she could find a course out of the reach of the net, and so she was saved.

The helpless one was taken unawares and soon was caught in the net. Nothing could save her.

The subject of abortion is now at high tide, and Muslim communities can follow a helpless, a smart, or a smarter course. Perhaps awareness before it is too late saves us much trouble. The examples, in our Arab world are many.

The second approach occurred to me while reading the Quran:

In the Name of God, the Compassionate, the Merciful Prophet, if believing women come to you and pledge themselves to worship God alone, with no partner; to commit neither theft, nor adultery, nor murder of their own children; to utter no falsehood of their own invention; and to disobey you in nothing just or reasonable, accept their allegiance and implore God to forgive them. God is forgiving and merciful. (Al-Mumtahinah [She Who Is Tested], 12)

I stopped long at the phrase "nor murder their own children" and wondered, "Did women really murder their own children?" The practice of killing offspring, that was familiar in pre-Islam and prohibited by Islam, was

the burying alive of daughters, but not sons, and therefore could not be the reference of the word "children," which includes both. Moreover, the burying-alive crime was committed by men only, and not women, because it was pre-Islamic men, not women, who were biased in their desire for offspring, to males against females.

When the birth of a girl is announced to one of them, his face grows dark and he is filled with inward gloom. Because of the bad news he hides himself from men: should he keep her with disgrace or bury her under the dust?" (Al-Nahl [The Bee], 58-59)

I wondered what the crime committed by women against their own children, male and female, was, and the only answer I was satisfied with was that the murder of children by their own mothers meant intentional abortion.

This distinction between a crime whose victims are only female and which is stimulated by fear of disgrace, and another crime whose victims are children in general and which has a different motivation is made clearer in God's warning: "You shall not kill your children because you cannot support them (We provide for you and them) ...." (Al-An'aam [Cattle], 151) and "You shall not kill your children for fear of want. We will provide for them." (Al-Israa' [The Night Journey], 31) The latter crime is committed against children of both sexes for purely economic reasons, which was not unfamiliar to Arabs, but always committed by men only meant. The expressions "because you cannot support them" in the first verse and "for fear of want" in the second include both actual and feared want. Both verses show that killing a child is not the solution. The only killing attributable to women can be nothing else but abortion.

The third approach is that I am a physician and a Muslim. Medicine has its main body and its branches, its general areas and its details, and Islam has its orders, warnings, and regulations which show people what is lawful and what is not, whether clearly or by inference.

The question of abortion is one that I daily come across in my practice as a gynecologist and obstetrician. Other doctors, in all corners of the earth, also have to face it. It weighs down on doctors, when pondering what to do, that abortion in recent times have no longer been a medical question decided by physicians. Competition came from legislative bodies, sociologists, demographers, economists, and exponents of new schools of thought, ethics, and behaviour. We are not, and cannot be, isolated from those factors that have recently been changing the features

of the world. This world has shrunk under the influence of transport media, broadcasting waves, and the printing press, so all its inhabitants are aware of everything that goes on in it.

I wish the final word on abortion could be found in a book that we open and copy. But in addition to the Legislation He has given us, God does not exempt our eyes from seeing, our ears from hearing, nor our brains from thinking. It is a law of His that as many issues surprise people as they themselves create. Our early fiqh scholars were aware of this fact, and therefore their opinions agreed at times and differed at others. Al-Shafi'i even had two schools of thought, so he is quoted as expressing a view but later giving a different ruling on the same issue, and Omar would give two different answers to the same question when asked at different periods of time, saying, "I ruled according to my knowledge then, and I rule according to my knowledge now."

At our time, the question of abortion is different from what it was at the time the religion books available to us were written. It is now international in dimensions, and, like rates of monetary exchange, areas of political tension, hot and cold war fronts, epidemics, and energy issues, abortion cannot be understood unless its international dimensions and the currents controlling it are comprehended, and its movement, from where to where are studied. It is only when reasons are clear that a ruling is possible. Except in matters of worship or a clear text, Islamic rulings are based on reasoning.

Now I can get to the subject.

## DEVELOPMENT OF THE LEGAL VIEW ON ABORTION

Since ancient times, abortion has always been a hateful thing. In the Hippocratic Oath, which is transmitted from one generation of physicians to another, a medical graduate pledges not to prescribe a medicine that causes abortion. Until recently, there has been a unanimous agreement that abortion can be justified only when a woman's life is threatened unless her pregnancy is terminated. This is still the law in many countries including Egypt, Syria, Lebanon, Jordan, and others. Punishment for abortion may be more severe when it is practiced by a physician, pharmacist, or midwife. In recent years, however, I have noted a change in the verdicts covering abortion, which differs from one country to another. I will spare you the trouble of listening to details of the stipulations of various countries. But the law now recognizes justifications for abortion other than the medical indications, the legal scope allowing abortion becoming for wider than the medical. Abortion indications now considered legal include:

1. Medical reasons, which have already been referred to. In certain countries, the definition of medical reasons has been enlarged, and more things are now included. It started with the threat to the mother's life, then threat to her health was added, then threat to her psychological, as well as physical, welfare. This threat was then enlarged in definition to include the present and the foreseen future. Then the physical and psychological well being of the other family members, including natural and adopted children, was incorporated into the definition.

2. Reasons related to the fetus, which are part of the medical reasons. These are the cases when it is certain or probable that a fetus suffers from a disease or disablement (or is already dead).

3. Humanitarian considerations which allow abortion when pregnancy is the result of rape or intercourse with an under age or demented female. An example of this is a famous case against Professor Bourne in Britain in the thirties. Although his motives were humanitarian when he performed abortion on a fourteen-year old girl raped by a band of soldiers, his

defense rested on medical reasons. He argued that the muscles and the bones of the girl's pelvis were too small, which pose a serious threat to her at the time of delivery. The court accepted this defense and pronounced him not guilty.

4. Socio-medical considerations, which include high parity of and short intervals between pregnancies. These cannot be regarded as illness but have physical and psychological complications. Also included is age, when a woman is too young or too old, and the embarrassment to which an unmarried woman is exposed if she gets pregnant. It is worth mentioning here that Tunisian law allows abortion to a woman with five living children, and in Jordanian law, which considers abortion a crime, the desire to avoid scandal that affects the honour of a family is admitted as extenuating circumstance.

5. Abortion at request. This is a new formula that aims at putting an end to fraudulent, illegal practices. It is the ultimate point in the current high tide in favour of abortion liberalization, and it is the result of a campaign characterized with persistence and determination which ended with legal admission in certain eastern and western countries, such as Hungary, Russia, and the U.S.A., though in Russia a condition was attached; a woman who desires abortion can have it, but only after meeting with a committee that attempts to change her mind.

#### **The Implication of the Changes and Evolution of Abortion Laws:**

It is clear that the new legislation in many countries have the general aim of legalizing abortion, after it has been restricted, though in varying degrees. Under restrictive laws, abortion was not actually as limited as expected. There have been individuals within and outside the medical profession who practiced abortion secretly for a fee that differed from one person to another. These people have, in their experimentation, cause the death of many women, as well as injuries to many others, who either suffer chronic ailments or become sterile. Perhaps the tragedies caused by this type of practice, known as "criminal abortion," have been the strongest argument of the advocates of legalizing abortion; since it is going to be performed anyhow, it is better to have it under safe circumstances and proper medical supervision.

Laws restricting abortion were broken not only through secret practices, but also through tricks. After the admission of threat to physical and psychological welfare as sufficient justification of abortion, it was

enough for a girl to say she would commit suicide unless she had abortion to have a doctor label her as a suicidal tendency, which allowed her to have her wish.

A phenomenon has been noted and is worth mentioning. It was believed that legalizing abortion would put an end to criminal abortion practices, which have turned into a business, but authorities have been surprised that the opposite is what has taken place. In Hungary, the number of illegal abortions in 1956, the year in which abortion was legalized, was in the vicinity of 100,000-150,000 a year, but in the sixties the annual number rose to 160,000-180,000, and went over 200,000 in 1968. The trend was confirmed by the experience of Japan, Scandinavian countries, and others.

Another point worth mentioning is that some countries, which have legalized abortion to reduce the population explosion, considering it a measure of contraception, are faced with a very serious crisis. In Japan, where abortion has been legitimate since 1948, the rate of birth went down to 13.5 per thousand. Now authorities face the bitter fact that the number of young people does not meet the country's needs of labour manpower. If one adds to this the fact that medical care has increased the proportion of old people, it becomes clear that the supporting social stratum, i.e. that of productive workers, has shrunk in comparison with the supported one, which consists of children and old people.

In Romania, abortion was made legal in 1956, and the number of abortions went up to one fourth of the total number of pregnancies in 1958, then to one third in 1959, and then kept going up until the number of aborted fetuses surpassed the number of those allowed to mature to birth. Realizing that the nation was committing a form of suicide that threatened it with extinction, the government retreated its steps and decided to allow abortion only for medical reasons and to encourage national human growth with awards and allowances for birth and for children. Maternity leave is now granted with full pay, and tax exemptions are allowed to large families. Other eastern European countries followed Romania's example. More recently France and West Germany have followed suit.

An English law of 1967 allows abortion if pregnancy poses a physical or psychological threat to the woman herself or to any of the family children, including her natural offspring, her husband's and any adopted children. In determining such a threat, the law urges that environmental circumstances of the present, as well as the forceable future, should be

taken into consideration. Thus the law admits the adoption of children and, when the adopting mother conceives, she is allowed to abort her fetus to protect the adopted child against the probability of psychological upset with the new pregnancy.

It was clear that the new legislation was not a response to a recommendation by medical organizations. In fact, the Royal Society of Gynecologists and Obstetricians asked for a committee of physicians and jurists to be formed to discuss the subject, but the request was turned down. A mass media campaign swept Britain with the argument that abortion was a right to any woman who desired it and that no woman should be forced to carry a baby she did not want.

Sir Thomas Jiffcoate, a physician, made a statement for the British Broadcasting Corporation in which he said that the new abortion law was sponsored by a small, but well organized, group of rabble rousers, who brainwashed on the public opinion by promoting biased and misinformed propaganda and by exploiting the press to brainwash the nation with the motto of "Abortion on demand." He added that this group received foreign funds to publish and promote a booklet which explained the new law in a biased manner, and when physicians offered to contribute to the discussion, a Member of Parliament said, "We are here to legislate, not to listen to experts."

Thus the new law was very flexible, and allowed physicians to use their discretion. What was the result?

A conscientious physician remained conscientious, but a person who used to secretly practise abortion now began to practice it publicly and under the protection of the law, as if the new law was made to protect the very persons against whom it was supposed to protect the nation.

And what are the direct consequences of that law, when put into practice? The following things have been noted:

1. Cases of abortion have continuously increased, occupying hospital beds and taking the time of specialists to an extent that affected the treatment of patients with other ailments.

2. Only 44% of the abortion cases have been married women. The other 56% are cases of illegitimate conception of single women (37%) and widows and divorcees (19%). These figures reveal the true needs that the new law caters for. In the U.S. the percentage of abortion among unmarried women are even higher.

3. Three private hospitals in London have handled more abortion cases than all the national health hospitals in the London area, which indicates the extent of the commercial exploitation of abortion.

4. In spite of legalizing contraceptives and abortion, the percentage of illegitimate children has greatly increased. This suggests that the heart of the matter is to create an atmosphere of laxity, shamelessness, and indifference to restrictions, inhibitions, and responsibilities--or, in other words, to promote sexual license.

### **The Moral Background Which Has Led to Legalization:**

We cannot regard the taming of the law to permit abortion in isolation; it is a part of a whole picture and cannot be comprehended unless we look at the whole. Otherwise we would be like a person who reads in the Quran, "Do not perform prayer," and stops. The tide of abortion legalization is just a thread in a fabric, a step on a road, a part of a whole. After World War I, two new philosophies, or perhaps two aspects of the same philosophy, swept over the world. The first denies God's existence altogether and rejects religion, which it called the opium of nations. It claims that prophets were no more than social reformers who, to tempt people to follow them, promised gains that were not in their possession, so they drew on an imaginary bank which they called the paradise or the hereafter. This philosophy spread so much that one third of the earth's population went under its influence. Since the beginning, it aimed at removing the belief in God from human souls.

The second aspect of this philosophy was a new school in the Christian West which promoted what it termed "new morality." Taking advantage of the wave of scientific progress and the triumphs achieved by the human mind, it sought to glorify this mind and called for making it the true guide and shaper of human life and the arbiter of behaviour. What reason approved, it said, was right, and what it did not was wrong. At the climax of its celebration of human science, this school proposed that the whole human heritage should be revised, in order to get rid of old archaic and silly legacies, for which it was high time to go into oblivion. In its new role as ultimate authority in human life, reason began to approve and reject, to allow and forbid, and to prove and deny. In short, human reason replaced the worshipped deity.

Under the spell of the brain washing they were subjected to, people were unaware that their new deity was limited and deficient. Reason



conceives what is within the horizon, but beyond this horizon there are others of which it knows nothing. It is deficient in scientific knowledge; otherwise, what is the rationale of setting laboratories and allotting budgets for research? Is it not true that every day science brings us a new discovery, which is an admission against us, proving that the previous day we knew less? Is our great dedication to scientific research not synonymous with an awareness that there is much we are still ignorant of?

Human reason started to go over old virtues and values, replacing them with new ones. Raising the banners of freedom, it preached to man that he was free to do what he wanted as long as he did not do harm to others.

This movement was further supported by another, seemingly, but not actually separate, school of thought which was called "morality without religion." It argued that man should love good for its own sake and hate evil in response to his good nature without the need to follow any particular religion. Religion, it said, had long separated people from each other and had caused massacres even among fellow Christians. Since religion aimed at guiding man to love, honesty, and good, it added, if these goals can be reached through a means other than religion, pure good was gained and fanaticism and intolerance, and their consequences, were avoided. It went on to say that man had to be guided by his conscience, and that many religious people, who performed the rituals of their religion, were nevertheless dishonest, perverted, or full of hatred.

Many virtuous people were greatly impressed with this call for virtue, and this was a big gain for the movement, for which the important thing was not have a fixed standard of good and evil with which no one was allowed to tamper. Once the rock of faith was budged and man's conscience replaced the teachings of God, things got much easier. The new guardian was amiable and good-natured, and since this guardian had been liberated from faith and was allowed freedom of movement, the hitches, of which the guardian was unaware, were many. Man's personality is subject to suggestibility. Even iron responds to extreme heat and constant hammering.

The inevitable result was that the shade of religion over people's lives shrank, and the voice of God within them became less audible. In time, Western public opinion turned its back to God and even became insolent against Him. Perhaps a helping factor of this development was that the

human mind, with all its learning, could not longer accept the iatrogenic artefacts introduced by the clergy into Christianity.

I, like many others, was greatly surprised when a Time Magazine issue of 1966 came out with the big headline on its cover: "Is God Dead?" I thought the earth was rocking in its last convulsion, shaking off its burdens, especially that the magazine is one of the widest circulation. Still time kept on referring to the subject, offering contrary views. In its issue of December 26, 1969, it published an essay under the title, "The New Clergy Bring God Back to Life." As one sows, one reaps. It is not hard to understand that many of yesterday's taboos are permitted today. Under the motto of "new morality," man is proclaimed free so long as he does no harm to others, and the question of "harm" is only given superficial consideration. Among things that have changed is the attitude towards sexual relations; the new morality are exactly the same as the old immorality.

All this was followed by a planned and storming wave promoting everything that stimulates sexual desire: motion pictures, plays, songs, dances, fashions, books of passing entertainment, profound philosophical books, radio and television programmes, public lectures, and individual meetings--a comprehensive movement orchestrated in the same direction and with one purpose. It turned into a social avalanche, sweeping societies en mass rather than individually. The movement could not be restricted to a single field.

A professor of psychology at a major British university warned against psychological complexes resulting from sexual repression experienced by young people. Bertrand Russell declared on a radio broadcast how happy he was at the positive response to his call for sexual relations between male and female university students, provided that no conception results, which is made possible by contraceptives. Even the church itself has not been immune to this intellectual onslaught. Time magazine says in its October 28, 1966, issue that a committee of the British Church Council blesses the sexual relationship of marriage but does not insist on chastity before marriage nor fidelity within it. The committee, adds the magazine, urges, that contraceptives be made available to unmarried girls and that further flexibility should be introduced into abortion laws. The magazine quotes an article by an English bishop in the fifties who calls on people to stop using the word "God" for a full generation, and says that it is justifiable for a young man to have sexual intercourse with a young woman

as long as he does it lovingly and does not force her. When I read this, I remembered the saying of Christ, Peace be upon him, that if a man looked at a woman with lust, he committed adultery in his heart.

In the same magazine I also read the story of an American youngman who applied for a church position, and then it was discovered that he was a homosexual. He did not deny it, and the interviewing committee commented on his application that he could have lied and that they appreciated his honesty. Asked by a reporter whether his homosexuality would not affect his congregation if he did become a minister, the young man said he did not regard sex as something vulgar, and he was satisfied to have a man with whom he could have a stable relationship. Is this not strange? The stranger thing is that the young man got the position.

This is a brief glimpse of the moral environment in the West. It is not surprising that it should leave its mark on various aspects of life, including legislation. It explains new developments of which the new abortion laws are one example. Another law considers sodomy no crime when it is practised privately by two consenting adults.

Under the guise of woman's freedom, people in the West say that since men are free to have sex as they wish, so women should enjoy the same freedom, instead of saying that since adultery is improper for a woman, it is likewise improper for a man.

As moths are attracted by fire, young people of both sexes have been attracted by this sexual freedom. Medical authorities, at seeing venereal diseases spread once more in England after it was believed that the country has got rid of them once and for all, have been sounding the alarm. The germs of these diseases have developed immunity to penicillin, and so syphilis and gonorrhoea are now as common as they used to be before penicillin was discovered, but with two serious differences. The first is that the age of patients ranged in the past between twenty-five and thirty five, while patients today are in the fifteen to twenty-five age group. In 1965 twenty seven per cent of female patients were under twenty. The second difference is that most patients in the past were men, with a minority of women, but the percentage of female patients went up steadily to become equal to, and then surpass, that of men. It is no longer the prostitute of yesterday that carried the disease to many men. Today's female patients are ordinary students, workers, and employees in all walks of life.

In the U.S., Dr. Brown of the American Center for Disease Control

announced that 650,000 American young men and women under twenty were afflicted with syphilis and gonorrhoea every year. Dr. McKenzie Pullock of the American Health administration announced that cases had drastically increased in recent years and called for a state of national emergency to be declared.

Abortion increased, mostly of illegitimate conception. The percentage of illegitimate births surpassed that of legitimate ones in many American states. I once attended a maternity ward at a leading American hospital, and only one of the patients was introduced to me as "Mrs." All the others carried the title of "Miss." On the other hand, I was greatly surprised by a demonstration of unmarried girls in New York who carried placards and chanted mottoes demanding the legalization of abortion. The demonstration, with photos, was reported in newspapers.

All these developments explain the motivation that call for new laws and insist that abortion should be as available as water and air to both married and unmarried women. Now wonder the later developments have lead the West to its present crisis; not only the moral crisis but the health crisis as well.

### **How We Can We Be Guided to a Sound Opinion Concerning Abortion:**

There are three sources of guidance: first, the moral view; second, the medical professional code; and third, the rulings of Islamic jurisprudence.

#### **Moral Principles**

I have separated morality from religion on purpose, for not all people are religious. Praise be to God, our religion allows us, in propagating it, to use common sense, kindly advice, and calm and meaningful argument, so we should not hesitate to discuss this question on pure intellectual, secular grounds.

Let us take an objective look at the evolution of life over its recorded history. The highest form of life is that of man. What distinguishes man from all animals is that he is the only one capable, when he desires something, to restrain himself even when that thing is within his reach. An animal responds to the feelings of thirst, hunger, and sexual desire in a direct manner as soon as circumstances allow, programmed only by instinct. But man bases his life and his civilization on the principle of self control, without which a human society would turn into a jungle. Many are

the cultures that grew lax in applying self control and made it easy for man to gratify his whims and desires; they yielded to vice and were therefore destroyed. Modern civilization is no exception. If the current moral trend continues, there is no doubt that our civilization has planted in its body the seeds of its own destruction.

We have no quarrel with the ideals of freedom and equality upheld by modern, atheist philosophers, nor with their championing women's right to freedom and equality with man. But let us use their own criteria, and apply their own principles. A most obvious fundamental of justice and equality is that any relationship between two persons is devoid of fairness, justice, and equality unless the consequences are equally shouldered. Is equality realized when sex is made free for both men and women? In fact the exact opposite is true, for it has been proved that a woman is always a loser.

If she is deserted after an affair, she is the loser.

If she illegitimately conceives and aborts the baby, she is the loser.

If she gives birth to an illegitimate child, she is again the loser, whether she keeps the fatherless child or gives it up for adoption. Let us not cite to them what God and His Prophet say, for even according to their logic there is great injustice in this freedom. They claim that sexual desire is irresistible and consider the idea of chastity unfeasible. In the past, they made it easy to ignore chastity by claiming that the hymen is destroyed by physical exercise. Today, they do not need that argument any longer. For them, chastity is a theoretical concept which cannot be put into practice. Our Muslim societies, however, prove their error; the percentage of virginity among our girls before marriage is still close to one hundred per cent.

We thank God that our societies have something to offer the wayward West in its dark times. Virtue is actually preventive medicine. What is needed is for dedicated people to be active in confronting the sweeping corruptive current, which is so powerful and cunning, and which aims at the destruction of the cornerstones of societies with the hope that they will succumb and thus be easy to take over. It wants them to become submissive so that the group which believes itself to be the Chosen People and the others nothing but beasts and dumb animals can rule them.

### **Code of the Medical Profession:**

The last decade witnessed the birth of a new field of medical specialization, a field somewhere in between obstetrics and pediatrics, which is called "fetal medicine," and which takes care of the fetus before it is born and while still in its mother's womb.

It has been possible to dignose a group of fetal diseases and to find remedy for some of them, not all of which take the form of medicine; some are rather of pure surgical nature, and they are performed for the fetus while in its mother's womb. A baby might be immaturely born, so it is placed in an incubator that provides it with warmth, nourishment, clean air, and unpolluted environment. Scientific research is being made to devise an artificial placenta in which a fetus aborted at an even earlier stage can be placed.

It is clear that in the medical profession, a fetus is regarded as a client that is entitled to all the respect and care due to patients. How is it then that the same profession takes care and precautions to safeguard this fetus, and on the other hand allows itself to tamper with its life and condemn it to death, for no reason other than that it is unwanted.

### **Islam's Point of View:**

It is well known that Islam regards life, including that of fetus, as sacred. Some old fiqh scholars, however, divided fetal life into two stages, the line separating which is the moment when a lady first feels the fetus moving inside her, which usually occurs at the end of the fourth month of pregnancy. This group of scholars assumed that such a feeling is caused by the beginning of fetal life, or what they termed as spirit being breathed into the fetus. Some of them permit abortion before spirit is breathed in.

The ruling then was based on that explanation. Medical progress since their time and into ours, however, has revealed that fetal movement does not begin when the mother first feels it; an embryo moves long before that, but the mother does not feel it because the water sack in which the embryo floats is at the beginning too large for its tiny body. With time, the fetus grows, and its punches and kicks get to the wall of the uterus, so the lady begins to feel them. We now have instruments that allow us to hear the heart beats of an embryo in its fifth week and to monitor its movement even earlier, as seen on the ultrasound screen. It has been scientifically established that, at the beginning, an embryo is a zygote that immediately begins to multiply, which means it is a living creature, constantly growing

and developing in a smooth and unceasing manner, without a dividing line between one stage and the other as old scholars believed.

Since the explanation is no longer valid, the ruling has to be changed. On the basis of scientific discoveries, fetal sanctity applies to all stages of fetal life. This is the modern view reached by physicians through direct observation, and earlier reached by a number of old fiqh scholars through deduction and common sense. They ruled that even before spirit is breathed into it, an embryo is alive, and its life of growth and development must be respected so it is unlawful to terminate the pregnancy.

One of these was Imam Al-Ghazali, who, in discussing this question, distinguishes it from coitus interruptus, which was the available method of contraception. He says, "It [coitus interruptus] is not the same as abortion or burying a child alive, the latter being a crime against an existing being." The first stage of existence is the ejection of semen and its union with an ovum and to spoil this is a crime. If it turns into a seed and then a clot, the crime is worse, and it is even worse after spirit is breathed into the fetus and its creation is completed. The worst crime is against this creature after it separates from its mother and becomes an independent living being.

Another point is that fiqh scholars, and I add to them physicians, unanimously agree that if continued pregnancy threatens the life of a woman, the fetus is sacrificed to save her, because she is the root and the fetus is a branch. Other excuses which used to be cited as justification for abortion, such as the mother's milk being scanty and the father being too poor to hire a wet nurse, or the mother being afraid to get pregnant while still nursing a child, are outdated now after contraceptive means, canned milk, and vitamins and tonics for the mother have become available.

The fact is that Islamic Legislation spares no evidence to indicate the sanctity of the fetus and to safeguard its right. It is sufficient to cite the four following examples.

First, if a man dies and is survived by a pregnant widow, his legacy cannot be dispensed of before the fetus's share is allotted and kept for it until it is born. The heirs undertake to pay back the shares of other twins, if the widow happens to give birth to more than one.

Second, if a woman has a miscarriage at any stage of fetal life, and the fetus gives any sign of life, such as coughing, sneezing, or moving a finger, the fetus inherits its appointed share from the estate of any legitimate legator who has died after its conception. If this fetus itself dies,

it is inherited by its legal heirs.

Third, if a pregnant woman criminal is sentenced to death, execution is postponed until she delivers the baby or, according to another school of thought, until she completes nursing it. The Prophet himself, Peace be upon him, postponed the stoning of a pregnant adulteress. This is a sufficient proof that illegitimate pregnancy is not a justification for abortion and that the fetus in a case like this has the right to live.

Fourth, Islam imposes a monetary punishment for any action that causes abortion and, consequently, the death of the fetus, or if abortion takes place before the end of the fourth month. This blood money is one twentieth of the blood money (ransom) due for an adult and it is paid to the legal heirs of the fetus. If it is aborted after the fourth month and shows a sign of life then dies, the full amount of an adult blood money has to be paid. When one of the heirs is an accomplice, he pays his share of the blood money and is deprived of his share of the legacy. The blood money is due even if abortion is unintentional. Omar, [the Second Caliph,] summoned a pregnant woman and she was afraid, worrying what he could possibly want with her. On her way to him she aborted. Omar consulted others on the matter, and Ali Ibn Abu Taleb advised him to pay blood money for the fetus, because he had caused the abortion by frightening the woman. Omar followed that advice.

If more than one fetus is aborted, blood money is due for each. Paying this money does not cancel any other punishment pronounced by a judge who is convinced the crime was committed on purpose, whether this other punishment is a fine or something else.

Blood money is due as from the earliest stage of embryonic life. It is even said that if a woman drops a lump, some blood, or something similar which, when displayed to experts, proves to be an early embryo that could have developed into a human being, then any person who has caused her to abort has to bear the responsibility.

It goes without saying that all these are secondary rights branching from the major right to live, to which an embryo is entitled, and which we have to safeguard according to medical ethics, moral standards, and the instructions of God.

But man, by going to extremes, Has been misled by his reason and lost his way. I wonder when someone kills himself, Does he hate himself to that extent! Here is man, wielding weapons of destruction, without The



slightest consideration for children, women, and the helpless. Here he is again, reaching inside wombs, Plucking out embryos and fetuses. He is made of light and clay, but He turns the light off and follows his clay element. Whatever knowledge he acquires, man is lost, If he loses sight of his lair.

## **ABORTION BETWEEN ISLAMIC REGULATIONS & MEDICAL FINDINGS**

Dr. Muhammad Na'eem Yasin

1. Muslim fiqh scholars have not failed to consider the question of abortion and come up with an Islamic regulation that covers this human action. The source that most of them have based their conclusion on, is a confirmed and authentic tradition of the Prophet, God's Blessings be upon him, which is cited by both Al-Bukhari and Muslim. Al-Nawawi has included it as the fourth in his List of Forty traditions.

Ibn Mas'oud, God be pleased with him, quotes the Apostle of God, who utters nothing but the truth, as saying,

The creation of one of you in the belly of his mother takes forty days, then for a similar period he is a clot of blood, then again for an equal period he is a morsel. Then God sends an angel, who is ordered to write down four words. He is told to write his work, means of living, life span, and whether he will be miserable or happy. Then spirit is breathed into him. (1)

As scholars considered this tradition, they realized that the Prophet, Peace be upon him, tells that a human embryo passes through two stages, from the moment it is formed as organic matter when, though living, it has none of the human traits, till it then takes the form of a well-proportioned creature, with all the human qualities, or their potential. The first stage includes three embryonic phases: the sperm, the clot, and the morsel. The second stage begins when the fetus is 120 days old when spirit is breathed into him.

Taking the meaning of this tradition into consideration, fiqh scholars set out to find a regulation for abortion. They all agreed on certain points, but on others opinions differ.

2. One point of agreement is that it is necessary, when abortion is under consideration, to distinguish two types of unborn creatures that are the subject of such action: the embryo of the first stage, with its three

phases, and the fetus into which spirit has been breathed, which distinguishes human beings from other creatures according to their understanding.

3. Another point of agreement among fiqh scholars is their ruling on abortion in the second stage. All of them say that such abortion is forbidden, and they say it in unequivocal, conclusive terms. None of them makes any exception for this prohibition, even if the pregnancy endangers the life or well-being of the mother. (2)

Some of them are explicit on this point. Ibn 'Abdin says, "If the fetus is alive, and the life of its mother is endangered by the pregnancy, it is not permissible to abort it, because the mother's death is assumed, and it is not permissible to terminate it. The mother's death as a result of the pregnancy, is assumed, and it is not permissible to kill a human being on the basis of an assumption." (3)

In spite of this, the scholarly committee of the *Fiqh Encyclopedia*, which is published by the Kuwait Ministry of Waqfs, concludes that priority should be given to the mother's life, because she is the origin, and her life is confirmed with certitude, while to allow the fetus to live on would most probably lead to its death with the death of its mother. (4)

4. It is my belief that the unanimous agreement of scholars on forbidding abortion after spirit is breathed into the fetus is due to two things.

First, they consider the argument that the fetus might survive but the mother would die to be non-conclusive. The rule concerning the lives that have to be protected, according to Islamic Law, is that they cannot be sacrificed when there is any doubt about the cause which requires such a sacrifice.

This is rather similar to the established rule in the Islamic penal system, the rule of suspending punishment and chastisement when doubt exists, even when there is evidence that calls for punishment. The non-conclusiveness regarding the mother's death if the fetus is not aborted it is considered as sufficient doubt to prevent sacrificing it to save its mother.

Conviction that the question is doubtful was strengthened by the fact that medical findings at the time of these scholars had no way of being conclusive as to the consequences of leaving the fetus in its mother's womb. Medical methods at the time allowed physician to only tell what is more probable.

Second, scholars regard the fetus, after spirit is breathed into it, as having all the human characteristics and deserving the same protection and the same right to live as any human being. (5)

5. Fiqh scholars getting disagree on the legitimacy of abortion before spirit is breathed into the embryo, as described in the quoted tradition of the Prophet. The difference range from permission, with no need for justification, to prohibition unless it is imperative. Between these two extremes, these are those who say such abortion is permissible when justified, though the justification does not have to be an absolute necessity. Among the justifications they admit is the mother's need to take medication, or the drying of her milk with pregnancy, when the father has no means to hire a wet nurse for the infant. (6)

6. This is a summary of the viewpoints of fiqh scholars as regards abortion. They are based on certain Islamic rules, on a text with an assumed interpretation, and on an assumed general knowledge of facts. However, the cases to which a ruling an abortion applies are now much clearer, and the facts of these cases are more certain, if not absolutely certain. With current knowledge, the text [of the tradition] should in fact be interpreted in light of the confirmed facts, without affectation or departure from its spirit.

To explain this, medical science has uncovered that life begins with the early days of an embryo, that is before spirit is breathed into it as mentioned in the Prophet's tradition, Peace be upon him. With this life, movement also begins, which can be detected by modern medical equipment, before an embryo completes its second month. (6)

It might be supposed that such a discovery contradicts the authentic tradition of the Prophet on the point when spirit is breathed into a fetus, which is the beginning of its fifth month.

Actually there is neither discrepancy nor contradiction. The tradition does not explicitly determine when life begins for an embryo, but rather when it acquires human identity and characteristics, which is also the time its destiny is made, and that is, as told by the Prophet, 120 days after the sperm is united with the ovum.

It is not the same as the beginning of life. The embryo is not lifeless before spirit is breathed into it. In fact, the Prophet's reference to development from sperm to clot to morsel indicates a form of life.

Yet, even though it is a living organism, it cannot be called human, for

a human being is a living creature with a spirit.

Some scholars believe that this living organism, that does not yet have a spirit, is not resurrected on Doomsday, for only fetuses with spirits, which means those who have completed 120 days or more, are resurrected.

7. This interpretation of the Prophet's tradition gains further validity when one contemplates the majority of Quranic Verses which describe the stages of man's creation inside and outside his mother's womb, as in God's saying, "Do you disbelieve in Him who created you of dust, then of a sperm, then fashioned you as a man?" (Al-Kahf [The Cave], 37) and his saying, "We have created you of dust, then of a sperm, then of a clot, then of a morsel...." (Al-Haj [Pilgrimage], 5) and His saying, "He is it Who created you from dust, then from a sperm, then from a clot." (Al-Mou'men [The Believer], 67) These holy verses and other, similar ones show that the raw materials from which human beings are created are dust, sperms, clots and morsels (lumps of flesh), some of which are lifeless. This usage in the Quran indicates that the term human should not be applied to these materials. From a linguistic point of view, if a sperm, for example, was claimed to be man himself, then the meaning of these verses would be that man was created from man, which makes no sense. Therefore, in the stages before spirit is breathed into it, an embryo is a living organism ready to form into a human being, but it is not the human being itself. Perhaps such an interpretation is further supported by another usage of these terms in the Holy Quran: "Was he not a sperm of ejected semen? Then he became a clot. Then He created and fashioned, and made of him a pair, the male and female." [Al-Quiyamah [Doomsday], 37-39) Here creation is specifically mentioned as occurring after the sperm and clot stages, as the word "then" indicates. This suggests that the creation and fashioning of the fetus occurs at the end of the following stage, that of the morsel, when it is ready for the spirit to be breathed into it. It is to be noted that the morsel is described as "shaped and shapeless" (7) in the *sura* of Al-Haj, while it is mentioned in the Prophet's tradition as a stage prior to the breathing of spirit into the embryo. This is a further proof that life and motion and consequently creation and fashioning, occur before the spirit is breathed in. (8) There is no contradiction between this interpretation and the findings of modern medicine that indicate life and motion, as well the formation of some limbs and organs, before the embryo completes two months. Creation, however, is not finalized by the formation of organs, but by God's gift of spirit which occurs only after 120 days, as the Prophet, who utters nothing but the truth confirms. (9)

8. If some fiqh scholars and Quranic commentators interpret the tradition and the Quranic texts in a way that contradicts some of the new scientific findings in the field of medicine, it is because they took the literal meaning of "alakah" (clot) and "mudhghah" (morsel) and applied it too narrowly to these texts.<sup>(10)</sup> An animal, however, might have the shape of a clot and, at the same time, have certain organs, such as the eyes. The similarity with a clot could be in the shape where the head and body are joined due to the absence of limbs. Similarly, a morsel does not have to be a shapeless piece of flesh; it could be shaped, as in fact it is described in certain verses of the holy Quran.

Whatever the case is, scholar's interpretations is not the criterion.<sup>(11)</sup> It is the texts themselves that count, and neither the Quran nor tradition of the Prophet gives a particular definition of the clot and morsel to make us understand them as incompatible with what science has uncovered.

9. The chosen interpretation of the Quranic texts and Prophet traditions which describe the stages of embryo creation does not impose on those who accept it to favour one generalized opinion on the issue of abortion. The fetus goes through two stages before it is born, and acquire human status only in the second. So a distinction should be made between these stage when a statute on abortion is being considered. It stands to reason that an act of violence against a living creature that has been given the attribute of humanity by God is not the same as a similar act against a living creature that has not had God's spirit breathed into it and has not yet acquired human status. The first case is more abominable and more deserving of punishment, and that the fetus in this stage deserves protection more than in the earlier stage, being a human being with the right to live. No one is entitled to deprive it of that right except for a legitimate reason, and of the legitimate reasons of killing a human being in Islam, only one may apply to a fetus, and that is absolute necessity. An example of this is a situation where killing the fetus is the lesser of two evils, one of which is inevitable, as when physicians are absolutely certain that allowing the fetus to stay in its mother's womb would cause death to both of them. In such a case, it is alright to terminate the pregnancy if in order to save the mother:

In the stage when the embryo does not have human spirit, the general rule concerning abortion is to consider it a heinous, immoral deed, because it annihilates a living being with human potential. It is a forbidden deed, though the crime in this case is not as terrible as that of aborting a fetus into which spirit has been breathed. Punishment for the abortion of

an embryo could be waived when committed for a legitimate reason.

Perhaps it is this interpretation which leads some Hanafi scholars to rule that *diyya* (blood money), equal to one twentieth of the ordinary *diyya*, should be paid when a fetus is aborted spirit has been breathed into it. While a compensation of a lesser amount to be determined by a judge is due if an embryo in the earlier stage is aborted. (12)

10. On the basis of all that has been mentioned, I might sum up the ruling to which I subscribe in relation to abortion as follows:

- A. Abortion is forbidden at any stage of fetus development. It is a crime that incurs a deterring punishment in addition to monetary compensation.
- B. If a fetus has completed 120 days, abortion is to be allowed only when it is a necessity to save the mother's life. Punishment is not to be waived if abortion is performed for any other reason.
- C. If a fetus has not completed 120 days and there is valid justification for abortion, punishment is to be waived. The justification referred to here does not necessarily have to be the one referred to above. Other excuses are admitted. A serious disease of the fetus and fear for the mother's health, even if it is not confirmed with certainty, are examples of such justification. The likely harm is a legitimate excuse here, unlike the case of abortion after spirit is breathed in.

#### **Session Chairman**

We are grateful to Dr. Yasin for his commendable effort and valuable research. Would Dr. Al-Wa'ii kindly speak now!

## Notes

- (1) *Al-Lu'lu' wa' l-Murjan (Pearls and Coral)*, Tradition No. 1695.
- (2) Compare with what Dr. Hassan Hathout says on page 10 of his medical paper submitted to the seminar on Human Reproduction in Islam.
- (3) *Ibn 'Abdin's Note*, 1,602; *Al-Bahr Al-Ra'ik (The Calm Sea*, 8, 233; *Al-Majmou' (The Collection)*, vol. 5, p. 301 (as quoted in *The Fiqh Encyclopedia*, vol. 2, 57.
- (4) *The Fiqh Encyclopedia*, 2, 57 (Notations)
- (5) This is implied in the quotation from Ibn 'Abdin cited above. It is almost explicitly expressed.
- (6) And this is also implied by Ibn 'Abdin, who ascribes humanity to the fetus when he says, "and it is not permissible to kill a human being on an assumption."
- (7) The original Arabic words for "shaped" and "shapeless" are derived from the root "to create." (Translator)
- (8) See, for example, Ibn Kathir's interpretation of the fifth verse of the Sura of Al-Haj. He interprets "clot" as a red drop of blood and "morsel" as a shapeless lump of flesh with no features.
- (9) This development, "the breathing of spirit into an embryo," is not something that can be scientifically observed through any medical equipment. It is something the exact nature of which only God knows.
- (10) This interpretation may gain more validity from the stages of the creation of Adam, Peace be on him, as outlined by God when he says, Then "He fashioned him and breathed of His spirit into him." (Al-Sajdah [prostration], 9), and when he says: "When I have fashioned him and breathed of My spirit into him, then prostrate yourselves before him." (Al-Hijr, 29 and Sad 72). God, the Most High, explains that He first created Adam out of clay. The next stage was that of fashioning the new creature in a human shape. The breathing of spirit comes next which means that this is a later stage that comes after that of creation and even after, or at least parallel with the stage of fashioning.
- (11) The minutes of the meeting mention Ibn Hajar's interpretation of this tradition as he explains that the period of forty days of gathering creation refers to a continuing process of subtle creation which becomes visible by human eyes when the fetus reaches the stage of morsel. When fashioning is complete, spirit is breathed into the



fetus. It is clear, then, that the gathering of creation in this period does not mean that fashioning takes place all of a sudden when this period is over as some of our contemporaries suggest.

(Note by Muhammad Al-Ashqar)

(12) *The Fiqh Encyclopedia*, 2, 61 (Notation)

# **ISLAMIC VERDICT ON ABORTION**

Dr. Tawfik Al-Wa'ii

## **Definition of Abortion**

Abortion is the dropping down of a fetus that has not fully formed, whether this is done by the woman or someone else.

This general definition includes abortion that happens naturally and that which is wilfully done. This meaning conforms with the definition of fiqh scholars. Often these scholars use terms as dropping, casting down, or falling when speaking about abortion.

## **Legal Verdict on Abortion**

Scholars unanimously consider abortion forbidden if it is done after spirit is breathed into the fetus. Concerning abortion in an earlier stage, they come up with various details and differ in their rulings, ranging from permission to reprehensibility to prohibition.

## **Abortion After the Spirit is Breathed In**

All scholars agree that abortion after spirit is breathed in is forbidden, as it is an unlawful killing of a soul protected by the Law. "Breathing spirit in" was identified by the scholars of old days with [the mother's] awareness of the baby [inside her] medically known as quickening. Naturally in those days there were no modern scientific equipments of the type available today to reveal the existence of a living embryo at an early stage.

## UNJUSTIFIED ABORTION AFTER SPIRIT IS BREATHED IN

Fiqh scholars unanimously agree that abortion is unlawful. They estimate the point when breathing spirit in takes place as four month after conception. In this they depended on the methods common at their time, for before that point, they had no means to detect fetal life.

A fetus which has reached this stage is treated by scholars exactly like an ordinary human being. The Hanafi school finds, as expressed in *Al-Bahr Al-Ra'ik (The Clear Sea)*, that

If a fetus is situated crosswise in the womb of a pregnant woman, and can be delivered only by cutting it to pieces, otherwise there is a risk to the mother's life, it is alright to cut it if it is dead. If alive cutting it is unlawful, because saving a soul by means of killing another is against Islamic Law.

(1)

In *Al-Dur Al-Mukhtar (Selected Pearls)* and Ibn 'Abdin's Foot-notes, we find that

If a pregnant woman dies and the fetus is alive, her belly should be cut to get the baby out. When the opposite is true, and the mother's life is believed to be at risk, it [the fetus] should be cut up and pulled out, only if dead. But not otherwise.

Ibn 'Abdin, commenting on the clause "When the opposite is true," says "That is when the fetus dies inside her while she is alive." He comments on "But not otherwise" by saying, "If it is alive it is unlawful to cut it, because the mother's death is assumed and it is unlawful to kill a living human being on an assumption." (2)

Apparently, Hanafi scholars are speaking here about cases when the fetus is alive and may survive if delivered, as when it is in the sixth month of its fetal life or a later stage. Then it cannot be sacrificed to save the mother's life. This is why Ibn 'Abdin says in his comment, "The possibility of the mother's death is assumed and is set against the killing of a living human creature [whose survival is] not assumed."

Earlier, the author of *Al-Bahr Al-Ra'ik*, says, "It is unlawful to save a

soul by killing another." Therefore, the texts attributed to these scholars, do not settle the issue. What covers it is their quotation of what Al-Karnal Ibn Al-Humam says: "Abortion of a conceived fetus is unlawful after it acquires a form, which means that it is alive and his organs have been shaped." (3)

#### **The Maliki School Point of View**

Maliki scholars say that it is unlawful to abort a fetus into whom spirit has been breathed, and there are no exceptions. Ibn Al-'Arabi says that a fetus go through stages, which he lists. Then he says, "Once spirit is breathed in, it would be the killing of a soul, and there are no exception." (4) In Al-Dardir's *Elaboration on Khalil's Summary*, we find: "If spirit is breathed into a fetus, abortion is unanimously agreed to be forbidden. (5) Thus the Malikis unanimously consider such abortion unlawful, an unjustified killing of a living soul.

#### **The Shafi'i School Point of View**

Shafi'i scholars are also unanimous in regarding abortion after spirit is breathed in as unlawful. Al-Ramli says, "But there is no doubt about prohibition from the time spirit is breathed into a fetus until delivery... even if the embryo is the outcome of adultery, once spirit is breathed into it, there is no doubt about that to abort, it is forbidden." The same view is held by Al-Ghazali, Al-Bujairami and other Shafi'i scholars. (6)

#### **The Hanbali School Point of View**

Hanbali scholars also consider such abortion forbidden. Ibn Qudamah says in *Al-Mughni*, "If someone hits the belly of a woman, or if a pregnant woman takes a medicine, and the baby is aborted, atonement and blood money are due in either case." The Hanbali assertion that atonement is due indicates that the action is forbidden, and whoever commits it sins and has to atone as a sign of repentance of the sin committed. Blood money is the compensation paid when a living person is caused to die. This attitude is expressed by Ibn 'Akil in *Al-Insaf* (Equity) and *Al-Furou'* (Branches), showing that breathing spirit makes abortion and any other harm to a fetus unlawful.

## ABORTION BEFORE SPIRIT IS BREATHED IN

Naturally the only means available to fiqh scholars to determine that spirit had been breathed into a fetus and to tell that it was alive was its movement as felt by the mother. They had no endoscopes ultrasound detectors or radiology equipment to help them. Hence, some of them base their opinion prohibiting abortion during the early days of pregnancy on the sacredness and dignity of a human seed even before it takes form. Others say that prohibition applies once the embryo takes shape, even if spirit has not been breathed in. Still others find that once an ovum is fertilized, abortion becomes reprehensible, because sooner or later it is going to take a shape and be ready for spirit to be breathed in. These concur that prohibition applies when an embryo has taken a shape. Some scholars believe abortion to be permissible when there is a valid reason for it. If no such valid reason exists, abortion is reprehensible. Another group permit abortion, without condition, before the breathing in of spirit.

What is clear from the statement of scholars is that the question of permission and prohibition at this stage concerns the sacredness or non-sacredness of a human seed before it starts to take shape. Once it is being shaped, prohibition applies according to the general point of view.

### The Hanafi Point of View

Hanafi scholars have two opinions on this issue. The first is to allow abortion before an embryo takes form. Al-Kamal Ibn Al-Humam, in his book *Fatth Al-Qadir*, says, "Abortion after conception is permitted unless the fetus has started to shape." In *Al-Bahr Al-Ra'ik*, Ibn Najim Al-Masri says, "A woman who is treated to abort does not sin unless the fetal form has started to take shape." Ibn 'Abdin, in his *Note*, endorses this opinion.

The second Hanafi opinion considers abortion without justification, even before spirit is breathed in, prohibited. Al-Khani group is quoted to have held such an opinion, with the justification that it is an honoured seed. They add that for a person in a state of consecration [hram] to break the egg of a game bird is included in prohibition, because the egg is the

origin of the bird. (8) Since punishment is due in this case, the least thing that can be said about a woman who aborts is that she sins by doing so when there is no justification.

A group of Hanafi scholars used to prohibit such abortion altogether. One of these is Ali Ibn Musa, the leading Hanafi scholar of his time, who says that abortion is reprehensible. He explains: "After semen has reached the uterus, it is destined to bring life, so what applies to living beings should apply to it, as in the case of an egg of a game bird broken by someone who is in the state of in consecration.

The Zhahiri group holds the same opinion. Ibn Wahaban, a Hanafi fiqh scholar of Damascus and a judge of Hama, says that aborting an early seed is judged by the reason, and saying that it is in such a case not sinful means the sin is not the same as in the case of murder. (9)

### **The Maliki School Point of View**

The Malikis tend to be strict about abortion before spirit is breathed in, which they prohibit even before a fetus completes forty days of its life.

In *Al-Sharh Al-Kabir (The Great Explanation)*, we find that "it is not permissible to get out sperms which are shaping in the uterus even before forty days [of fetal life]." Al-Dasouqi comments on this in his "*Foot-notes*" saying, "This is the accepted decision," which means that the phrasing implies prohibition.

Al-Rahwani says in his "*Foot-notes*" on Al-Zarkani's "*Al-Sharh*" that a baby goes through stages. The first is pre-conception, and this can be prevented through coitus interruptus, which is permissible. The second is when the uterus retains a sperm. In this case no one is allowed to try preventing its birth, as some vicious ruffraff servants used to do when menstruation stopped; they resorted to medicine that would relax the uterus, which would allow the sperm to drop out. Then there is the stage when the fetus is shaped though spirit is not yet breathed in it. Prohibition is stricter in this case, as indicated by the saying of [Imam] Ali, related by Ibn Majah and Ahmad: "A miscarried fetus pulls its mother to paradise with its umbilical cord if she resigns herself to her loss." Al-Rahwani, quoting *Al-Mi'yar (The Standard)*, says, "Our scholars stipulate prohibition of anything that ejects an embryo out of the uterus or gets a sperm out. Both Al-Muhassel and Al-Nazher School concur with this." Al-Jazuli says, "No person is allowed to take medication that may lessen his offspring or do anything similar." Al-'Izz Ibn Abd Al-Salam says, "No woman is allowed to

use anything that may reduce the power which causes conception.”

Ibn Rushed says, “They [the Malikis] differed on the fetal stage at which blood money is due. Malik says that ‘blood money is due for anything [a pregnant woman] aborts, whether morsel or clot, so long as it is known to be a future child.’” (10)

All this shows that the Maliki school does not only forbid abortion at all stage of conception, but even forbids semen being flushed out or medication that prevents an embryo from taking shape or conception from taking place. They impose blood money to be paid by any person who causes a woman to abort, even when the embryo is only a clot or a morsel.

### **The Shafi’i Point of View**

The Shafi’i school holds two opinions concerning abortion before forty days of fetal life are completed. The first is that it is uncertain whether it should be regarded as abortion, and the other is that it is forbidden.

Al-Bujairmi says, “They differ on whether causing a sperm to drop after it has settled in the womb.” Abu Isshak al-Marwazi is quoted as saying that it is not unlawful to drop a sperm or a clot. He quotes Abu Hanifa on this. In *Al-Ihya’ (Giving Life)*, Al-Ghazali is quoted as saying in his discussion of “Coitus interruptus what amounts to prohibition, adding that it is the more logical attitude, because once it settles, a sperm is bound to take shape, which prepares it for the spirit to be breathed into it.

In *Nihayat Al-Muhtaj*, we find: “Scholars disagree over the sperm before forty days are completed. They hold two opinions. It is said that it is uncertain whether the rulings on abortion and on burying an infant alive apply in this case. On the other hand, it is also said that it has some sanctity and it is unlawful to either sabotage or cause it to drop after it has settled in the womb.

Al-Ghazali elaborates what Al-Bujairmi considers the more logical Shafi’i viewpoint, justifies and explains it. He says, “Intentional abortion and burying an infant alive are felonies committed against an existing being. The first stage of existence is depositing a sperm in the uterus, where it mixes with the woman’s fluid. To sabotage it is a felony against an existence. If it has already turned into a clot or a morsel, the felony is more serious. Once spirit is breathed into it, the seriousness of the felony becomes much greater.”

This then is the better founded opinion of the school of Imam Al-Shafi’i as expressed by Al-Ghazali and quoted in *Nihayat Al-Muhtaj*. It

is the view favoured by Al-Bujirami.<sup>(11)</sup>

### **The Hanbali Point of View**

The Hanbalis tend to permit dropping a sperm before forty days are completed. *Al-Furu' (Branches)* mentions that "It is permissible to take a lawful medicine to drop a sperm." In *Al-'Insaf (Fairness)*, we read, "It is allowed to take medicine to cause a sperm to drop." In *Ghayat Al-Muntaha (The Ultimate End)*: "A man may take a lawful medicine to prevent intercourse; a woman may take it to drop a sperm, but not a clot."

The Hanbali scholar Ibn Qudama, however, says atonement for abortion in general is due, which implies that he does not consider it lawful even if it is done before forty days are completed. On the subject, he says, "Any person who bumps the belly of a woman causing her to drop an embryo, and any pregnant woman who takes a medicine that causes her embryo to drop, must make atonement and pay blood money. Sin is implied to have been committed when atonement is deemed due; this sin, which can only be lifted through atonement, must be the commission of something forbidden by Islamic Law or the omission of an obligation.

It is clear then that the Hanbalis have two points of view concerning abortion before forty days are completed. One regards it as permissible, and the other, held by Ibn Qudama, as unlawful. (12)

### **Summary**

Scholars of all four major schools of fiqh discussed abortion before and after forty days are completed, and before and after spirit is breathed in. Their opinions amount to forbidden abortion after forty days of fetal life are completed.<sup>(13)</sup> As to earlier abortion, the Malikis hold one opinion,<sup>(14)</sup> which regards it as also forbidden, because a sperm is a living thing, and the general rule holds life sacred. Anything that causes harm to that sperm or even keeps it from growing and performing its function, i.e. the birth of a human being, is unlawful. This is explicitly expressed by the scholars of all four schools, who affirm prohibition of taking any medicine that would abort an embryo.

As we have said, there are two different opinions concerning abortion before forty days of fetal life are completed, although the majority tend to rule against it. Those who find it permissible base their opinion on the assumption that the embryo is not yet a living being. If it is proved that an



embryo is alive before it has completed forty days, I do not believe a single scholar would disagree that its abortion is unlawful, because all scholars hold life sacred and regard it as the basis of permission or prohibition.

## JUSTIFIABLE ABORTION

Certain scholars regard abortion for a legitimate reason lawful, particularly if spirit has not been breathed into the fetus yet. One of the acceptable reasons is fear for the mother's life. Another, according to some scholars, is when the pregnancy is the result of adultery. If it is confirmed that the baby would be deformed due to a disease suffered by the mother or any other reason, this would also be a reasonable justification. In "*Nihayat Al-Muhtaj*" (*The Needy's Satisfaction*), Al-Ramli says on the subject, "if the sperm is that of adultery, permission [of abortion] might be justified. If, however, it is spared until spirit is breathed into it, prohibition is certain." (15)

The Hanafi school does not permit abortion after spirit is breathed in even for such an excuse as fear for the mother's life. Ibn 'Abdin says in his "*Foot-notes*", "when a fetus is alive it is unlawful to cut it, because the possibility of the mother's death is only assumed and it is unlawful to kill a living human being on the basis of an assumption.

The Hanafis, it seems, want by this to hinder the killing of fetuses on the mere assumption that a mother would be harmed or that her life would be endangered. Their verdict, however, implies that if it is certain that the mother would die [by sparing the fetus], it is not forbidden to abort it.

Fiqh scholars allow early abortion to save a mother's life or the life of the fetus itself when a mother dies with a living fetus in her belly. On this, Al-Nawawi says in *Al-Majmou'* (*The Total*), "If a woman dies and a living fetus is inside her, her belly is opened to get it out as Ibn Suraj says." Others have said that midwives should be consulted. If they say there is hope for the fetus to survive if it is brought out, such as when it has completed six months or more, then her belly is cut to get out. But if they say its survival is hopeless, it being under six months, it is senseless to desecrate her body in vain." Al-Mawardi says that Ibn Suraj's opinion is the same as Abu Hanifa's and most scholars'. Al-Nawawi, compiler and editor of *Al-Majmou'*, decries the killing of a living being, even if its survival is hopeless. Therefore, he believes the fetus should be brought out in case it does live against all odds. (16)

## **Summary**

It is clear then that old scholars are unanimous in prohibiting unjustified abortion after spirit is breathed in. They allow it, however, when there is a compelling reason, which is the certainty of the mother's death if the fetus is kept inside her.

As for abortion before spirit is breathed in, some of them consider it absolutely prohibited or reprehensible, while others, whose point of view is more valid, say it is forbidden after the first forty days, and consider it permissible if done earlier. Others say it is permissible for certain reasons, such as fear for the mother's life, the sperm being the result of adultery, or certainty that the baby would be deformed.

The spirit of Islamic Fiqh and the outcome of Scholars' views imply that an embryo is considered alive since the outset of conception; that its life, in all its stages, is sacred, particularly after spirit is breathed in, and that aggression against it, in the form of abortion, is unlawful, unless for an extreme necessity as explained by those scholars.

## **Session Chairman**

We thank the honourable Dr. Al-Wa'li for this enlightening review of scholars' opinions on abortion. Now it is time for open discussion.

## Notes

- (1) First Edition, 8, 233. (Al-Matba'ah Al-'Aliyah).
- (2) Ibn 'Abdin's "Foot-notes", Bulak Edition, 1, 602.
- (3) *Fatth Al-Qadir 'Ala Al-Hidayah*, Bulak Edition, 2, 495.
- (4) Al-Rahouni's "Foot-notes" on Al-Zarkani's "Al-Sharh" (Elaboration), Bulak Edition, 3, 264.
- (5) *Al-Sharh Al-Kabir* (The Detailed Elaboration) and Al-Dasouki's "Foot-notes" Isa 'Al-Halabi's Edition, 2, 267.
- (6) *Nihayat Al-Muhtaj* (The Needy's Satisfaction), Al-Halabi Edition, 8, 416; Al-Jamal's "Foot-notes" on Sharh Al-Minhaj, 5,490; Al-Bujairami's "Foot-notes" on *Al-Iqnaa'* (Persuasion), Al-Halabi Edition, 3, 303.
- (7) *Al-Mughni*, 8, 406, 418 (Cairo); *Al-Insaf*, 1, 186; *Al-Furu'* Wahida Edition, 1, 191.
- (8) Hunting is forbidden for a person in the state of consecration i.e. Ihraam which he has to go into, when performing a pilgrimage (*Hajj*) or a brief pilgrimage ('Umra). (Translator's note)
- (9) *Al-Bahr Al-Ra'ik*, 8, 233 (Al-Ilmiya publishing House); *Fatth Al-Qadir*, Bulak Edition, 2, 495; Ibn 'Abdin's Note, Bulak Edition, 2, 380.
- (10) *Al-Sharh Al-Kabir* with Al-Dasouqi's "Foot-notes", 2, 266, 277; Al-Rahwani's "Foot-notes" on Al-Zarkani's "Al-Sharh" (Explanation), First Bulak Edition, 3, 264; *Bidayat Al-Mujtahed* (A Starting-Point for the Diligent) 2, 453 (Al-Azhar College Publications).  
Correction: Al-Maliki school holds another opinion, expressed by Imam Al-Lukhami, which maintains that abortion before forty days are completed is permissible. This is quoted in *The Fiqh Encyclopedia*. (Muhammad Al-Ashqar's note)
- (11) *Tuhfat Al-Habib* (The Lover's Curiosity), 3, 303 (Al-Halabi Publication); Al-Sharwani's "Foot-notes" on *Tuhfat Al-Habib*, First Edition, 6, 248; *Nihayat Al-Muhtaj*, 8, 416, (Al-Halabi Publication).
- (12) *Al-Furu'*, 6, 191; *Al-Insaf*, 1, 386; *Ghayat Al-Muntaha*, 1, 81; *Al-Rawdh Al-Murabba'* (The Square Garden), 2, 316; *Al-Mughni*, 8, 815; *Kashaf Al-Kinaa'* (Unveiling), 6, 54, 17 (Publisher: Ansar Al-Sunna)  
Correction: No atonement is required for aborting an embryo before it has taken shape in the opinion of Hanbali scholars. This opinion is advanced by the author of *Al-Mughni* (7, 802) himself. Therefore only one verified opinion is held by the Hanbalis. (Muhammad Al-Ashqar's note)

- (13) This is true for the majority, though it is not a unanimous prohibition of abortion before form is detected. See the Hanafi opinion referred to earlier by the writer (Muhammad Al-Ashqar's note)
- (14) The fact is that this is the widely-accepted Maliki opinion, but they have another, which is permission as indicated above. (Muhammad Al-Ashqar's note)
- (15) 8, 416.
- (16) 5, 301 (Al-Muniriyah Press)

## DISCUSSION

### Chairman

With your approval, we will allow time first for medical opinions, and then as usual, we can listen to Islamic legal viewpoints.

### Dr. 'Isam Al-Sherbini

What I want to say is based on Dr. Hassan Hathout's statement yesterday that human life begins with the union of a sperm and ovum.

We have different types of life. It is well known that when man dies and his human life terminates, in a way no one contests, his cells continue to live for a period of time, long or short. A heart continues to beat after excution, as physicians, district attorneys, and attending police officers would testify. Organs are transplanted from the dead to the living: a heart, a kidney, a liver--all can be transplanted, and the list is still open as experiments continue. This is one type of life. Another thing: we can cultivate human tissues in a vessel, as Dr. Abd Al-Hafez says, and the culture produces one generation after another. This is another type of life. Is the life of an ovum, which has been fertilized with a sperm, a true human life, or is it a different type of life? I was surprised yesterday when the question was raised of what we are supposed to do with surplus fertilized ova, whether it is alright to dispose of them or they must be implanted. We are restricting ourselves too much, while there is no need for such restriction. New questions might arise concerning eight-cell, or sixteen-cell, embryos. What should we do with them? Should we flush them down the drain or should we bury them, and if the latter, should it be in Muslim or in non-Muslim cemeteries? Someone may ask, should we perform the prayer for the deceased? We should also keep in mind that this living ovum has another trait, which Dr. Maher mentioned yesterday. At least in lower creature, if it unites with a full living cell, it can produce a clone, an identical being. God has made a woman to produce one ovum a month. In thirty years, she produces 360. An ordinary woman bears five to ten children, or let us say fifteen, or even twenty. This means that, by God's Will, over three hundred ova perish. When it comes to sperms, 400 million

are ejected at a time, each of which is capable of reproducing if it gets to the ovum. This is the nature of creation.

I am afraid what Dr. Hassan cited yesterday is an argument against, rather than for, him. He cited Imam Ghazali's opinion concerning the beginning of fetal life. The Imam says the crime against the embryo gets more serious, the closer its timing is to the date of delivery. It is a full crime after the baby's birth. This means that there is some difference between the fetus in its early months and the born baby. In the other example he [Dr. Hassan Hathout] cited--the fact that an embryo's share in inheritance is set aside and that even if it is born and then dies after crying, it is eligible to inherit and be inherited--if an embryo is alive in the same sense a human being is, then there would be no need to wait for its birth; it should be eligible to inherit and be inherited at the very moment of conception.

The same thing is true for blood money due as a result of causing abortion. If an embryo is alive since the moment of conception, retribution would have been exacted or blood money paid in the same way and amount as for the killing of a living. What I want to say is that there is no doubt that stages of life have to be distinguished. Even though Dr. Hassan is unable to see the dividing lines, fiqh scholars had no differences over this. The Prophet's tradition distinguishes forty-day stages, after which spirit is breathed in, and in the Quranic verse, there is the clot of blood, then the morsel, then bones are formed, then flesh covers the bones, and then a new creation is set forth.

Again Dr. Hassan was not able to draw lines distinguishing pregnancy stages, but there is a stage which is very clearly distinct from others. It is the one referred to by "and then spirit is breathed into it," and this is a new stage different from the ones before it. In the Quran, several stages are mentioned, and then: "We bring it into being as a new creation." Again this is a major step. Now I want to rephrase the question addressed to the honourable fiqh scholars. I do not call for permission of abortion at any stage whatsoever and for no reason at all. But I do not want doors to be closed in our faces, when the Legislator has kept them open. This is why I am rephrasing the question. Concerning this embryo, which is secure in its mother's womb and has its rights and its sanctity, we all agree that it may be aborted to save the mother's life, whether we believe this to be a matter of necessity or the lesser of two evils. The killing of a human being for a necessity is a subject of controversy among scholars, some of whom do not allow it even if the necessity is saving the life of another human being. But when we allow abortion for a necessity at all stages, does this

necessity remain the same in the early stages, or is permission granted for something which is just short of being a necessity? Is abortion allowed to satisfy a need, as Dr. Zakariya mentioned yesterday? Would a need count the same as a necessity? That is the question I would like the honourable scholars to answer.

**Dr. Tal'at Al-Qasabl**

I have been practicing gynecology for about thirty years, and I believe the first thing we should know is the definition of conception. Conception is the implantation of a living fertilized ovum into a living body or a uterus. After this definition we come to the question: When does the termination of pregnancy mean abortion? I believe that abortion at any time, from the first moment, is unlawful for us, Muslims, even if it is called for by a necessity other than a threat to the mother's life. That is the only reason for which we can terminate pregnancy, even at an advanced stage. Pregnancy is terminated even in the twenty-eighth or thirtieth week, that is in the seventh or eighth month, if it poses a threat to the mother's life in any way. This is the medical attitude, and that is what we practice. Whenever the threat is very serious, we terminate the pregnancy at whatever stage. Other than this, there is no justification for abortion.

**Dr. Abd Al-Hafez [Hilmi]**

All the papers are objective, and I am going to go over some criteria.

The first is the criterion of life. Life characterizes a sperm even before it is ejected and an ovum even before it is released. It also characterizes them when they unite. Life is a continuous process. I subscribe to the view expressed by Dr. Ahmad Shawqi Ibrahim, which distinguishes between the breathing in of spirit and life as such, which practically continues through all stages.

The second criterion is that of quickening, which has been raised. There is fetal movement which used to be unknown before the mother felt it, but it has been detected by modern monitoring equipment. I say that motion goes on even before that, because cells, even at the earliest stages, are in motion, even if this motion is not detected by any equipment. Cells move and arrange themselves, etc. The trait of motion also exists at the very beginning.

The third criterion has been referred to by Dr. Basalamah as a morsel turning, according to your expression, into a fetus. Scientifically, the term



fetus is used starting with roughly the eighth week, which agrees with the Prophet's tradition about the forty-day stages, with a slight difference of few days.

The fourth point which I would like to support is one raised by Dr. Tal'at. We are now in a position where new information is available to us allowing us to arrive at a better opinion. If fertilization takes place either in a tube or inside a female, the embryo takes six or seven days--something of that sort--before it is implanted. I mean it is a group of cells that are transferred from the tube into the uterus, and it undergoes some change there, before it sticks to the uterus wall. What I want to say is that we should take this last point into consideration. Once the embryo sticks, it will most probably survive. Allow me to exceed a little the time I am allowed, which I have promised to observe. Al-Ghazali says the first step of existence is when a germ gets into the uterus, mixes with the woman's liquid, and is ready to survive. To spoil this is a crime. When the germ turns into a clot, the crime is worse. If creation is completed and spirit is breathed in, it is even worse. The worst of all is a crime against the baby after it is separated from the mother.

The American constitution attempted to determine the beginning of life and to define the word "person." In short, there was a lot of controversy over the word, while drafting the constitution. What is the meaning of conception? What is the meaning of person? What is the meaning of life? They arrived at the conclusion (and their discussion is available) that there is no difference over the biologic meaning of life. They said, however, that there is a difference between a life and a person, or what we call a human being, other than a fetus. A living thing which God will not to secure a place for itself in the uterus may have another consideration, which might allow for more mercy and less restriction. However, this is a religious matter for fiqh scholars to determine.

#### **Dr. Abdulla Basalamah**

Perhaps before Dr. Ahmad Shawqi speaks, I should mention that the committee being referred to, whether in Britain or the U.S.A. has come to the conclusion that movement begins after the nervous tube, which is the canal that contains the nervous system, is developed, which is usually in the sixth or seventh week, i.e. within forty to forty-two days.

### **Dr. Ahmad Shawqi**

In fact Dr. Abd Al-Hafez has spared me saying almost half of what I want to say. Life is a continuous process, not only in the sperm and the ovum, but since the creation of Adam until Doomsday. It never ceases. The creation of a germ is the union of two lives, the sperm's and the ovum's. They are two separate lives, and then the mystery of a new life begins with their union. The creation of this germ then is different from that of the clot of blood and the morsel, which are one stage following another, not a union of two independent lives as we have in the germ.

This allows us to understand better the text of the Quranic verse and become aware of the scientific facts implied in it. It does not say, "We create him, a drop of sperm", but rather "then We cause him, to remain a drop of sperm....." and then adds, "The sperms We create out of the drop of sperm a germ cell, and then we create out of the germ-cell on embryonic lump...." (Al-Mu'minun [The Believers], 13). The Arabic word used for creating the sperm is more inclusive than the one used for the germ-cell and embryonic lump.

I want to add a brief word. When there is an explicit text [in the Quran or Tradition], there is no room for independent opinion. Since there is a confirmed tradition of the Prophet, Peace be upon him, which says, "Then an angel is sent..." and lists a number of forty-day stages, there is no room for us, with our limited knowledge, to come up with independent opinions, because what we do know is nothing compared to God's knowledge. We may not understand, but future generations will better comprehend the meaning of the tradition and the Quranic verse, together with their scientific implications. Once again, there is no room for independent opinion when there is an explicit text.

### **Dr. Hassan Hathout**

I beg that we stop any discussion of the prohibition of abortion after spirit is breathed in. This question is already settled. It seems all of us have access to the same books and have read what they say about abortion. If there is anything new, of course we welcome it.

Abortion after spirit is breathed in is unlawful, but what about before the breathing in of spirit? One tradition says that an angel is sent to the fetus to breath spirit into it within 120 days. Another tradition has it as forty-two days, and a different version of the latter, as forty-five. The Prophet, Peace be upon him, tells, and is told, nothing but the truth. We have to be aware of this, even when we have forty-two days in one

tradition and 120 in another.

What is the ruling concerning an early embryo, which medicine has recently told us is alive and moves? I am a Muslim doctor with a Western education. The medicine we practise is acquired in the West. I go here and there and receive new medical concepts, and I try to scrutinize them to determine what I can take and follow and what I should avoid and deem unlawful. Almost all are in agreement that, inspite of certain legal reservation made by certain fiqh scholars, if continued pregnancy threatens the life of a woman, her life is considered the root and the embryo's an offshoot, and roots have priority over branches. I would add "mostly" because there are cases where it is the other way round. An example is that of a mother with a very advanced and serious case of cancer. There is a treatment that might palliate her, but the chances are rather slim, and the treatment would be harmful to a fetus she is carrying, which is in its sixth month. In a month, the baby would survive if born. Here, the survival of the fetus is more probable than that of the mother, because the cancer has spread in her body. The treatment in this case is postponed until the fetus is mature enough to be removed from her uterus without causing it to die. As a physician, I am not called upon to protect the spirit; I do not know what the spirit is. "Say: 'Knowledge of the spirit belongs to my Lord'. (Al-Israa' [The Night Journey], 85) But I ask you about life before spirit is breathed in; do you recommend that it should be respected, safeguarded, and preserved, or is it violatable? When a lady comes to me and says, "I am pregnant in my sixth week, and I would like to abort the baby," should my answer be, "Fine! Come back tomorrow and I will have it aborted"? In another country we might also discuss the fees. I can by no means overlook what I see going on in the world, of which many of you, your honours, might be unaware. The moral trend in the world now is towards boring a tiny gap through which legalization of abortion may establish itself. This trend is at our doorstep, and in many cases it is already in.

This is one point. As a physician, I cannot ignore the living creature that I see and know, whose growth I follow, and whom I am required as a doctor to protect as one of my patients. When I receive a pregnant woman, I am not receiving one patient but two, one inside the other. As a doctor, I have learned to protect life, and I do not say to protect spirit. I have already said I do not know what spirit is. I protect life from its inception, and I never terminate a life unless to save another--never to save a fortune or a reputation. I never put an end to a life because a lady says, "We are poor," or "I am going on a summer vacation, and I am not ready to spend it in

pregnancy." So, please tell me, should I safeguard a life from the very beginning? or can you find for me in Legislation another option, in cases other than that of saving a mother's life? This is the very point we differ on, and we need not go over points on which we are in agreement. Is an embryo's life to be respected from its first moment or not?

I will rephrase the question. Let us assume a woman criminal, who has been pregnant for two weeks, is condemned to die. Should the sentence be executed, or should it be postponed until the baby is born? Answer me, does the baby has the right to live, so execution is deferred, or has he no right, so both the mother and the baby should be executed? This is a specific point which we need to settle. Certain utterances are like a mouthful that can be chewed and swallowed, but others are like chewing gum which is chewed and chewed but never swallowed.

The only point of difference is over human life in its earliest stages, should it be respected or not? What I understand is:

On this account we decreed upon the children of Israel that whoever killed a human being, except as a punishment for murder or other wicked crimes, should be looked upon as though he had killed all mankind. (Al-Ma'ida [The Table], 32)

The crux of the matter here is not spirit. We do not know what spirit is. It is only a human life that is brought to an end. Now tell me about the two-week pregnant lady who had a death sentence. Is she to be executed or not? And her embryo, does he have the right to live, which means that a stay of execution is mandatory? That is our subject.

Thank you.

**Dr. Abdulla Basalamah**

I want to add something in order to save time. The question is a legal one, and it is one of the rare cases doctor come across. What some of them always face is the question of abortion on demand. We have excluded all cases of abortion for reasons concerning the mother's or the fetus's health. But what our doctors who are trained in the West face is abortion on demand. Is it lawful during the first forty-two days? Is it lawful in the period between the forty second day and the 120th? Or is all abortion unlawful?

**Councillor Abdulla Al-'Isa**

In fact Dr. Na'eem [Yasin] and Dr. Tawfiq [Al-Wa'ii] have covered the subject in detail. I want to say that it is not breathing the spirit in, which

makes the difference. The point is the respect due to the embryo or the germ. [It is due,] according to fiqh scholars, not with the breathing in of spirit, but rather when the fetus begins to form. Although some medical professors have objected that the term "to form" is a fiqh, rather than medical, term, beginning to form is for fiqh scholars the criterion in many rulings, such as blood money and termination of the waiting period [for a widow or a divorcee].

In the third volume of the "*Sharh Muntaha Al-Iradak*" (*Interpretation of Ultimate Desires*), the author says, in discussing blood money due for an aborted fetus, "A fetus is what human form, even when obscure, can be discerned in; it is neither the embryonic lump nor the germ-cell." This implies that no blood money is due for either an embryonic lump or germ-cell.

On another subject, the termination of a woman's waiting period, the author says, "A pregnant woman's waiting period terminates only after she delivers what human form, even when obscure, can be discerned in." The implication is that it does not terminate if she drops a germ-cell or an embryonic lump.

On the subject of executing a pregnant woman, who is convicted to be pulled which has been raised by Dr. Hassan, I say that legally a pregnant woman should never be executed. If her pregnancy is confirmed by a doctor, even if this could be done within one or two days of the time of fertilization, the Law decrees suspension of the sentence until after delivery.

### **Sheikh Mahmoud Makadi**

First, I want to clarify things concerning the tradition that says the angel's visit occurs after 120 days. It is confirmed as an authentic tradition, related by Muslim. As I said yesterday, in the Book of Destiny, two traditions are listed. The first is narrated by Huthaifa Ibn Osaïd quoting the Prophet, Peace be upon him, saying, "An angel comes to the germ...." (2) And the other is narrated by 'Amer Ibn Wathilah, who quotes Ibn Mas'oud as saying that he heard the Prophet say, "When forty-two nights have passed, an angel is sent to the germ to assess it and give it hearing, sight, skin, flesh, and bone, and then say 'O Lord: male or female?' ..." to the end of the tradition. (3)

These two traditions can be found on page 45 of the eighth volume, the Istanbul edition. We have made it clear that the angel's visit occurs within forty-two to forty-five nights. Any addition to this I leave to our old venerable fiqh scholars themselves, and be sure that they compare

medical and fiqh information. With your permission, I will not quote an unknown scholar. All of us are familiar with Shihab Al-Din Al-Qarafi and know how meticulous he was in his research. Probably he closely consulted physicians as we are doing at this session. He says on page 123 of his fourth volume:

The forming of a fetus sometimes takes a month (which means that within a month the organs take shape), sometimes a month and a five days, and sometimes a month and a half. When it takes form in a month, it takes a similar period for it to start moving, which is felt by the mother. In other words, it begins to move within two months. It is delivered after double that period, i.e. four months. If four months are added to the first two, it is clear that it is delivered within six months. This is in some cases. If taking form takes one month and five days, it begins to move within two months and ten days. If that is doubled, which means four months and twenty days, and added to the period it takes the fetus to move, the result would be seven months, and the baby is delivered within such a period. If it forms within one month and a half, it moves within three and is delivered within nine, according to the above method of reckoning, and this is the common thing and the majority of infants are born in such a time. The fetus goes through normal development only in six, seven or nine months, but something may happen and pregnancy may extend to twelve lunar months.

Other scholars have gone into the question of unusual occurrences and said a baby might take up to two years or more [to be born], which is the view of the Hanafi school; four years, which is the common view of the Shafi'is; or five years, which is the common view of the Malikis. Some scholars of the latter two schools say it might take up to seven. Now listen to this. The author of "*Al-Istiqssaa*" (*Investigation*) says, "In Waset, a woman delivered after seven years of pregnancy a very hairy baby. At the time of its birth, a bird landed by its side, and the baby said, 'Shoo!'" Malek says, "The wife of Ibn 'Ajlan never delivers in less than five years of pregnancy." These, however, are very rare and unusual cases, and the most acceptable opinion is the first. Thus, in saying

The creation of one of you in the belly of his mother takes forty days, or for forty mornings he is a germ, then for forty more he is a clot of blood, then for another forty, a morsel, and then spirit is breathed in.

the Prophet, Peace be upon him, refers to all three views, because forty is not much more than thirty-five, nor much less than forty-five. It is an

average point which represents the other periods. This is the true interpretation of the tradition, but this surface meaning does not apply to the creation of most embryos. If we take the surface meaning, it indicates that perceptible fetal movement begins in four months and delivery occurs in twelve, which does happen, though it is rather rare. You can take the tradition as referring to certain, not all, cases. One case is sufficient to prove that it is true, and there have been many cases like that where pregnancy lasted twelve months. These cases have proved the truth of the tradition, so we do not have to abandon the surface meaning.

You may prefer to take the uncommon usage of the words, rather than the surface meaning, which would then refer to common cases, and the reference would be to average periods, as it has already been mentioned. What recommends our interpretation is the direct knowledge of the stages of forming, moving, and delivery acquired by those who used to open the bellies of pregnant women condemned to death and see with their own eyes. This knowledge acquired by the senses recommends the surface meaning of the tradition. Sheikh Al-Qadhi set an important rule: "We do not deny what we see with our own eyes." We let Dr. Hassan see for himself, and we take his word. We then interpret the tradition on the basis of what we see.

He has raised a simple objection that non-Muslims might follow this practice. I will argue against his point, because he cited the findings of anatomists who are of course non-Muslim. That was the situation then, but today we have very pious physicians and anatomists, who are also fiqh scholars. I will only answer with one point I made yesterday. When we get a report from a trustworthy non Muslim physician, we accept everything he says, because we know he has no biases at all.

These are the things I wanted to say, and I think they are sufficient and give an answer to the question raised. Thank you.

### **Professor Zakarriya Al-Berri**

It seems that by God's Will we are going to reach an agreement. There is a verse in the Quran that settles the difference over the inception of human life. It is in the sura of Al-Mu'minun, and we all know it. God says, "And then We bring forth another creation." ([The Believers], 14) Thus, there is life in the early stages, but it is animal life. The embryo has not yet acquired the stature of a human being. The beginning of human life occurs after the phases mentioned by Imam Ali, as implied in God's saying: "And then We bring forth another creation." Let me emphasize the phrase

another creation," which is brought forth by breathing spirit into a fetus and by its human form. In earlier stages, an embryo does not yet rank as a human being.

Therefore, it is clear that abortion cannot be allowed during the human stage unless for a necessity. Before that, the embryo is not a human soul, but rather an animal life bound to turn into a human being. It is animal in the same sense as we refer to a sperm [in Arabic] as an animal. Abortion before that is not ruled as forbidden, but ranks lower in fiqh restrictions; it is reprehensible.

Islamic rules are clear and well-defined. When something is deemed prohibited (or unlawful), this means a person who commits that things must be punished, while committing something which is deemed reprehensible does not entail punishment. On this basis, the early stage is one of reprehension, but not prohibition, of abortion. Reprehension intensifies as the embryo develops, in the sense that if we accept the view expressed in some Islamic works that the breathing in of spirit occurs in 120 days, then abortion on the 119th day is so reprehensible that it is almost forbidden. In the very early stages, reprehension is not as intensive. On the 120th day, reprehension turns into prohibition. Another Qurani verse might be regarded as supporting this view; it deals with a widow's waiting period: "Widows shall wait, [keeping themselves apart from men] for four months and ten days after their husbands' death." (Al-Bakarah [The Cow], 234)

We should pay attention to the phrase "and ten days," to see how specific the Quran is. It does not set the period as just four months, but adds the ten days, as if to indicate that the breathing in of spirit occurs within 120-130 days. In no way can the ten days have been added haphazardly; God is Most Sublime, and there has to be a rationale for the ten day addition. As some fiqh scholars, contemporary and otherwise, have pointed out, setting the waiting period of a widow, assumed to be non-pregnant, as such is to make sure that she is not pregnant, for the waiting period of pregnant women ends with delivery. Others cannot be absolutely certain, so they have to wait until things are clear, and that is by allowing time for spirit breathing into any possible, undetected fetus.

As to the point taken against fiqh scholars, that some of them have unreasonably extended the period of pregnancy, they have an excuse for that. At their time, medicine was not as advanced as it is today. When Imam Malek cites the example of Muhammad Ibn 'Ajan's wife, it is



because that is the evidence he has. The only scientific-religious approach available to him is that of sociological survey, and this has led him to be told by a certain woman, his neighbour's wife, that her pregnancies last for so long. With only this as evidence, it is natural that he arrives at that conclusion. It is known that the Hanafi school has based its conclusion on what Lady 'Aishah has said, which is attributed to the Prophet, Peace be upon him. Still, contemporary medicine has recently extended the maximum period of pregnancy. An English doctor has written in a medical journal that a baby might stay in its mother's uterus for several years. He explains that in normal circumstances, a baby is born at the usual time, and if circumstances are bad, not conducive to life, it dies. But there are border cases in which the baby hibernates in its mother's belly until God wills for it to wake.

Thank you.

### **The Chairman**

We thank Dr. Zakarriya for his specific views on abortion. Now it is the turn for Sheikh Muhammad Al-Ashqar.

### **Sheikh Muhammad Al-Ashqar**

When we watched the film at the opening of the seminar, we somewhat wondered, and doubted whether the tradition concerning the forty-day stages, in spite of being related in both Compilations [of authentic traditions by Al-Bukhari and Muslim], is not well supported. I thought perhaps it was narrated by one Companion only, and some confusion might have occurred. I checked it and discovered it was narrated on the authority of about ten Companions, three of them are quoted in the two authentic Compilations. In other books, authentic versions, on the general meaning of which there can be no doubt, are also listed. There are some variations in the different versions of this tradition, although all of them agree that an angel is sent to the baby in every pregnant woman's belly, with the order of determining the baby's fortune and destiny, and whether it will be miserable or happy. Some authentic versions also agree on the breathing in of spirit. Still there is some conflict, which concerns the period of 120 days (forty and then forty and then another forty). In one version, it is only one period of forty days. This in fact is the key to the answer. I hope we can reach, in the light of what the film has shown us, a better understanding than what we could reach by merely reading the different versions of the tradition.

Perhaps things can be explained by a quote I have copied from Ibn Hajar on an index card. It is nothing new, nor does it say much, but it explains many things that have been raised at the session and supports some of the medical and other accounts given. What is nice about this quote is that it is originally a quote from a physician, so it is not merely a fiqh scholar's point of view.

This fiqh scholar/physician, who excelled in both fields, is one of our venerable scholars. He is Sheikh Shams Al-Din Ibn Al-Qayyem, who, I believe, is known to all of you. So I will quote his exact words and add nothing of my own. His statement is quoted by Ibn Hajar in *Fatth Al-Bari (The Creator's Inspiration)*, (4) which says:

According to Sheikh Shams Al-Din Ibn Al-Qayyem, the inside of the uterus is rough like sponge, and in its absorption of semen, it is like dry land absorbing water. It has naturally desired it, so it holds it, keeps it in, and does not allow it to drop out, lest air should spoil it. God permits the womb angel to bring it to maturity within forty days, during which it forms.

I want to draw attention to the tradition, which says, "The forming of one of you takes forty days." Forming has a certain interpretation pointed out by Sheikh Ibn Al-Qayyem, who says:

When the uterus holds it and does not eject it out, it turns upon itself and gathers strength for six full days. Then three spots form at the spots where the heart, the brain, and the liver are located.

We saw in the film two spots, and I do not know whether the third can be verified or not.

Within three full days, five lines form between these spot. Fifteen days later, blood starts to flow through it. Its three parts become distinct. Then the spine's solidification takes twelve full days. The head emerges from the shoulders, the limbs from the ribs, the belly from the embryo [I believe there is a copying error here, and it should read "from the sides"], and in four days the distinction is completed and the fetus's form becomes apparent. This brings the total to forty days, which explains [the Prophet's] statement that "it is formed in forty days." These are the details of what he summed up.

This does not contradict his saying that "for a similar period it is a clot," because a clot, though only a drop of blood, takes in these second forty days a shape other than that of the sperm, and lines start to form gradually in an imperceptible manner. Then it turns solid within forty days, with the form getting clearer and clearer, until it is a fully formed embryonic lump,

and is now clearly perceivable. When the third forty is completed (there is doubt about the fourth forty), spirit is breathed in as mentioned in this authentic tradition.

Here end the words of Ibn Al-Qayyem, may God have mercy on him. Now concerning the opinions of fiqh scholars, they can be grouped into three points of view concerning the period before spirit is breathed in. One is general permission of abortion, which some scholars support, though some make prohibition the general rule, and some make it reprehensibility, while others opt for general permission. This general permission is the viewpoint of Hanbali scholars, as quoted by Sheikh Tawfiq [Al-Wa'ii], though in another place they justify it more clearly. In the Book of Puerperium, they explicitly say, "A woman may abort a germ within the first forty days with unprohibited medicine." It is a clear statement that allows no controversy and indicates that they support permission.

Now we are wavering between prohibition and reprehensibility within the first 120 days, and non-restricted permission in the first forty. On the basis of the film we have seen, I favour prohibition to start after the first forty or forty-two days, rather than the first 120, following the second version [of the tradition] related by Muslim. I mean we can follow both versions, and the second is more specific than the first which makes the early stage 120 days. We rule that permission should cover the first forty days, and we restrict ourselves to that period. We speak of no non-restricted permission after the first forty days. Personally I tend to support permission during the first forty days, though with some reprehension for non-justified abortion. A woman and her husband better what they want. It seems to me the only scholars who differ on this are Imam Al-Ghazali and his followers.

The majority of scholars tend to permit abortion before spirit is breathed in. Al-Ghazali, however, suppresses a different point of view in his book "*Ihya' 'Uloom Al-Deen*" (*The Revival of Religious Sciences*), though not in his fiqh works. "*Ihya' 'Uloom Al-Deen*" (*Revival of Religious Sciences*) follows a mystical rather than fiqh approach. In that book, he makes the point that it [the embryo in its earliest stages] is the beginning of a dormant human life. He bases this on an analogy of game-fowl eggs in the state of consecration. If a man in consecration collects such eggs and breaks them, he is considered as collecting game, and he has to make amends for his action, as all fiqh scholars agree, regarding this as a ruling relevant to a matter of detail. It is this unanimous ruling which Al-Ghazali bases his opinion on. He says, "Such an action calls for amends, because the man has collected game, since an egg contains a dormant bird, and

the man would be spoiling the bird's life." This point of view makes sense, because even if we know that an egg has not united with a sperm, that is, if we are certain the egg is not fertilized, amends are still due. It makes no difference whether there is or there is not a dormant bird in the egg. The amends for hunting are due, because collecting the eggs is actually an act of hunting. The action serves the interest of the collector, and therefore it is a type of hunting. When we were kids, we used to search for nests and "hunt" the eggs they had. Thus it is not important whether an egg contains an embryo or not; the action is still that of hunting. Al-Ghazali bases and justifies his opinion on this analogy, but the point is not the same. Others, even including some Hanafi scholars, have followed this opinion, all referring to the same argument on the basis of what Al-Ghazali himself says. But I believe none of the earlier scholars makes that argument.

Therefore, I believe that we should permit abortion within the first forty days. It seems to me this would solve many problems and would allow a person to organize his life and plan his family and allow us perhaps to end pregnancy in cases where it is undesirable for various reasons. Let us not burden ourselves, nor burden Muslims and push them into a religious corner, telling them that something is forbidden when there is not evidence of its prohibition, particularly since the question of breathing spirit is valid. In authentic sunna, there is a distinction of the fetus's rights based on two stages of its life, in one of which it has no spirit and in the other it does. What is unlawful in destroying what is spiritless? The statement that we do not know what spirit is, and whether it is different from life or the same thing, is something that from the point of view of Islamic fiqh and Law I reject categorically. Since there is a text on the subject, and we as Muslims are required to observe these texts and derive ruling from them, we have no excuse before God not to give them full considerations in our faith and in Legislation as well. I call upon all those who will draft the recommendation on this subject to benefit from this tradition and from God's saying: "Then we bring forth another creation." This dictates a legal ruling on the subject, a ruling which is almost final, and which we should not cancel under any pretext. We might err in our judgment or base it on an illusion, but what Quranic and tradition texts suggest to us is closer to the truth, and in the worst case, we would have done our best, though we might have erred. Yet I believe the margin of error is very slim, for we have to take into account the tradition's distinction of the two stages, before and after spirit is breathed in. This would be striving for the truth on the basis of Islamic law, not away from it.

As for the statement that at the moment a sperm is formed and gets inside a woman, it becomes a human being that differs in no way from other human beings, nor from how it will be after spirit is breathed into it, it is a statement that, in my opinion, should not be made.

Thank you.

### **Session Chairman**

We thank the Honourable Sheikh for expressing a specific opinion on the question with which we have started our discussion, and that is the attitude towards an embryo in its first forty days. Now it is the turn of Dr. Muhammad Fawzi Faidh Allah.

### **Dr. Muhammad Fawzi [Faidh Allah]**

I like to be brief and avoid long comments. I favour the Hanafi School's point of view on this subject, not because I follow that school, but because their opinion is focussed and detailed in a way I could not see in others, and is in harmony or close to the opinion of Imam Al-Ghazali, may God have mercy on him, to which Dr. Abd Al-Hafez has referred. The Hanafis divide abortion into three cases, those of the stages before the embryo takes a form, after it forms, and after the breathing in of spirit.

For the first stage they rule that abortion by taking drugs or similar things is reprehensible, which means the woman is accountable only to God. In the second stage they say that the ruling on abortion is reprehension that comes close to prohibition and that it is only allowed when there is some valid justification. In the third stage it is unanimously ruled as unlawful.

As for the question of suspension of a pregnant woman's execution, it is confirmed in tradition. There was a woman who deserved the death punishment but was pregnant at the time. When she came to the Prophet, Peace be upon him, He said to her, "Go and come back when you have delivered." (5) He did not ask how far she was in pregnancy, whether it was her second, third, or fourth month. He merely told her to come back after her delivery, which indicated the Prophet's respect for fetal life in general, without restricting this to a specific period.

### **Chairman**

We thank the Honourable Sheikh. As usual there is a final word by Dr.

Hassan Hathout, but first Sheikh Mahmoud Makadi has a point or two to comment on.

### **Sheikh Mahmoud Makadi**

We, Dr. Zakariya and I, studied forensic medicine as an interdisciplinary course involving medicine and law. It was taught by an outstanding professor, with the aim of establishing a link between medicine, and fiqh and law. We were taught that conception begins when an ovum, fertilized by a man's semen, secures itself [within the uterus]. But even before this, there is an opinion of the Maliki School I want to cite, which it seems Professor Muhammad Al-Ashqar did not pay attention to when he checked references. They say that semen should not be removed out of the uterus, even within the first forty days. This is the view followed by scholars of that school. Of course the source has been cited by Dr. Tawfiq Al-Wa'ii; it is the second volume of Al-Dasouqi's *'Foot-notes'*, page 66. It is also the more commonly accepted view in the Shafi'i School. All this is mentioned in *The Fiqh Encyclopedia*.

I do not like to repeat what others have said, but I have a brief comment on what Sheikh Muhammad Al-Ashqar said, when he referred those who forbid abortion before the spirit is breathed in to the tradition, claiming there is a contradiction between such prohibition and what the tradition says.

### **Sheikh Badr [Al-Mutawalli Abd Al-Baset]**

The phases of life as detailed in the tradition are something no one doubts. Everybody agrees that after the breathing in of spirit, a human being attains normal stature, and there is no difference whatsoever over this. When someone, however, says abortion before that is prohibited, forbidden, or reprehensible, he is in effect saying that it is a destruction of what is likely to turn into a human being. It is my firm belief that when conception is certain, the embryo should be protected.

Sheikh Muhammad [Al-Ashqar]'s objection to the analogy made by Al-Ghazali between abortion and game eggs in the sacred area of Makkah is not valid at all, and there should be no objection. The ruling concerning game eggs is not based on the assumption that they are 100% fertilized, but that most of them are, and the majority dictates the rule.

The same thing is true about a fertilized ovum; it is exactly like the eggs, where the probability that they are fertilized is 99%. Al-Ghazali's

reasoning then is clear and nothing is wrong with it. He says that prohibition applies from the beginning, and that with the passage of time, the crime becomes more serious, the worst crime being abortion after spirit is breathed in. The situation is that, as Dr. Hassan Hathout says, if we open the door here even very little, the practice will spread more widely, so let us fear God. Some want to go so far in this that they would like to oblige a lady who asks to have abortion to keep her figure on her health, or because her husband is worried about having too many children. If we open the gate for evil, it cannot be closed again till Doomsday, and you will be responsible for it. Pre-emptive prohibition (to anticipate and avoid bad sequelae) is one of the main tenets of Legislation, and as soon as pregnancy is confirmed the embryo has to be protected. Not before, though, for sometimes it is only a matter of a swelling or blood congealed inside the woman. But with the scientific progress today, we can easily make certain. This is the sacred duty of a doctor. Once he determines a woman is pregnant, abortion is allowed only for a necessity, or, as Dr. Zakariyya has said, when there is a very pressing reason which virtually amounts to a necessity. It is up to the doctor, and he has the right to decide. He has to carefully estimate whether a necessity calls for abortion or not. We leave this to physicians.

### **Session Chairman**

We have another question now. What are the cases of necessity that make abortion lawful? There are various cases, and there is more room for discussion here.

### **Counsellor Abdulla Al-'Isa**

First, concerning the question of the Sheikh Mahmoud Al-Makadi over the tradition related by Muslim, I believe it does not mention the breathing in of spirit, as in the one related by Al-Bukhari, which says this occurs after 120 days. Some scholars are confused and think this contradicts the statement that spirit breathing occurs after forty days, but spirit is mentioned only in the 120-day tradition.

### **Session Chairman**

Thank you for this explanation. Now it is the turn of Counsellor Abdulla Muhammad.

### **Counsellor Abdulla Muhammad**

A comment is made by the Imam in interpreting God's saying, "Men, We have created you from a male and a female..." (Al-Hujurat [Chambers], 13) He quotes the two traditions, the one narrated by Muslim and the one by Al-Bukhari, and he reconciles the two. But we will not go over that now. We hear many views advanced by various scholars, so what value is there in each of these?

Islamic fiqh has a rule that if there is a difference of opinion, or there are various opinions, over the same subject, this allows room for making things easier for people. It is said that a layman is of the same school of thought as the scholar who gives him a certain ruling. If a man asks for the opinion of a Sheikh or a scholar and receives it, there is nothing that should keep him from following it. There is always room for mercy and kindness.

Thank you.

### **Session Chairman**

Now before adjourning the morning session, may I ask Dr. Hassan, Do you have any specific points concerning what has been said?

### **Dr. Hassan Hathout**

I would like to answer a question, and I have a final word.

It is possible to diagnose pregnancy even before the date of the first menstrual period which would be missed. Ovulation, the release of an ovum from an ovary, occurs two weeks before menstruation. An ovum, may be fertilized within twenty-four hours. If it is, conception begins, and the zygote moves from the tube to the uterus within five days. It attaches itself to the wall of the uterus. When it is time for the lady's period (which we not occur) in other words, when we say a lady should have had her period yesterday but did not--this means conception has taken place two weeks earlier, and the embryo is already implanted in the uterus. If we make daily tests, we can detect conception before the date of that menstruation.

As for taking a form, if that means that in a group of cells there are indications that certain cells are going to take a certain shape, while others will take another, and so on, this occurs within the first two weeks. Some cells, in that period, form an exterior layer producing hormones, while another layer forms the fetus. This second layer consists of the ectoderm



and the endoderm. From the first are developed skin structures, the nervous system, and so on, and from the second, muscles and bones. This is a type of formation familiar to physicians, but is probably unknown to others, who would like perhaps to see a head with eyes. For the physician, who can examine things under a microscope, this is formation, and it starts before the date of the first menstruation period to be missed.

The second point is that as a Muslim and a physician, I believe when there is conception, there is life, which I have to take care of and to protect. If I abort it, I would be doing something unlawful.

Thank you.

**Chairman**

As we come to the end, there is a brief word by Dr. 'Isam Al-Sherbini.

**Dr. 'Isam Al-Sherbini**

Now that we have fully discussed the simpler aspects of the problem and decided that it is unlawful to "destroy" a spirit unless in a case of a necessity, it is made easy for doctors to reject justifications which we regard as invalid to abort a living creature, like having too many children, poverty, keeping a lady's figure--all these we can ignore.

The more serious question is that of abortion during the period before spirit is breathed in, that is in the first four months, when there are pressing reasons though they are short of being necessities. It is cases like this which I beg our fiqh scholars to concentrate on in order to give us relief. For example, a patient with a heart disease may conceive, give birth, and still survive, but she would suffer serious injury. Another with kidney trouble may have her condition aggravated, and so on.

Such diseases are serious reasons [for abortion], but they do not qualify as necessities. There may be added to these other things such as fetal deformities, but that would need a special session. It is, however, the cases of disease which are very pressing for us and which we can by no means ignore.

**Dr. Abd Al-Aziz Kamel**

We pray for a propitious beginning.

We would have liked Dr. Abdallah Basalamah to continue his participation, as well as his chairmanship, but he is committed to a travel

schedule, and after a little while he is, by God's Will, leaving for Saudi Arabia. So I move up here again to resume the work with you.

On the question of abortion we have reached a two-point conclusion. The first is prohibition, (6) to keep this door tightly shut. It is not to be practiced (and I am not saying it is not to be permitted) except to save life, either the mother's or the fetus's. This is the first point.

We come next to something else raised by Dr. 'Isam.' He says abortion is sometimes not a matter of survival, but a prevention of a very serious injury which is certain to happen otherwise either to the mother, as Dr. 'Isam has told us, or to the fetus, as we have been told by Dr. Tal'at, who says the fetus might be certain to suffer a major deformity.

We approach this question on the basis that we are discussing something which is unlawful except to save life, and life begins at the moment of conception. In the early stages, the ruling is that abortion is reprehensible, and it gradually reaches the point when it is totally forbidden.

Physicians here spoke about the principle of prohibition and the fact that it concerns life, and cited relevant Quranic verses. Dr. Zakarriya also spoke about this subject, raised by Dr. Hassan Hathout. A number of religion scholars followed him and agreed with what he had said. If the execution of a woman sentenced to death is postponed in deference to the fetus's right to live, it is actually a deference to a life existing within her. The tradition does not tell us whether the woman's pregnancy is in its early or advanced stages, but the deference is for the right to life itself.

So far then we have agreed on certain things. One of these is that in the stage after what Islamic Law defines as the breathing in of spirit, which is linked to life in its general meaning as medical experts have explained, the ruling is absolute prohibition of abortion, except under one condition: when it is practiced in exchange for a life. It is over the early stages that we have some difference, whether the ruling is that of reprehension or prohibition. The latter is based on taking into consideration the fact that the embryo is a living creature, while reprehension is based on regarding the embryo from a legal Islamic point as the beginning of a creation process. I hope I have explained this accurately, Dr. Al-Ashqar.

We have then one stage, the one following the first four months, on which we are in full agreement, and another stage on which we have two different views. The first combines the first four months with the latter stage under the same ruling, while the other reduces prohibition into reprehension in that early stage. (7)

We have then the other issue, which is the ruling when no life is threatened, but there is an injury to an existing life or a prospective one, as when a physician has conclusive evidence that a fetus, due to certain factors, would be deformed, or that a mother would suffer serious injury. That is the question raised at the end of the previous session.

Over this, I have a suggestion based on the fact that this prospective injury requires estimation, and we should not ask a doctor to shoulder such a critical responsibility all by himself. What I propose is that in every hospital, there should be a committee, which has both medical and religious members, to review every case. As long as we are satisfied with the knowledge and conscientiousness of the members, they can make the decision. Since we have a committee to review the cases of patients who want to go abroad for treatment, should these cases not be considered by a committee that represent both medical and Legal Islamic knowledge? This way we can protect a doctor against any moral pressures or psychological uneasiness that he may feel. The matter is left to a group of people whose ethics and knowledge we trust. This is my suggestion for such cases.

If it meets your approval, we can come up with a recommendation that every hospital should have a specialized committee which meets all these requirements to make such decisions. I am fully aware of the dangers of opening the door for abortion, because once we start, much evil will result.

The strange thing is that on some issues, flexibility comes from fiqh scholars, while on others, it is recommended by scientists. The same thing is true about strictness. On this issue, abortion, we realize that it is scientists and specialized physicians who call for a strict ruling, because they are afraid of the consequences of allowing it. If we, however, follow the suggestion I am making, there will be sufficient precaution. It is up to you.

Since it is Dr. 'Isam who has raised this question, I think he should be the one to speak next.

#### **Dr. 'Isam Al-Sherbini**

I believe the recommendation just made by Dr. Abd Al-Aziz Kamel is now a law with a set of regulations. The law stipulates that abortion is permissible when it is to save the mother's life, but if the pregnancy is still in its first four months, abortion is permitted, or at least it is not considered

a crime, in two cases. The first is when there is a serious threat to the mother's health, and the second is the case when the probability that the fetus would be born with a major deformity is high. It is also stipulated that abortion should only be practiced in the hospitals administered by the Ministry of Health except in cases of emergency. The decision has to be made by a committee of two or three specialists, one of whom has to be a gynecologist/obstetrician. So the law already exists.

If you allow me, the subject should be based on the question of whether it is possible to have both fiqh and medicine represented [on the committee]. But I am against having only one side decide; the proposal calls for a joint committee. We are now dwelling on a small detail of a comprehension plan I have in mind, which I would like to explain to you.

We notice that the general tendency of current Islamic awareness is to encourage cooperation. In the past, fiqh scholars, tradition scholars, Islamic art experts, and physicians--each worked in isolation. Later, however, we started to hold joint meetings and make joint decisions. Meetings of religious and fiqh scholars with physicians serve our interests, and I believe ties should be made as close as possible, for each of us has something to offer the others. The result of such exchange is mutual respect, and neither religion nor science will regard the other with condensation, but they turn into two hands working jointly.

#### **Dr. Tal'at [Al-Qasabi]**

It is the habit now at the Maternity Hospital that whenever there is the question of abortion for a certain patient, the following procedure is followed. Three consultant physicians meet together. If all three agree that abortion is necessary, it is performed as long as the pregnancy is still in its first three months.

But another problem is that we come across pregnant women who have the German measles. If a pregnant woman has this disease in the first month of pregnancy, the chances are 50% that the baby will be deformed. In the second month, the probability is about 30%, and in the third, 15%. At a later stage, the probability becomes negligible. We do come across cases of this sort, and we would like to know the Islamic ruling on them. If a lady had the German measles in her first month of pregnancy, and this is proved through her blood and other tests, are we permitted to perform abortion?

**Dr. Abd Al-Aziz Kamel**

Of course when I proposed joint committees, I had in mind that you face, in your practice, cases of this sort. Today it is a case of German measles; tomorrow you have a different case. If we agree to a satisfactory system, which might be an improvement since you have already decided that the decision should not be made by just one person. You have opted for three consultant doctors, benefitting from their age, experience, and deliberation before they make a decision. I am suggesting the addition of a fiqh scholar, so that if they have a question concerning Islamic Law, he can provide them with the answer.

**Dr. Tal'at [Al-Qasabi]**

I am afraid the burden would be too much for you. I mean if you have to come to the hospital every now and then.

**Dr. Abd Al-Aziz Kamel**

By God if they accept my presence, I will not find it a burden, but rather part of my job. It would be a new system for all of us, allowing us to cooperate in applying Islamic rulings. Later, we may recommend that the decisions made should be published and distributed all over the Muslim world.

**Dr. Zakariya [Al-Berri]**

In my opinion, the committee should be called upon only when cases require a decision, so that we do not have as a speaker implied, to find scholars who make this a daily task. Thus we compromise with the point raised by the doctor. (8)

**Session Chairman**

Concerning the committee, its work will be organized by a set of regulations.

**Dr. Abdulla Basalamah**

The suggestion itself is great, but for practical purposes, we should go back to what Councillor Muhammad Abdulla said at the beginning. At a certain hospital, the fiqh scholar might be one who believes in forbidding abortion even in the first forty days of pregnancy, or he might be of the

opinion that it is lawful as long as spirit is not breathed into the fetus yet. The result is that what is practiced in Al-Sabah Hospital in Kuwait, for example, would be different from what occurs at the university hospital in Jeddah, and from the practice in Asyut, and thus we are back where we started.

The decision of the scholar would be influenced by the opinion of physicians, because he himself is unable to determine the extent and probability of the injury. He might only be able to come up with a general ruling that a certain result is harmful.

It would be much better if we could reach general guidelines which can become known and observed all over the world. Arriving at guidelines might prove more practical than forming committees. This is my personal opinion.

#### **Dr. Hassan Hathout**

One of the blessings of this meeting is that it has for the first time brought fiqh scholars and doctors together. Having a committee in every hospital would create a problem, which is the fact that doctors will not be able to reveal the secrets of their patients to committee members. I find, however, nothing wrong with their being told as cases that exist somewhere, without naming the patient or even the hospital. The ideal situation, I believe, is to include fiqh studies in the training of doctors to practice medicine, which is part of the proposal that such studies, relevant to medical practice, should be introduced in the curricula of medical schools.

God has blessed us here at the Medical School of Kuwait University to include in the syllabus of the course on gynecology, Islamic views relevant to gynecology and obstetrics. Perhaps it is the only medical school in the world that teaches such course officially. With the little we teach, we try to make our students aware that study in this department involves legal Islamic rulings. We also try to complement the medical information with Islamic rationale and regulations, and we thank God for this.

I want to suggest an amendment to the proposal made by Dr. Abd Al-Aziz Kamel. A body should be formed in Kuwait and in every other country. Call it a society, a committee, or an authority. It should be permanent. It can be called "The Authority of Medicine and Islamic Fiqh," "The Authority of Medicine and Islamic Law," or "The Islamic Legal Authority for Medical Questions." It can hold periodic meetings like the Islamic ruling (i.e. fatwa) committee at the Ministry of Endowments, with

some fiqh scholars devoting part or all of their time to serve as members together with a number of physicians who represent all fields of specialization. At their meetings, they discuss every new finding of science. At the same time, they serve as a consultatory committee for medical cases that require an Islamic opinion which doctors cannot arrive at by themselves.

I want to correct something said by Dr. 'Isam. He used the expression "when the probability is high," but this is not so. Kuwaiti law says:

Any physician, midwife, or pharmacist ... who gives or prescribes a medicine or interferes in any other way with the result that a fetus is aborted shall be fined and sentenced to jail.

The following article, however, says:

Yet a doctor is allowed to perform abortion, if he is certain, with all good intention, that it would save the life of the mother, the continuity of pregnancy being a threat to her life.

This was how the Kuwaiti Law, as well as the Egyptian Law and the laws of most Arab countries, read and continued to read until it was changed in 1982. The new law reads the same as the old one: that abortion is categorically forbidden at all stages, but if a doctor is certain the continuity of pregnancy threatens the life of a mother, he can abort the fetus. The new law, however, adds another article, which reads: "If doctors are certain [not if the probability is high] the fetus is seriously inflicted with a physical and/or mental injury, or something of the sort...." If this law is followed literally, abortion is virtually prohibited altogether. No doctor can be certain of such an injury except in one case: absence of the head, that is the embryo being headless, which is something that can be determined in the early stages of pregnancy. But this is the only case.

If we are going to discuss later the diagnosis of fetal diseases and the consequent permissibility of abortion, let us then postpone this point until then. However, the law does not say, "when the probability is high."

### **Professor Khaled Al-Mathkour**

In support of what Dr. Hassan Hathout has mentioned concerning the introduction of a course that relates medical concerns to Islamic Law into the curricula of medical schools, there is in the plan for setting up the College of Islamic Law and Islamic Studies a course called "Islamic Medicine." In the future, God willing, a course on "Islamic Economy" will

be proposed. If we start to act and form a university committee to coordinate the teaching of this course in both the College of Islamic Law and the School of Medicine, we will achieve much.

Thank you.

**Dr. Abd Al-Aziz Kamel**

The suggestion made by Dr. Hassan complements mine, and I find it acceptable with some expansion. After speaking, an idea occurred to me. So far we have cooperated with scholars on the Islamic ruling (i.e. fatwas) committee at the Ministry of Waqfs and other scholars. I would like to see some development of the committee, so that it is not merely one general committee; several specialized subcommittees can branch from it, each with a particular specialization and with membership that includes a number of religious scholars who are interested in a certain branch of social progress and a number of specialists in that branch. They decide how they would meet. I do not want to go into details of regulations, but I am interested in the idea of a general committee with several specialized subcommittees composed of individuals, some with basically religious education and others with basically scientific education. When they meet, they discuss the questions raised by scientists in the particular field. We want to see them cooperate with religious scholars to find out the rulings on these questions. Later, if publication of the work of the committee is undertaken and distributed to all parts of the Muslim World, the benefit would be greater. It would be more comprehensive, if counterpart committees are formed in other countries. I believe all this will amount to new, organized, scientific cornerstones which will allow the current movement of Islamic awareness to push forward with clear sight.

If this modified suggestion is acceptable to you, it can easily replace the original proposal I have made, which was an expansion on the one advanced by Dr. 'Isam. In this case, we can consider this a recommendation to be made by the [recommendation drafting] committee.

**Sheikh Badr Al-Mutawali Abd Al-Baset**

I want to assure all people here that the Ministry of Waqfs is in the process of enlarging the Islamic ruling (i.e. fatwa) committee by including new members specialized on divorce affairs and what is known as the personal statute, as well as others who specialize in other matters. This is because questions of divorce and the like are taking up much of the committee's time. This is the tendency at present.



**Dr. Abd Al-Aziz Kamel**

We thank God for that. There is still a need for specialization in religious work and in scientific fields. We can appeal to the Minister of Waqfs for cooperation on this subject, with God's blessing. The Minister of Health may contact him, with a recommendation from you if you approve the idea.

Now we move other subjects, which I do not believe will take much time, especially that one of them has been partly covered in our discussion of previous topics. It is "Medical Examination of the Opposite Sex" which we will turn to now.

Does Dr. Hassan have any details to give on this subject?

## Notes

1. It is well known that fiqh scholars of all schools do not permit abortion to save a mother's life after spirit is breathed into a fetus. Only few scholars oppose this view, but perhaps Dr. Hassan Hathout means to say that these few are right, if abortion is necessary to save the mother's life. I also favour this opinion, but only God has perfect knowledge. (Dr. Muhammad Al-Ashqar)
2. The tradition narrated by Huthaifah is related by Ahmad and Muslim.
3. The tradition narrated by Ibn Mas'oud is related by Muslim.
4. *Fatth Al-Bari in Sharh Sahih Al-Bukhari (The Creator's Inspiration in Interpreting Al-Bukhari's Collection)* (Al-Salafiyah Press), 2, 481.
5. The tradition is related by Abd Al-Razzaq, Ahmad, Muslim, Abu Dawood, and Al-Nassa'ii. *Kanz Al-'Ummal (The Labourers' Treasure)* 5, 440.
6. The truth is there was no unanimous agreement over prohibition. Many favoured permission or reprehension as can be seen above. (Dr. Muhammad Al-Ashqar's note.)
7. To make the presentation complete, it should be added that one point of view is that abortion is permitted in the first forty days, which is the view of the Hanbali School as mentioned above. (Dr. Muhammad Al-Ashqar's note.)
8. The speaker here comments on the Arabic equivalent of the word specialists. This and a latter footnote by Dr. Muhammad Al-Ashqar on a similar point have been skipped because they are meaningless to readers of English. (Translator's note)

## **MEDICAL EXAMINATION BY THE DOCTOR OF PATIENTS OF THE OTHER SEX**

Professor Dr. Hassan Hathout

The medical corps in the army of the Prophet, Peace be upon him, consisted of Muslim women who had some medical knowledge. They were known as the Therapists. They used to set out with the army, equipped with their medical tools, and tents would probably be set up for them at the edge of the battlefield, in a manner that resembles what we call today field hospitals. If a man is injured, they would carry him there and treat the wounds in any part of his body.

This practice was established as early as the Battles of Badr and Uhud, and it raised no controversy or differences of opinion. Some of these ladies excelled in their medical service, and other went even further by taking part in the actual fighting, such as Nusaibah Bint Ka'ab, who fought in Uhud and was praised by the Prophet, Peace be upon him.

Treatment is a necessity. If Islamic Legislation has rulings on men's and women's 'awras (parts of the body which should not be exposed to members of the other sex or of the same sex), it was clear that the necessities of treatment counted an exception of the general rule. They had no qualms over this, nor did they see in it a violation of religious instruction. They did not insist on making it an issue for objections or scruples.

Fiqh studies have kept to that tradition up till now. It is unlawful for a man to expose his 'awra to either men or women, and the same thing is true about the 'awra of a woman. Prohibition holds except in matters of treatment and medical practice. Whenever there is a medical need, and there is fear of God and good intention, no sin is committed by such exposition.

Some Muslims, however, are confused over this issue and betray uneasiness about it, especially when it involves the field of gynecology and obstetrics in particular. But when a person looks with insight into both

the medical profession and Islamic Law, he will find in every medical field what should suspend the rules concerning 'awras. Other than her face and hands, a woman is not allowed to expose any part of her body before men. Let us leave aside the field of gynecology and obstetrics. What about internal medicine, where a doctor may need to examine the chest, the abdomen, the back, or the limbs? What about a surgeon who may need to touch and feel the breasts to make sure they have no tumour that might prove cancerous? What is the difference between what the eye sees in a haemorrhoids or fistula operation and in an operation of stitching a perineum injured during childbirth?

The fact is that medical practice has special concessions that are relevant to it alone. A body has a structure and an anatomy, and there are sound bodies and unhealthy ones. Disease might be located in one part rather than another, or it might start in one system and affect another or even the whole body. A doctor looks at a human body the same way an architect looks at a building and a mechanic, at a machine. No longer is the body seen in terms of charm, 'awra seduction, or temptation, as the case is outside medical practice. The process of training a young man or woman to be a physician molds him or her into this professional attitude, which might not be recognized by someone alien to the profession. This professionalisation begins at the earliest training stages, while a student studies the anatomy, structure, and functions of the human body, as well as the interdependence of these functions. It goes on when later he studies man, how he gets healthy, falls ill, and is treated. If this training is accompanied with a strengthening of faith, fear of God, and moral values, the deviant though rare, examples of which we hear every now and then in all ages and all places would no longer exist. The medical profession has guarded itself against such elements, when it made it one of its basic principles that a doctor's examination of a patient of the other sex should always take place in the presence of a third party that belongs to the same profession, which is usually the nurse.

Muslim scholars, both old and modern, have held the same view. Hundreds of years ago, they came up with rulings, which, measured by the standards of our own time, are highly enlightened and reveal broad mindedness, as well as full understanding of both the spirit and the texts of Islamic Law. These rulings combine warm Islamic sentiments with sober Islamic reason. The examples are many. To cite some, rather than all, of these, we can turn to the Sixth Volume of *Al-Mughni (The Sufficient)* by Ibn Qudamah; page 559, where he says, "A doctor is allowed to look at what parts of her body he needs to, whether 'awra or not."

One of the pleasant examples occurs in *Al-Adab Al-Shar'iyah (Islamic Manners)* by Ibn Mufleh, of the Hanbali school of thought (Volume II, p.464). He says:

Al-Marwizily says: I told Abu Abdulla, "A woman may have a broken bone, and a splinterer may touch her with his hand." He said, "It's a case of necessity," and found nothing wrong with it. I said to Abu Abdulla, "A splinterer who is cautious in his work says, 'The woman has to bare her chest and I have to place my hand on her,'" Talhah said, "He will be rewarded by God." I asked Ibn Mudharres for his opinion, and he said, "It's a case of necessity," and found nothing wrong with it.

On the same page, he says:

If a woman is ill and the only person available to treat her is a man, he is allowed to see of her body what the need calls for, including genitals and the anus, and the same is true for a male doctor with a male patient. Ibn Hamdan adds, "If no one is available to treat a man other than a woman, she is allowed to see of her body what the need calls for, including genitals and the anus."

Al-Qadhi, i.e. Abu Ya'ali, a scholar of the Hanbali School of thought, says:

A physician is allowed to look at a woman's *awra* when the need calls for that, and the same thing is true if the physician is a woman or if the need calls for looking at a man's *awra*.

There is, however, a group of Muslims who pause uneasily at expressions such as "the need," "if the only person available to treat her is a man," and so on. I hope we will quietly deliberate the matter before we jump to final conclusions.

Reservations are not limited to the field of gynecology and obstetrics alone, but apply to all medical practice. We should also be aware that a woman is not allowed in all cases to look at the *awra* of another woman, but necessity, which is in this case medical need, is again the exception to the general rule. In the first place, a Muslim woman, like a man, can only look at what is allowed to her of another woman's body (Ibn 'Abdin's "*Footnotes*", v.5, p.237). If a woman specializes in gynecology and obstetrics, the exception dictated by the needs of treatment suspends the general rule. The exception applies to male and female doctors, even if there is a difference of opinion over distributing the work between them. It should be known, however, that the requirements of training doctors, male and female, make it imperative for them from the beginning to see the *awra* of members of the other sex. There will be no male physicians if the

woman's body, or any part of it, is skipped from the curriculum, and, likewise, there will be no female physicians if the man's body, or any part of it, is skipped in the curriculum. The nature of medical study makes skipping impossible.

Specialization in any branch of medicine comes only after comprehensive general study. Specialization means a general knowledge of all medicine, followed by in-depth study of a particular field. Otherwise, a specialist would be like someone looking through a keyhole; he would only see a fragment of a picture, without knowing what surrounds it, comes before it, follows it, or interacts and integrates with it.

I want hereby to reassure some of our sons and daughters who, in holding tight to their religious faith, believe, when they first enter medical school, that they are committing a sin by looking at the bodies of members of the other sex, whether they are corpses or the bodies of patients. Since preparing male and female doctors is a religious duty, there is neither sin nor disobedience, for that without which a duty cannot be performed is itself a duty.

Let us go back now to the opinion that advocates restricting the practice of gynecology and obstetrics to female doctors. I believe it would have made more sense if the call was for restriction of the treatment of woman to female doctors and men to male doctors in every field of medicine, be it surgery, pulmonary diseases, cardiology, internal medicine, endocrinology, dermatology, arthology, radiology, neurology, or some other field. Practice in each of these medical branches might require the examination of a woman's 'awra, with no part of her body exempted.

Is that at all possible?

Is permission of looking at 'awras restricted to the duration of study, after which work is distributed: male doctors for men and female doctors for women?

But the number of female doctors in any field of specialization, and even in general practice, is not sufficient to shoulder the burden of treating women, who amount to one half of society. No medical planning is so ambitious as to have half of the medical manpower in every speciality and subspeciality of medicine composed of women.

I would like to clear a misunderstanding which is wide spread outside the medical community. The majority of people think that, by virtue of being feminine, a woman doctor is naturally inclined to specialize in

gynecology and obstetrics. I am not speaking about common midwifery or taking care of natural childbirth; an ordinary midwife on the nursing staff of hospitals or childbirth centers can take care of that, and this has been the actual practice for a long time. The need for a specialist occurs when things are not normal, when there is some difficulty, complications, emergencies, or side effects for either mother or infant.

At this point, I can honestly say that this field of specialization is one of the most demanding branches of medicine, if not the most demanding of all. It is a type of surgical practice that calls for making most serious decisions within few moments and for carrying out these decisions with decisiveness, promptness, and boldness, regardless of the time of day and the long hours of work required. It is a field open only for persons with strong will, healthy bodies, quick intuition, and the ability to weigh things carefully and to take wise and prompt measures without delay or hesitation.

Within the medical profession, everyone is aware that there is no abundance of people, whether men or women, with these qualities, and perhaps the type is less common among women. Therefore the number of women who excel in it is limited. At the same time, such women make a great sacrifice of their time, the care for their own children, their households, and themselves. Not many women are ready for such a sacrifice.

Since we started to rotate doctors, during their internship, among a number of fields of specialization, we have noticed that later the majority of female doctors choose to specialize neither in surgery nor in gynecology and obstetrics, but rather a field which is less demanding.

Someone may say that a specialist need only be called upon when the situation becomes critical and the patient's life is threatened. This would be an obvious case of necessity, which is acceptable in Islamic Law. I believe a specialist would like such a suggestion. A skilled doctor should handle only serious cases. Otherwise, his time could be wasted on minor, rather than major, things.

But how does a doctor become so skilled and gain such a stature and such experience and ability to handle tough cases, unless he first treats less serious ones and gradually moves to the more and more challenging ones? Can anybody reach the top of a mountain without climbing the side step by step?

In order for a doctor to become a skilled one whom others consult, he has to start his career by practicing simple and normal cases and gradually gain skill, wisdom, and experience to get to the top he expects to reach. If we do not make such practice available to him, we would be condemning ourselves and our women to remain dependent on foreign specialists who, in matters of treatment, are alien to our religion and who do not understand the concepts of 'awra, fear of God, permission, and prohibition, or understand them in a way different from what we believe in.

I repeat that since training outstanding specialists is a duty and an obligation, then what is required to perform this duty, is itself a duty.

Before I conclude I want to bring up the matter of some women who are too embarrassed to be treated by a male doctor. It is our duty to do our best to have a woman doctor examine such a patient, not on the basis of permission and prohibition, but rather out of kindness, which a patient has the right to expect from a doctor, and out of respect for the patient's feeling, and also because we have been ordered to address people within the level of their mental abilities. If it is not possible to arrange at once for a female doctor to check the patient, we give her an appointment at a time when her desire can be met. If the case is urgent, we explain to her the necessity and assure her that she would be committing no sin by having a male doctor treat her.

In conclusion, these I have felt are words that need to be spoken after conversations with students, young doctors, and certain Muslim brothers, may God grant them success. We want to know the Islamic ruling on this question. We want to avoid burdening these doctors with what Islam does not burden them with. We want to keep the margin of permission intact for them and not let it shrink, to reassure them of the lawfulness of a practice where the criterion remains good intention, observing God's instructions, and fearing Him. There are doctors who have all these qualities and more, and we thank God for that. It is a blessing of His, and He has all the knowledge and wisdom.



## DISCUSSION

### Dr. Hassan Hathout

I sincerely say that I hope you have read the paper submitted to you on this subject. If I can guarantee that all have read it, I have nothing to add. But perhaps some have not read it. In this case I say that everybody is aware of the Islamic regulations concerning the 'awra, of both men and women. I hope we do not have to go into that. But does the rule have exceptions? I believe treatment and medical practice allow for an exception from the general rules, because treatment, everywhere, is a duty, and what is needed in the performance of a duty is a duty in itself.

I also have evidence. When I investigated the medical force in the army of the Prophet, Peace be upon him, I found out that it consisted of a unit of therapists, Muslim women who have received medical training in as much as medical knowledge at their time allowed. They went through the ranks, carried the injured, and treated their wounds regardless of what part of the body was wounded. I also looked through books, which I hesitate to describe as old, because although they are, they were very advanced for their time. I have great respect for these books, and I hope to God we may have books that can be called very advanced for our time. I went hundreds of years backward, though perhaps I should say forward, and discovered in books such as *Al-Mughni* by Ibn Qudamah, Ibn 'Abdin's *Foot-notes*, and so on, permission of exposition before members of the other sex for medical reasons, because treatment was considered a necessity. The word necessity, however, was part of the ruling, which meant, that if a woman fell sick, and the only doctor available to treat her was a man, it is lawful for him to look at her 'awra, including her genitals and anus, and if a man fell sick, and the only doctor available to treat him was a woman, it is lawful for her to look at the location of the disease, even if it is his genitals or anus. When Judge Abu Ya'ali was asked about the splinterer who needed to place a splint on a woman's arm and insisted that she should bare her chest and that he needed to place his hand on it, the judge said it was lawful and the splinterer would be rewarded by God. The training of a doctor similarly requires full knowledge of the structure and functions of

the human body, which in turn requires looking at the 'awra of corpses and of living men and women. This is essential in the making of a doctor, male or female.

But although medical treatment is a necessity that calls for an exception from the general rule, there is a new attitude in Kuwait and other countries, which is part of the contemporary Islamic reawakening, which I pray would continue, stabilize, and be well-guided. The new attitude is that male doctors should not help women in childbirth, and so on and so forth. Reviewing expressions of this sort reveals that it is childbirth and the field of gynecology and obstetrics that are always targeted. No one says anything against a surgeon, although he may perform a haemorrhoids or fistula operation for a woman, which requires the exposition of the same part of her 'awra, nor against a specialist in internal medicine, who feels the abdomen, the chest, and the breasts, nor against radiologists, dermatologists, and other male doctors. The branch of gynecology and obstetrics is specially focused on, although it does not differ from other branches in the need to look at the 'awras of women patients.

Some people say that a woman should be examined by a female doctor. Only when the case proves too serious and there is an emergency, a male specialist may be called.

As if there are people who go through medical school to specialize in serious cases alone, while in fact it is a question of a ladder that should be climbed. The serious can only be mastered by first practicing the common. What I am advocating is that treatment should be regarded as an exception to the general rule. At health departments, if a woman asks to be examined or treated by a woman doctor, her wish should be met, not because one thing is lawful and the other is not, but because it is our duty to make people comfortable. If a woman is too embarrassed with a male doctor, we should look for a female doctor for her. If a woman believes it is unlawful for her to be seen by a man, we find her a woman. But at the same time, we should make clear to people what Islam allows and what it forbids. On this point, some people would say that as long as there is a female doctor at a certain hospital, it is unlawful for a male doctor to examine a woman. But the female doctor would be exhausted to death. Is the amount of what she can handle unlimited? Does she not get tired and need to have a time to rest, and so on and so forth? All these are considerations of which might not be aware. I believe Islam allows us a margin in this matter, on the condition that we should observe that part of the medical protocol, as it is called, which requires a doctor not to be alone

with a patient of the other sex and calls for the presence of a third party, which is usually a nurse, and the condition of choosing carefully, for we should always choose those with whose piety and good conduct we are satisfied.

I believe that in my medical practice I have gained the good opinion of many among you. Well, I have turned down an opportunity to specialize in internal medicine and waited for the chance to go into the field of gynecology and obstetrics. I reveal no secret by saying that I was one of the disciples of the late Hasan Al-Banna, and yet there was no contradiction expressed by him to me taking up gynaecology.

Whenever I start my work, the body of a woman is no longer tempting, seductive, or desirable. Not at all. In medical practice, the mind assumes a completely different attitude. It is almost like that of a mechanic fixing a car, and I hope you can trust that. This is the attitude of our profession as I see it from the inside. If there are any other points, we can answer them in our discussion, by God's Will.

**Dr. Abd Al-Aziz Kamel.**

Thank you, Dr. Hassaan. I want to underline the last paragraph in your paper, which says:

We want to know the Islamic ruling on this question. We want to avoid burdening these doctors with what Islam does not burden them. We want to keep the margin of permission intact for them and not let it shrink, to reassure them of the lawfulness of a practice where the criterion remains good intention, observing God's instructions, and fearing Him. There are doctors who have all these qualities and more, and we thank God for that. It is a blessing of His, and He has all the knowledge and wisdom.

This is the question. I believe that there are some medical comments.

**Dr. 'Isam Al-Sherbini**

I beg for two things. The first is that we want to benefit from the time available to our fiqh scholars, or as much of it as possible, in discussing the current issue. All of us agree that cases of necessity make lawful what is otherwise forbidden. Therefore, let us speak of cases that are not exactly necessities, cases of need.

The second thing is that if there are some five minutes left, I hope another question will be annexed to this. It concerns the waiting period of

widows, which is another sensitive situation in our practice. Some women believe it is alright for them to be examined by us, but not during the waiting period. They believe that throughout that period, they have to stay home and receive no man. They want to be treated over the telephone, and sometimes they even have doubts about telephone conversations. I hope a couple of words can be said on this question in the way of reassuring widows in their waiting period.

**Dr. Abd Al-Aziz Kamel**

Brothers of the medical profession, do you have anything to add on this subject? No? Then, as far as the case of necessity is concerned, physicians believe they have spoken enough on the subject, advocating that exposition in such cases is lawful, after we all make sure that the practice is allowed only to physicians with high moral standards and strong religious faith.

Other than fiqh scholars, is there anyone with a question?

**Professor [Tawfiq] Al-Wa'ii**

Dr. Hassan, in your paper you make treatment itself a necessity. I mean you say that a physician, male or female, is exempted from the general rule on the 'awra of either sex. Do you mean that whenever a male physician examines or treats a woman, this is to be regarded as a necessity, even if woman doctors are available?

**Dr. Hassan Hathout**

When a student, male or female, enters medical school the general rulings of Islamic Legislation on 'awras no longer apply to him (or her) within the field of medicine. From the very beginning of their studies at medical school, students need to dissect. This is even before they become doctors; they are still under training.

On the other hand, can you imagine a community where all female patients are treated for all ailments and diseases by female doctors and all male patients by male doctors. It is, of course, an imaginary situation, quite impossible today. The question does not concern gynecology alone, but also includes internal medicine, dermatology, and cases of women who have abscesses, belly aches, coughs, and so on and so forth. I mean the functions of the body are interdependent. Once a person takes the step of joining medical school, he is indeed exempted. In the near future, we

cannot expect a situation where female doctors treat all female patients in all fields of medicine, including surgery, cardiosurgery, neurosurgery, internal medicine, E.N.T., and so on and so forth. It is not possible for the foreseen future. Yet, every field involves the exposition of 'awras.

It is my opinion that once students are admitted into medical school, exemption applies to them, for they have crossed the threshold of necessity.

### **Professor [Tawfiq] Al-Wa'li**

The fact is that joining the school of medicine, having to dissect, and so on are a necessity for learning medicine, and what a certain duty can not be performed without is itself a duty. The question, however, concerns ordinary cases, which a woman understands as much as a man. Women doctors are available for such ordinary cases, which do not call for a specialist nor need great effort. So why should women not treat women in such cases? It would be in keeping with our Islamic way, Islamic instructions, and what distinguishes us as a Muslim nation. The case would be different when there is a necessity, as when there is only a male doctor in a village, or only a male doctor on call and the case is an emergency, as in difficult childbirth and the like, or as when a case requires a male doctor and a female doctor, or more than one doctor. But for ordinary cases, women doctors are available, and we thank God for that, so why should we not observe the rules of 'awra in Islamic Legislation? I say this, and I would like to listen to more said on the subject.

### **Dr. Zakarriya [Al-Berri]**

For a man to look at the 'awra of a woman is not prohibited for its own sake, but rather because of something else, that to which it may lead. Consequently, its prohibition is less strict than that of something prohibited for its own sake. Because of this, fiqh scholars, who allow what is prohibited for its own sake only in cases of necessity, are more flexible on what is prohibited because of something else, which they say is permissible in cases of need, as well as necessity. This question that we have here can be settled by saying it is more proper to have a female doctor, when one of the same level is available, treat a female patient, but this is not the same as saying the doctor should or must be a female.

If a woman goes to Dr. Hassan for treatment, and there is a woman doctor, but she has recently graduated and is not with the same

experience as he, I would not say that in this case it would be more proper for the patient to go to the female doctor. The lady doctor has to be on the same level as he is, and we should be able to trust her. So the idea of propriety is not an absolute one. Medicine is knowledge, honesty, and trust, and there is a difference for the patient between being treated by Dr. Hassan and by a recently graduated female doctor. Propriety applies when the two doctors are of equal standing, and it is based on the fact that it is less harmful for a woman's 'awra to be seen by another woman than by a man, which is something natural and has been mentioned by fiqh scholars. Women by nature are less strict about exposing their bodies to other women than men are with other men, and this is the case in all societies.

The question concerning the waiting period [of a widow] results from ignorance of Islamic rulings. A widow is required to mourn, by not wearing make-up or ornaments before other persons, and so on. But she is not required to stay at home and stop all social activities. These ideas are the residue of old social traditions (1) and Islamic concepts in this respect are not clear to many people.

That some fiqh scholars are strict, while others are lenient, is not something new, and they will continue to be like that. It is the nature of interpreting the evidence and coming up with different points of view. The same thing applies to doctors, and we have seen examples of the two types in this seminar.

#### **Dr. Abdulla Abd Al-Shakour**

In writing this paper, Dr. Hassan was keeping one eye on the medical profession and the other on fiqh. This is a word of truth that must be said on his behalf.

When it comes to the question of necessity in medicine, I say that he spoke of nothing but necessity, point out that women doctors are not always available and that male and female students of medicine have to look at the bodies of members of the other sex.

He wonders whether we have read the paper, and he can rest assured that I at least have. If others have not, they will find out when they do that when we take medical practice into consideration, we have no option but to permit what necessity calls for. Of course this will have to be according to the conditions set by fiqh scholars; that there could be no sinful inclinations, that exposition and touch should be limited to the part of

the body involved, and that the doctor and patient should not be alone. All these matters have been mentioned by fiqh scholars, and therefore the subject does not call for long discussion, because the problem is almost solved.

Thank you.

**Mr. Abd Al-Rahman Abd Al-Khalek:**

While reading Dr. Hassan's paper and listening to what he told us, I felt that he based his fiqh opinion on many personal matters, that is on his personal attitude. Among doctors there may be devout ones as well as others, and therefore such rulings should not be based on personal observations of this sort. To consider that there is nothing wrong with this type of exposition at all is to cancel the basic Islamic ruling on 'awras, which is that in general it is forbidden for a member of one sex to behold the 'awra of a member of the other sex.

We have then an Islamic rule on the subject. There are Quranic verses and traditions of the Prophet. It is a definite rule, as evidenced by the leading fiqh scholar's statements. We are considering a definite question where a mere look at a stranger woman is forbidden. "He knows the furtive look and the secret thought." (Ghafer [The Forgiving One], 19) It is a definite stipulation of the Law, not just the conclusion of fiqh scholars, who, nonetheless, are almost unanimous in ruling that looking at 'awras is unlawful. Therefore, it can only be permitted for a necessity, and consequently we have to determine what the actual cases of necessity are.

On the other hand, we have seen that permission of this kind has encouraged people who want to corrupt the lives of Muslims to study this particular branch, i.e. gynecology and obstetrics, which many Christians have specialized in and have used for wicked purposes.

For this reason, we should go back to basics and apply the basic ruling, which is prohibition, and the only permission is in cases of necessity. We should also recommend proper alternatives. I will not call for what Dr. Hassan Hathout makes impossible, which is preparing female doctors treat female patients, and male doctors, male patients. But what cannot be achieved in full should not be abandoned altogether. There should be an Islamic guideline: that a male doctor practices the treatment of women only for necessity and the same is true concerning female doctors treating men. This guideline may motivate us to guide female

students to study the various branches of medicine, particularly the field of gynecology; to actually try to separate men and women in medical practice; to be very careful in these matters; and, in this particular field, gynecology, to be particularly careful that a Muslim woman is in the hands of an honest man. We choose a male doctor who is devout and upright indeed. This undoubtedly will keep us aware that what we are doing is a matter of necessity, not one that is permitted without any restriction.

There is another thing I have noticed in the paper of Dr. Hassan Hathout, which he has also mentioned now. It is the implication that 'awras are all equal. I disagree. In Islamic Legislation they are not regarded as equal. Looking at the genitals and the anus is not the same as looking at legs and arms. It is not right to obliterate the distinction between gross 'awra and other 'awras. Exposition of gross 'awra should be restricted to matters of necessity.

On the other hand, the distinction between specialization in gynecology and in other branches of medicine is valid and based on a sound rationale. It is not as has been said a mere innovation of the current Islamic movement, or what has been called Islamic awakening. I find it valid because 'awras are not all the same. Therefore, we should not look at the question as a personal matter, but rather as an Islamic legal one, which God determines in explicit verses of the Quran and the Prophet, Peace be upon him, reinforces in his traditions.

Thank you.

#### **Dr. Muhammad Al-Ashqar**

There is the case of necessity, on which there is an agreement, and discussion started on that basis.

But not we have moved from cases of necessity to cases of need, and I believe we have evidence, which is the example cited by Dr. Hassan Hathout of women setting out to battles with the Prophet, Peace be upon him, to treat the wounded. It is a valid example, because it is certain that there was no necessity in that case. A number of fighting men could have been given the task of treating injuries. There was no violation in that example, and the tradition is authentic, so its implications should be followed, and treatment [of a member of the other sex] should not be restricted to cases of necessity, but can be practiced when the need calls for it. Still, the treatment of men by men, and women by women, is a priority, and for this priority to be put into practice, measures have to be



taken to make that possible. The state policy, and in particular the policy of the Ministry of Health and schools of medicine, should encourage women to study the field of specialization that deal with their hygiene, that is gynecology and obstetrics, and the like. The government here, and in all Muslim countries, should come up with a method of encouragement, either through awards, or any other method usually followed.

It is necessary for this Islamic priority to be put into practice: women treat women and men treat men.

On the other hand, the *'awra* of a Muslim patient, female or male, should only be exposed to a Muslim doctor. In treating Muslim patients, Muslim doctors have a priority. We have learned, and felt, that many non-Muslim doctors are on the staff of the School of Medicine [of the University of Kuwait]. This should not be. Sometimes a doctor needs to examine the abdomen of a man or a woman, and he exposes the whole body. There is no need for that. A non-Muslim doctor might have no qualms about this, but a Muslim doctor, as far as we have learned so far, covers everything other than the abdomen with a sheet or something else and only exposes what needs to be exposed. Even if a non-Muslim doctor does that, he does it out of courtesy and not in observance of the legal ruling as such.

Thank you.

### **Sheikh Ibrahim Al-Dasouki**

After the statements we have heard, whether made by physicians or by religion scholars, we only have to recommend that students at schools of medicine should be guided to particular fields of specialization. Female students who are admitted into medical school should be encouraged to specialize in various branches, particularly gynecology and obstetrics, so that a day would come when we have a sufficient number of female doctors to treat our women, and there will no longer be a need for a woman to expose her *'awra* before a non-trustworthy Muslim male doctor or a non-Muslim one. Thank you.

### **Professor Khaled Al-Mathkour**

We have, by God's will, an agreement over the basic thing, which is prohibition for a man to look at the *'awra* of a woman, and for a woman to look at that of a man. But things are judged by circumstances.

In fact, because I receive letters and telephone calls, I have been informed of many problems, and I am greatly upset by the many incidents that take place, particularly at the Maternity Hospital and particularly in cases of gynecology. Many people are upset and keep complaining. Of course, officials at the Ministry of Health have to deserve God's instructions on such matters.

As Dr. Hassan Hathout has said, and he is undoubtedly aware of some of the things that go on, pious doctors are badly needed. And as Sheikh Abd Al-Rahman, may God grant him long life, has said, a clear trend must be established, so that women can be treated by members of the same sex.

**Sheikh Badr [Al-Mutawalli Abd Al-Baset]**

I want to say that everything that has been said on the subject, on all sides, is very good. The point I want to make is that cases of need are treated as cases of necessity. We have agreed that exposition before members of the other sex is forbidden except in cases of necessity, but we also observe that need is treated as necessity. Cases of need that are treated as necessity are those that lead to a very difficult situation if ignored, so if hardship may result we treat the case as one of necessity, even if it is not so. I hope this clears things up. It is alright for a male doctor to look at a woman and for a female doctor to look at a man if a need calls for that. And in cases of need, we give ourselves a margin to avoid hardships, but at the same time we avoid unrestricted permission, of which some people are afraid. Thank you.

**Dr. Abd Al-Aziz Kamel**

In fact when this discussion started, I connected two things in my mind, this topic we are discussing and another that was discussed in full detail at the First Conference of Islamic Medicine. It was the starting point of all that we have been doing in these conferences, and that was "an Islamic code of medical ethics," and all the moral values, physician responsibilities, and medical responsibilities involved.

I can therefore look at the current topic only as a point of detail within the general framework outline at the First Conference of Islamic Medicine, even if, with the passage of time, some of us might have forgotten. When we are making a recommendation on this issue, we may connect the two together. For example, we may say that exposition before members of the other sex in medical practice is permissible in light of the needs of society

and of the Islamic code drafted at the First Conference of Islamic Medicine. Thus we apply to this topic all the moral values approved in that conference.

In addition, we may also recommend more extensive education for our girls, and at the same time we allow women their wishes. Undoubtedly, as you have said at the beginning, if a woman patient tells you she wants to see a woman doctor, you grant her wish, because part of the treatment is for the patient to be psychologically comfortable. We try to cause the patient no embarrassment. But if exposition does occur, neither physician nor patient should feel guilty, especially that, as doctors know, there are certain branches of medicine which are most difficult.

Dr. Mahmoud Al-Bouz, here is a question for you, a very simple question. Do you have any lady specialized in orthopedics?

#### **Dr. Mahmoud Al-Bouz**

Seventy per cent of the medical manpower in Russia consists of female doctors, and still there is not a single orthopedic surgeon there. I mean, this specialization is for men only. Therefore, I believe that the proposed general policy concerning women education which aims at having women treat women and men treat men will stop short in certain fields of specialization, one of which is orthopedic surgeons.

For example, in Denmark, which is a highly civilized country, I met only one female orthopedist, and it turned out that she is specialized in hand surgery. In Britain, there is an excellent female orthopedist, whom Dr. Siddiqah Al-'Awadhi knows, and she specialized, after orthopedics, in genetics, that is osteopathic genetics. The answer to your question then is: there are no female orthopedists.

#### **Dr. Abd Al-Aziz Kamel**

Then, if you approve, we will make a recommendation saying that exposition before members of the other sex is permissible in medical practice in light of the needs of Muslim societies and in accordance with the values of the Islamic Code of medical ethics, or whatever the name we gave it was, which was approved by the First Conference of Islamic Medicine. We also urge our daughters to specialize in the fields of medicine in greater numbers.

### **Professor Muhammad Al-Muslimani**

What I want to talk about has nothing to do with specialization. We have focused here on the responsibility of physicians and forgotten the society we are dealing with. If Dr. Al-Mathkour says he has one hundred letters [of complaints], there are about ten thousand people in other countries and other fields of medicine who are not satisfied with the current situation. In fact, we also need to educate Muslim girls and women on these matters.

### **Dr. Abd Al-Aziz Kamel**

With your permission, the last point is the diagnosis of fetal disease with the consequent permission of abortion. Dr. Hassan, is there anything else to be said on the subject, or can we turn to the question of abortion?

### **Dr. Hassan Hathout**

I believe that we are all in agreement over the question of clinical examination of members of the other sex. The urgent need now is that people are confused, because a Friday speaker at a certain mosque announced that when only one woman doctor is available at a hospital, it is prohibited for women to be examined by men. Is not that a rejection of male doctors? Women have been confused because of this, so I wish you make things easier for them by informing them.

There is one more thing. We notice complete, or almost complete, disinclination among female students to specialize in gynecology and obstetrics. When new girl students are admitted into the university, I happen to meet them, and I say to each one, "You are a good Muslim; you perform your prayers and other religious duties, you wear a proper Islamic dress, and you seem to have strong faith. Why do you not specialize in gynecology and obstetrics?" And she says, "Oh no, it is a very demanding field."

It is true that the field is not easy, but a male doctor is satisfied when he has his private clinic, because he charges such a sum of money for each childbirth, and in ordinary cases, the nurse may do the job. The task of a female gynecologist and obstetrician is in the difficult, rather than normal, cases of childbirth, and such cases demand a special type of physician as regards stamina and endurance.

All are aware that when a female doctor specializes in gynecology and obstetrics, she is making a great sacrifice that affects her household

and the care she can take of her children. We also need a word of encouragement for women doctors not to neglect this branch. The phrasing proposed by Dr. Abd Al-Aziz Kamel is, I believe, acceptable to everybody.

**Dr. Abd Al-Aziz Kamel**

The subject of the diagnosis of fetal disease with the consequent permission of abortion can be appended to the topic of abortion. If this is acceptable, our work comes to an end. I thank you for your great cooperation with each other and with those who had the responsibility of keeping sessions in order.

**Dr. Madihah**

I have a question for Dr. Al-Ashqar concerning a Muslim female patient being examined by a non-Muslim male doctor. What is the Islamic attitude. We have Christian doctors as well as doctors belonging to other faiths.

**[Dr. Muhammad Al-Ashqar]**

It is better to have a Muslim doctor examine her, but it is not prohibited to have a Christian doctor.

**Dr. Abd Al-Aziz Kamel**

If you please, if there are suggestions, or postponed issues (which indeed there are), they can be submitted in writing to the Recommendation Committee, especially that I can see that the stomachs, legs, and heads of the participants are screaming. At the same time, we have the subject of organ transplants and that of the doctor's oath. Therefore, we welcome written suggestions to the Committee, and thank you all.

**Chairman of the Recommendation Committee**

Brother members of the Recommendation Committee. If you please, let us meet now to decide the time by which we will finish drafting the recommendations. The members are:

- Professor Khaled Al-Mathkour,
- Professor Abd Al-Sattar Abu Ghuddah,
- Professor Zakarriya Al-Berri,
- Professor Muhammad Al-Ashqar,
- Professor 'Onaizi Al-'Onaizi,

- Professor 'Adel Al-Tawhid,
- Professor Ahmad Sharf Al-Din,
- Professor Hassan Hathout,
- Professor Ahmad Al-Ghandour, and
- Dr. Ahmad Raja'ii Al-Gindi.

### **Note**

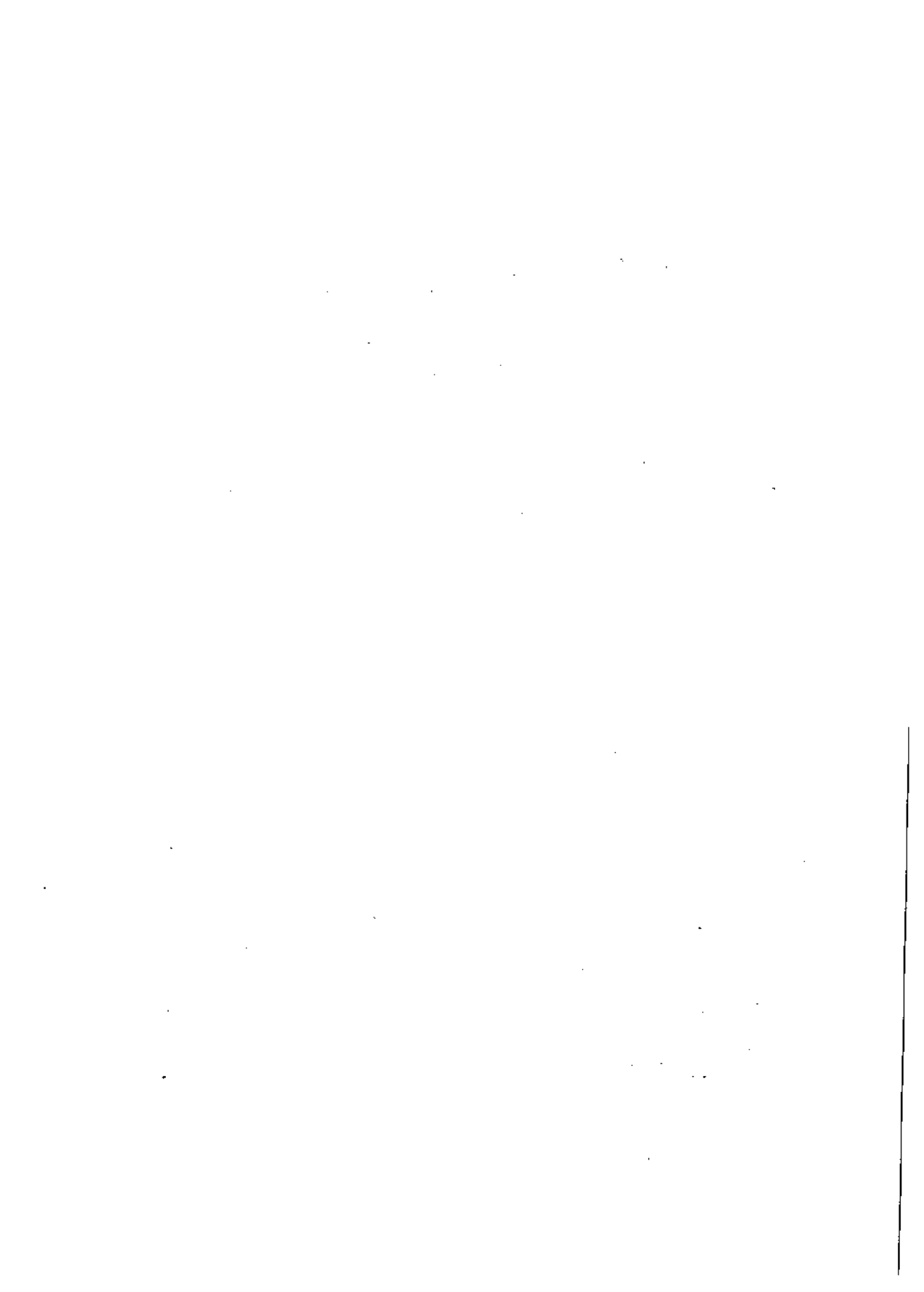
- (1) There is a Quranic text that explicitly requires a woman to stay home during her waiting period. Dr. Zakariya means that that does not prevent her going out when she needs to, such as when she has to go to a doctor for treatment. (Dr. Muhammad Al-Ashqar's note.)

## **FIFTH SESSION**

This session was chaired by His Excellency Dr. Abd Al-Rahman Al-'Awadhi and attended by Assistant Chairman Abdulla Al-'Isa, Professor Abd Al-Aziz Kamel, and Professor Khaled Al-Mathkour. The session was devoted to a discussion of the recommendation drafted by the committee formed specially for that purpose. The recommendations listed below were approved.

The seminar concluded its work at 9:30 p.m., Thursday, Sha'ban 13, 1403 H.; May 26, 1983 A.D.

Editor





## RECOMMENDATIONS

**Session Chairman, [Dr. Abd Al-Aziz Kamel]**

In the Name of God, the Compassionate, the Merciful.

Praise be to God and Peace and Blessings to His Apostle and his kin and Companions, and those who promote his Message until Doomsday. Warm greetings, brothers and sisters, and God's Peace, Mercy, and Blessings be with you.

It was expected that Dr. Abd Al-Rahman Al-'Awadhi, the Minister of Health, would be with us and chair this session, but some urgent business developed in the last moment and kept him from attending. He sends you his greetings and hopes that we all cooperate in this last session to finish the business expected of us. As you know the Recommendation Committee started its work at five and met for four full hours, from five to nine. It tried its very best to include in the recommendations what we arrived at in our sessions yesterday and today.

As you know, there was a discussion over phrasing at the recommendation sessions, which resulted in what we have here. Certain subjects were discussed again and again when first raised then were discussed once more in the recommendation session to decide the best phrasing. I do not think we need to go into more discussion. As it is the practice in such seminars, the Recommendation Committee has been trusted with the outcome of our work. What is left now is to have the recommendations read to, and certified by, you.

The Committee is chaired by His Excellency Councillor Abdulla Al-'Isa and he is assisted by members of the Committee. Would he kindly read to you what the Committee has arrived at.

In the Name of God, the Compassionate, the Merciful.

## **THE SEMINAR ON REPRODUCTION IN ISLAM MINUTES OF THE RECOMMENDATION COMMITTEE**

Date (Third Day): Thursday, Sha'ban 13, 1403 H.; May 26, 1983 A.D.  
Time: 5:00-9:30 p.m.

Place: Sheraton Hotel, [Kuwait] Roof B.

### **Attending Members:**

1. Sheikh Abdulla Al-'Isa, Chairman.
2. Dr. Ahmad Al-Ghandour.
3. Dr. Zakarriya Al-Berri.
4. Dr. Muhammad Sulaiman Al-Ashqar.
5. Dr. Khaled Al-Mathkour, Secretary.
6. Dr. Abd Al-Sattar Abu Ghuddah, Secretary.
7. Dr. Hassan Hathout.
8. Dr. Abd Al-Hafez Hilmi.
9. Dr. 'Onaizi Al-'Onaizi.
10. Dr. 'Adel Al-Tawhid.
11. Dr. Ahmad Raja'ii Al-Gindi.
12. Dr. Ahmad Sharf Al-Din.

### **Minutes of the Session**

First, the Committee reviewed the reports submitted on the sessions of the seminar to be guided by them, together with the memoranda of the chairmen and secretaries of the sessions, in determining what has been arrived of recommendations at the seminar.

### **Milk Banks**

1. The setting up of banks of mixed human milk is to be discouraged. If medical need calls for them, banks of human milk may be set up for

premature babies. A group of participants believe, on the basis of the opinion of the majority of fiqh scholars, that the collection of milk should be done in a way that guarantees the identification of each donor and each baby receiver. The nursing should be written down in records that are kept, and everyone involved should be notified to avoid the marriage of persons who have a milk relationship entailing the prohibition of their marriage.

Others, however, believe there is no need to identify the donors and receivers, on the basis of the opinion of Al-Laith Ibn Sa'd and the scholars of Al-Zhahiriyah School and their followers, who believe that milk relationships result only when a baby sucks the breast of a milk mother.

### **Fetal Sex Selection**

2. There was an agreement that the Islamic legal viewpoint is that fetal sex selection is unlawful when it is practiced at a national level, while on an individual basis, some of the scholars participating in the seminar, believe there is nothing legally wrong with the attempt to fulfil the wish of a married couple to have a boy or a girl through available medical means, while other scholars believe it is unlawful for fear that one sex might outnumber the other.

### **Cloning**

3. The seminar recommends further medical and fiqh study of the questions related to human cloning, along the same lines followed in animal experiments, and does not favour a hasty ruling on these matters.

4. There is an agreement that it is lawful to apply genetic engineering technology to microorganisms, by using recombinant DNA in the field of producing therapeutic drugs in abundant quantities. It is recommended that the properties of the said acid should be exploited in all fields that would benefit Muslims and keep them away from harm.

### **Test Tube Babies (and the Surrogate Mother-hood)**

5. The seminar concluded that such a practice is lawful if it only involves a married couple while the marriage is valid and sufficient and meticulous care is taken to avoid lineage confusion, although even here there is some reservation under the pretext of pre-emptive (anticipatory) prohibition.

It was also agreed that the practice is unlawful if it involves an alien party, whether in the form of semen, an ovum, an embryo, or a womb.

### **Surgical Contraception (Sterilization)**

6. It is agreed that surgical contraception is lawful on the individual level in cases of necessity as determined by a trustworthy Muslim doctor and when other alternatives have been exhausted. On the level of the Muslim nation at large, it is unlawful, and the seminar denounces turning sterilization into a general campaign and warns against its exploitation in demographic wars that aim at turning Muslims into minorities in their own countries or in the world as a whole.

### **Abortion**

7. Going over the views expressed by earlier fiqh scholars, with the keen insight and sound judgment they demonstrate, and noting that they unanimously forbid abortion after the breathing in of spirit, i.e. after the first four months of pregnancy, and that they differ over abortion before spirit is breathed in, with some opting for categorical prohibition or considering it reprehensible, and other prohibiting it after the first forty days and allowing it before that, with some difference over the necessity for justifying reasons; and benefitting from a review of contemporary medical and scientific advances as established in papers and by modern medical technology; the seminar concludes that an embryo is a living organism from the moment of conception, and its life is to be respected in all its stages, especially after spirit is breathed in. Aggression against it, in the form of abortion, is unlawful except in cases of maximum necessity. Some participants, however disagreed and believe abortion before the fortieth day, particularly when there is justification, is lawful.

### **Medical Examination of the Other Sex**

8. It is lawful for a medical member of one sex to look at the 'awra of a member of the other sex for purposes of medical examination, treatment, and medical education. Exposition, however, should be limited to what the need calls for.

### **[Other Recommendations]**

9. Effort should be made to include in the curricula of medical schools in the Islamic World a study of subjects of Islamic Law related to health,

disease, and treatment, and to include medical subjects in the curricula of colleges of Islamic studies.

10. A permanent committee composed of fiqh scholars, doctors, and scientists should be established to look when necessary into cases that require technical knowledge and Islamic ruling.

11. Due to the great benefit resulting from the seminar, the participants recommend holding others to discuss similar medical problems.

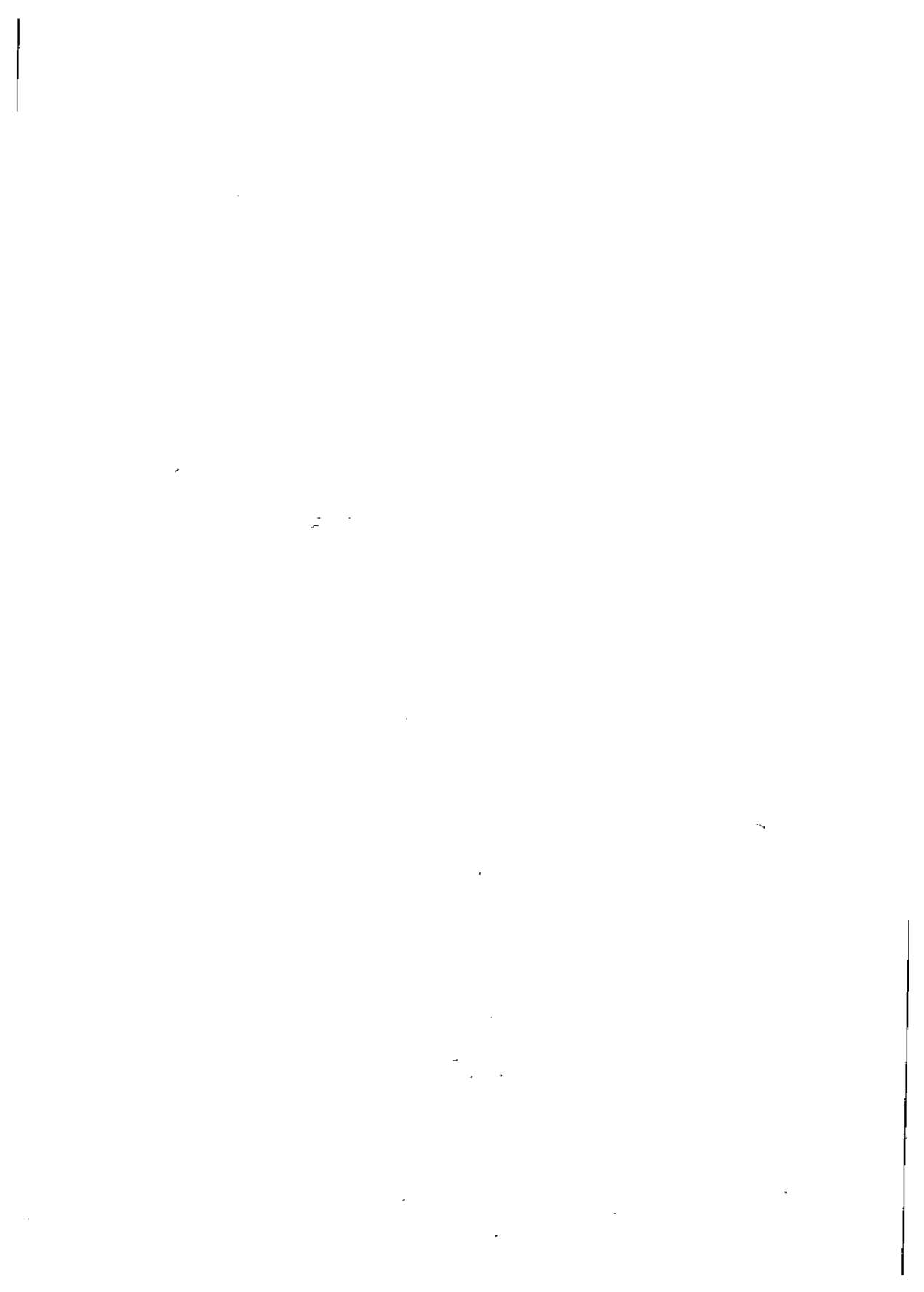
The participants wish to express their gratitude to and appreciation of the Government of Kuwait as represented by the Ministry of Health and other involved bodies for their efforts to make this seminar successful.

#### **Dr. Abd Al-Aziz Kamel**

I believe this is the end of the recommendations, and the Committee has expressed what we all feel. We thank Councillor Abdulla Al-'Isa.

I believe that what has been written truly reflects the way we felt and thought in our debates. If it is acceptable, I move now to a final item.

At the conclusion of this seminar that has brought together scholars from various disciplines: fiqh, medicine, law, and science, and from various countries of the Islamic world, I believe I express what we all feel of thankfulness and gratitude to his hospitable Islamic Arab country, including its Prince, Crown Prince, government, and people, for giving us this opportunity for fruitful dialogue, which deals with problems facing our contemporary Islamic World and strengthens the ties between scholars of various disciplines, different in their ways, united in their goals, all aiming at the glory of Islam and Muslims and at turning scientific and scholarly hopes and opinions into formulas that find their way to practical application and that are exchanged with other Arab and Muslim countries. The efforts made by the Ministry of Health, His Excellency the Minister, and the elite that assist him can only be met by great appreciation and gratitude, and by calling for more, by God's Will. I believe I express what we all feel by thanking those brothers who have participated in this conference, believing in its conception, planning for it, and putting it into practice; those who contributed with their opinions, their views, and their thoughts. I pray that this meeting is only a milestone on a road of special and fruitful cooperation through which we hope that our efforts are the fruition of earlier ones and a seed for future ones. Peace and God's Mercy and Blessings to you all.



## PART TWO

### PAPERS SUBMITTED BUT NOT DISCUSSED AT THE SEMINAR

The following papers were submitted to the seminar's secretariate but were not discussed in any of the sessions. Due to their importance, it was considered necessary to include them in the seminar's documents.

Editor

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# THE INCEPTION OF LIFE AND EMBRYO SANCTITY

Dr. Abdulla Basalamah

The inception of embryo life is an important scientific, fiqh, and social question. Anyone who has followed the dialogue over this question notices that the "answer" to it has differed with the different ages. Each age comes up with its own ruling (i.e. fatwa), which is consistent with the findings of science and the technology available at the time. A satisfactory answer is necessary so that a fetus may have its legal rights.

This legal right is guaranteed by Islam, and the evidence is abundant. Here are some examples.

First:

A. If a man dies and a pregnant wife survives him, the right of the fetus is secure, and the inheritance cannot be disposed of before the share of the fetus is set aside. If the wife delivers more than one baby, the legatees have to pay back the share of the others.

B. If a woman aborts a fetus, at any stage of its life, and it betrays any sign of life, such as a cough, sneeze, or finger movement, etc., the fetus is entitled to inherit any legitimate legator who has died after its conception. If the fetus does not survive, its legal legatees inherit its share.

Second:

Islam guarantees the sanctity of fetal life and protects a fetus against deliberate abortion without legitimate excuse. We even come across the ruling that if a pregnant woman is sentenced to death, execution is postponed until after delivery, and according to another view, until the mother completes nursing the child. (1) The prophet, Peace be upon him, postponed the stoning of a pregnant adulteress, which indicates that illicit conception does not justify abortion.

Third:

Islam imposes a monetary fine (blood money) for causing a woman to abort. If the fetus is aborted during the first four months of its life, or if it is dead when aborted, the blood money due is one tenth of that of an adult. (2) If the abortion occurs after the fourth month, and the fetus is alive when aborted, the blood money is the same as that due for an adult. (3) These and other examples show us that Islamic Law safeguards the life of a fetus, as well as its rights, while it is still in the womb.

These days, however, with all the social changes and scientific findings, we find ourselves before an open window, with hands almost reaching into tamper with the lives of fetuses. Permission and prohibition seem to be obscured by the interpretations of modern science concerning fetal growth, stages, and movement, as well as the inception of embryonic life.

Old Muslim fiqh scholars attempted in previous ages to determine the time when embryonic life began, but the modern methods of fetal diagnosis, such as fetoscopy, ultrasound, and other means for examining a fetus and monitoring its growth inside the uterus, were not available to them. These scientific methods allow us now to see the embryo inside the mother's belly from the earliest moments and to follow its growth, hour after hour and day after day, until it fully grows into a human being.

Fiqh opinions of earlier times said that the life of a fetus began with the appreciation of its movements inside the mother's belly, which is around the fourth month of pregnancy, thus equating life with quickening. It seems that the evidence on which they based that view was the "forty-day" tradition of the Prophet, Peace be upon him, which says: The creation of one of you in the belly of his mother takes forty days of his being a drop of sperm, then for a similar period, he is a germ cell, then for another forty days, he is an embryonic lump, then an angel is sent to him to breath spirit into him. (A authentic tradition)

It is clear that certain scholars interpret the tradition to mean that life begins in a fetus with the breathing in of the spirit, which occurs within 120 days of pregnancy. That is why certain fiqh schools allow justifiable abortion within that period, while all schools agree that the sanctity of fetal life must be observed after the fourth month.

At the turn of the century, or perhaps earlier, with the invention of the microscope and the progress in the study of anatomy and im embryology,

etc., it was confirmed beyond any doubt that life began inside the womb at the very moment of conception, right after fertilization and the production of a zygote. Consequently, from the earliest stage of its life, an embryo is said to be a living creature that has its sanctity and whose life must be protected against aggression. This scientific fact has turned into a legal and Islamic rule that has been discussed at many gatherings and seminars dedicated to the subject of abortion and Islam's attitude towards it.

I, however, have not been satisfied with such a conclusion and have felt that it implies a rejection of what is suggested by the Prophet's traditions on the subject, in favour of the scientific view that the sanctity of the embryo began with the inception of life in it.

Yet when we keep up with the accelerating scientific progress, we notice that scientific findings change. It has, for example, also been established beyond doubt that there is life even before fertilization and the production of the embryo or zygote. There is life in a sperm, as well as in the ovum released from an ovary, and each of them has proved to be an independent living organism. Their union, and the consequent conception, is a continuation of a life process that has been going on already.

As it is well known, this primal or basic form of life in an ovum or a sperm has no sanctity, nor is it unlawful to destroy it. Billions of billions of sperms are ejected outside wombs and perish with no sin involved. Every month, every adult female loses an ovum, which perishes unfertilized, with no sin involved.

Add to that the following scientific fact. Sometimes the union of a sperm and an ovum results in a form of conception, but it is an abnormal form, known as hydatidiform mole, which results in a mass of tissues with the form of watery vesicles and the appearance of a bunch of grapes. It does not produce an embryo, nor a human creature. Aborting such a mass is a medical duty; it must be removed out of the womb as soon as it is diagnosed to protect the lady involved against serious complications.

It is also scientifically known that not every union of a sperm and an ovum results in an embryo that can survive. It might rather produce a sterile or imperfect embryo, which remains in the uterus up to several weeks and then drops by itself, or it has to be removed.

From all this, one concludes that not every conception is bound to produce a human being that has sanctity and the right to be preserved. The question then is: when does the union of a sperm and an ovum entail sanctity and rights? When does fetal sanctity begin? In my opinion it

begins when a fetus turns into a human being. A fetus that has acquired human features and traits is one with sanctity and rights, but not every living organism in a uterus is entitled to the same degree of sanctity and honour.

If we follow the life of a fetus inside the womb, we find that it goes through several stages. The Quran describes these stages in a detailed and precise manner which surpasses all human sciences, including embryology. God says:

We first created man from an essence of clay: then placed him, a drop of sperm, in a safe enclosure. Then create out of the drop of sperm a germ cell and out of germ-cell, we create an embryonic lump and then we create within the embryonic lump bones, then we clothed the bones with flesh. Then we bring this into a being as a new creation. Blessed be God, the noblest of creators. (Al-Mu'minun [The Believers], 12-14)

The scientific (anatomical) description of the fetus can be as follows. After the sperm and ovum unite, the resulting zygote passes from the stage of a sperm into that of a germ-cell, and then of an embryonic lump. Then bone and flesh begin to form. So far it is still a mass of cells and tissues that has not taken a form similar to that of a human being, nor does it have moving limbs. After about forty days of gestation, fetal limbs emerge, and then the spinal canal that carries the nerves. In about forty-two days, another inception occurs, that of the growth of something well defined. When the nerves (or spinal canal) form, movement begins. It is not felt by the mother yet, but it can now be taped and watched on a video cassette.

The scientific anatomical description of a fetus and the possibility of producing photos of a fetus inside the uterus with modern scientific equipment reveal that it acquires human form within six weeks, i.e. forty-two days, of gestation.

The Quran also describes the creation of a human being when God says, "We have created man out of an intermingled drop of sperm." (Al-Insan [Man], 2) which is the "mixture" of a sperm and an ovum. He also says, "He created man from a drop of sperm: yet man openly disputes His judgment," (Al-Nahl [The Bee], 3) which means that man is the outcome of that germ. Again He says, "[He] created man from germ cells." (Al-'Alaq [The Germ-Cells], 2) which signifies that the germ cell stage precedes that of the human being. And He says, "We moulded man into the most noble image." (Al-Tin [The Fig], 4)

All this shows that the first union of a sperm and an ovum is not a human being, although it is alive. Again, the stages of sperm, germ-cell,

embryonic lump, and bone and flesh are still short of being a human being that has "a most noble image." The human being rather comes with the following stage, the second inception, when the fetus starts to have human features.

To go back to the question, Islam guarantees the sanctity of fetuses, but when does this guarantee begin? With the beginning of life? with the beginning of the unfelt movement of its limbs within about forty days? or with the mother's feeling of the movement in the fourth or fifth month of pregnancy?

What I believe (and only God has perfect knowledge) is that the view that fetal sanctity begins with the inception of life is not sound. It rather begins, in my opinion, when a fetus acquires human form, which begins within forty days of its creation in the belly of its mother.

"He [the Prophet] does not speak out of his own fancy." (Al-Najm [The Star], 3) Neither God nor His honoured Apostle utter anything but the Truth.

## Notes

(Dr. Muhammad Al-Ashqar)

1. The common view is that execution is postponed until she completes nursing the child. If someone takes on the responsibility of nursing it, execution is not postponed after delivery. See *Al-Mughni* by Ibn Qudamah, Third Edition, 8, 170.
2. That is if human form can be detected, not if the aborted embryo is a drop of sperm, germ-cell or embryonic lump with no form. See *Al-Mughni*, 7, 802.
3. This is the view of the Shafi'i School of thought. The Hanbali School says blood money equal to an adult's is only due if the fetus is aborted alive after the sixth month. As experience shows, if it is born before that, it does not survive. See *Al-Mughni*, 7, 812.

# THE SEMINAR ON REPRODUCTION IN ISLAM

Sheikh Ibrahim Al-Qattan

## 1. Abortion

The question of abortion is discussed by Dr. Hassan Hathout in detail. He sufficiently covers its legal and medical aspects, as well as the Islamic point of view.

I agree with all what he says and thank him for this meticulous, well-organized paper. I do not believe more needs be written on the subject other than what this revered physician has included in his valuable paper. May God reward him, give him long life, and keep him for us a valuable support.

## 2. Surgical Contraception

Dr. Hassan Hathout has written a valuable paper on this from an Islamic viewpoint. He says he has found nothing in the Quran, Sunna, the consensus of scholars, or analogy that explicitly covers contraceptive surgery, known as sterilization operations, as this type of surgery is something new, developed in this age of ours.

He goes into details to justify the permissibility of such surgery, pointing out that it differs from male "castration." He says the important consideration is the health of the woman involved, and whether it is threatened by pregnancy, which should be determined by a Muslim doctor, and the operation has to be consented to by the woman and her husband, etc.

I especially like his statement:

In my opinion, and I see Islamic medicine as a trust and a worship, Islam calls upon a doctor not to reach a final decision before carefully and with insight considering a number of points. If he fails to do so, his decision would be hasty and deficient from an Islamic point of view.

And he lists eight points.

He comes to a wise conclusion, saying: "So this is sterilization. It includes permissible cases, others with a most reprehensible permission, and overtly unlawful cases."

### 3. Medical Examination of the Other Sex

Dr. Hassan Hathout discusses this topic at length, quoting statements by our good predecessors which we should be proud of for the far sightedness, open mindedness and sound judgment they reflect. On this point he says:

Muslim scholars, both old and modern, have held the same view. Hundreds of years ago, they came up with rulings, which, measured by the standards of our own time, are highly enlightened and reveal broad mindedness, as well as full understanding of both the spirit and the texts of Islamic Law. These rulings combine warm Islamic sentiments with sober Islamic reason. The examples are many.

He cites a passage from *Al-Mughni (The Sufficient)* by Ibn Qudamah, which is most explicit, well-reasoned, and objective. Another passage he cites is from *Al-Adab Al-Shar'iyah (Islamic Manners)* by Ibn Mufleh, of the Hanbali school of thought (Volume II, p.464). It says what can be summed up with the words of Al-Qadhi, i.e. Abu Ya'ali, a prominent scholar of the Hanbali School of thought:

A physician is allowed to look at a woman's *awra* when the need calls for that, and the same thing is true if the physician is a woman or if the need calls for looking at a man's *'awra*.

Ibn 'Abdin's *Foot-notes*, v.5, p.237, is also quoted: "A male physician may look at the location of [a woman's] disease to the extent that the need calls for."

Dr. Hathout excels in this paper and mentions all kinds of details. He ends his paper by saying:

In conclusion, these I have felt are words that need to be spoken after conversations with students, young doctors, and certain Muslim brothers, may God grant them success. We want to know the Islamic ruling on this question. We want to avoid burdening these doctors with what Islam does not burden them. We want to keep the margin of permission intact for them and not let it shrink, to reassure them of the lawfulness of a practice where the criterion remains good intention, observing God's instructions, and fearing Him. There are doctors who have all these qualities and more, and we thank God for that.



Everything written by this honourable research scholar, Dr. Hassan Hathout, is, in my opinion, in harmony with the rulings of Islamic Law and should be followed. I thank him heartily for these valuable papers. We do need open minds guided by the Divine Light and guiding people in their affairs to the Straight Path.

I find no need after these detailed, enlightened works, with their clear explanation and sound judgment based on experience and on the great Islamic Legislation, for more to be written on this subject. May God reward Dr. Hathout, give him long life, and keep him for us a valuable support.

I want to add a brief word on family planning, as the subject merits some deliberation and the texts that cover it need to be reviewed. I sum up what our master the late Sheikh Mahmoud Shaltout, former Sheikh of Al-Azhar, says in his rulings, i.e. *fatwas*.

Family planning, in its general sense, is something contrary to nature, to God's Wisdom, and to Islamic Legislation. We find in our studies many issues on which the point of controversy is not sufficiently investigated. The subject of family planning, in my opinion, is one of the clearest examples of subjects on which opinions differed, without an effort on the part of research scholars to define specially what the expression "family planning" means.

It was thought that the purpose of family planning is a general law that would set a maximum limit of children for the whole nation, without making any distinction between a lady who is fast to conceive and one who is slow and who completes nursing a baby and taking care of it before conceiving again, and thus does not nurse one baby while pregnant with another; nor between a healthy person with no diseases, who produces strong and healthy children, and an ailing, weak one, who produces weaklings; nor between a wealthy and prosperous person, capable of raising his children regardless of how numerous they may be, and a poor person in dire conditions, with no ability to support many children, which makes him edgy and irritable, spoils his life, and turns it into a series of dilemmas and difficulties.

This general meaning of family planning cannot be advocated by anyone and is unacceptable to any reasonable man, any legislation aiming at reform, or any nation wishing to survive and taking serious and fast steps in the form of productive projects to compete with other nations and foil the design of colonial invaders. It is a way of thinking contrary to the nature of creation, which is constant growth, and to the wisdom of the

All-Sagacious, Who created the ability to reproduce in both man and animal and created in the earth and the rest of his creation, on the other hand, the chance of constantly increasing productivity.

It is inevitable then that Islamic Legislation, which is the Law of the All-Sagacious, Who perfectly knows the nature of His creation, should reject such a way of thinking. Islamic Legislation, in fact, encourages efforts for power,, further civilization, increased manpower, and the availability of jobs to be achieved by such manpower. It also urges people to marry. God gives people the blessing of having children and grandchildren as one of the consequences of marriage and reassures them about their livelihood. He says:

God has given you wives from among yourselves, and through them He has granted you sons and grandsons. He has also provided you with good things. (Al-Nahl [The Bee], 72)

One of the advices of the Prophet, Peace be upon him, is: "Mary and reproduce; I am going to boast your number over other nations on Doomsday." (1) He also says, "A fertile black woman is better than a beauty who bears no children," (2) and "Whoever refrains from marriage for fear of want is not one of us." (3) And God says:

Your Lord gives abundantly to whom He wills and sparingly to whom He pleases. He knows His worshippers and observes their doing. You shall not kill your children for fear of want. We will provide for them and for you. To kill them is a great sin. (Al-Israa' [The Night Journey], 30-31)

In pre-Islam, when a man had too many children, and he feared poverty, he would kill as many of them as he pleased, which was a great crime, rejected by Islam and totally forbidden. Indeed the Quran warns sternly against such crimes. God says:

Say: 'Come, I will tell you what your Lord has forbidden to you: that you shall believe in no gods other than Him; that you shall show kindness to your parents; that you shall not kill your children because you cannot support them (We provide for you and for them)....' (Al-An'aam [Cattle], 151)

The first verse refers to those Arabs who killed their children for fear of the poverty they were suffering. But such things are major crimes forbidden by Islam, and their prohibition is stressed in the Quran. God has taken upon Himself to provide for all people.

Family planning in its general sense, which makes it obligatory for everybody, is a violation of the instructions of Islam and a departure from commonsense and from the rules of Islamic Legislation.

### **Special Cases of Family Planning**

On the other hand, family planning may be a way of dealing with special cases, such as woman who are fast to conceive, people with diseases, the few who do not have the nerves to face many responsibilities and are not offered assistance by their governments or the wealthy in their nation to support them in shouldering these responsibilities. These special cases can be dealt with individually, each with what needs to be done in order to avoid the certain harm that will otherwise be caused.

It is some of these cases that call for family planning, which is on an individual basis and does not go beyond being a remedy to avoid certain damage and to guarantee good and healthy offspring. Such planning does not go against nature, nor is it forbidden in Islamic Law, but may rather be encouraged and even demanded.

The Prophet, Peace be upon him, permits coitus interruptus when both husband and wife accept it. A rule of Legislation says, "Harm shall be removed." So things are left for the individual and his assessment of his circumstances and his forbearance. Fiqh scholars allow temporary or permanent planning by a married couple if either or both of them have a disease which is likely to transmit to children and grandchildren.

Such type of family planning in special cases, which are unlikely to be general in a certain nation and which remain limited to a very small percentage of the population, is permitted or demanded in Islam, depending on the volume of threatened damage and on the interests of the married couple involved.

### **Abortion**

Our fiqh scholars have dealt with abortion, all agreeing that after spirit is breathed into a fetus, which they say does not occur before the end of the fourth month of fetal life, abortion is forbidden and considered a crime no Muslim is allowed to commit, because it is an aggression against a fully-formed, clearly-alive creature. If a fetus is alive when aborted, blood money has to be paid, and if dead, a smaller sum of money is due.

However, they also say (4) that in case it is established, through a

trustworthy authority, that a fetus who is certain to survive would cause the death of its mother if pregnancy is allowed to continue, the general rules of Legislation call for choosing the lesser evil. If there is no way to save the mother's life other than aborting the fetus, abortion is obligatory; she cannot be sacrificed to save its life, because she is the origin, her life has been established, and she has an independent share of life. It has obligations towards her as she has obligations towards it. In addition to all this, she is the cornerstone of the whole family, and it stands against reason to sacrifice her life for a fetus which does not yet have an independent life of its own and has not yet acquired rights and obligations.

Abortion within the first four months, before spirit is breathed in as they put it, is a controversial subject among scholars; some consider it lawful, claiming that such a fetus has no life yet, so no crime is committed and no prohibition applies. Others believe it is either forbidden or reprehensible, because a growth and potential life are involved. Imam Al-Ghazali discusses this point and illustrates the difference between it and contraception. He says:

It [contraception] is not the same as abortion or burying a child alive, the latter being a crime against an existing being. The first stage of existence is the ejection of semen and its union with an ovum and to spoil this is a crime. If it turns into a seed and then a germ-cell, the crime is worse, and it is even worse after spirit is breathed into the fetus and its creation is completed. The worst crime is against this creature after it separates from its mother and becomes an independent living being.

The guideline set by Al-Ghazali and his followers, ruling that abortion is unlawful once a sperm is united with an ovum, shows that the scholars of Islamic Law agree with physicians, though they use different phraseology, that the organism with which fertilization takes place has a life of its own, which allows it to struggle in the effort to reach its objective, the ovum. On the basis of this life, they came up with rulings and established consequences. As for the life which begins within four months, it is the apparent life which a mother feels with the movement of a fetus, and which was described in the Prophet's tradition as the breathing in of spirit.

Perhaps scholars who deny life before spirit breathing mean this apparent life, but at the same time, they do not deny that the organism is alive, and its life allows it to reach the ovum. This leads us to conclude that the difference in opinion among scholars over the ruling concerning abortion in early pregnancy is based on their lack of attention to, or lack of knowledge of, such details, or they probably mean that the degree of

prohibition in such a stage does not amount to that in the later stage when a fetus has been fully formed and a mother feels the baby kicking in her belly. (5)

If that is so, scholars are then in agreement that abortion is forbidden during any stage of gestation, and cases of necessity are also assessed and ruled upon in the different stages of fetal life. Thus it is clear that the Islamic and the medical viewpoints meet.

### **Artificial Insemination**

It is known that the creation of a child starts with semen which is ejected by a man and finds its way to the womb, which is ready to receive it. "He is created from a flowing fluid. He issues forth from the loins and the ribs." (Al-Tareq [The Nightly Visitant], 6-7) "We have created man from the union of two sexes...." (Al-Insan [Man], 2) The semen does not have to get to the uterus in the familiar physical way, and this is something known to all people and mentioned by fiqh scholars: "Conception may result from inserting the fluid into the right place without intercourse." They make this statement and rule that a waiting period has to be observed, during which a husband stays away from his wife until it is established that she is not pregnant, in case the semen of a stranger gets into her uterus in this method. They say, "If a woman allows into her body semen which she believes to be her husband's and the turns out to be somebody else's, she has to observe a waiting period exactly as if she has gone through an intercourse which involves an error."

This hypothetical situation is mentioned in works by scholars of the Shaf'ii School of thought. The author of Al-Bahr (The Sea), who is a Hanafi scholar, says he has not come across such a hypothesis among scholars of his School of thought, but general regulations do not rule it out. The waiting period is to make sure that no conception has taken place, which explicitly admits that semen may get into the uterus in a way other than the normal one and be a means of pregnancy. Thus the familiar rule that a child is created from semen without the need for a sexual intercourse is implied. Physical intercourse is the familiar, but not the only, method for this creation, as long as the semen has all the natural properties.

Artificial insemination for purposes of reproduction has been known to man since ancient times, and in the early periods of human existence, this method was applied to plants and animals with success. Fine animal pedigrees and fruit yields have been produced this way. This success caused man to experiment with the artificial insemination of a woman with

the semen of a man. Again the experiment was successful, and a fetus was produced through this type of insemination. After a full fetal life, a fully developed human child was born.

Human artificial insemination, however, did not have the purpose of producing better and healthier human stocks, as the case was with plants and animals. Originally, the purpose was scientific. The success of the experiment, both scientifically and practically, has turned it into a method to meet the desire of childless married couples who want children. Such couples no longer have to feel sterile, and can, like everybody else, enjoy fatherhood and motherhood.

### **The Ruling of Islamic Legislation on Artificial Insemination.**

With the above in mind, we can rule that, according to Islamic Law, human artificial insemination is a lawful thing that involves no sin and no restraint if a husband's semen is used to inseminate his own wife. It is an action that falls within the laws governing virtuous human societies. In addition, it may be a means for such a couple to have a legitimate child that bears the father's name, extend the parents' lives, completes their psychological and social happiness, and gives them reassurance as to the continuity of their mutual love and companionship.

If insemination involves the semen of a man other than the husband of the woman involved, which is perhaps what people usually mean when they speak about artificial insemination, it is unlawful. An action of this sort is in Islamic Law a terrible crime and a major sin which falls in the same category as adulter, the essence and the consequences of both being the same.

This is a summary of what our great master the late Sheikh Mahmoud Shaltut says in his book *Al-Fatawa* (Cairo: Al-Qalam Publishing House).

It is God Who guides us to success.

## Notes

- (1) Related by Al-Tabarani in his *Intermediate Dictionary* as narrated by Sahi Ibn Hanif with the phrasing, "Wed because I am going to boast your number over other nations," and listed by Abd Al-Razzaq with the phrasing, "Get married and multiply...."
- (2) Related by Al-Tabarani as on the authority of Mu'awyah Ibn Hidah. It is a poorly verified tradition. (*Dha'if Al-Jami' Al-Saghir [The Small Collection of Poorly Verified Traditions]*)
- (3) Related by Al-Dailami on the authority of Abu Sa'id, but the degree of its verification is not mentioned by anyone. (Muhammad Al-Ashqar's note)
- (4) The honourable author fails to identify the Imams and major scholars who say this. It is known, however, that this opinion belongs to contemporary fiqh scholars, but that does not make it less valid. (Muhammad Al-Ashqar's note)
- (5) This view and interpretation of the opinion of dissenters are questionable, as can be confirmed by scrutinizing their writings, some of which are quoted and can be referred to in the paper submitted by Dr. Tawfiq Al-Wa'ii and published in this book. (Muhammad Al-Ashqar's note)

## **FETAL RIGHT TO LIVE IN ISLAMIC LEGISLATION**

**Dr. Hasan Ali Al-Shathili**

**In the Name of God, the Compassionate, the Merciful.**

Praise be to God, the Lord of creation, and Peace and Blessings on his most honoured Apostle, Muhammad Ibn Abdulla, and all his kin and Companions, as well as those who follow their example until Doomsday.

There has been much talk recently over the life of an embryo and how far it is to be respected. Certain opinions have surfaced, calling for cancelling the sanctity of fetal life and permitting its termination. Such calls are usually supported by shaky excuses and sometimes use as a pretext for such permission the need to hide terrible facts and not to publicise crimes against the honour of families. At other times, the reason given is fear of poverty, or a woman's reluctance to keep the fetus of a husband who has died leaving her at the prime of her youth or whose companionship is something she has no desire to last, as well as other excuses, which similarly glitter on the outside but are actually dark in essence. With no real understanding of those areas of God's Law which admit concessions, exemption and facilitation and those which do not, they use the mask of facilitation and flexibility as a guillotine to end the lives of innocent souls or to bury them alive, without their being able, helpless as they are, to defend themselves and to cry against the injustice committed against them.

Those advocates have no clear evidence or proof based on science, reason, or Islamic Law, all of which are indeed against them. Their call is nothing but the desire to imitate societies which may be scientifically ahead but are, at the same time, socially lacerated and with poor family ties. They have no controls that allow them tight legislation and check their extreme whims. The intellectual invasion of these societies is welcomed under the guise of freedom and emancipation and with the pretext of following every new trend, even when such a trend would damage the interests of the society in which we live, destroy lives which God has made unlawful to tamper with, set a hazardous course which is likely to lead to



widespread vice and sin, and keep a person who commits such a crime from being punished. All or some of these things, or perhaps others, have prompted such initiative and easily-influenced people to try and influence others in our Muslim societies, which are pure in their nature and their faith.

With the broad base of faith in these areas and Muslim countries in general--the people of which have been chosen by God to be honoured over all humanity and to receive universal light and the guidance of the Message of Muhammad, Peace be upon him who has brought them the complete and perfect Legislation that admits no falsehood whether it be explicit or try to sneak from behind it--our society always casts off every alien element and refuses to stake religion and faith at the table of caprices and desires.

Since people always need full explanations, constant reminders, and instruction as to the ruling of God's Legislation and the interpretations of Muslim scholars--both the early ones whose works are the heritage of this nation and embody its ideas, horizons, and essence, and the recent who represent its modern Legislative renaissance--I have noted that there is an urgent need for me to submit this paper over "An Fetal Right to Live in Islamic Legislation," showing that aggression against it is unlawful and pointing out the punishment prescribed for those who destroy its life or cause it any harm.

## FORWORD

God has created man, honoured him, exalted him above many of His other creatures, endowed him with intellect and reason, made him master of everything in Heaven and on and inside earth, made it his responsibility to populate the universe, and entrusted him with the task of studying, learning, and teaching His Law.

We offered Our Trust to the heavens, to the earth, and to the mountains, but they refused the burden and were afraid to receive it. Man undertook to bear it and proved himself a sinner and a fool. (Al-Ahzab [The Parties], 72)

Because of its importance, this creature has been the subject of studies that cover all aspects of its being--spiritual, psychological, physical, social, and so on. Every scholar discovers for himself that man is an inimitable miracle and a living proof of the Creator's Omnipotence. Such scholars piously contemplate God's Power, as represented in what He has given, suspended, and denied. Great is the Creator, the All-Powerful, the Great Engineer, Who says, "There are on earth numerous signs for those seeking reassurance, ...and in yourselves. Can you not see?" (Al-Thariyat [The Winds], 21)

God has addressed this creature, sent him Messengers with His Laws, and singled him of His creation out with orders and prohibitions, so that the universe would follow its right course and people would constantly improve their lot, whether in the present or in the future, and would abandon which might hamper this improvement, tamper with its course, or prevent it from going on, age after age and era after era, in all corners of the earth. It is a course that leads both Muslims and non-Muslims to stability, which brings them progress and prosperity and allows the plant of pure faith and of the Religion which is full of love and humanity to grow and cover with its shade of justice and care all creatures, foremost among which is man.

This is what God intends for us, for every Muslim who believes that there is no deity other than God and that Muhammad, Peace be upon him, is His Apostle. Aware of His intention, Muslims, from the earliest days of Islam, have been searching, studying, and investigating within this Religion that God has chosen for them, inspired to the unschooled Prophet, Muhammad Ibn Abdulla, and articulated in God's Book and the

Sunna of his Apostle, Peace be upon him. God says: "Believers, obey God and the Apostle," (Al-Nisaa' [Women], 59) "Whatever the Apostle gives you, accept it, and whatever he forbids you, refrain from it," (Al-Hashr [Congregation], 7) and "He that obeys the Apostle obeys God Himself." (Al-Nisaa', 80) The Prophet, Peace be upon him, says, "I have given you something to which you should hold tight; for it will keep you from ever getting astray after I die: God's Book and my Sunna." It is within the framework of these two sources that Muslims' minds have been endeavouring to fully grasp the stipulations of their Religion--whether they relate to faith, morality, or everyday affairs (fiqh)--and to know what they are ordered to do and what they are warned against; what is lawful and what is unlawful in God's Legislation that serves the interests of all people; what is obligatory, what is needed to make things easier, and what improves and complements; what relates to this world and what relates to the Hereafter.

Because interests get tangled with each other, and this may lead to confusion the limits of which cannot be defined, it is imperative to determine what type of person is addressed in God's Legislation. This means determining the identity of such person, the time at which he is addressed, the time when he is no longer addressed, and the time when, and the way in which, he is required to observe or to refrain from what is required, recommended, lawful, reprehensible, or forbidden. Investigation of this sort is necessary for a Muslim at all stages of his life, lest he be exposed to jolts or get lost in the battle ground of life. Our early scholars, may God be pleased with them, had certain principles which they observed in interpreting this Law of God and rules which they followed in determining its rulings on the basis of its two above-mentioned sources. One of these principles and rules was the mastery of Arabic, as it is the language of the Quran and Sunna, with which the Prophet, Peace be upon him, addressed all people. Another rule was the necessity to know any Quranic verse or Prophet's tradition which serves as interpretation, to be aware of which parts of the Quran were revealed earlier and which later, and to know what is general and what applies to specific cases, what is conditional and what is not, what is expressed in general terms and what is illustrated. A third rule was to take all the evidence that is found in the two sources and derive rulings from it, when such rulings are not explicit. These rules and controls which guarantee best interpretation of the Legislation are actually the same in every discipline. They do not come accidentally, nor through intuition or guess work, but are rather rooted in what we are taught by God, as explained to us in His Book and the Sunna of His Apostle, Peace by upon him.

## **Man's Competence**

Scholars of Islam maintain that man has "competence" in as far as determining his rights and duties in his life on earth and their consequences which influence his other life. In its Islamic legal meaning, competence is the total sum of the qualities in man that make legal rulings applicable to him. He gains this competence little by little as he goes through the stages of life, from the moment he forms as an embryo in his mother's belly through his birth and until he dies, and even after his death. This competence is in proportion with his physical and mental abilities, decreasing when they do and reaching its highest point when he has full physical and mental powers. The estimation of its application and degree is a matter that the Law decides, for it is this Law which is the source of rulings governing people's affairs and which determines the competence of each individual as regards any of these rulings. An individual has the right to demand, or the obligation to observe, a certain thing in proportion with his competence. The rights and obligations this competence entails are either related to the interests of all people or to those of the individual himself, and therefore, they are divided into two main headings.

The first is the rights of God, or, you may say, of society, and these concern the public interest, rather than the particular interest of a certain party. Although these are the rights of society, they are called God's rights to honour them, stress their importance, and prompt people to observe them and not to tamper with or ignore any of them. No remission, reconciliation, or waiver is possible when it comes to one of these rights. Among these are the rights of a human being as such, which include the right to live, to own, and to get married, and the freedom of expression, thought, and belief. All these are essential to a human being and cannot be bought, sold, given, or abdicated. Thus they are a protection for every human being, which guarantees the realization of the objective for which he was created. The rights of God also include what is ordained by Islamic Law for us, whether in the form of religious observances (prayer, fasting, pilgrimage, zakah), punishments (retribution, blood money, or any of the punishments for adultery, libel, theft, looting, drinking, and apostasy), or financial resources (zakah, land tax, Fitr feast charity, expiations, etc.).

Under the second heading are the rights of a person, which include every right that concerns a special interest of that person as well as his dealings (purchases, sales, partnerships, consolidations). In this type of rights, generosity, gift, waiver, reconciliation, remission, and sales are all lawful. In Islamic Law, a right for man is inherent in every right of God, and

vice versa. God's right surfaces when a person is unreasonable in using his right. In such a case, God's right takes precedence, and the right involved assumes a divine quality. The person forfeits his control, so that public interest can be served. This is a guarantee against deviation and despotism. God is every observing his creatures, and His Law aims at perfect justice among them, at their best interest and at continuous prosperity for those who deserve it and hardship for those who fail to heed His instructions in spite of being aware of them.

### **The Purposes of Marriage**

Populating the universe is one of the rights of God, and He has pointed out that this can be achieved through marriage. For a Muslim, marriage may be obligatory, recommended, preferred, permitted, reprehensible, or forbidden depending on whether or not he meets its conditions, or some of them, which include desire, ability (physical, mental, and financial), fairness, and good temper which prevents him from oppression and injustice. Marriage serves great purposes. It is the means for the survival of humanity as long as God has destined it to survive, and He alone knows how long that will be. For through marriage, man, who is chosen by God to shoulder the burden of His trust, multiplies, at the same time keeping away from vice and from being reduced to the ranks of dumb beasts. Marriage also keeps lineage from being obscured, prevents injustice and bloodshedding, and protects man's health and wealth, thus safety, security, love, and friendliness dominate, one generation after another, which is the purpose of the prudent Legislation in all its stipulations. In addition to all these great benefits, marriage refines man's manners and makes a human being accustomed to be more patient and tolerant as he finds himself in need to deal with other human beings, to raise children, to undertake task for weak Muslims who are unable to take care of themselves, and to support children, relatives, and the oppressed. Marriage also teaches him to keep his close-of-kin women and himself chaste, to keep vice away from himself as well as from Muslim women, and to busy himself with the disciplining of his children and preparing them for the worship of God. His wife also engages in preparing others and relating to them God's orders and warnings.

It is clear then that marriage serves great purposes from which all people benefit and to which their immediate, as well as future, interests are related. It is therefore one of the closest things to religious worship. Al-Kamal Ibn Al-Humam says, "It is so close to religious observances that to be busy with it is better than to abandon it just for the sake of worship."

Both [Al-Bukhari's and Muslim's] Compilations of authentic Traditions relate that a group of the Companions of the Prophet, Peace be upon him, secretly asked his wives about his daily activities. One of these Companions said, "I will not get married." Another said, "I pray through the night and do not sleep." The third said, "I fast every single day." The Prophet learned of this, and He said, "What is the matter with some people who have said [such and such]. I fast and abstain from fasting, pray and sleep, and I marry women. He who renounces my example [Sunna] does not belong with me." God would naturally want the best of everything for His most honoured Prophet.

On the other hand, it is clear that reproduction is one of the fruits of marriage, and as such, it falls into the same category. In other words, reproduction is one of the God's rights. All people have to observe this right, protect it, and see that it keeps on being observed in the way that is most satisfactory to Him Who has that right.

Islam urges people to observe that right, as it is clear in the tradition of the Prophet, Peace be upon him. In one tradition, narrated by Anas, may God bless him, the Prophet is said to have urged family life and strongly forbidden abstinence from sex. He says, "Marry the loving and child-bearing; I will take pride, among other prophets on the day of Resurrection, in your number." (Related by Ibn Hayyan in his *Collection of Authentic Traditions*, as well as by Ahmad and Al-Tabarani) Ma'aqel Ibn Yassar quotes the Prophet, Peace be upon him, as saying, "Marry the loving and child-bearing; I will take pride in your number among other nations." (Related by Abu Dawood, Al-Nisa'ii, and Al-Hakem, who gives it the grade of 'authentic').

Although reproduction is one of the rights of God to be observed by all people, the Wise Legislator has set, within a carefully-drawn framework and a well-organized system, the way man should follow in observing this right. This system covers the stage of considering procreation in the first place, the stage of the fetus once it is conceived, the caring for this fetus, the protection due to it, and punishment for any aggression against it until it is born. The following will illustrate the stipulations of Islamic Law in this regard.

## **EMBRYO GUARDIANSHIP**

It has been God's Will to set a system for human reproduction, with rules and controls which govern its form and essence. These cover the contract through which procreation is achieved, which is the marriage contract, which He has ordered to be with the consent of the two parties involved. He has also made love, kindness, mercy, and courtesy the bases of married life. It is also His Will to provide children, the fruit of marriage, with care and protection from the first moment of their creation. He makes clear to the married couple the limits of their authority in controlling reproduction, whether before or after an embryo starts to form in the wife's belly. I believe we are called upon to explain the authority allowed to man in each of these two stages, by explaining the Islamic ruling on contraceptive measures in the stage before conception and on controlling the life of an embryo after conception, pointing out whether a married couple (or either of them) have the right or authority to abort a baby. We should also mention the ruling that applies to them, or to anyone else, when abortion is caused to take place.

## CONTRACEPTION

Islamic fiqh covers the case when contraception is wished by a husband and/or his wife through coitus interruptus, which was the method about which the Prophet, Peace be upon him, was specifically asked, and the one familiar at the time. Modern methods were not known then, but a ruling on these can be deduced through analogy with coitus interruptus, so long as these methods cause no harm to either wife or husband. Scholars have expressed three opinions on the subject; some ruled it unlawful, other reprehensible, and a third group permitted it with certain conditions. Here is a summary of these opinions:

The first, which is advocated by Al-Zhahiriyyah School of thought, says that coitus interruptus is prohibited. In *Al-Muhalla (The Adorned)* we read:

Coitus interruptus is unlawful with either a free woman or a slave. The evidence is what Muslim relates, quoting Jathamah Bint Wahb. She says, I was in the presence of the Prophet, Peace be upon him, with a group of people who asked him about coitus interruptus. He said, "It is burying in secret alive" and he read, "And if the buried-alive girl is asked...." (1)

The second opinion regards coitus interruptus as only reprehensible, and this is the view of Hanbali scholars (as well as scholars of the Imami school, unless it is set as a condition in the contract of marriage). Ibn Qudamah (2) says that Omar, Ali, Ibn Omar, Ibn Mas'oud, and Abu Bakr Al-Siddiq are all quoted as testifying to its being reprehensible, because it reduces the number of offspring. The Prophet, Peace be upon him, urges people to take the necessary measures to have children. He says, "Marry, reproduce, and multiply...." An exception is when coitus interruptus is followed to meet a certain need, such as when a war is going on in the country. Otherwise, it is reprehensible, not forbidden, and its permissibility is established through quotations from Ali, Sa'ad Ibn Abu Waqqas, Abu Ayub, Zaid Ibn Thabet, Jaber, Ibn 'Abbas, Al-Hasan Ibn Ali, Khabbab Ibn Al-Aratt, Sa'eed Ibn Al-Musayyib, Tawoos, 'Ataa', Al-Nukha'ii, Malek, Al-Shaf'ii, and the Iraqi branch of the Hanafi School of thought.

The third opinion is held by the majority of scholars, who rule that distinction should be made between a free woman and a slave. With a



slave, coitus interruptus is permissible, even without her consent. In the case of a free woman, there are three different cases. The first is when both husband and wife agree on resorting to coitus interruptus. The second and third are the cases when one wants it and the other disagrees.

**The First Case:** When both spouses favour coitus interruptus, it is lawful for them, on basis of narrated traditions. Jaber is quoted as having said, "We used to resort to coitus interruptus during the lifetime of God's Apostle, Peace be upon him, and while the Quran was still being revealed [to him]." (Related by Al-Bukhari and Muslim). Muslim quotes Jaber as saying, "We used to resort to coitus interruptus during the lifetime of God's Apostle, Peace be upon him, and he did not forbid us from doing so." This tradition seems to imply that coitus interruptus is allowed with no restriction, but actually the wife's consent is set as a condition, as indicated by Omar Ibn Al-Khattab, who is quoted as saying, "God's Apostle, Peace be upon him, forbade coitus interruptus with a free woman without her consent." (3) (Related by Ahmad). Similar traditions are narrated by Ibn 'Abbas and Ibn Omar). Unanimity over its permission is confirmed by Ibn Abd Al-Barr (4) and seconded by Ibn Hubairah. It should be clear, however, that this unanimity is qualified by the above-mentioned two opinions, and particularly what Ibn Qudamah says.

**The Second Case** (when a husband wants to apply coitus interruptus, but his wife disagrees): It is unlawful for a husband to resort to coitus interruptus with his free wife without her consent, the evidence being the above mentioned tradition of Omar. Abstinence from this method of contraception is her right, because she has married to achieve certain common purposes, one of which is having children. To cancel, give up, or forgo these purposes is something that requires the agreement of both parties as the case is with a marriage contract. This is the point of view of the majority of scholars. Some, however, such as those of the Shaf'ii School of thought, say a wife's consent is preferable but not absolutely necessary, but the first opinion is more valid, as it is supported with Omar's tradition and for the reasons listed above.

**The Third Case** (when a wife desires coitus interruptus, but the husband does not): Again it is unlawful. As it is prohibited for a husband without his wife's consent, it is likewise prohibited for a wife without her husband's consent and permission. (5) This view is supported by the majority of scholars. Scholars of the Zaidi school of thought, however, believe that a woman can take contraceptive measures, even if her husband does not like that, because his right to a baby is not confirmed

before conception takes place. By analogy with the second case, I find the former viewpoint more acceptable, because, as mentioned earlier, offspring is one of the purposes of marriage, and a woman has no right to be arbitrary in her opinion and cancel or suspend any of these purposes. Agreement of husband and wife over any modification, reduction or suspension is essential.

### **The Preponderant View**

I believe the opinion of the majority of scholars, listed above as the third, is preponderant, because it is better supported.

A. As for the tradition quoted by Ibn Hazm, in which the Prophet says, "that is burying alive in secret," it is contradicted by another, narrated by Abu Sa'id, who says:

The Jews had said that coitus interruptus is a minor form of burying children alive, and the Prophet, Peace be upon him, commented, "The Jews have lied. If God, great as He is, wants to create something, none of you can foil it." (Related by Ahmad and Abu Dawood) (7)

It is also contradicted by the above quoted traditions which indicates that coitus interruptus is lawful. Because of this the majority of scholars allow it as long as both husband and wife consent to it. As for the tradition quoted by Ibn Hazm, they come up with certain interpretations, regard it as lacking in authenticity, or, if it is authentic, they say it is cancelled by later traditions.

B. Certain considerations, which are acceptable to the Legislator and regarded as valid by a married couple, might call for postponing child bearing. I believe it is lawful for them in such a case to do so. Since they are given the freedom to get married in the first place, and I stress here that marriage is neither an obligation nor something unlawful, and since it is subject to their consent first and last, there is no reason why reproduction should not be regarded as subject to their consent, since its purpose is acceptable to the Legislator, Who regards it as valid and does not negate it.

C. The contraceptive method used should not cause harm to either husband or wife, since they do not have the right to cause harm to themselves. They are edifices of God as mentioned in the tradition: "Man is an edifice of God, and whoever destroys His edifice is damned." God's instruction: "... do not with your own hands cast yourselves into destruction" (Al-Baqarah [The Cow], p.195) forbids it. There is plenty of other evidence.

If conception does take place, a right is established other than the rights of the married couple, which is the embryo's right to survival, and what obligations that entails on others.

Here we may raise a question in the light of this new creature's gradual development from helplessness to strength; of its growth, first undetected but later detected and felt through its movement; and of its fitness to survive. The question is whether the rights of the husband and/or wife have more weight than the right of this new being, on the basis that it originates from and is dependent on them, and consequently, aborting it is permitted. Or whether it is unlawful, as their guardianship is limited and does not control the embryo's right to survive; it is rather restricted to taking care of it and giving it the necessary protection until it is born, an upright being.

The answer to this question requires a definition of what an embryo is linguistically and traditionally, as well as its rights and the punishment for aggression against it.

### **Embryo Definition**

In language, an embryo or fetus is "what a woman bears in her belly." Once it is born, it is a "child." If it is aborted dead, it is a "miscarried fetus," which might be also referred to as "fetus." Fiqh scholars follow the same definition. The terms "embryo" and "fetus" apply from the moment a sperm is united with an ovum, producing a zygote which multiplies and produces a fully formed creature, and until it is born.

### **Islam's Concern for Embryos**

The religion of Islam pays attention to an embryo from the moment it begins to form, because it is the first stage in the creation of the noblest creature, a proof of the existence of its Most Sublime Creator, evidence of the Divine Power, and an example of the Inimitability of God's creation at every stage of its growth. Islamic Law shows concern for fetal life and includes stipulation that guarantees a fetus's continued development and survival and impose a punishment against anyone who commits aggression against it. When punishment is imposed, it is the clearest proof that a certain action is unlawful.

### **Islam's Solicitude for Embryos**

This solicitude is evident in what the Prophet, Peace be upon him, is

quoted to have said: "God assign an angel for a uterus. The angel reports, 'God: a drop of sperm.' 'God: a germ-cell.' 'God: an embryonic lump.' If God desires this to develop into a creature, He says so. The angel says, 'God, is it to be male or female? miserable or happy? What livelihood shall it have? How long shall it live?' All is destined while it is still in its mother's belly." (8)

The Legislator's solicitude, as explained in this tradition, is clear in the fact that an angel is assigned to watch the development of the drop of sperm and report it to the Lord. Since God does not need such a report, His Knowledge being comprehensive, and neither veils and concealments nor periods and crises regardless of how far they extend in the past or in the future can detract from it, the report signifies how He cares for and honours this creature, and this calls for its protection, keeping it away from hazards, and warns against any tampering with its life, until it is born to assume the role it is destined for in this life.

### **Stipulations That Guarantee the Fetus's Survival**

The stipulations made to guarantee the fetus's continued growth and to respect its life, are several. Some of these are:

1. A father is required to support his fetus. On divorced whom who are still in their waiting periods God says:

Lodge them where you dwell, according to your means. Do not harass them as to make life intolerable for them. If they are with child, support them until they deliver. (10)

Support is due to the fetus even when it is not due to the mother, as when she is recalcitrant, pregnant as a result of a questionable intercourse or an invalid marriage, or divorced a final time, which renders her unqualified for support in the opinion of some scholars. Fetus support is due all through the period of gestation, and if the father is deceased or too poor to pay it, it is the duty of his next of kin. Some scholars believe that Fitr feast charity is recommended or required to be on behalf of the fetus on the grounds that Othman Ibn 'Afan is said to have paid it. (11)

2. A pregnant woman is allowed not to fast in Ramadhan if she fears for the life of her fetus. This licence is a part of Islam's solicitude and protection of the fetus.

3. The execution of a pregnant woman who is sentenced to die is postponed until she delivers, and sometimes forgone altogether. Buraida narrates a story of God's Apostle, Peace be upon him, which concerns the

Ghamidi woman who confessed having committed adultery and thus deserved to be stoned to death. The Prophet said to her, "Go now, and come back when you have delivered." Having delivered, she came back with her baby in a rag and said, "Here it is. I have given birth to it." "Go now and nurse it, and come back when it is weaned," He said. When the child was weaned, she came back with it, carrying a piece of bread. "Here it is," she said. "It is weaned and now eats regular food." He took the boy from her, gave it to a man, and had her executed. (12)

The Apostle, Peace be upon him, ordered a woman who deserved punishment to be well treated while she was waiting for execution. 'Omran Ibn Husain says a woman of the Juhaina tribe, pregnant as a result of adultery, came to the Prophet, Peace be upon him, and said, "Apostle of God, I deserve to be punished, so have me executed." He called her guardian and told him, "Treat her kindly. When she delivers, come to me." Kind treatment during this period, and while the mother is aware of her guilt, reflects on the physical and psychological makeup of the child, reducing whatever influence results from the mother's feeling of guilt, including its effect on the nourishment the fetus receives from her.

4. A fetus is paid due consideration and allowed a type of eligibility compatible with its condition. It is under some sort of covenant or has a reduced eligibility, which entitles it to its legitimate rights without holding it responsible for any obligations. Due to its helplessness which is clear in its full dependence on its mother, it has no obligations, but because it is a living soul, which is expected to be independent once the period of gestation is over, it is entitled to the rights that guarantee its social belonging and life stability. Its lineage, as the child of its father, is confirmed, and a pregnant woman who has lost her husband or has been divorced is prohibited from remarrying before the child is born, so that this lineage would not be confused. If any of its legitimate legators dies, its share of the legacy is kept for it. If born alive, it is entitled to this share, and if dead, the share is distributed among the other heirs. It is also entitled to receive a willed share and an endowment, and to enjoy other rights designed to protect its life and future from the first moment it is conceived in its mother's belly.

As for the punishments stipulated to protect the life of a fetus, they are the main subject of this paper.

## **PUNISHMENT FOR AGRESSION AGAINST A FETUS**

In God's Legislation, any crime of aggression against whatever God has made it unlawful to assault has two punishments, one in this life and another in the Hereafter. An explanation of the two types in cases of aggression against a fetus follows.

### **THE FIRST TYPE PUNISHMENT IN THE HEREAFTER**

The type and degree of punishment in the Hereafter is something for God to determine. He knows hidden thoughts and intentions, and His justice requires that the punishment should be in proportion to the criminal's intention. For this type of punishment, material evidence is of no value, neither confirming nor negating. Such evidence is valid in determining verdicts in this world, because it indicates purpose and intention. What it indicates, however, might be imprecise or untrue, and therefore, it is possible for the innocent to receive punishment in this world, but with punishments of the Hereafter, this can never happen.

Moreover, a person may approach God with the means He has made available for man to approach Him, with hope for His mercy, for reduction of punishment, or for full forgiveness for his mistake. God has promised to accept such pleas; He says, "God does not forgive that partners be associated with Him, but He forgives whomever He wills any lesser sin." (Al-Nisaa' [Women], 48)

This punishment in the Hereafter is for the violation of what God holds sacred, and a person who brings such a punishment upon himself does so by disobeying God and His Law.

In the light of this, the stipulation in Islamic Law concerning the abortion of an embryo--as something forbidden, reprehensible, or permitted at the various stages of fetal life--will be discussed next, with distinction made between this discussion and the circumstances that call for punishment in this life. Each of the two types of punishment has its own characteristics. A guilty person may escape punishment in this world due to the lack of sufficient evidence or to suspicion concerning what evidence is available, but punishment in the Hereafter does not need the same kind of evidence and still applies under such circumstances.

## PROHIBITION OF ABORTION

In God's Book, it is made clear that a fetus goes through distinct stages:

We first made man from an essence of clay: then placed him, as a drop of sperm, in a safe enclosure. Then We made out of the drop of sperm a germ cell, then out of the germ-cell we created an embryonic lump and then we created within the embryonic lump bones, then clothed the bones with flesh, thus bringing forth another creation. Blessed be God, the noblest of creators. (Al-Mu'minun [The Believers], pp 12-14) (15)

The duration of these stages is specified in the Prophet's Sunna. In Muslim's Compilation of authentic Traditions, Abdulla Ibn Mas'oud quotes the Prophet, Peace be upon him, as having said,

The creation of one of you in the belly of his mother takes forty days of his being a drop of sperm, then for a similar period, he is a germ cell, then for another forty days, he is an embryonic lump, then an angel is sent to him to breath spirit into him, ordered to write down four words: its livelihood, life duration, career, and whether it is to be miserable or happy.

In any research on Islamic stipulations that cover abortion, a scholar cannot ignore or bypass this specification, but since the ruling covering the germ-cell and the embryonic-lump stages in Islamic fiqh is similar, the stages of fetal life can be combined into three: the first covers the first forty days, the second includes the period from the forty-first days, the second includes the period from the forty-first day to the end of the fourth month, and the third covers the rest of the period of gestation until birth.

**The First Stage:** At the beginning of this stage, the embryo is a single cell, which gradually multiplies until it begins to take form, they head emerging at one end, with protrusions that will later become eyes. Generally, however, it seems formless to the eye of the beholder.

The majority of scholars (16) believe that abortion during this stage is unlawful and that a person who commits aggression, causing the abortion of an embryo, is liable for punishment for his crime, whether this person is the father, mother, or someone else, unless there is valid justification, like fear for the mother's life if the embryo is allowed to remain in her belly. In such a case, abortion is permitted as a sacrifice of a part to save a whole,



the Hanafi school and is also held by the Maliki, Shafi'i, Hanbali, Imami, Zahariyah, and Abadiyah schools of thought. Some Hanafi and Shafi'i scholars, as well as the Zaidi school of thought, hold a different opinion in case both parents agree to abortion, but they cite no evidence to support their argument.

The majority of scholars base their conclusion that abortion is unlawful during this period on analogy with the forbidding the breaking game bird eggs during consecration (i.e. *ihraam*). The argument is that God makes hunting forbidden for a person in consecration. He says:

Believers, kill no game whilst in pilgrimage consecration. He that kills game by design, shall present, as offering, a domestic beast equivalent to that which he has killed.... (Al-Ma'idah [The Table], 95)

He also says, "... you are forbidden the game of the land so long as you are in consecration." (Al-Ma'idah [The Table], 96) Similarly, it is prohibited for such a person to break an egg of a game bird. If he does break it, he is liable to the fine for such an action. It is told that the Prophet, Peace be upon him, was brought ostrich eggs, but he said, "We are in consecration. Give it to others who are not." (17)

This makes it clear that game eggs, which are the origin of game birds, are subject to the same ruling as the birds themselves. The same can be said about the origin of non-bird game, i.e. mammal game; aggression against their fetuses is the same as aggression against them. If this is true, then the origin of anything is subject to the same ruling, as the thing itself.

To go back to our subject, aggression against a human fetus is unlawful, because murder is prohibited, unless justified. God says, "... you shall not kill, for that is forbidden by God, except for a just cause...." (Al-An'aam [Cattle], 151; Al-Israa' [The Night Journey], 33) Since man's origin is the fetus, and by analogy with the prohibition of breaking game bird eggs while a person is in consecration, the prohibition of aggression against a fetus is established. In fact, the reasons for forbidding it are greater than those in the case of game bird eggs, because the original rule concerning murder is prohibition; it is only permitted for a just cause. While the original rule with killing game is permission, and it is prohibited only when a person is in a state of consecration. More caution is required when permission is ruled as an exception of a generally forbidden thing than when prohibition is ruled as an exception of what is generally lawful.

Stating this same idea, the author of Al-Khaniyah, a book of the

Hanafi school of thought, answers scholars who permit abortion at this stage, saying,

I do not believe it is permitted. If a person in consecration breaks game birds eggs, the rule of game prohibition applies, and since retribution is due in his case, it is the more reason that she [i.e. a mother] should be regarded as having sinned if she aborts an embryo for no justification. The Hanafi scholar Ali Ibn Musa says, on the same subject

Abortion of such an embryo is reprehensible. Before long, spirit will be breathed into it, because once a sperm gets into the uterus, it is bound to live, so aborting it is ruled the same as the abortion of a living fetus. A germ is destined to take form once it settles, and to spoil it is a crime.

For all these reasons, we believe abortion during this stage is unlawful, unless for valid justification as explained above. A different opinion is unacceptable because no evidence supports it.

As for the time duration specified in certain traditions, they show the stages of the fetus during the period of gestation, and God's concern for its development. If God shows such a concern, it is the more reason for people to show as much, and aggression against a fetus is far from concern for its well-being, so it makes no sense to deduce from such a tradition a meaning opposite to what is intended.

It is also taken for granted, in fiqh and science as well as by applying common sense, that an embryo, from the beginning when it is a single cell until it is fully formed, is a living being, as evidenced by its growth. Moreover, it is the origin of human life, and a stage in man's development, so the same rule that applies to man should apply to it. As for the fact that spirit enters its body at a certain point, which is the end of the fourth month of pregnancy, this is something we are told of, but the truth of the matter is something that God has kept for himself, for He says, "They ask you about the Spirit. Say: 'The Spirit is my Lord's concern.'" (Al-Israa' [The Night Journey], 85) Since it is kept from our knowledge, we cannot use such a metaphysical thing as a basis for a material, secure ruling which the Sunna of the Prophet contradicts, as it shows that abortion at any stage entails punishment.

**The Second Stage:** This is the stage from the fortieth through the 120th day of fetal life. During this stage, as medicine tells us, some organs of the fetus are formed, including its heart. As for Islamic Legislation, what determines the duration of this stage is the above-quoted tradition, which says that after 120 days, an angel is dispatched to breathe spirit into a or a branch to save the source. This opinion is the preponderant view of

fetus. It is clear then that within the first 120 days, a fetus has no spirit. Does that make it lawful to drop it?

The majority of scholars believe abortion in this case is unlawful, which stands to reason, since they rule that it is prohibited even within the first forty days. The only group that come up with a different ruling is the Zaidi school of thought, which says it is alright for a woman to abort a fetus within the first 120 days, with her husband's consent. If he does not agree, it is unlawful for her to abort it, if she nevertheless does, she would be committing a sin, but she is not fined.

The Zaidi view is contradicted by the evidence cited by the majority of scholars in support of the prohibition of abortion in the first stage, as well as the ruling we have concluded to be weightier evidence on the basis that this evidence is clear and explicit. The Zaidi opinion has no clear support. Nor is it common in Islamic Legislation to allow blood shedding, whether by parent or any other person. Moreover, this opinion waives any punishment against a person, other than the parents, who kills this fetus. For either it is alive, and its killer must be punished, or it is not, and no punishment applies whatsoever. There is no way in which the life of a fetus during this stage can be denied. Scholars of the Zaidi School themselves rule that if an aggression causes the fetus of a domestic animal to drop dead, the person who commits it must be fined one twentieth of the price of such an animal in addition to compensation for any damage caused to the mother. In so ruling, they make no distinction between one stage of fetal life and another. Is it fair then to impose a fine for the abortion of an animal fetus and, at the same time, permit the abortion of a human fetus, with no fine imposed?

It is clear then that abortion is unlawful and no one, parent or other, has an authority over the life of a fetus, because its right to live is in the hands of the Giver of this life. It is not owned by anyone who, like it, is owned by its Creator. Therefore, aborting it can by no means be allowed unless for justifiable excuse. Such excuses will be discussed later.

**The Third Stage:** This stage starts after the fourth month of pregnancy and continues until birth. Biologically, the organs of a fetus, though diminutive at the beginning, take full form and gradually, till the hour of birth, they are perfected. The mother begins to feel it moving.

From the legal point of view, the Prophet, Peace be upon him, points out that spirit is breathed into the fetus at the beginning of this stage. This

does not mean the fetus has no life before that, as it might occur to one's mind by applying the normal system of analogy with what happens at the time of death. The fetus does have, in the first 120 days, some kind of life and even of spirit, as evidenced by its movement and growth.

On this basis, fiqh scholars distinguish two types of movement. One is related to growth and formation, which is accompanied by a natural spirit spread all over the body in which it dwells. This is different from human spirit, which is independent and comes from God. This second spirit is the one breathed in by an angel, and it succeeds the former.

If we try to understand its nature, the truth about it, and its influence over the body, we would be contemplating something the knowledge of which God has kept for Himself and the nature of which He has hidden for a reason which He knows and to serve an interest which He estimates. He says, "They ask you about the Spirit. Say: 'The Spirit is my Lord's concern. Little indeed is the knowledge you are given.'" (Al-Israa', 85)

Since a fetus, after the first forty days, has human spirit, scholars are unanimous in ruling abortion unlawful during this stage. They all agree that anyone who commits the crime of causing such an abortion has to be punished, be it the father, the mother, or another person, unless there is a justification.

It is clear from the above explanation concerning the three stages that abortion of a fetus cannot be considered lawful at all, unless there is an excuse acceptable in Islamic Law. This conclusion is based on the evidence already cited, as well as on the fact that fiqh scholars, physicians, biologists, and embryologists consider an embryo to be a living being, or even a human being in its most minute form, from the moment of its conception. It gradually grows and develops into higher forms, and its hidden parts and organs start to emerge. It is a living creature, a human being or at least the origin of human life. As such, its life is protected, and neither aggression against it nor killing it is allowed. Its parents or any other person have no authority over it to allow such an aggression against it. Their guardianship over it is one of protection and care rather than elimination and murder. It is a guardianship with the task to see that it survives until it is born, not to cause it to perish.

### **Excuses That Make Abortion Permissible**

Some excuses are legitimate in Islamic Law, while others are not. Legitimate excuses are those acceptable to the All-Sagacious Legislator

as reasons to permit what is normally forbidden. An example of these is fear for the mother's life if a fetus is allowed to continue in her belly, as when a woman has a disease that makes pregnancy and its stages hazardous for her. In such a case abortion is lawful to save the mother's life, as a sacrifice of a branch to save the source or a part to save the whole.

Some Hanafi scholars cite another example of cases in which abortion is permitted. Ibn Wahban says.

One excuse is the drying of her [i.e. the mother's] milk as a result of pregnancy, when the father has no means to hire a wet nurse and it is feared that [the child being nursed] might perish.

In this case, the mere conception has caused milk to dry when it is needed to nurse the embryo's infant brother, and the family does not have the means to supply this infant with other milk, whether it is another woman's powder milk. This might result from poverty and the absence of social welfare or from the infant's rejection of any milk other than the mother's. In such a case, this scholar believes that abortion is lawful in order to save the life of the infant brother. This case provides another legitimate excuse. A family of this type might lose all their children under the circumstances, for with every conception, the mother's milk may dry up and an infant may die. To save the apparent, established life of the nursing brother, it is permitted to sacrifice the hidden life of the embryo.

Such a case is not very likely to develop in our modern world, with the availability of powder milk, at very reasonable prices, to replace the mother's. In our communities, and we praise God for that, poverty does not reach the extent that a person is unable to feed his child with such milk. If there are such cases, the excuse is valid.

Yet poverty in itself is not a legitimate excuse for abortion, as the Quran itself points out: "You shall not kill your children for fear of want. It is We who provide sustenance for them and for you. To kill them is a great sin." (Al-Israa' [The Night Journey], 31) (18) Fear of poverty is not an acceptable justification of murder, whether the victim is already born or still a fetus.

Nor does fear of having too many children justify abortion, though it might justify contraception, not out of fear of poverty but rather for fear that the parents might not be able to offer the necessary care and proper education for all their children. "All of you are guardians, and each is responsible for what falls under this guardianship."

Fear of scandal and disgrace is not an acceptable excuse either. If a woman commits adultery, gets pregnant, and fears disgrace or violence from her folks, this fear does not justify aborting the baby to keep her secret to herself. This woman has committed a punishable sin and has to bear the consequences rather than hide the crime by committing another. Why should the fetus pay for the mother's sin while it is guilty of nothing? It is not the fetus that should be punished, but rather the mother. How would she accept to satisfy her desires and whims and let another party perish to pay for her base illegitimate action? We have sufficient guidance on a case of this sort in the story of the Juhaina tribe woman, who committed adultery and confessed her guilt while she was pregnant. The Prophet, Peace be upon him, delayed her execution until she had delivered her baby, and even until the baby was no longer dependent on her.

When no legitimate justification applies, abortion is unlawful, and any person who causes it deserves punishment.

## **THE SECOND TYPE PUNISHMENT IN THIS WORLD**

Punishment in this world for killing a fetus is either original or consequential. In the various schools of Islamic fiqh, the original punishment takes one of three forms: retaliation, full blood money, or fetus blood money combined with chastisement. The consequential includes reparation and disinheritance.

## **THE ORIGINAL PUNISHMENT**

Since texts of the Prophet's Sunna make it clear that once it completes the fourth month of its life, a fetus has the spirit breathed into it, some scholars believe a person who kills it intentionally is liable to retaliation. Others say full blood money is due, while a third group insists that it is a fetus blood money that is due as certain traditions indicate.

As the main point of this paper is the discussion of fetus blood money, which requires some detail, we will start with retaliation and full blood money.



## RETALIATION OR FULL BLOOD MONEY

Some scholars believe that the end of the fourth month of pregnancy is the dividing line between reduced punishment, which is retaliation in the case of intentional killing and full blood money in cases which do not call for retaliation, for one or another of the reasons that suspend it, as well as in cases of unintended aggression.

It is of great importance to go over these views and review the evidence they use to support their argument.

### The First Opinion

This is the point of view of Al-Zhahiriyah school of thought and it distinguishes between a fetus which has not yet completed the fourth month of its life and one that has. For aggression against the first, whether it is done on purpose or not, scholars of this school say a fetus blood money is due, because that is the ruling of the Prophet, Peace be upon him, and because no murder takes place in this case. Murder, they argue, can only be committed against a creature with a spirit, and spirit is not breathed in this type of fetus yet. Thus, since the aggressor has committed no murder, he cannot be killed. In other words, retaliation does not apply here.

As for the second type of fetus, they distinguish between intentional and unintentional killing. (19) Intentional killing calls for the punishment of such a crime, which is retaliation. God says: "Believers, retaliation is decreed for you in bloodshed ..." (Al-Baqara [The Cow], 178) and "... We decreed for them a life for a life...." (Al-Ma'idah [The Table], 45) The victim here is a human being with spirit as the tradition quoted-above proves, so life for life applies in this case, and the family of the fetus has two options, requital on the one hand or blood money (or mutual waiver) on the other. If they opt for blood money, however, they have to be satisfied with fetus, rather than full, blood money. The Prophet, Peace be upon him, has made it clear to us that blood money for a human being already born is one hundred camels. He also points out that for a fetus that is killed, a ghurrah (fetus blood money) is due, and he uses the very word. Traditions of the Prophet, then, indicate that blood money here is different. As for unintentional killing, it only calls for fetus blood money. (20)

killing, it only calls for fetus blood money. (20)

The Second Opinion: This is the viewpoint of the Imami and the Ibadhiyah schools of thought. It says that for killing a fetus which has completed four months of its life, the punishment is full blood money (21) rather than fetus blood money or retaliation. Imami scholars add that within the first four months the blood money for a drop of sperm is twenty dinars, for a germ cell forty, for an embryonic lump sixty, for one which has started to take human form eighty, and for a fully formed fetus a hundred, which is the full amount of fetus blood money. These details are attributed to Ali [Ibn Abu Taleb], may God bless him with His Mercy, (22) and to Abd Al-Malik Ibn Marwan. (23)

Ibadhiyah scholars differ. The blood money due in their opinion is ten dinars for a sperm, fourteen for a zygote, twenty four for a germ cell, forty for an embryonic lump, sixty for a developed lump, eighty for a fully formed one, and one hundred for a fetus with hair. (24)

Qatadah is quoted as having said, "One third of a fetus blood money is due for a germ cell of blood, and two thirds for an embryonic lump." (25)

None of these scholars quote any evidence from the Quran or Sunna to support this distribution, which is in discrepancy with the content of authentic traditions on the subject, and this is pointed out by Ibn Qudamah in *Al-Mughni (The Sufficient)* and by the author of *Al-Rawdh Al-Nadhir (The Blooming Garden)*. The latter quotes *Sharh Al-Ibanah (The Illustrative Explanation)* as saying that such distribution is acceptable only as a compromise agreed upon by both parties. No scholar objects to a waiver, by the party to whom blood money is due, of the whole amount or part of it, as long as he does it voluntarily.

The Third Opinion, which is agreed by the majority of scholars, and it makes no distinction between a fetus which has or has not completed four months of its life. (26) They agree that fetus blood money is the punishment for killing a fetus. Neither retaliation nor full blood money applies in this case. Nor is the division of the fetus blood money acceptable; it has to be paid in full.

They base this view on the traditions that impose fetus blood money as punishment for killing a fetus and stipulate nothing else. When making this stipulation, the Prophet, Peace be upon him, did not ask at what stages of its life the fetus was. Being so, the tradition's ruling applies to any aggression against a fetus with no distinction. This is the point of view of the Hanafi, Maliki, Shafi'i, Hanbali, and Zaidi schools of thought. It is

also attributed to Omar Ibn Al-Khattab, 'Atta', Al-Sha'bi, Al-Nakh'i, Al-Zahri, Al-Thawri, Isshaq, and Abu Thawr.

I find this opinion to be weightier for the following reasons:

A. Traditions of the Prophet stipulate that fetus blood money is due when a fetus is killed without making distinction: "Fetus blood money is due for killing a fetus." Linguistically and traditionally, an "embryo/fetus" is what a woman bears in her belly as long as it is there, whether it is a germ-cell or an embryonic lump, fully formed or not, over or under four months of fetal life. Being so, the ruling expressed in the tradition is inclusive. If the different stages called for different rulings, the Prophet, Peace be upon him, would have indicated that. Since He has not, the stipulation applies to the act of killing at all stages of the fetal life, whether the act is intended, almost intended, or committed by mistake. The difference between these three types of violence is reflected in the liability for blood money and in the chastisement decreed.

B. The difference in human life as regards age or capability does not reflect on the Islamic-fiqh punishment for violence committed against it. A human being is a human being and violence against him is the same at all stages of his life regardless of whether he is a child, a youth, a young man, a middle aged man, an elderly person, or an old man. Since this is the case, it makes more sense that punishment for violence against a fetus should be the same at all stages of its development, because it is the origin of man, or even man himself at the stage of formation and invisibility. What we applied for man in the case of aggression committed against him after he emerges to life, i.e. after his birth, ruling that no difference is considered when violence is committed against him, should also be applied here in the case of violence against this human being at the stage of its gestation and invisibility, while in the mother's belly. As to the distinction between punishment before and after birth, it is based on the tradition cited above.

C. The criterion that should be considered for applying the ruling is whether it is alive or not, and an embryo has life from the moment of its creation, before and after spirit is breathed into it. The nature of spirit is something we do not know, for God keeps it to Himself. The evidence for this is that certain rights--such as inheritance, the right to be willed to, and support--are established for it once it is conceived. The breathing in of spirit does not affect these rights one way or the other. Therefore, if it is established that it is alive at the time violence is committed against it, the

punishment applies, and there is no need to define the stage of development it has reached, because in all its stages, it is a living being, whose life is protected, and who has a right to care and preservation.

### **Al-Ghurrah (Fetus Blood Money)**

The above makes it clear that fetus blood money is agreed upon as due when violence is committed against a fetus, though there is some controversy over the stage of fetal development at which it becomes due.

Scholars have therefore discussed its various aspects at length, and we offer here a comparative study of these aspects.

#### **Definition of Fetus Blood Money**

In language "al-ghurrah" refers to a white spot on a mare's forehead. The word is used in more than one sense. To say a person is the ghurrah of his people means he is their chief, and the ghurrah of everything is its beginning. The word is also used to denote a male or female slave or a mare.

In fiqh terminology, it is used to express the monetary fine due as a result of an act of violence that causes a fetus to perish. It is said that the word ghurrah is used for this fine because it is the first item listed when blood money is discussed.

The source of stipulating this fine is the Prophet's Sunna. Al-Mughirah Ibn Shu'bah says a woman struck another wife of her husband's, who was pregnant, with a tent post and killed her. The case was referred to the Prophet, Peace be upon him, and he ruled that the clan of the killer should pay blood money for the victim and ghurrah for the fetus. (Related by Muslim and Ahmad) (28)

#### **The Amount of Fetus Blood Money**

A. It is a male or female slave, for so some traditions define it. One of these is attributed to Al-Mughirah Ibn Shu'bah, who says that Omar Ibn Al-Khattab consulted other Companions over a miscarried baby, and Al-Mughirah told him, "The Prophet, Peace be upon him, has stipulated a male or female slave." Omar said, "Get someone that can back your story," (29) and Muhammad Ibn Muslimah testified that he has witnessed the Prophet, Peace be upon him, making that ruling.

B. If there are no slaves as the case is today after slavery has been abolished in all communities, which is what the All-Sagacious Legislator has aimed at, the fetus blood money is estimated in some of the texts that deal with the subject as one tenth of full blood money and in others as one twentieth. In one of these Ibn 'Asem is quoted as saying, "If he [the aggressor] has no slaves, male or female, he gives ten camels." Al-Hareth Ibn Abu Ussamah is also quoted as saying, "And fetus money is due for a fetus, a male or female slave, ten camels, or one hundred sheep." Ten camels amount to one tenth of full blood money, but a hundred sheep are only one twentieth.

The Prophet, Peace be upon him, says, as quoted by Al-Imam Al-Mahbubi, "Fetus blood money is due for a fetus: a male for female slave to the value of five hundred," and adds according to another version, "or five hundred," dirham, that is, which is one twentieth of full blood money, if the latter is considered to be ten thousand dirham, as some scholars maintain.

In one version, the tradition specify 500 dinars as the amount of fetus blood money and, in another, as the value of the slave. On the other hand, Abu Hurairah quotes the Prophet as stipulating blood money when a fetus is caused to perish to be paid by the aggressor's family on the father's side, specifying its amount as one twentieth of full blood money. This is an explicit definition, and the tradition does not go beyond it.

When one considers all these texts, the following becomes evident:

A. Fetus blood money is either one tenth or one twentieth of full blood money, and the latter amount is supported by the majority of scholars (the Hanafi, Maliki, Shafi'i, Hanbali, and Zaidi schools of thought).

B. There is unanimous agreement over the amount of one twentieth. The case of those who consider it the amount of the fetus blood money is obvious, and one twentieth is part of the one tenth that others believe to be its real amount. The difference then is only over the amount in excess of one twentieth, and, as mentioned above, the majority rule against it.

Because punishment cannot be confirmed without a text (of the Quran or Sunna) to support it, and the amount supported by texts is that of one twentieth, it is probable that any increase of this amount cannot be verified, and the more cautious procedure is to set it as one twentieth. Therefore, I find this opinion carrying more weight, and I also favour the view that the same amount is due in the case of a male or female fetus,

because there is no distinction on the basis of sex in the Sunna, and the majority of scholars are also against the distinction.

The amount of blood money—whether in camels, gold, silver, sheep, or gowns—is specified (30) in Sunna for every type of aggression. In the case of fetus blood money, scholars say that if it is not available as specified, a payment can be made in another form, as follows: (31) in camels, five; in gold, fifty dinars; and in silver, six hundred dirhams, on the basis that full blood money is worth 12,000 silver dirhams, which is the opinion of the Maliki, Shafi'i, and, in one version, Hanbali schools of thought, while Hanafi Scholars, Al-Hadi, and Al-Mu'ayyad Billah set full blood money at 10,000, which means fetus blood money is worth five hundred dirhams.

In any case, it is possible to determine the amount of one twentieth of full blood money in our present time on the basis of gold prices. Full blood money is set as 1,000 gold dinars, and since a dinar, at the time of the Prophet, weighed 4.241 grams, the price of this amount of gold in the currency of any country can be multiplied by one thousand to determine the amount of full blood money, and by dividing this by twenty, fetus blood money is determined.

### **Who Has to Pay Fetus Blood Money**

Since it is established that fetus blood money has to be paid, we have to determine who has to pay such blood money. Violence is sometimes intentional and at other times committed by mistake, and the first type is the worst, the aggressor having meant to end a life and carried out his intention, which makes him hostile to society and a violator of the Law who should be disciplined and deserves no reduction of punishment. The case of error is the opposite. The aggressor has not intended to kill, and his action is not considered a crime in Islamic Law, as it is clear in the tradition, "My nation is not brought to account for error, forgetfulness, and what they are forced to do." Being so, the case deserves reduction of punishment. A semi-intentional crime is a case inbetween. In such a case, though the violence is intentional, killing is not. On account that the aggressor's purpose is to cause material harm, the act is intentional, and on account of his not planning to kill, it is an error. Such a case calls for reduction on the second account, but not on the first.

This is the method of Islamic fiqh in dividing a crime into categories and determining its type. Is such division possible in the case of violence against a fetus, or are all cases ruled the same?

To answer this question, we should mention that the doubt that such a division confronts lies in the fact that a fetus is hidden in the mother's belly and, consequently, it cannot be determined, with absolute certainty, whether it is alive or dead at the time violence is committed. The possibility that it is already dead at the time is there, and consequently the killing is suspected, which means that the action cannot be described as intentional. Because of this, it can only be described as semi-intentional or accidental. Some scholars decline to describe this type of aggression as being intentional.

Other scholars, however, believe that since the life of a fetus can be ascertained, on the evidence that it has not been aborted and its mother has not complained of any pain nor complained of the pregnancy, it can be assumed to be alive unless a proof that it has died before the commission of the action surfaces. In the latter case, the aggression cannot be against the fetus, but rather against the "corpse" of the fetus, which is a different matter. For this reason, we do not find in the Tradition of the Prophet, Peace be upon him, anything that calls for hesitation in applying punishment to a person who has caused the abortion of a fetus.

This being explained, we can now move to the main topic of discussion, which is the identity of the party that has to pay the blood money. Scholars have followed two different courses on this issue. Some find that in all three types of aggression the same party has to pay the blood money, while others make distinction on the basis of whether the action is intentional, semi-intentional, or committed by mistake.

The first group say the clan of the aggressor on his father's side have to pay the fetus blood money. This is the view of the Hanafi, Zaidi, and, in a more common version, Shafi'i Schools of thought, as well as Al-Zahiriyyah in the case of violence committed before the breathing in of spirit. They base this generalization in making the clan responsible on certain versions of the tradition narrated by Al-Mughirah, which is quoted above. According to these versions, the Prophet, Peace be upon him, made the clan of the woman who had struck the blow responsible for the blood money for both the victim and her fetus. It is said that the father of the killer exclaimed, "Do we pay blood money to that which has neither drunk nor fed, nor screamed nor cried? Such a thing is a waste." [This statement being made in traditional prose rhyme,] the Prophet said, "Are we to follow the rhyming sayings and monk-rulings of Pre-Islam? Pay the fetus blood money!" (Related by Abu Dawood and Al-Nassa'ie).

It is clear in this that payment of blood money is the responsibility of the clan of the aggressor, on his father's side. The father's exclamation, expressing denial of responsibility, brought him the answer by the Prophet that he is responsible. A father is, of course, a member of the clan on the father's side. The fact that it is made the responsibility of the clan implies that the action cannot fall under the category of intentional aggression, because a clan is not responsible when an action is intentional as the Prophet's Tradition explicitly says.

The second group, the Maliki (32) and Al-Ibadhiyah scholars, say fetus blood money has to be paid out of the aggressor's money in the case of intentional violence, because a clan is not responsible when an action is deliberate, as explicitly stated in the Tradition of the Prophet, Peace be upon him. It is also to be paid by him in the case of killing the fetus by mistake, because it is one twentieth of the amount of full blood money, and the clan is not held responsible for payment when the amount is less than one third of full blood money, on the basis that Omar is quoted to have ruled that no party other than the aggressor is to shoulder any blood money below that entailed by a blow on the head, which calls for one third of the full blood money.

A third group make distinction between intentional, semi-intentional, and unintentional violence. This group includes the scholars of the Hanbali and Imami Schools of thought, as well as Shafi'i scholars according to one version. However, the scholars of this group differ over details.

The Shafi'i version and the Imami opinion agree that in cases of intentional killing, it is the killer, rather than his clan, that pays the fetus blood money, while in cases of accidental killing, it is to be paid by the clan, rather than the person involved. The two schools differ over semi-intentional killing, the Shafi' is saying the money should be paid by the clan and the Imamis, by the person himself. It should be remembered here that Imami scholars rule that fetus blood money is paid in cases of violence against a fetus before spirit is breathed into it; otherwise full blood money is to be paid. The Shafi'is rule that it is fetus blood money that is due in all cases.

Hanbali scholars distinguish between a fetus that dies with, or after, its mother and a fetus that dies alone. In the former case, blood money for both the fetus and the mother in semi-intentional and unintentional killing is to be paid by the clan, on the evidence of the Prophet's ruling, narrated by Al-Mughirah and quoted above.



If the crime against the mother is deliberate, the fetus blood money is to be paid by the criminal, rather than his clan, because, as explained above, a clan's responsibility does not include any amount below that of one third of full blood money. Another reason is that the responsibility cannot be divided, with the aggressor paying part and others paying the rest, so the full amount is to be shouldered by him. Besides the combined blood money is due for a crime that entails more than one third of the amount of full blood money, which is similar to the case of a crime of deliberate amputation of a person's organ that causes complications leading to the death of that person. In a case of this sort, it is the criminal, not his clan, who pays the blood money.

If a fetus dies alone or before the mother's death, the aggressor bears the burden of the blood money, because the clan's responsibility, as already explained, does not cover an amount below one third, whether the crime is intentional, semi-intentional, or accidental.

What I believe should be followed is the following:

First, if the crime against the fetus is intentional, the blood money has to be paid by the criminal alone, and the clan is not responsible for any part of it. Ibn 'Abbas quotes the Prophet, Peace be upon him, as saying, "A clan does not have to pay [blood money] for deliberate murder or for a slave, nor an amount mutually agreed upon or by confession." Omar is quoted as saying, "The Sunna is that a clan does not shoulder any blood money for deliberate killing unless it volunteers to do so." [Related by Malek]. Moreover, blood money is a fine for something destroyed and this is supposed to be paid by the destroyer, as God says, "And no soul shall bear another's burden." An exception to this general ruling is made only in the case of error, because a person who commits an action by error is excused, as it is made explicit in the tradition, "My nation is not brought to account for error...." Holding a clan responsible is done to encourage cooperation and solidarity with the victim and his family. An intentional killer has no excuse and therefore should receive no consolation or assistance, lest he might be encouraged to commit similar crimes, which would lead to corruption.

To hold the aggressor responsible for the blood money does not prevent pronouncing another punishment, one of the chastisement, against him, for his aggression against others and violation of law and order. The type of punishment is to be determined by the ruler or whoever acts on his behalf.

Second, violence may be semi-intentional, as when a man intends to discipline his wife, when he is playing with her, or when he is engaged in any other activity which, in itself, is lawful, but is not done with sufficient caution or is carried too far, or when the implement of the crime is not one that is usually for killing, or it is, but the aggressor uses it where it does not normally cause death. In such cases, I support the view that the aggressor's clan should pay blood money for the fetus's death, on the evidence of a tradition narrated by Abu Hurairah. He says:

Two women of the Huthoil tribe fought with each other. One threw a stone at the other and killed her together with a fetus in her belly. The case was taken to the Prophet, Peace be upon him, and he ruled that the blood money for the fetus was a male or female slave, and also ruled that the blood money for the victim should be paid by the aggressor's clan. (Related by Al-Bukhari and Muslim).

Throwing a stone at the woman is semi-intentional manslaughter, because the action is described as "throwing," and taking into consideration the physical stature of the victim, the implement of the crime can be considered as one that does not normally kill. Moreover, a thrown stone may hit or miss, and if it does hit, it may or may not hit a fatal spot. The view that the crime is semi-intentional is further supported by the ruling of the Prophet that the aggressor's clan should pay the victim's blood money. Had he ruled the action to be intentional murder, he would have pronounced the punishment of retaliation against her in observance of God's stipulation, "... retaliation is decreed for you in bloodshed ..." (Al-Baqarah [The Cow], 178) and of the saying of the Prophet himself, "Intentional crime calls for retaliation."

Another point is that semi-intentional violence merits some reduction of punishment on the basis that the aggressor does not have the intention to kill. Blood money for accidental manslaughter is shouldered by the killer's clan, so the same should hold for semi-intentional violence against a fetus. (34)

Third, if the act that causes the fetus to perish is accidental, the clan has to pay the blood money. I support the view that this includes the aggressor himself, first and last of all. In the case of unintentional killing, the Great Legislator stipulates that blood money and atonement have to be paid. He says, "He that accidentally kills a believer must free one Muslim slave and pay blood money to the victim's family...." (Al-Nisaa' [The Cow], 92) Atonement should be made, and scholars unanimously agree that it should be out of the killer's own money or property. The same

should apply to blood money, except that the Prophet's Sunna, as the above quoted tradition stipulates, obliges his clan to stand in solidarity with him as an action of consolation and assistance and an expression of sympathy. Thus his responsibility is established in the Quranic verse, and his clan's, in the tradition. Moreover, it does not stand to reason that he should contribute no share of the blood money at all and that others should meet the full amount when it is he who has caused the accidental death. If he is exempted, the members of his clan are likely to resent him. What does not stand to reason cannot be acceptable in Islamic Law. On the other hand, to make him responsible for the whole thing does not agree with the waiver of responsibility for error which is mentioned in the above quoted tradition. Furthermore, his participation with the clan allows for feelings of solidarity and compassion, offers him the chance to feel what other members of his clan feel, and shows consideration for both parties (him and his clan). All this helps towards more caution that may prevent accidental aggression and avoid monetary fines.

Fourth, I believe that payment of blood money should be immediate in the case of intentional murder, as it is a compensation for something destroyed, and this kind of compensation, such as the value of destroyed objects, is immediately due. Postponement is a type of reduction and facilitation which does not match the nature of the crime, which rather calls for strictness. The same view is expressed by Maiiki and Hanbali scholars, who say the criminal has to pay the blood money for both mother and fetus, [if the crime is against both].

As for semi-intentional and accidental manslaughter, in which I have already favoured that the clan should pay the blood money due, I also support the opinion that payment should be installed over a three-year period, with one third due at the end of every year. This is in analogy with the instalment payment, favoured by the majority of scholars, of all other types of blood money entailed by violence of these two types.

## **THE FETUS FOR WHICH BLOOD MONEY IS DUE**

When a crime is committed against a fetus, this fetus, for which blood money is due, is either alive or dead when it comes out of the mother's belly. Each of these cases has several types the rulings over which differ with the different effect of the crime on both the fetus and the mother, with whom it is closely and organically connected. Details of the rulings over the two cases, and the types each has, follow.

## **THE FIRST CASE SURVIVAL OF THE FETUS AFTER THE CRIME IS COMMITTED**

If a fetus survives a crime committed against it, two types of the case have to be distinguished. The first is when it survives and completes the period of gestation, and the second is when it is aborted as a result of the crime but it is alive at the time of abortion.

### **The First Type**

Here there are two possibilities. The first is that when the fetus is not affected by the crime at all. It suffers no harm or damage. The fact that the criminal deserves punishment for the effect of his crime on the mother is beside the point and has separate rulings under aggression against a human being. The second possibility is that when the fetus is harmed, but the effect is not fatal, as when one of its limbs is severed. In such a case, the rule that applies is the same as in the case of an already-born human being. For one hand, half of the full blood money amount is due, and for both hands, the full amount. The same applies to other limbs and organs. This is the ruling of the Hanafi (36) and Hanbali (37) schools of thought, provided that the fetus has taken human form at the time of the crime, making it is possible to distinguish hands and legs, and that it has completed four months of fetal life according to Hanafi scholars, and six according to the Hanbali school of thought. Otherwise half of the amount of fetus blood money is due for one hand, the full amount for both, and so on.

Shafi'i (38) and Imami (39) scholars believe that for the damaged organ of the fetus, a fraction of the fetus blood money is due, corresponding to the fraction of full blood money for a similar organ in a human being. As one half of that is due for the [damaged] hand of a human being, so one half of fetus blood money is due for the hand of a fetus, and the full amount for both hands as the case is with a human being.

What one feels to be more reasonable is that if a fetus survives and is born alive after a crime is committed against it, the damaged organ calls

for the same blood money as that of an already-born human being, since the injury, whether it is a severed hand or leg, or a lost eye or sense, will affect it throughout its life and hinder the activities which need that damaged part to be performed. It is a life-long injury. Therefore, I favour the first opinion, which rules that such a crime against a fetus is the same as a crime against the already born.

Determining the stage of its life at the time of injury is irrelevant. Whether it has or has not completed four months of fetal life, the valid criterion is the extent of injury it suffers. This becomes evident at its birth, as long as nothing happens to suspend the connection between the crime and the injury discovered at birth. If the injury is found out at birth or during pregnancy, the criminal should be sentenced to the same punishment entailed by the same injury to any human being.

It might be objected that only fetus blood money is due if the fetus is aborted and it is dead at the moment of abortion, so how can it be ruled that such a fraction of full blood money, which might be twice as much as fetus blood money, should be due for an injury? The objection is invalid, because the situation is different. Before it is born, a fetus is exposed to many hazards. Its growth might or might not take a normal course. It might be born dead or alive. There are several possibilities that make its growth until birth uncertain. So the blood money specified by the Prophet's Sunna for a crime against it that causes it to be aborted and ends its life is appropriate to the somewhat ambiguous life conditions of the fetus.

.. While if it is alive when it gets out, the rulings that apply to it are the same that apply to already-born human beings. Punishment for aggressions against this group is specified in the Quran and the Prophet's Sunna. The fact that the fetus is still inside its mother's belly at the time of aggression is no reason to say that these rulings do not apply in its case. After any injury, we have first to find out its type and extent to estimate its effect, and then we can rule what punishment is called for. We do the same when the injured is a fetus, but in its case we have to wait till it is born. Justice calls for this, for in both theory and actual situations, what is the difference between a crime against a fetus which causes its hand to be severed, but it survives till birth and after birth, and a crime against an already born person that causes his hand to be severed? Both have to spend their lives without this limb, and the future of both will be affected by it. In fact, if anything, the effect on the embryo's future might be greater.

For this reason, I favour the view of Hanafi and Hanbali scholars that

what is applied in the case of other human beings should also be applied in the case of a fetus.

The second type is when the crime causes the fetus's abortion and it is alive when it comes out, but it soon dies as a result of the crime, regardless of whether the mother dies or not. In such a case the punishment ruled against the criminal is the same as in a crime against any other human being if certain conditions are met.

### **The First Condition**

The child should be born alive. Once it is established that the fetus is alive, the crime against it is regarded as a crime against a fully-formed human being, an independent soul with a life of its own. A crime against it is like a crime against any other human being.

However, since the indications of life are varied, some of which revealing that this life is stable, while others failing to do so, and some even are not sufficient indications of life-these have to be discussed separately as regards the ruling that applies in each case.

The first type is indications that reveal a stable life. Of these there are two. The first is crying. Fiqh scholars are unanimous in saying that when a baby cries at birth, it is regarded as a living human being. The Prophet, Peace be upon him, says, "If a child 'cries' at birth, it is entitled to inheritance." Ibn 'Abbas, Al-Qasem, and Al-Nakha'i interpret the Arabic word used in the tradition as meaning crying.

Some scholars take the tradition literally and say that unless it cries at birth, a new-born is not entitled to inherit. Other indications, they believe, are invalid. Perhaps they consider the basis that entitles it to inheritance, to which only the living are entitled, its being born and its crying at birth. It is a basis composed of two elements, if both exist the ruling applies, and if either or both do not exist, it does not. This ruling is attributed to Al-Zahri, Qatadah, Isshaq, Imam Malek, Imam Ahmad, and Al-Ibadhiyah scholars. Something to the same effect is also attributed to Omar, Ibn Abbas, Al-Hasan Ibn Ali, and Jaber. (40)

The second is any of a set of signs that also indicate stable life, whether it be a deep breath, the act of nursing, a cough, or something similar. Any of these things is sufficient to make the rulings concerning other human beings applicable to it in the opinion of Maliki and Hanbali scholars, who consider that one of these signs is decisive to apply those rulings.

The same thing is true about Hanafi, Shafi'i, Zaidi, and Imami scholars, as well as others, who consider any sign indicating life sufficient, as will be explained below. The rationale of the Maliki and Hanbali Schools is that the signs listed above are as good as crying in indicating that the fetus is alive, so there is no reason to insist on crying. The tradition of the Prophet implies that the ruling becomes applicable when it is confirmed that the fetus is alive, whatever the method of confirmation is. After all, taking some milk, taking a deep breath, sneezing, or coughing are more indicative of life than the cry at birth.

We can explain their point of view in another way. The criterion for the applicability of the ruling is stable life, so any indication of such life is sufficient, whether it is crying at birth as mentioned in the tradition or any other sign which is equally or even more indicative. Crying is not meant for itself, but rather as a sign of this stable life.

The second type of indications is that which indicates life without being a sign of its stability, as the motion of certain organs, such as the arms, legs, eyes, lips, or anything similar, without being accompanied by any of the first type of signs. Fiqh scholars differ over the applicability of rulings that govern ordinary human beings in cases of this sort. Some believe these rulings do not apply, on the evidence of the above-cited tradition, which correlates crying at birth to the eligibility to inherit, and the fact that the fetus in this case does not cry. In the opinion of these scholars, who insist on crying at birth or any of the other signs of stable life, none of the rulings that concern human beings is applicable to such fetus.

Most scholars, however, believe that this type of signs, like the first one, is sufficient to make the new-born baby qualified for the rulings that govern human beings, because since its life is indicated by such signs, it is to be regarded the same as a baby that cries at birth and the like. (41) Ibn Rushd, a Maliki scholar, adopts this opinion, although it is contrary to that of his School. He writes:

Al-Shafi'i, Abu Hanifah, Al-Thawri, and most scholars say that whatever usually indicates life such as a motion, sneeze, or breath qualifies the newborn to be considered a human being, which is more likely to be true. (42)

Scholars of the Zaidi and Imami, (43) as well as Al-Zahiriyyah, (44) Schools of thought hold the same opinion.

It is clear that the tradition about a baby crying at birth should be understood by its implication, which is indication of life, and this makes the



criterion of eligibility for the rulings concerning human beings in general any normal sign of life. No particular indication should be insisted upon. If a movement that reveals life is witnessed, the rulings apply. Otherwise, they do not. I do not think these signs have to be visible; a doctor may listen to the baby's heart beat or artery circulation with his stethoscope. These are not signs that can be seen, and yet if they are confirmed we cannot deny the fetus's life, because such a denial would be untrue. What we have to do is to try to confirm its life with one of the familiar methods, taking the testimony of authorities on the subject. Science and experience have unfolded new horizons which have left no room for doubt in such matters that, in the past, had only visible signs to rely on.

This is the view I support; everything that proves the baby's life, whether it is one of the signs that by experience and common knowledge are known to indicate life or it is something known to physicians and other specialists as a sign of life, is a basis that supports the applicability of general human rulings. Nothing else counts in applying these rulings.

The third type is involuntary movements. On basis of the conclusion above, convulsions and involuntary movements of the fetus do not necessarily result from its being alive and consequently do not indicate life. They might be caused by the pressure it undergoes at delivery, having to go through a narrow space, and its resumption of its normal size when it is freed out of that space. Common sense tells us that such movements are not necessarily signs of life, and it is a condition for the applicability of the above mentioned rulings that there should be an indication of life.

Scholars discuss how one type of signs is to be distinguished from the other. The author of "Nihayat Al-Muhtaj" (The Needy's Satisfaction) says, "A mere convulsion does not count." This means a convulsion should be that of a living being rather than an involuntary movement. Ibn Qudamah phrases the case clearly, saying:

A single movement or convulsion does not indicate life, because a convulsion might be the result of another factor, which is its getting out through a narrow space. Flesh does convulse when released after being pressed, and this does not signal life.

We have to make sure that a sign indicates life, because with such a sign certain rights are established. Rights are real, and real things cannot be established through doubtful ones.

## **The Second Condition**

It should be confirmed that the fetus has died as a result of the act of violence. Otherwise, an innocent person might be punished. This can be confirmed either by consulting experts or through clear signs, such as when the fetus aborts showing signs of pain or injury and then dies, or when the mother remains in pain until she drops it and then it dies. In cases like these, it is clear that the death has been caused by the violence.

This ruling is similar to what applies in the case of a person who immediately dies, or lives in pain until he dies, as a result of a blow received from someone. The latter is considered a killer. It is therefore necessary to wait for pain to end before a verdict is pronounced against an aggressor, lest the victim dies as a result of the aggression, which makes the aggressor liable to the punishment of manslaughter rather than that of a lesser crime.

If something else occurs between the time of aggression and the death of the victim which can be taken as a cause of death, the relationship between cause and effect is broken. That something may be a fatal disease or an act committed by a third party, as when someone kills a child after it is born and shows signs of stable life. In this case, the second, rather than the first, aggressor is charged with manslaughter and receives due punishment depending on whether the act is intentional, semi-intentional, or accidental.

If the child has no stable life, as when it is breathing its last—which is expressed in Islamic fiqh as “acting like a slain person”—the killer is ruled to be the first aggressor, who has to pay full blood money, while the second is punished for what he has done. The second is not charged with manslaughter, which means ending a life, because the victim’s life has already been ended, the only thing left in it being the convulsion of dying. The second act cannot therefore be regarded as a cause of death, which has already resulted from the first.

A time span may pass between the cause and effect during which no sign of the effect of the act of aggression is evident, like when the child is born alive and survives for a while, seeming to be healthy and revealing no sign of injury. This time span is sufficient to break the link between the crime and the child’s death. If it does die, the person who has committed the act of violence against it as a fetus cannot be charged with manslaughter, for the effects of the act have to be evident throughout the period between the act and the death. Medicine can determine such cases

and establish the length of the period necessary to break the connection and consider the act of violence irrelevant to the death.

Maliki scholars offer a set of rules all of their own for applying full punishment against a person who commits aggression against a fetus which is aborted alive and then dies. I believe it is important to explain and analyse this set of rules.

They believe the aggressor deserves full punishment under the following conditions:

A. The child's life when it gets out has to be confirmed, which has already been explained.

B. The child's guardians have to swear its death has been the result of the crime committed against it, whether it dies immediately or later. (46) If they do, two types of crime have to be distinguished.

The first is when the criminal deliberately aims his aggression against the fetus, which is a deliberate crime, by intentionally hitting the mother on the abdomen or the back, (47) which causes the fetus to abort alive and then dies. Maliki scholars favour the opinion that in such a case, and after the oath is sworn, the aggressor is liable for retaliation. This is contrary to the view of Ashhab, who says the aggressor has to pay full blood money after the oath is sworn. (47)

The second type is when the blow is not deliberately aimed at the fetus in the above-described manner, whether the aggressor intentionally aims a blow at the mother, but not at one of these two places, or the blow is accidental and hits one of the two spots or does not. In this case full blood money has to be paid after the act of swearing.

When the guardians decline to swear, no blood money of either kind is due. No fetus blood money is due because the child does separate from the mother and live a stable life, which makes him a normal human being, and no fetus money is ruled when the victim is a normal human being. As for full blood money, it cannot be imposed because of the guardians' failure to swear that the child's death is caused by the crime, and swearing is a condition in this case. This is the common opinion of Maliki scholars, although some of them differ, saying that when the guardians decline to swear only fetus blood money is due.

When one considers this condition of swearing advanced by the Maliki School, one realizes that it is the only school that sets it. Apparently,

it is made in analogy with the case of a victim whose murderer is unknown, since the death of a newly-born infant might have any of several causes. In both cases, therefore, the exact identity of the killer is unknown. The analogy, however, does not work. Here the identity of the aggressor is established, and the likelihood of another cause of death remains a mere possibility. It is the aggressor, or someone acting on his behalf, that has to prove the opposite of what seems obvious and evident. If he does prove the contrary, the charge is dropped against him and the cause of death is considered to be the second, rather than the first. If he fails, the charge holds. This is the opinion I support and promote. To follow the Maliki opinion is to rule that in the case of a fetus of this sort, that comes out alive and then dies, neither fetus nor full blood money is due unless its folks swear, although they may decline to do so out of piety and caution, which would mean the baby's blood is spilled in vain.

Moreover, experts can investigate the circumstances and causes leading to the death of a newly-born infant. If another cause is revealed, such as negligence on the part of the midwife or obstetrician by leaving the umbilical cord untied or exposing the infant to extreme cold or heat which it cannot stand, the death of the infant may be attributed to that cause. The consequences, as well as the motives, of such negligence have to be investigated, and in the light of the findings the real culprit can be identified. Due punishment is then pronounced against him, depending on whether the crime is deliberate, semi-intentional, or unintentional.

### **The Third Condition**

Spirit has to have been breathed into the fetus.

A. The majority of scholars set this as a condition in the case of an infant which is aborted alive then dies as a result of the violence committed against it. This means it should have completed at least four months of fetal life. With spirit breathed into it, it can be claimed that a human life has been eliminated and therefore due punishment for such elimination can be pronounced against the aggressor.

This is a stipulation of the Shafi'i School, which says it does not matter if the fetus's abortion occurs before the end of the sixth month of pregnancy as long as its life can be determined. It has already been mentioned that Imami and Al-Zahiriyah scholars believe full blood money is due if a fetus is killed after spirit is breathed into it, so naturally they consider it due if it is aborted alive and then dies under the influence of the

crime. It has also been mentioned that Al-Zhahiriyah scholars believe retaliation is the punishment for an intentional crime against a fetus into which spirit has been breathed, while in the case of accidental killing, they hold the view that fetus blood money should be paid if it is dead at the time of abortion, and full blood money if it is alive.

B. Hanbali scholars and Al-Muzni hold that full blood money should be paid if abortion occurs at the end of or after the sixth month, because before that it is not normal for it to survive once it separates from its mother, and consequently, by analogy with a fetus that is dead at abortion, full blood money cannot be imposed in such a case.

What I believe should be followed is taking its life as a criterion for imposing full blood money on an aggressor once spirit is breathed into a fetus. If a fetus has completed the fourth month of its life, and its life is confirmed when it is aborted as a result of a crime against it, the same blood money is due in its case as in the case of an already born human being, because both have human spirit and the life of both has been ascertained. There is no ground then for distinguishing between them, and the same ruling, which is the payment of full blood money, should apply in both cases. The claim that the fetus is not likely to survive outside its mother's belly is based on the knowledge available in old days, when embryology had not developed and the survival of such fetuses was unusual. Today, and in the future, the possibilities might prove different. If it is established that a fetus of this type may survive, which is very probable, the justification of the ruling loses its validity. Since it is likely to become invalid, another criterion of a more permanent and satisfactory nature should be sought, on the basis of which full punishment can be pronounced. This criterion is the possibility that the fetus may live, which can only be after spirit is breathed into it. (48) If it is and it is aborted alive, it is looked upon the same way the living, not the dead, are looked upon. (49)

## **THE SECOND CASE DEATH OF THE FETUS AS A RESULT OF THE CRIME**

A fetus's death as a result of a crime committed against it may take any of several forms. The ruling concerning such a crime differs with each form.

### **The First Form**

If the fetus is aborted dead and in one piece while the mother is still alive—regardless of whether or not she dies immediately after the abortion as a result of the crime—scholars agree that fetus blood money has to be paid. None of them says retaliation or full blood money is the due punishment even if spirit has already been breathed into the fetus. They follow in this the Prophet's example when He, Peace be upon him, ruled that fetus blood money should be paid in the case of the fetus that was dropped dead. Although in that incident the mother died after the abortion, the death or survival of the mother does not affect the ruling on the crime against a fetus; it rather affects the ruling against the aggressor for her own death, which is covered by the rules on crimes against living human beings.

### **The Second Form**

When part of the fetus drops out and later the mother and the fetus both die, scholars of the Shafi'i, Hanbali, Zaidi, and Imami schools of thought hold that fetus blood money is also due, because the aggressor has killed the fetus, as well as its mother, and has to meet the punishment for the double crime. The separation of the whole fetal body from the mother is irrelevant since it does not change the fact, unless it is established that it has really existed and has been alive at the time of the crime, and that its moving from its place and separation from the mother have been under the influence of the crime, which has affected the mother as well.

Maliki scholars and Ibn Al-Munther believe fetus blood money is not due unless the fetus is aborted intact. They use as evidence the fact that the Prophet, Peace be upon him, ruled that fetus blood money was due in the case of the fetus aborted by its mother, while in a case like this the mother only drops a part of the fetal body, and the death of the fetus might be the result of her own death.

The approach leading to this opinion shows that it is based on the incident mentioned by the tradition referred to above, which is interpreted to specify that the fetus has to be aborted. What should be considered, however, is the general implication of the wording rather than the stated reason. If we examine the argument closely, we find that the stated reason. If we examine the argument closely, we find that it fails to follow the rationale for pronouncing the punishment, which is safeguarding fetal life. After all, what difference is there between an aborted fetus which is dead at abortion and one part of which drops and then the mother dies? The important thing is that the fetus dies in both cases.

To the argument that it is probable that the death of the fetus results from the death of its mother, the answer is that whatever constitutes a crime against its means of life is a crime against it. Otherwise, how can Maliki scholars and others rule that a person who kills two persons with one blow should receive the same punishment as another who kills two with separate blows? or that if someone keeps the means of survival, such as food, water, or the like, from a person, he should receive the punishment of a murderer who kills with direct means? Because of this, I support the first opinion.

### **The Third Form**

If the mother dies and then the fetus drops out and it is dead, the death of the mother seems to be another reason for its death, in addition to the first, which is the crime. The conflicting reasons have led scholars to differ again over blood money, whether it should or should not be paid. There are two points of view concerning a case of this sort.

A. A group of scholars believe the aggressor deserves the punishment for killing a fetus, because the obvious thing is that the fetus has perished as a result of the act of violence, which is clear in its dropping out dead out of its mother's belly. A fine for it is due as it is due when a fetus is aborted while its mother is still alive. Moreover, if the fetus comes out alive after her death, and then dies, the fine is due, so the same thing should apply when it comes out dead.

B. The Hanafi, Maliki, Shafi'i and Al-Ibadhiyah schools of thought believe no punishment is due for the death of a fetus in a case of this type. Hanafi scholars explain their conclusion claiming that analogy makes the idea of a fine for a fetus unacceptable to start with, because of the equal probability of its being dead or alive at the time the mother is assaulted. A fine cannot be based on suspicion. In this case, there is the additional probability of its death being the result of the mother's death rather than the blow. Since the tradition of the Prophet, Peace be upon him, waives the analogy by imposing fetus blood money in a specific case, which is its abortion before the mother's death and being dead when it aborts, the first equally of probability is disregarded. But the second dictates that a fine cannot be ruled in a case other than the one covered by the tradition.

They also say that a fetus in this case has the same status as one of the mother's organs, the rulings covering which are suspended by her death.

The opinion I support is the first, which I believe should be followed for the following reasons:

1. It is no longer difficult to determine the truth concerning the first probability, which is the death of the fetus before, and as result of something other than, the crime. Experts and specialists can establish the cause of death by examining the fetus. Medicine and the supporting sciences have developed in a way that no ambiguity remains over this point. Since this is possible, the basis of the opinion that calls for waiving punishment in a case of this type is invalidated. Consequently, punishment has to be applied if it is established that the crime is the cause of death. I do not believe the latter group of scholars would have held a view different from that of the first group if such scientific progress had been reached in their time.

2. The normal thing is for the fetus to survive unless an evident reason terminates its life. The evident reason here is the crime against its mother. The criminal should then bear the punishment of killing the fetus, notwithstanding the mother's death after abortion or before it. If another consideration proves to have more weight than this one and renders it invalid, we have to disregard this one and take the other, as when it is established that the mother has taken something that affects the fetus's life or hers before the crime is committed. When there is no such consideration, we have to consider the obvious reason in order to protect the lives of both fetus and mother.



3. Even if we accept the notion that the fetus's death is a result of the mother's, it is established in fiqh that when someone kills two persons with one blow, he has to bear the punishment of two crimes. Two people are killed, and the fact that the crime is committed with one blow is irrelevant; what counts is that both are victims. The case is the same as that of two persons killed separately. By analogy, the same thing is true about assaulting a pregnant woman, because this is also a case of two persons who, though live and exist together, have separate lives, souls, security, and rights.

The claim that a fetus is the same as any organ of the mother is thus negated. It has been established that it is an independent soul, covered by separate rulings, and that a crime against it calls for a fine and a penalty.

#### **The Fourth Form**

This is the case when the mother dies without an abortion. The fetus dies while still in her belly.

A. Scholars of Al-Zahiriyyah and Imami schools of thought--and Al-Zuhri is said to hold the same opinion--believe that fetus blood money is due in such a case, because the crime is the apparent cause of the fetus's death. The important thing, Imami scholars say, is to determine that the fetus has been alive before the crime, and whether it is aborted or not does not change the rule that fetus blood money is due for its death. Ibn Hazm adds:

The Prophet, Peace be upon him, does not set the abortion of the fetus as a condition; He says that fetus blood money is due for a fetus, whether it is male or female, a slave or a free creature, and regardless of how it is killed and whether or not it is aborted. If a pregnant woman is killed, there is no doubt that her fetus would perish. (51)

B. The majority of scholars (52) believe the criminal is not obliged to pay anything for the fetus. Supporting this view, Ibn Qudamah says:

A fetus does not gain the status of a child unless it gets out. Otherwise, it is not entitled to a share in a will or to inheritance, because if it does not get out, there is the probability that no fetus exists in the first place or that it is dead and whatever motion she has felt while alive might have resulted from something other than a fetus inside her. There is doubt over the matter, and a fine cannot be based on doubt.

What is more valid is that when it is confirmed a fetus has existed and

has been alive before the assault, fetus blood money should be paid. A variety of modern scientific techniques can determine this. When its existence and life are not confirmed, no blood money is due.

There is a great difference between this and the right to a share in a will or to inheritance, because the latter involves funds that have to be transferred to its credit, while, being still hidden in its mother's belly and its survival being uncertain, it cannot be credited. The funds are set aside for it until its existence and life at the time the will or inheritance is due are confirmed, which is done by its birth within a certain period of time. This issue, however, involves its death inside the belly of its mother, who also dies. Confirming its existence, as well as the cause of its death, is now possible in various ways. When it is confirmed, justice requires that the criminal should be penalized. Otherwise, such crimes would be encouraged, which is something unacceptable to either reason or Islamic Legislation.

### **The Fifth Form**

This concerns a fetus that does not separate, neither partially nor completely, from the mother, who dies as a result of the aggression, but is later extracted and is discovered to be dead. Fiqh scholars discuss two aspects of this type of cases.

The first aspect is the permissibility of extracting a fetus from its mother when her life ends for one reason or another, particularly when the fact that she is pregnant is evident and there is some hope for the child's survival. Abu Hanifah is quoted to have said:

A man came to me and said, 'I have come from the farther end of Kufa. My sister has died early at night, and the baby is moving inside her.' I told him, 'Go and cut her belly, and get it out.' Seven years later, he came to me again, accompanied by a boy, at the Rayyani Quarter. He said, 'Do you know this lad?' I answered that I did not. He said, 'This is the baby we asked you about, telling you of a woman who had died while the baby was still moving in her belly, and you ordered me to cut her belly and get it out. I did, and here he is. He is your boy, and I have called him Naja [i.e. Saved].'

Apparently the time between asking the question and carrying out the instruction in the incident mentioned here was short enough to save the fetus. Perhaps the woman was still dying or was in a coma prior to death, which was confused with death at the time, as only experts could make the

distinction. What can be concluded from the incident is that fiqh scholars do not rule against such an action that may save the fetus's life. Zaidi scholars say something to the same effect. (54) I even believe that such an action is a legal obligation, in the hope of saving the fetus's life, particularly if the stage of pregnancy makes its survival probable. Delay in doing this should be investigated and should entail criminal liability against any person who is aware of the existence of a fetus inside the woman and of the possibility of saving it, and yet fails to do what a human being is expected to do under the circumstances. The effort to save the fetus is to be regarded as a collective duty. If all the people present, aware of the situation, and capable of doing something fail to do it, they are all guilty and deserve punishment. If only one person is available, the effort to save the fetus is an individual duty for him.

The second aspect is whether a penalty is due for this fetus that dies with its mother. The majority of scholars (those of the Hanafi, Maliki, Shafi'i, Hanbali, Zaidi, and Al-Ibadhiyah schools of thought) believe no blood money is due for the fetus in a case of this sort, because the apparent reason for its death is the death of its mother. Al-Zhahiriyah and Imami Schools do not think its getting out of the mother's belly is a necessary condition for imposing a punishment for its death, which should be imposed as long as its existence and life before her death are confirmed.

I promote this second opinion, because when we do make sure that it has been alive before the crime, and that its death has been caused by the act of aggression, then a penalty for its death is due. The point is that pregnancy has to be confirmed, and it is not unless the fetus does get out, because a punishment cannot be based on suspicion. But if a method can be used to ascertain that the woman has indeed been with child, whether it is extracting the fetus out of her or any other method known to experts, the rule applies regardless of what the method is. Moreover, there is nothing in the Quran or Sunna to support this condition. The context of the incident in which fetus blood money was imposed does not imply that the phrasing should be taken literally. Punishment should be dealt in every case of a crime that causes the death of a fetus, whether it gets out by itself or it does not. The same thing holds if an attempt is made to get it out in order to save it after the death of the mother is established, and it turns out to be dead.

This is why some Zaidi scholars object to what is mentioned in some books of their school to the effect that

If the child does not get out of the mother's belly after the crime against

her, but her heirs open her belly to get it out, no fetus blood money is due, because it did not get out, but was rather got out.

Objecting scholars say, "It makes more sense to call for fetus blood money, since the crime is normally confirmed through the fetus's existence, which is proved in this case." We have already quoted what Al-Zhahiriyah scholars say on the subject. All this makes it clear that the reason for the condition set by some scholars is to make sure that there actually is a fetus, which is one of the basic elements of the crime. Therefore, the criminal must receive the punishment for killing a fetus when the existence of this fetus is proved by whatever method and it is established that its death has directly or indirectly been caused by the crime.

### **The Sixth Form**

This covers aggression against more than one fetus in the same belly.

If an assault against a woman causes her to abort two or more dead fetuses, fetus blood money is due for each. The Prophet, Peace be upon him, says such a blood money is due for killing a fetus, so twice the amount is due for killing two, and so on.

This opinion is attributed to Al-Zuhri, who said in the case of a woman that had miscarried three babies, "I believe fetus blood money is due for each of them." A similar opinion is expressed by Rabi'ah and Al-Laith Ibn Sa'd Al-Ansari. The latter says that for a dead miscarried baby, fetus blood money, in the form of a male or female slave, is due, and that double that is due for two.

The ruling is further confirmed by analogy with the rules concerning crimes against living human beings. If a person kills two people with one blow, he has to pay the fine for each. (55)

When the assault causes the miscarriage of more than one living fetus, then they die, or one of them does, for each is due the same blood money as paid for a crime against an already-born human being, as explained above. The same principle applies in the case when injury, rather than death, results from the crime.

### **Who Receives Fetus Blood Money**

If fetus blood money is due in full or part, the party to whom it is due, in Islamic fiqh, is either the mother or its legitimate heirs. Because of the

organic connection between it and its mother, a fetus may be looked at as a part of her. On the other hand it is a human soul with the potential to be independent when the right time comes. The first consideration suggests that fetus blood money should be paid to the mother, unless she is the culprit, and the second suggests that payment should be made to the fetus's heirs. Fiqh scholars' views on the point are:

### **The First Point of View**

The majority of scholars (those of the Hanafi, Maliki, Shafi'i, Hanbali, Zaidi, and Imami schools of thought) hold that fetus blood money is due to the fetus's heirs, because it is a living human being and the blood money is the fine for tampering with its life. In every case where there is a fine of blood money for aggression against a human soul, it is the legitimate heirs who receive the fine. It is established that blood money is to be treated, in matters of inheritance, like any property of the deceased. God says that in the case of accidental manslaughter, "blood money [is to be paid] to the victim's family...." The same thing is true about fetus blood money.

Moreover, the Prophet, Peace be upon him, makes the fine due for the killed fetus, which is fetus blood money, separate from that due for its mother, which is full blood money, so the first has to follow the same general rules as the second, rather than the rules covering blood money for damaged limbs and organs. If the fetus were regarded as one of her parts, no blood money would be due for it once such a fine is collected for the death of the mother, because, like her other parts, it would be covered by that fine.

If it is the mother who should receive fetus blood money, then in a case where she dies as a result of aggression against her and a dead fetus gets out of her body after her death, no blood money is due for the fetus, because nothing is due to a person after his death.

### **The Second Point of View**

Rabi'ah and Al-Laith Ibn Sa'd believe that fetus blood money is not due to the fetus's heirs, but rather to its mother in particular. They argue that the fetus is looked upon as a part of hers, since it lives and dies with her. As such, the fine for its death should, like a compensation for any organ of hers damaged as a result of an act of violence, be paid to her.

If the mother herself is the aggressor, as when a mother takes some

drug, inserts something inside her, or does something of the same sort in order to abort, Ibrahim Al-Nakha'i says she has to make reparation by freeing a slave and pay fetus blood money to the father.

It is clear that this point of view gives more weight to the organic, though partial, connection between the fetus and each of its parents than to the individuality of the fetus and the fact that it has a separate life and separate rights. Since the connection with the mother is stronger, she is given priority as recipient of the fetus blood money over the father. When something occurs that invalidates her right to it, the father's connection takes priority, and he gets the money. By the same logic, if both parents kill the fetus, is the blood money to be paid to its heirs on the basis of their relation to it, or do relatives on the mother's side have priority over those on the father's side in keeping with the original order of priorities? The scholars supporting this point of view do not clarify this point.

### **The Third Point of View**

This is the opinion of Al-Zahiriya School, and it is a compromise of the first two. It makes a distinction between a fetus killed before the 121st day of pregnancy, or on or after that day.

If it is killed earlier, fetus blood money is to be paid to its mother, because at that early stage, the fetus, as Ibn Hazm puts it, is one of her parts and undoubtedly part of her blood, flesh, and intestines, which makes her the victim of the assault, and there is no doubt that the fetus blood money is due to her. If she dies, then aborts the fetus, the fetus blood money goes to her heirs, because the crime makes it due to her and, therefore, part of her legacy. For a fetus that has completed 120 nights of its life, fetus blood money is due to the heirs who would inherit it if it were born alive and then dies, thus covered by the general rules of inheritance. In both the Quran and Sunna, it is stipulated that blood money for a person killed, whether deliberately or accidentally, is to be paid to its family. God says, "He that accidentally kills a believer must free one believer slave and pay blood money to the victim's family...." The Prophet, Peace be upon him, says on deliberate murder, "Whenever a man is killed after this statement of mine, his family have two options," and then he mentions "retaliation, or blood money or mutual waiver." (56) Blood money for a slaughtered person is due to his family. No person can be said to be slaughtered unless he has been alive and the act of manslaughter changes his condition from life to death, and no scholar of the language in

which the Quran was revealed argues over this point. Once it completes 120 days, a fetus is alive, as the Prophet, who is inspired and utters nothing but the truth, explicitly tells us. Being alive, a crime that ends its life renders it, without any doubt, a slaughtered soul, and as such, the fetus blood money, which is the fine due for its slaughter has to be paid to his family as the Quranic text specifies. All scholars agree that the heirs who get this blood money "should share it according to the rules of inheritance without any difference or exception."

It is thus clear that Al-Zhahiriyah school of thought agrees with the majority of scholars on the blood money due for a fetus over 120 days and differs with them on that for a fetus aborted at an earlier stage, on which it follows the second point of view.

I have an objection to the point at which Al-Zhahiriyah school of thought differs with the majority of scholars. Al-Zhahiriyah base their opinion on the assumption that a fetus is not alive before its 121st day and, consequently, it is a part of its mother. This argument is faulty on two counts. First, if it is not alive, how can there be a fine for violence committed against it? Blood money is due for the living. The second contradiction in the argument is that the same school stipulates that this fetus has the right to be willed to and to inherit, but how can that be if it is not alive? Therefore, I find that their conclusion is not based on a sound argument. An embryo is alive from the moment of conception and is entitled to the rights that are appropriate to its condition.

As for the fact that spirit is breathed into it at a certain point, God says, "They ask you about the Spirit. Say: 'The Spirit is my Lord's concern. Little indeed is the knowledge you are given.'" (Al-Israa' [The Night Journey], 85) Life is an evident thing, while spirit is metaphysical. Rulings are based on physical, rather than metaphysical, phenomena. Therefore, the same way that the fetus's heirs receive the blood money for it after its fourth month, they receive it also at the earlier stage. No distinction should be made. This is further supported by the fact that the Prophet, Peace be upon him, did not ask at what stage the fetus was in the case where he stipulated the payment of fetus blood money. This implies the ruling is the same in all cases.

Let us consider the claim of those who hold the second viewpoint that a fetus is regarded as part of the mother, so any fetus blood money is due to her in the same way as blood money is when one of her parts is damaged. If this claim is valid, it would mean that blood money for it should

be incorporated into hers, and only one should be imposed. But the Prophet imposes full blood money for her and fetus blood money for the fetus.

Moreover, the rights it has indicate that it has a life independent of its mother's. The Apostle of God, Peace be upon him, postponed the execution of an adulteress until she delivered her baby. He also forbids the execution of any retaliation, and similar penalties, that may cause a fetus to perish. As will be shown below, reparation is stipulated to be paid when a fetus is killed, and reparation is only due when a human soul is slaughtered. Rights are established for it, and it acquires other rights, all of which are independent of the mother's, which implies that they are two souls, not one. The case being so, fetus blood money is subject to the same rules as all blood money, which means that it is to be inherited by its legitimate heirs, with no distinction made between one fetus or another. When these rules are applied, they have to be applied in full.

#### **Mutual Inheritance of Mother and Fetus**

As a mother and her fetus(es) are exposed to death as a result of a crime against one of them, and as their death might be simultaneous or successive, inheritance rules covering the various cases are significant. For this reason, we offer an explanation of these rules.

If the mother and fetus(es) die at the same time, or if there is suspicion over the matter, or if it cannot be determined which has died first, or if heirs argue over the question, the same ruling applicable in the case of persons who have drowned applies to them. This means that neither (or none) of them inherits the other(s). Each is inherited by his rightful heirs. The mother inherits nothing of the blood money of its fetus(es) and is not inherited by it (them). One of the conditions of inheritance is that it has to be confirmed that an heir is alive when the legator dies, and this condition is not met here, because it cannot be definitely established which has died first. This is the opinion of the majority of scholars (the Hanafis, Malikis, Shafi'is, and most of the Imamis), and the opinion I support.

If their deaths are successive, the one that survives the other(s), even for one moment, inherits the one(s) whose death occurs first. If a fetus is dead when it is aborted, or if it is alive and dies after abortion, and then the mother dies, she inherits her share of its blood money and is, in turn, inherited by her legitimate heirs, because it is established that she has survived her fetus. If it is alive at the moment of abortion and dies after its mother, or if she dies and it is extracted alive and then dies, it inherits the



mother and is, in turn, inherited by its legitimate heirs, because it is established that it has survived her in either of the two cases.

### **Mutual Inheritance of Mother and Twins**

The same thing is true in the case of twin fetuses. Whichever survives the other inherits it, and if the survivor dies, it is inherited by whoever of its heirs is alive at the time of its death. The same thing is true concerning the twins and their mother. If a woman aborts a fetus, either dead or alive but dies right after abortion, and then she aborts another, fetus blood money is due for a dead fetus and full blood money for one that is alive when aborted. A living fetus inherits its dead twin, including a share in its blood money.

If she drops a dead fetus and then dies, aborting another, which is alive, she and the second twin inherit their shares of the blood money due for the first.

If she aborts both dead and then dies, she inherits both.

## **SUBSEQUENT PENALTY**

This penalty includes two things: reparation and disinheritance, both of which are regarded as rights of God. Once such rights are due, they have to be met, for they are subject to no compromise, waiver, or remission by any authority, whatever it may be. A Muslim leader, or whoever represents him, has to collect it, because he is charged with implementing God's stipulation and of protecting the nation's interests.

### **Reparation**

Reparation (60) in Islamic fiqh is "anything stipulated by God to be done for any of a set of reasons He defines." (61) This penalty is a form of worship, (62) and it is stipulated as a penance for a sin and a means to remove guilt and to seek to be close to God.

### **The Form Reparation Takes**

For murder, God has made this type of penalty financial in nature first of all. It takes the form of freeing a Muslim slave. This type of penance is very appropriate to the crime. Slavery is a form of death, and freedom is

equal to life. Therefore, freeing a slave is like bringing to life a human soul in compensation for the one killed. If a person is too poor to free a slave, or if no slave is available as the case is in our age, he has to fast for two months consecutively, as God stipulates when he says, "He that accidentally kills a believer must free one Muslim slave.... If a man cannot afford to do this, he must fast two consecutive months." (Al-Nisaa' [Women], 92)

If for one reason or another, a Muslim cannot fast like this, Shafi'i scholars, in a better supported opinion, and Imam Ahmad, as he is quoted in one version, say that he has to feed sixty poor people. This ruling is in analogy with the penance for absolute divorce and failure to fast in Ramadhan. It is true this option is not mentioned in the above-quoted verse, but it is offered in the similar cases of absolute divorce and failure to fast; hence the analogy.

### **Reparation Being Due When Someone Kills a Fetus**

Since reparation is stipulated only in cases of accidental manslaughter, and since a fetus is regarded in Legislation as a human soul in certain things but not in others, fiqh scholars differ over whether or not reparation should be paid when a fetus is killed. Hanafi, Maliki, and Zaidi scholars believe no such reparation is due, but the Hanafis recommend and the Malikis prefer its payment.

When the Prophet, Peace be upon him, ruled that the killer of a fetus has to pay fetus blood money, he mentioned nothing about reparation, although the situation called for a statement, so he would have mentioned it if it had been an obligation. Since reparation is linked to manslaughter and has certain requirements that do not apply to a fetus, such as the victim's being a Muslim or having the same standing as a Muslim. God says, "He that accidentally kills a believer must free one Muslim slave...." In the same verse He mentions [that reparation should be paid], " ... if the victim be a member of a tribe with whom you have a treaty...." As for the fetus, neither its being killed is confirmed, because its life prior to the crime is not confirmed, nor its being a Muslim or of the same standing as a Muslim. It cannot be a Muslim, because faith or infidelity cannot be determined during gestation, and it cannot have the standing of a Muslim, because that can only be when its life is confirmed. Since reparation is an obligation, it is not something to be determined through scholarly interpretation, but rather by the Quran, Sunna, or consensus. With the case of a fetus failing to meet any of these requisites, reparation does not have to be paid. It is to be paid for killing a "soul" in the full sense of the

word, and a fetus is a human soul in certain things while in others it is not, as implied by the fact that when it is killed, fetus blood money rather than full blood money is paid.

However, since the criminal has committed an unlawful thing, it is recommended that he should attempt to get God's forgiveness for his guilt through reparation. (64)

Al-Zhahiriya and most Imami scholars believe reparation should be made when a fetus is killed after its fourth months. Ibn Hazm goes into detail in explaining the various aspects of this point of view:

If someone strikes a pregnant woman and she aborts her fetus, he has to pay no reparation if this occurs within the first four months of gestation, but he has to pay fetus blood money, because the Prophet, Peace be upon him, has ordered it. The aggressor in this case has killed no one, only caused a fetus to abort. Having killed no one, neither intentionally nor unintentionally, no reparation is due, for it is only due in accidental manslaughter, which can only be against a creature with a spirit, while spirit has not been breathed into this fetus yet.

When aggression occurs after the first four months, the fetus is felt to move in a way that leaves no doubt about it, and four competent midwives testify to that effect, fetus blood money is due, because it is a fetus that has been killed and that is the fine due for killing a fetus, and reparation is also due, in the form of freeing a slave or, for those who cannot afford it, fasting two consecutive months, because he has killed a believer by accident.

If someone says that the Prophet, Peace be upon him, does not stipulate reparation in a case like this, our answer is that it is true reparation is not mentioned in the tradition that concerns the aborted fetus, but not all teachings are derived from a single Quranic verse, a single Quranic sura, or a single tradition. Since God says reparation has to be paid when a Muslim is killed by mistake and He told the Prophet, Peace be upon him, that He has created all His servants as orthodox believers, (65) once spirit is created in the fetus, it is an orthodox Muslim according to the explicit text of the Quran, and so reparation is due in its case. This verse [i.e. the one which stipulates reparation] adds to what is stipulated in the tradition. All God's orders must be received with grace, and we cannot reject one because of another. Anyone who does would be disobeying God's orders.

He supports the opinion that reparation is due with certain stories told of some Companions and followers. One is related by Abd Al-Razzaq on the authority after Omar Ibn Tharr:

A woman rubbed the abdomen of another who was pregnant, and the latter aborted the fetus. The case was taken to Omar Ibn Al-Khattab and he ordered the woman [who rubbed the other's abdomen] to make reparation by freeing a slave.

Ali says, "This was told of Omar and none of the other Companions is said to have a different opinion."

Ibn Al-Juraih is quoted to have said, "I asked 'Ataa', 'What is due from a fetus's killer? He said, 'To free a slave or to fast.'" Al-Zuhri is similarly quoted to have ruled in the case of a man who struck his wife causing her to abort, "He is fined fetus blood money, has to free a slave, and inherits no share of the fetus blood money, which goes to the other heirs." Ibrahim Al-Nakha'i says about a woman who takes a drug or inserts something inside her, causing her fetus to drop, "She has to make reparation and pay fetus blood money." (66)

This is how Al-Zahiriyyah scholars think and how they interpret the evidence available. If I have any comment at this stage, it is that these stories of Omar, 'Ataa', Al-Zuhri, and Al-Nakha'i are general in ruling that reparation is due, in the sense that they do not specify a particular stage of fetal life. Their implication is that such reparation is due whenever a fetus is killed, regardless of its reaching the four months point or not.

Many scholars hold the same opinion, i.e. that reparation should be paid whenever a fetus is killed. These include the Shafi'i, the Hanbali, and some of the Imami scholars, as well as Al-Hasan, 'Ataa', Al-Zuhri, Al-Nakha'i, Al-Hakam, and Isshak. Moreover, Malek is quoted as holding the same opinion. (67) From our explanation of the second point of view and the evidence cited by its supporters, it is clear that the same evidence is used to support this one, but the supporters of this third opinion do not make the same distinction between a fetus killed within the first four months and one that is killed later. The texts cited do not go into such detail, and the ruling remains general in its nature.

What I support is the third opinion that calls for reparation at any stage a fetus is killed, and I do so for several considerations.

1. The texts stipulating that reparation should be made are inclusive of everything that may be described as manslaughter, which is causing a living being to turn into a lifeless corpse. Aggression against a living fetus which causes it to be aborted and become a lifeless body is, therefore, manslaughter. That is why the expression, "A dead fetus is aborted" is

used. If it has no human spirit, it still has natural spirit, and the loss of this natural spirit is death. When this loss is the result of violence, it is manslaughter, which means it is aggression against a human being or a potential human being. Since it is manslaughter, the texts cited above rule that the killer has to make reparation to make up for his guilt and the harm he has caused.

2. It is doubtless that the killer of a fetus has committed a prohibited action. It is unanimously agreed that with such an action, he has angered his Creator Who regulates his affairs and relationships. He has therefore to allay this Divine anger with the means God prescribes for such a purpose, which in this case is reparation.

3. The claim of supporters of the first opinion that reparation is due when a Muslim soul is killed and that in the case of a fetus it cannot be established that it is alive nor that it is Muslim is a rejected argument. Concerning its life, what needs to be determined is that its death is caused by the crime. As for its being a Muslim, Ibn Hazm's counter argument is cited above. The Prophet, Peace be upon him, reports that God, say, "I create all My servants as orthodox Muslims." The Prophet also says, "All infants are born to this faith."

Undoubtedly, the religion of an infant is a matter of standing rather than faith. True faith is the outcome of firm belief based on evidence and reason, and such a creature has not been blessed with the gift of reason yet. It is out of mercy and kindness that it is given the same standing as a Muslim.

Yet, the faith of a victim is not a condition for the ruling that a killer has to make reparation. Such reparation is also due in the case of killing a *zimmi* (68) or a person who has been granted security. The evidence for this is that God says in the verse that stipulates reparation, "If the victim be a member of a tribe with whom you have a treaty, the blood money is to be paid to his family in addition to freeing and a Muslim slave." (Al-Nisaa' [Women], 92) A *zimmi* is under a treaty, and there is an explicit text covering his case. The explicit text takes priority over the implication that may be deduced from His saying earlier in the same verse, "He that accidentally kills a believer..." Since he is a human being unjustly killed, reparation has to be made as in the case of killing a Muslim.

Thus it is not a condition that the victim must be a Muslim for ruling that the killer has to make reparation, which is due whenever a soul whose life is under protection is killed. A fetus is a human being in hiding, and its

life is protected as indicated by the prohibition of any violence against it, which is considered a crime, and by the punishment of its killer.

As for their claim that a fetus is a human being only in a certain sense and this sense only covers rights and obligations, the fact is that it is a human being as indicated by the fact that rights are established for it from the time of its conception. Such rights of inheritance, share in a will, and lineage could not be established if it were not a human being.

The point that its blood money is not full blood money is a different matter. Blood money does differ in different cases, but in all these reparation has to be made. The fine for killing a fetus is its blood money, which, in its condition, is the full amount that corresponds with its state. There is no ground for taking the fact that it is less than the blood money for other human beings as evidence that reparation is not due in its case. The stipulation of reparation is inclusive.

I also support the view that all types of aggression against a fetus call for reparation to be made by the killer, whether the killing is deliberate, semi-intentional, or accidental. It is stipulated in the case of unintentional slaughter, which is of less weight than intentional murder. In fact the former does not entail guilt as stated in the tradition: "My nation is not brought to account for error, forgetfulness, and what they are forced to do." It makes more sense that it should be made in cases of intentional killing, because a murderer has more reason to atone for his action than an accidental killer.

The Sunna supports this opinion. Wathila Ibn Al-Asfa' says:

We went to the Prophet, Peace be upon him, to consult him over the case of a friend of ours who had brought on himself the damnation of hellfire by committing murder. The Prophet said, 'Free on his behalf a slave. For every part of the slave, God frees one of his parts from hell.'

The Prophet ordered these people to free a slave on behalf of the murderer who deserved hellfire, and this can only be for deliberate murder. (69) God says,

He who kills a believer by design shall burn in Hell forever. He incurs the wrath of God, who will lay His curse on him and prepare for him a woeful scourge. (Al-Nisaa', 93)

The above tradition thus shows that reparation is also due in the case of deliberate murder.

Since it is now established that it is due in both intentional and unintentional manslaughter, it is also an obligation in semi-intentional killing, which is a case in between the two.

I also support the idea that reparation should be made in both cases of direct killing and causing death. An example of the second type is when a person trespasses and digs a hole in a ground he does not own. If a pregnant woman who is passing through happens to fall in the hole and to abort a dead fetus, the direct cause of its death would be the mother's fall, not the digging of the hole, because she could have paid attention and noticed it or taken a different route. This type of killing is called causing death, which is done through a certain means. Between the original action and the result another cause occurs, which in this case is the fall. It is connected with the first cause and resulting from it, but it is not an inevitable consequence, for it might not occur. Therefore, taking the matter of face value, there is more reason to attribute the death to the second cause than to the first.

For this reason, the majority of scholars (70), who say that causing death is subject to the same rulings as direct killing set as a condition that the connection between cause and effect should be evident and should continue until the result occurs, with no other event occurring to which the result, i.e. the death, can be attributed. If such an event does take place, the effect of the first cause is broken and the resulting death is considered to be the outcome of the second cause, to which the effect is still linked. This is true in the case when a third party interferes by pushing the woman into the hole. The killer in such a case is the man who has pushed her, rather than the one who has made the hole. But although these scholars hold that the two types are the same, some of them--those of the Shafi'i, Hanbali, and Al-Zahiriya schools of thought--do not consider that a direct act is a condition for stipulating reparation, while others, the Zaidis and Imamis, do. I favour the view that it is due in the case of killing a fetus, whether it is direct killing or causing death, because although the cause is different, the outcome is the same, and also because reparation is rendered due by the act of killing, and this act is committed in both cases. There is no ground on which to base distinction. When reparation is stipulated to remove guilt and to allay God's wrath, it is because the killer, whatever his method is, needs it.

### **Reparation Is to Be Paid by Every Killer, Even a Relative**

Whoever the killer is, whether it is one of the parents or someone

else, reparation has to be made, and this is the opinion of all those who support the making of reparation in cases of fetus killing.

When a woman causes the death of her fetus, by taking a drug for example or using another method to abort it, she has to make reparation, because she is a killer. She also has to pay fetus blood money, and she forfeits her right to inherit it. As mentioned above, Ibrahim Al-Nakha'i says about a waom who takes a drug or inserts something inside her, causing her fetus to drop, "She has to make reparation and pay fetus blood money." The same thing is true about the father. Al-Zahri is also quoted above as having ruled in the case of a man who struck his wife causing her to abort, "He is to be fined fetus blood money, has to free a slave, and inherits no share of the fetus blood money, which goes to the other heirs."

The same is also true about others, whether relatives or strangers. Mujahed narrates the story involving Omar quoted earlier:

A woman rubbed the abdomen of another who was pregnant, and the latter aborted. The case was taken to Omar Ibn Al-Khattab and he ordered the woman [who rubbed the other's abdomen] to make reparation by freeing a slave.

All this shows that a fetus has an separate life, which has to be respected, and that it is independent in this from either parent. The task of parents is limited to taking care of it, protecting it, and ensuring its growth, but they have no right to cause it any harm. It also shows that neither a physician nor anybody else has the right to tamper with fetal life for any reason, except in cases of necessity, which involve fear for the mother's life if the fetus continues to live. The physician has to be almost one hundred per cent sure that allowing the fetus to stay would be hazardous to her life. He cannot act on a mere assumption; souls cannot be sacrificed for a guess or suspicion.

### **Reparation Multiplies with Multiple Fetuses (Twins) and/or Killers**

If a crime causes the abortion of more than one fetus, the killer, if he is a single person, has to make reparation and to pay fetus blood money for each of them.

When there are more than one killer, and their taking part in killing the fetus or fetuses (twins) is proved, each of them has to make reparation for each fetus. If three persons kill two fetuses, six reparations have to be made, each of the killers making two.



As for fetus blood money, only a double amount is to be paid [for two fetuses], and the killers pay equal shares. The reason for this is that reparation is due to be made by every person who commits an act of killing, and in the example used here, all three persons have done that, for although they are partners in the crime, each is considered a killer. The obligation to make reparation relates to the criminal, while fetus blood money relates to the victim, being the fine for its death. Therefore, it does not multiply by the number of killers, though it does by the number of victim fetuses.

### **Disinheritance of a Fetus Killer**

The killer of a fetus cannot inherit any share of the fetus blood money. This ruling is based on the Prophet's statement, "A killer cannot inherit." (71) Ibn Qudamah says scholars agree on this point.

(72) He adds:

If a pregnant woman takes a medicine that aborts her fetus, she has to pay fetus blood money, of which she inherits nothing. I do not know of any controversy among scholars over this point. The reason is that she purposely aborts the fetus, which is a crime on her part, so she must pay fetus blood money, as another person would have to if he committed the same crime. She does not inherit any share of the blood money, because a killer inherits nothing of the blood money he must pay for his victim, which is inherited by all other heirs. If the person who causes the abortion is the father or someone else, he also, and for the same reason, has to pay fetus blood money, of which he inherits nothing. (72)

### **Conclusion**

I do not want at the end of this paper to go into lengthy detail on the great physical injury suffered by a mother who aborts her child. Physicians have already covered this point, and the occasion does not allow a survey of these injuries and the social damage that can be caused by a permission of abortion. The latter includes the facilitation of adultery, the consequences of which are "dropped," thus obliterating the evidence of the great sin committed. This evidence constitutes a condemnation of that sin by common sense and on legal Islamic grounds, and haunts the conscience of the criminals wherever they go and whatever they do. Every human being with an active conscience, integrity, a sense of honour, and moral and religious scruples categorically rejects such an action.

Therefore, I will be content to sum up the outcome of this paper from the point of view of Islamic fiqh and legislation. (73)

## **THE OUTCOME OF THIS STUDY OF FETAL LIFE IN THE LIGHT OF ISLAMIC LEGISLATION**

From this study, I can make the following conclusions in the light of the Islamic fiqh views that I find to be weightier and believe should be followed.

First: A fetus, from the moment of its creation, is a living being with a respected and protected soul.

Second: A fetus is covered by a covenant giving it certain rights that guarantee its survival and its protection by the community, including safeguarding and supporting it; keeping its share of any inheritance until it is born; allowing it the right to be named in wills and to receive endowments and, in the opinion of some scholars, gifts; and naming it after its father.

Third: A mother's custody over her fetus is one of protection, care, help to grow and develop, and keeping it away from all hazards and unhealthy influences. A father's custody is an indirect one which includes supporting it, caring for its mother and providing her with all possible means of comfort, and avoiding anything that might affect her or her fetus in a way that would hinder its growth or endanger its life.

Fourth: Causing injury to a fetus, or any of its parts, at any stage of its life, is unlawful and whoever does it is legally guilty. The type and extent of his punishment in the Hereafter is something for his Creator to determine.

Fifth: Causing injury to a fetus calls for a penalty in this world.

A. If the crime causes it to be aborted, and it is dead at abortion, fetus blood money, which is one twentieth of full blood money, has to be paid; reparation has to be made; and the killer forfeits any share in its legacy. A punishment which is appropriate to the type of crime, may be added. In cases of intentional killing this should be greater than in semi-intentional cases, and in the latter greater than in accidental killing. It might be waived in cases of unintentional killing if the criminal has taken sufficient precautions.

B. If it is alive at the moment of abortion but dies afterwards, the penalty is the same as in the case of manslaughter where the victim is an already-born human being whose life is protected. The penalty could be retaliation or full blood money, reparation, disinheritance, and other penalties.

C. If it drops alive and the crime causes injury without killing the fetus, such as the loss of an eye, a limb, one of the senses, or something else, the penalty is the same as in the case of similar injury to a living, already-born human being.

D. In all cases where any type of blood money is entailed, the criminal pays it when the crime is deliberate, while his clan, with him being the first to contribute, pays the indemnity in cases of accidental killing or injury.

E. The blood money for a fetus is inherited by its legitimate heirs, with the criminal receiving no share of it.

Sixth: In all these punishments it makes no difference whether the criminal is one of the parents or someone else. The penalties include all criminals.

Seventh: In a case of necessity, when a mother's life is threatened, abortion is permissible and all penalties are waived.

This is what I wanted to explain. I pray to God to guide us all in sincerely following His Law, to set our minds and hearts ready to observe the stipulations of our religion and reject any element alien to it, and to help every Muslim to contribute to the efforts for implementing His Legislation. This Divine Legislation is not addressed to a particular person or group, but rather to all humanity, and everyone has to account for his work in the Hereafter.

It is God who knows hidden intentions and offers assistance and guidance to the Straight Path.

## Notes

- (1) Vol. 10, p. 70.
- (2) *Al-Mughni (The Sufficient)*, vol. 7, p. 24.
- (3) There are, in the same section, other traditions supporting this. See *Nail Al-Awtar (Fulfilling Desires)*, vol. 6, p. 195.
- (4) *Ibid.*, vol. 6, p. 197.
- (5) In some traditions, the reason which made some of the Companions resort to coitus interruptus is mentioned, and they ask God's Apostle, Peace be upon him, about it. One of these is narrated by Usamah Ibn Zaid, who says a man came to the Prophet, Peace be upon him, and said, "I use coitus interruptus with my wife." "Why do you do it?" asked the Prophet. "I feel sorry for her offspring," answered the man. The Prophet, Peace be upon him, said, "If it were harmful, it would have harmed the Persians and Romans." (Related by Ahmad and Muslim)

Al-Shawkani commented on this, saying, "This is one of the motives of coitus interruptus, which is to avoid having too many children or to avoid having children to start with. All of this, "he adds, "does not affect the probability of involuntary conception."

- (6) Here are some of scholars' points of view on the subject.

The Hanafi School: In the case of a free woman, coitus interruptus is allowed with her consent, while in the case of a slave, with the consent of her master. Abu Hanifah's two disciples [Muhammad and Abu Yusuf] agree that a free woman has the right to agree or disagree, because intercourse is one of her rights, and coitus interruptus reduces this right. Therefore, her consent is a condition. (*Al-Ikhtiyar [The Choice]*, vol. 7, p. 172. Also see *Radd Al-Muhtar [Answer for the Perplexed]*, vol. 2, p. 411.)

The Maliki School: Al-Dasouqi says in *Al-Sharh Al-Kabir (The Great Explanation)*, vol. 2, pp. 266-267.

...and her husband may resort to coitus interruptus if she agrees, and he either pays her a compensation or not, regardless of how old she is, and her guardian's consent does not count. What he says implies that the owner of a slave can resort to coitus interruptus with her without her consent, which is the case.

The Hanbali School: *Al-Rawdh Al-Murabbaa' (The Square Garden)*, vol.2, p. 186, says, "Coitus interruptus without the consent of a free woman or the master of a slave is unlawful." Ibn Qudamah explains in *Al-Mughni*, vol.7, p. 23, that

coitus interruptus is reprehensible unless a need calls for it. It is unlawful with a free woman without her consent, as the tradition makes clear. As for a slave, it is allowed with or without her consent, but it is probable that her consent is also a condition.

He speaks with more detail on the subject, so if a reader desires more information, he may refer to it.

The Zaidi School: *Al-Taj al-Muthahhab (The Gilded Crown)*, vol. 2, p. 78, says, "a woman may take contraceptive measures, even if her husband does not like that, because his right to a baby is not confirmed before conception takes place."

The Imami School: *Al-Mukhtasar Al-Nafé (The Useful Summary)*, p.172, says,

As for coitus interruptus with a free woman, it is said to be unlawful, and if it is applied, a ten-dinar compensation is due to her for every ejection. It is also said to be reprehensible, which is more probable. In the case of slaves, it is lawful.

Al-Tousi says in *Al-Nihayah (The End)*, vol. 2, p. 491:

It is reprehensible for a man to resort to coitus interruptus with his free wife, but he commits no sin if he does. It is preferable, however, that he does not, unless it is set as a condition in the marriage contract, or he asks for her permission before intercourse. In these cases, coitus interruptus is allowed. As for a slave, coitus interruptus is lawful with her in all cases.

*Al-Lam'aah Al-Dimashqiyah (The Damascene Glitter)*, vol.5, p. 102, says:

It [coitus interruptus] is unlawful in the case of a woman unless it is set as a condition in the marriage contract; because it contradicts the rational of marriage. Reprehensibility, however, is the more common ruling, based on the authentic tradition reported by of Muhammad Ibn Muslim. When it is ruled unlawful, a ten dinar compensation is due to the woman for every ejection. If it is ruled reprehensible, compensation is recommended. It is also unlawful

for her to resort to coitus interruptus without his permission. It is the implication of the first cited evidence that if it is unlawful for him without her consent, it is likewise unlawful for her without his, although there is no mention of the latter case.

- (7) A similar tradition is related by Al-Tirmithi, quoting Jaber, and another is narrated by Abu Hurairah. Therefore, we find that some scholars interpret the tradition narrated by Juthamah as indicating mild reprehension. One of these is Al-Baihaqi. Others regard it as lacking in authenticity, because it contradicts other traditions which are better supported. A third group say it is cancelled [by later traditions]. After discussing the various evidence, both Ibn Al-Qayim and Al-Shawkani consider the permissibility of coitus interruptus as more probable. *Nail Al-Awtar*, vol. 6, p. 198.
- (8) Al-Qurtubi, *Ahkam Al-Qura'an (Rulings of the Quran)*, vol. 12, p.7.
- (9) On the same point, Al-Bukhari and Muslim relate several traditions. One of these is related by the latter as narrated by Huthaifa Ibn Usaïd, who quotes the Prophet, Peace be upon him, as saying, An angel comes to a germ forty, or forty-five, nights after it settles inside the womb. He says, 'God, is it to be miserable or happy?' and the answer is entered. He says, 'God, is it to be male or female?' and the answer is entered. He enters its work, its influence, its life span, and its livelihood. Then the register is folded; nothing is added and nothing omitted.
- There is no discrepancy between this tradition and the one quoted above. This one tells us the time at which the angel asks his Lord these questions, which occurs at a stage later than its reports on the condition of the germ.
- (10) Scholars have several opinions concerning support and dwelling for a divorcee whose divorce has been final. I give a detailed account of these opinions in my book *Tarikh Al-Tashri' Al-Islami (The History of Islamic Legislation)*, First Edition, p. 167.
- (11) See *Al-Rawdh Al-Murabbaa' (The Square Garden)*, vol.1, p.116, and Ibn Rajab, *Al-Qawa'id (The Rules)*, p.178.
- (12) Related by Muslim in his '*Sahih.*'
- (13) "Covenant" in language means compact. In Islamic Law the term is

used to "describe the condition when a human being becomes entitled to his rights and responsible for his obligations." This covenant remains with a human being throughout his life. I have discussed the question of eligibility in detail in my book *Nazharyet Al-Haq (The Truth Theory)*, p.74.

- (14) Certain scholars believe a poor mother has the right to be supported at the expense of a wealthy fetus.
- (15) A sperm is the semen, and the Arabic word indicates its scanty. A germ cell is blood that has solidified, which is the form a germ takes after a sperm unites with an ovum. An embryonic lump is a small lump of flesh of a chewable size. These stages combined last four months. Ibn 'Abbas says, "Within the ten days following these four months, spirit is breathed in, so that is the waiting period for a widow: four months and ten days." See Al-Qurtubi, vol.12, pp.7 & 108.  
Also see Al-Haj (The Pilgrimage), verse 5.
- (16) Some writers have taken the statement of Al-Zhahiriya scholars that "No reparation is due for the abortion of a fetus within the first four months" to mean that they do not consider such abortion unlawful, in spite of the fact that his school rules that fetus blood money is due in a case like that. The conclusion is unsupportable, for although reparation is in fact an act of penance for a sin or crime, a crime may take place without entailing reparation, as in the case of intentional manslaughter in the opinion of Al-Zhahiriya scholars themselves, as well as the majority of scholars. On the other hand, it is due in the case of unintentional manslaughter, although this is not regarded as the crime as it is explicit in the tradition: "My nation is not brought to account for error ..." because there is no intention in such a case. The ruling on such manslaughter is also explicitly expressed in the Quran, "He that accidentally kills a believer must free one believer slave." This shows that reparation and prohibition are not interrelated. The reasoning of Al-Zhahiriya scholars in saying that no reparation is due when a fetus is caused to abort within the first four month is that killing applies to a human being with a spirit, and spirit has not been breathed into the fetus yet, and therefore causing its abortion is not of an act of killing. (Ibn Hazm, *Al-Muhalla [The Adorned]*, vol.11, p.31) Therefore, I believe that the implication of the ruling made by these scholars is that the person who causes abortion within this period is a sinner, as suggested by ruling that he has to pay fetus blood money and is not entitled to a share of it if he is one of the fetus's heirs. Details on this are given

below. See Muhammad Salam Madkour, *Al-Janin (The Fetus)*, p.305, where the author, commenting on Ibn Hazm's statement that "It is true that no reparation is due from a person who strikes a pregnant woman and causes abortion of a fetus that has not completed four months yet," says it indicates that no sin is committed and thus such an abortion is not prohibited. The conclusion is wrong and we cannot endorse it for the reasons given above.

- (17) Many traditions of the Prophet which make clear that tampering with the eggs of a game bird during consecration is as unlawful as killing such bird are listed in *Nail Al-Awtar (Fulfilling Desires)* vol.5, p.20.
- (19) According to Al-Zhahiriyah, the Maliki, and the Zaidi schools of thought, a crime is definitely either intended or committed by error, and there is no third possibility. The majority of scholars (those of the Hanafi, Shafi's Hanbali, and Imami Schools) disagree. In their opinion, it is intentional, semi-intentional, or accidental. In my book *Al-Jinayat fi Al-Fiqh Al-Islami (Crimes in Islamic Fiqh)*, p.251, I favour the majority opinion as it has stronger evidence.
- (20) This analysis of Al-Zhahiriyah scholars imply that they are discussing intentional violence against the fetus.
- (21) If spirit has got into it, full blood money is due for a male fetus and half for a female, even if it is dead when aborted, as long as its life within the mother's belly is confirmed. If there is a probability that the movement inside her is the result of gases or something of the sort, it cannot be taken as a valid proof of its life. (*Al-Rawdhah Al-Bahiyah [The Elegant Garden]*, vol.2, p.445.
- (22) See *Al-Rawdh Al-Nadhir (The Blooming Garden)*, vol.4, p.271.
- (23) *Al-Mughni; Al-Sharh Al-Kabir (The Great Explanation)*, vol.9, pp.533, 539.
- (24) *Sharh Al-Nail (Explanation of Fulfilling [Desires])*, vol.15, p.77.
- (25) *Al-Mughni (The Sufficient)* and *Al-Sharh Al-Kabir (The Great Explanation)*, vol.9, p.539; *Al-Rawdh Al-Nadhir (The Blooming Garden)*, vol.4, p.271.
- (26) They differ, however, over whether it is due when the fetus has not taken form yet. I support the view that it is, because it is called "embryo/fetus."



- (27) Sheikh Taqi Al-Din Ibn Daqiq Al-'Id refers to this point. He says:

The tradition indicates that the ruling applies to what is called 'Janin' (embryo/fetus), so a fetus that has taken form is included, and a fetus at an earlier stage is not, except linguistically, for the word is derived from 'ljjitanan', which means hiding. If common usage differs, it takes precedence. (*Al-Rawdh Al-Nadhir*, vol. 4, p.271.)

But common usage does not differ. We use the word *Janin* for what a woman bears as long as it is in her belly and regardless of its stage of development. Therefore, since common usage and linguistic denotation agree, there is no room for distinction.

- (28) There are several traditions on the subject that can be referred to in *Nail Al-Awtar (Fulfilling Desires)*, vol.7, p.74. Some of these will be quoted below. There are other opinions concerning the amount of fetus blood money. It is said to be one twentieth of full blood money, and it is said to be the value of a male or female slave. But the value of something depends on its availability, and when it is not available, as the case is with slaves at present, this opinion becomes invalid. It is also said to be anything that meets the value of fetus blood money, which is the opinion of Al-Zahiriyyah School and some other scholars.
- (29) It was Omar's system, when told of a tradition of the Prophet unfamiliar to him, to ask the person who quotes it, to get someone who had heard the Prophet utter it to support the quotation. He did not do that out of suspicion but only to make sure. The phrase "a male or female slave" may indicate that the narrator is not sure, but all scholars agree on taking it as an explanation of fetus blood money.
- (30) It is 100 camels; 1,000 gold dinars, with a dinar weighing 4.241 grams; 12,000 silver dirhams, the dirham weighing 2.85 grams; 2,000 ewes; 200 gowns; etc., with a slight difference over details and types of payment. I discuss the whole thing in sufficient details in my book *Al-Jinayat fi Al-Fiqh Al-Islami (Crimes in Islamic Fiqh)*, p.240.
- (31) It should be noted that Maliki scholars believe it has to be paid only in gold or silver, not in camels.
- (32) Maliki scholars, as already pointed out, divide crime into only two categories, deliberate and accidental, with no third.

- (33) The blow on the head meant here is that which fractures the skull and gets to the tissue layer covering the brain. For this, one third of the full blood money is due, unless it affects the rest of the body and leads to death, the loss of one of the senses, or the damage of an organ.
- (34) Making the clan responsible for blood money in cases of semi-intentional manslaughter is the opinion of Hanafi, Shafi'i, and Hanbali scholars, and some of their followers. Other followers and scholars differ. In my book *Al-Jinayat fi Al-Fiqh Al-Islami*, p. 263, I support the former. It should be noted that Maliki, Zaidi, and Al-Zahiriyyah scholars say that a crime is either deliberate or unintentional, with no third possibility. In the same book, p.251, I favour the opinion that it might also be semi-intentional.
- (35) The view that the amount due in cases of semi-intentional and accidental crimes should be paid in installments over a three-year period is attributed to 'Amr\*, Ali, Ibn Abbas, and Abdulla Ibn Omar, may God be pleased with all of them. No one whose opinion is of value is quoted as holding a contrary opinion, so the ruling can be regarded as unanimous. It is expressed by Al-Sha'bi, Al-Nakha'i, Qatadah, Abu Hashem, Isshaq, Abu Thawr, Ibn Al-Munther, and scholars of the Hanafi, Shafi'i, Hanbali, and Zaidi schools of thought. Imami scholars say in semi-intentional cases it should be paid over a two-year period, and in accidental cases over a three-year period. As mentioned before, Al-Ibadiyyah scholars believe that the criminal, not the clan, should pay it and that payment should be immediate. The opinion of the majority of scholars, i.e. the former one, carries more weight.

\* Most probably there is a typing error in the original Arabic. The order here suggests that Omar rather than 'Amr is meant. (Translator)

- (36) In the chapter on Essences in *Ahkam Al-Sighar (Rulings over Infants)*, vol.27(?), p.7, we find:
- If someone strikes the abdomen of a pregnant woman and hits the hand of the fetus, causing it to be severed, and the fetus is later born alive, his clan has to pay half the amount of full blood money, because the crime is unintentional.
- (37) See *Al-Mughni*, vol.9, p.556.

(38) The author of *Nihayat Al-Muhtaj (The Needy's Satisfaction)*, vol.7, p.362, says (and this is not a word-for-word quotation) that if a woman survives a crime and does not drop a fetus, but rather a limb, only half of the fetus blood money is due for a severed limb, the same way that half the amount of full blood money is due when the limb of a person is severed. No fine is due for what is left of the fetus, because it cannot be established that it is caused to perish by the crime.

(39) In *Al-Rawdhah Al-Bahiyah*, vol.2, p.445, we read:  
amount of fetus blood money is due: for a severed hand, fifty dinars; for a finger (?), one dinar. If there is no established estimate, then an appropriate blood money is due, which is the balance between its value as a sound and whole being and after the injury.

(40) *Al-Mughni*, vol.9, p.550; *Sharh Al-Nail*, vol.157(?), p.83.

(41) In volume 3 of *Al-Ikhtiyar (The Choice)*, which is a Hanafi book, we find:

Its life is confirmed by its breathing when born; crying, which is making a sound, at birth; or moving an organ such as the lips or hands, because these things are indication of life.

In the Shafi'i book *Nihayat Al-Muhtaj (The Needy's Satisfaction)*, vol.7, p.361, we find:

...even if it does not cry at birth, because the assumption is that a life sign is detected such as breathing, sucking the breast, or making and unclenching a fist. In such a case, it does not matter whether it does or does not make the same convulsions as a slain person, because since its life is established, the obvious thing is that its death is the result of the crime. Its getting out of the womb before completing six months of gestation does not make any difference even when it is clear that it cannot survive. If the abortion itself is not a result of violence, then the person who has killed it [i.e. the original criminal] should be killed in return. It is like killing a sick person whose death is imminent. If it is aborted as a result of violence and it shows stable life, so be it. Otherwise, only the second criminal is excused. A mere convulsion is not sufficient [to indicate life]. (??)

In *Tatimmat Al-Rawdh Al-Nadhir (Conclusion of the Blooming Garden)*, p.100, Ibn Al-Athir is quoted as saying:

The child's crying is the sound it makes at birth, which is a synonym

of its being alive. If it does not cry, any other sign that indicates its life serves the purpose, for what is implied [by crying at birth] is anything that signals its being alive.

- (42) *Bidayat Al-Mujtahed (A Starting Point for the Diligent)*, vol. 2, p.408.
- (43) In *Al-Rawdhah Al-Bahiyah (The Elegant Garden)*, vol.2, p.299, we find:  
Stability of its [the fetus's] life after it gets out is not a condition, nor is its crying at birth, because it may be dumb. The important thing is full life indicated by clear motion, not by natural convulsion, as might happen if it is born partly alive and partly dead.
- (44) Ibn Hazm, *Al-Muhalla (The Adorned)*, vol.11, p.34.
- (45) This is different from Ashhab, who believes the swearing is unnecessary if the fetus dies immediately, in which case full blood money is due. Al-Lakhmi favours this opinion and says, "Its immediate death is an evidence that it is the result of the aggressor's blow." *Al-Sharh Al-Saghir (The Small Explanation)*, vol.1, p.250.
- (46) It is said that a blow on the mother's head has the same effect, but they (the Malikis) do not support this view.
- (47) Ibn Al-Hajeb says this is the more common view.
- (48) The dividing line in determining the type of punishment due for a crime against a fetus which is aborted alive is the one defined by the Legislator as the point at which spirit is breathed in, which is the end of the fourth month of pregnancy.
- (49) We can even go as far as to say that if it is determined that the fetus would have survived, the same ruling applies, which is the ruling on a crime against an already-born human being, even if the crime against the fetus occurs at an earlier stage.
- (50) Hanbali, Al-Zahiriyyah, Zaidi, and Imami scholars, as well as Ashhab of the Maliki School. The view is also attributed to Al-Laith Ibn Sa'd and Al-Zuhri.
- (51) See *Al-Mughni* and *Al-Sharh Al-Kabir*, vol.9, p.538; *Al-Muhalla*, vol.11, p.29; *Al-Rawdhah Al-Bahiyah*, vol.5, p.445.
- (52) Those of the Hanafi, Maliki, Shafi'i, and Hanbali schools of thought. The same view is supported by Qatadah, Al-Awza'i, Isshaq, and Ibn Al-Munther.

- (53) Abu Hanifah Al-Nu'man by this author.
- (54) See *Al-Taj al-Muthahhab (The Gilded Crown)*, vol.4, p.337.
- (55) *Al-Ikhtiyar (The Choice)*, vol.2, p.175; *Nihayat Al-Muhtaj*, vol.7, p.362; Ibn Hazm, *Al-Muhalla*, vol.11, p.32.
- (56) The version of the tradition narrated by Abu Hurairah is that the Prophet, Peace be upon him, says, "Anyone whose relative is killed has one of two options, either he accepts ransom or the murderer must be killed." This is related in all authentic collections, but the wording listed by Al-Tirmithi is, "... he either forgives or retaliates." This is further supported by Abu Sharih Al-Khuza'i, who is quoted as saying:

I heard the Prophet, Peace be upon him, say, 'Whoever is a victim of a murder in his family or an injury has three options: he either retaliates, or accepts blood money, or forgives. If he wants a fourth option, keep him from it.' (Related by Ahmad, Abu Dawood, and Ibn Majah)

- (57) The same is true when the mother dies and later the fetus gets out dead, because it cannot be established that it has lived after the mother's death.
- (58) Ali and Ibn Mas'oud are quoted as saying that the mother and fetus(es) in such a case inherit each other, which is also the earlier opinion of Abu Hanifah. It is said that Ali was asked about the case of two persons who died by drowning or when a building collapsed on their heads. He answered that they inherited each other. Imami scholars use this as evidence for their ruling on cases of drowning and the collapse of buildings, setting as a condition that the persons should be eligible to inherit each other in the first place and that each should have a property of his own. Other than that, most Imamis do not follow this ruling. They rather say, which is the view of the majority of scholars, that such persons inherit each other on the basis that it has to be confirmed that an heir is alive at the time of a legator's death, which is a general rule of inheritance.

Abu Laila holds the opinion that such people inherit each other, provided that when one inherits another, this does not include the property which the other inherits from him. Hanbali scholars agree with Abu Laila but set as a condition that the living heirs of any of them do not file a suit claiming that the death of the other person(s)

has occurred first. If the heirs of both victims contend with each other, the ones with stronger evidence win the case. If all of them swear to the truth of their claims, the two suits are rejected and each of the deceased is inherited by his legitimate heirs. If one party declines to swear, the other party wins their case.

- (59) I have explained above what is meant by the rights of God. Further explanation is available in the chapter of "Theory of the Truth" in my book *Al-Nazhariyat fi Al-Fiqh Al-Islami (Theories in Islamic Fiqh)*.
- (60) The Arabic word for reparation is derived from a root which means "to cover." A thing is hidden from the eyes when covered by something else.
- (61) Like reparation for manslaughter, per jury under oath, failure to fast in Ramadhan, or absolute divorce.
- (62) It is a punishment in the sense that it is met by payment of money or by fasting, and it is a worship in the sense that it obliterates guilt and makes a person closer to God.
- (63) Hanafi, Maliki, Zaidi, Imami and most probably Shafi'i scholars, as well as the Hanbalis according to one version--all believe that he is considered as if he has actually fasted and does not have to feed anyone, because God does not mention this. In my book *Al-Jinayat fi Al-Fiqh Al-Islami*, p.355, I support the view that feeding the poor is the right alternative, because it serves the purpose for which reparation is stipulated.
- (64) This is what Muhammad Ibn Al-Hasan and Abu Yusuf say. (*Al-Bada'i' [Marvels]*, vol.8, p.326.
- (65) The Prophet, Peace be upon him, says, speaking on behalf of his Lord, "I have created all my servants as orthodox Muslims." God says:  
  
Therefore stand firm in your devotion to the true faith, the upright nature with which God has endowed people. (Al-Rum [The Romans], 30)  
  
and the Prophet says, "Every child is born to this religion." (*Al-Muhalla*, vol.11, p.30)
- (66) *Ibid.*, vol.11, p.29
- (67) *Al-Sharh Al-Kabir*, vol.9, p.667.

- (68) A *Zimmi* is a non-muslim subject living in a muslim country and enjoying protection. (Translator)
- (69) Related by Dawood and Al-Hakem, the latter saying it is authentic.
- (70) Those of the Maliki, Shafi'i, Hanbali, Zaidi, Imami, and Al-Zhahiriyah schools of thought. Hanafi scholars disagree; they consider causing death the same as accidental manslaughter, which means blood money has to be paid by the clan of the killer, who is relieved of making reparation and is not disinherited. The majority of scholars have a different approach. They believe that causing death is subject to the same rulings as direct killing; when it is deliberate the punishment is retaliation, when semi-intentional or accidental, blood money and disinheritance. They differ over reparation as already explained.
- (71) Narrated by Omar and related by Imam Malek, Ahmad, and Ibn Majah.
- (72) *Al-Sharh Al-Kabir*, vol.9, p.550. Also see *Nihayat Al-Muhtaj*, p.363.
- (73) Naturally, a fetus owns nothing else, since it is not entitled to inheritance or a share of a will until it gets out alive from the mother's belly.
- (74) Criminal laws around the world tend to prohibit abortion and to punish whoever causes it. They allow it only in exceptional cases, which are cases of necessity or almost necessity, although the types of these cases vary. Here are some of the legal stipulations on the issue in Arab countries.
- Article 260 of the Egyptian Criminal Law stipulates a term of imprisonment with hard labour for anyone who causes a pregnant woman to abort by striking her or committing a similar act of violence. Article 261 says:
- Whoever gives, or recommends to, a pregnant woman drugs or other means to cause abortion, with or without her consent, is to be sentenced to a prison term.
- Article 263 says, "If the person performing abortion is a physician, surgeon, pharmacist, or midwife, he is sentenced to a term of hard labour."
- Article 174 of the Kuwaiti criminal law stipulates that
- Whoever causes a pregnant woman to abort, with or without her consent, by giving her, or causing her to take, drugs or other harmful

things, or by using force or any other means with which he aims at abortion, is sentenced to imprisonment for a maximum of ten years. A monetary fine of not more than 10,000 rupees may be added. If the person performing abortion is a physician, pharmacist, or midwife, he is sentenced to a term in prison of a maximum of fifteen years. A monetary fine of not more than 15,000 rupees may be added.

Article 176 says:

Any pregnant woman who takes drugs or other harmful things, or uses force or any other means, to cause herself to abort, and does, or allows another party to cause her to abort as explained above, is sentenced to a prison term of a maximum of five years and/or a monetary fine of not more than 5,000 rupees.



## PART THREE

### IMPORTANT DOCUMENTS PUBLISHED AFTER THE SEMINAR

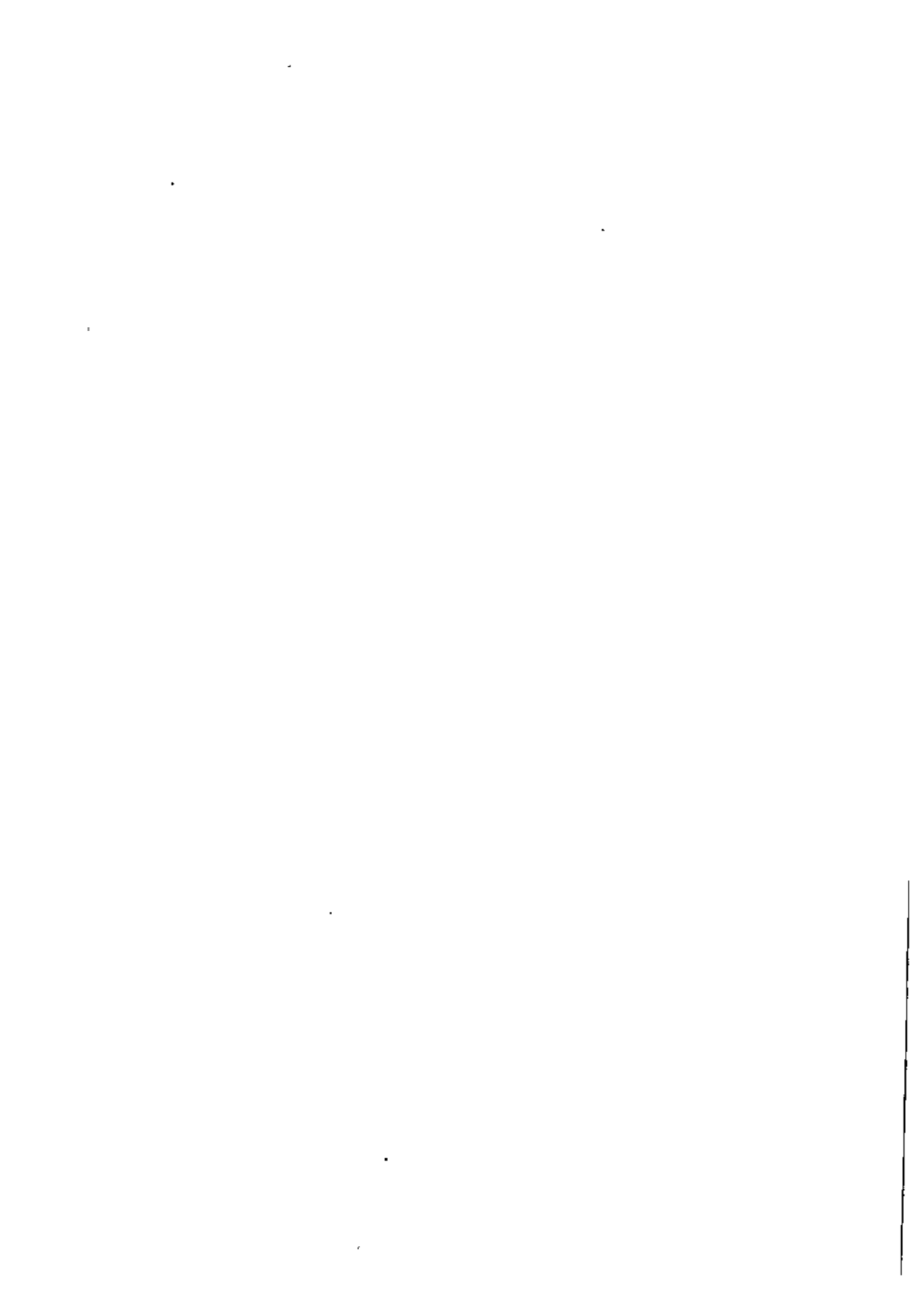
#### ECHOES OF THE SEMINAR OVER THE MUSLIM WORLD

Echoes of the seminar began to be heard in Muslim countries after its conclusion. The Egyptian daily *Al-Ahram* published on August 23 and 28, 1983, a report under the title, "A Bank for Mothers' Milk: Lawful or Unlawful?"

The reporter raised the issue at the Egyptian *Iftaa'* (Religious Rulings) Department and solicited opinions. For further benefit, we decided to republish the report here.

The Kuwaiti daily *Al-Watan*, on its part, published an article on test-tube babies on March 18, 1983, and *Usrati* Magazine published a report on semen and embryo banks. Because of their relevance to the subject of our seminar, we thought it would be of some advantage to attach both to its minutes.

Editor



## A BANK FOR MOTHERS' MILK: LAWFUL OR UNLAWFUL?

The Egyptian Ministry of Health addressed a question to the *Iftaa'* Department: *Is it lawful or unlawful to set up human milk banks?*

*Such a bank collects the milk of mothers, who either donate or sell it. The milk is then refrigerated for up to three months, or it is dried. It is used to nurse children who need natural, human milk.*

*However, a religious question has surfaced. What happens when they have grown up, they want to marry. Would the milk relationship hinder their marriage?*

*It is for this reason the Ministry of Health asked the question. But what was the answer of the *Iftaa'* Department?*

The answer was that taking this milk does not make it unlawful for a male infant to later marry the daughter of a donor. Al-Iftaa' Department bases this ruling on the stipulation of the Hanafi school of thought that nursing does not lead to marriage prohibition unless certain conditions are met. These include that the milk should be human, that it should be taken through the mouth, and that it should not be mixed with something else, such as water, medicine, ewe milk, solid food, or the milk of another woman. If it is mixed with other food and cooked on fire, marriage prohibition does not apply as the leading scholars of that school agree. According to Abu Hanifah himself, even if fire is not used, marriage prohibition is not confirmed, whether the added food constitutes a dominant or a minor percentage, because when solid and liquid food is mixed, the liquid is considered subordinate, and a ruling is based on the dominant element. If the milk of two women is mixed, marriage prohibition is applied on the basis of the larger percentage, so a milk relationship is established with the woman who contributes more. If they are mixed equally, marriage prohibition is confirmed for both women.

child takes the milk in the form of yoghurt or cheese, because taking such food cannot be called nursing.

After considering various opinions, the Iftaa' Department concludes that steam-dried milk that takes the form of powder is naturally no longer liquid, and children cannot take it before it is mixed with water sufficient to solve it. This water is greater in size than the milk, changes its properties, and is dominant in the mixture. By applying the criteria already mentioned, such milk does not entail marriage prohibition a legal, Islamic point of view. Therefore, in the case of milk prepared to be given to infants in either of the methods mentioned above, after being collected from many women, whose number is not definite and who are unidentifiable after the mixture is made, fiqh statements clearly indicate that there is nothing in Islamic Legislation to prevent the marriage of two people who have both taken this milk as infants. Marriage prohibition does not go into effect when the donor(s) of the milk cannot be identified.

When the milk is refrigerated for two or three months, after which it is still good to be given to infants in its natural form, the element of unidentifiability still holds, and again there is nothing against the marriage of the donor's infants and those who take her milk through the bank.

## **THE CONCEPT OF WET-NURSING HAS BEEN KNOWN SINCE THE DAYS OF THE PROPHET**

Dr. Abd Al-Latif Hamzah, the Mufti of Egypt, says:

"If there is nothing in religion, as the ruling indicates, to prevent it, and the public interest and modern health requirements call for the establishment of a milk bank to supply infants with the milk of mothers other than theirs, there can be no objection whatsoever to such a project being carried out. The idea of having an infant nurse from women other than its mother was familiar in the days of the Prophet, Peace be upon him."

The question now is whether the idea of setting up such a bank is under consideration in Egypt and what the opinion of officials concerned with child affairs is.

## **THIS KIND OF MILK IS NEEDED FOR PREMATURE BABIES**

Former Minister of Health Dr. Mamdouh Jabr says:

"The idea is hardly under consideration in Egypt, and is only raised by a small, special group, consisting of those concerned with premature babies. Such infants badly need natural, human milk, which is not readily available for them. Although such banks have been established in some European countries and in the U.S.A., where they have proved a great success, it is difficult to set up similar banks here in Egypt. First, there is no problem of natural milk in Egypt, where 85% of mothers nurse their children, while for the rest, the government makes sure that suitable manufactured milk, as well as other proper substitutes, is available.

"Second, a project of this sort is extremely expensive, if such milk is to be made available for ordinary children. Collecting the milk itself would take much time and effort. The process of sterilization, evaporation, and preservation involves much work and expense before the milk can be offered to the recipient infant. Moreover, the milk will be exposed to contamination, either through the method used when it is given to an infant, or through the water or other things used with it."

## **THE EXPERIMENT HAS BEEN PUT TO PRACTICE ABROAD**

Dr. Mustafa Hammami, Deputy Minister of Health for Basic Care, says:

"The idea has been put in practice abroad on the basis that a mother's milk offers the highest nourishment possible to an infant. If a mother has a surplus she does not need for nursing a baby of hers, it can be offered to another baby. Here in Egypt, however, it is extremely difficult to undertake such a project, because the maximum that can be collected a day from a mother whose milk is abundant is no more than one litre. Is such a quantity sufficient to be given to one or two infants?

"Moreover, one of the basic purposes of nursing is to establish an intimacy between a mother and an infant and provide the latter with an atmosphere of tenderness. This, naturally, cannot be done through a milk

bank. On the other hand, how are we going to get mothers to contribute their milk? Are these going to be mother donors whose children have died or are weaned? Is the donor going to favour an infant that badly needs her milk over her own child? All these are questions raised before such a project is undertaken. Furthermore, how is the milk going to be preserved? Is it going to be kept at hospitals to be available for special cases that need it badly? or is it going to be offered only to those who can financially afford it?"

## **HAS THE PROJECT TURNED INTO A BUSINESS ENTERPRISE?**

Dr. Abd Al-Sadeq Hamed Al-A'araj, assistant lecturer at the Banha School of Medicine, says:

"Natural breast-feeding has a great number of advantages that are not available in any of the various methods of artificial nursing. These are advantages for both infant and mother. The most important of these are:

--A mother's milk is naturally sterilized and contains a great number of anti-bacterial bodies, as well as bodies which neutralize other germs that might harm an infant.

--It provides the child with all the basic ingredients necessary for its physical development. It has, for example, the required percentage of iron for the infant's growth in the first three or four months of its life. Moreover, it is easy to digest. But can a mother have another infant share with hers her milk through the bank in order to provide the other baby with the necessary protection? or is such a project going to turn into a business enterprise, exploiting the resources of the poor to the benefit of the rich, which would weaken the former's bodies and badly affect their health, as well as the health of the children they are nursing? On the other hand, it has been scientifically established that the occurrence of gastro-enteritis in infants who receive artificial milk is five times as much as it is with breastfed children. Would this project be a form of treatment for gastro-enteritis?"

"For a long time," adds Dr. Abd Al-Sadeq Al-A'araj, "we have been taking a mother's natural milk to treat certain diseases, such as some eye and some skin diseases. For such treatment, the milk is mixed with certain medications."

The idea of setting up a human milk bank, which was a subject of a report in Al-Ahram a few days ago, has raised a great controversy and hot arguments among religious leaders, psychologists, and sociologists. While the mufti has announced that, according to Abu Hanifah's School, the project is lawful, a great number of religious leaders have pronounced it unlawful from the Islamic point of view.

At the same time, a number of sociology professors say that if the project is brought to light and a new generation takes sterilized or evaporated mothers' milk, we are going to have a new spoilt generation that cannot be controlled or disciplined.

The idea, in brief, is to set up a bank for the milk of mothers, which is either donated or sold. The milk, which is to be kept in special refrigerators or condensed and sterilized, would be given out to mothers who, for one reason or another, cannot breastfeed their infants.

From the religious point of view, the question was whether there is a danger that a number of children, taking the milk of the same donor, would become milk brothers and sisters without knowing. One day, one of these might marry his milk sister, with no one being aware of the fact. Thus a situation that Islam prohibits, takes place.

The Honourable Mufti announced on this page a few days ago that such a project is lawful from the Islamic viewpoint as interpreted by the School of Abu Hanifah, which sets as conditions for establishing a milk relationship that the milk should be a woman's; that it should be taken through the mouth or nose; that it should not be mixed with something else such as water, medicine, or the milk of another woman. Moreover, the identity of the mother donors would be unknown. When dried milk is to be given to a baby, water must be added to it and it is usually more than the milk in quantity.

The Honourable Sheikh Abd Al-Rahman Al-Najar, the General Director of Training and Da'wa at the Ministry of Endowments, says:

"A project like this is unlawful, and there is not the slightest doubt of its being so. With due respect to the point of view expressed by the Honourable Sheikh Abd Al-Latif Hamzah, the Mufti of the Arab Republic of Egypt, I do not agree at all with that view. The stipulation of its being unlawful is explicit and is supplied by the Shafi'i school of thought:

As prohibition results from taking milk in its original form, it also results when the milk takes a new form outside the mother's breast, like when it is

made into cheese or butter, or used to kneed dough, or mixed with water or something else provided that one of its three properties (taste, colour, and smell) is retained. In all these cases, the milk does get into the infant's belly and nourishes it. For prohibition to be established, the infant should drink the whole quantity. If it only takes part, which is confirmed to get into its belly, and what is left of the mixture is less than the original quantity of milk, prohibition goes into effect.

"I believe this is the opinion we should follow, particularly since physicians admit that this type of infant feeding does more harm than good. We should categorically prohibit it.

"The rationale for marriage prohibition resulting from nursing an infant is that the wet nurse's milk goes into the texture of the infant's tissues and cells. Without this milk, the infant, the first stage in building the man of the future, cannot survive."

The Honourable Sheikh Muhammad Husam Al-Din, Chief of the Central Bureau at the Office of the Sheikh of Al-Azhar, says:

"The Quran stipulated absolute prohibition of marriage resulting from nursing; God says, Forbidden for you in marriage are '... and your milk-mothers who have nursed you and your milk sisters ....'

"Marriage prohibition based on milk relationships is as strong as that based on blood or marriage relationships. These stipulations are warnings which amount to bounds separating what is lawful and what is unlawful. God say, 'Such are the bounds set by God. He that obeys God and His Apostle shall dwell for ever in gardens with rivers running beneath them.' He makes rulings on matters of inheritance and matters of marriage prohibition among those regarded as bounds and dividing lines, where permission and prohibition are very strict.

"In the Sunna of the Prophet, there are many traditions which points out these bounds. One of these is his saying, 'Nursing entails the same marriage prohibition as blood.'

"These Islamic instructions should be observed in spirit and in a way that matches their purposes and the reasons for making them. God alone knows the hidden rationale and justification of these rulings and knows better than any human being the consequences of violating prohibition stipulations and the damage to the Muslim community and Muslim themselves, their offspring, and their future, that may result from it. Prohibition is not pronounced haphazardly. It certainly has purposes, of



which we are sometimes aware and at other times we are not. Therefore, caution in such matters is necessary, and we should make sure to avoid areas of doubt related to them. It is certain that a person who commits something prohibited will suffer some harm. The least harm that results from taking matters of milk relationships lightly is that it is transgression over the bounds of God, whether there is a justification for it or not.

“Islam calls for purity in everything, purity in ethics and in means. We should not blindly imitate foreigners, because we should have a character distinctive of the Islamic Nation. We should not be followers of the West.

“The danger in a project like this is that the identity of the donor(s) is obscured, and consequently one cannot identify the real milk mother of an infant, which leads to the confusion of lineage. Regardless of the extent of doubt involved, it is not right to say that a certain fiqh school makes marriage lawful if the milk taken is mixed, whether in a small or a large proportion. Challenges based on formalities do not hold in spiritual aspects and in matters of piety. Therefore, such a project is anti-Islamic.”

## **SOCIOLOGISTS WARN**

The thing left for us to do is to find out the opinions of sociologists and psychologist over this question. Dr. Ali Fahmi of the National Sociological and Criminal Research Centre says:

“If such a project is put into practice it will be a failure and would produce a generation of social outcast, who will not be capable of social and environmental adjustment. It will be a sickly generation that suffers all kinds of diseases and infections, because many children will be deprived of the natural milk of their mothers, who will be dealing with the bank. The right of these children to natural nourishment will be forfeited because the milk of their mothers will be sold. Many mothers will be encouraged to turn milk selling into a trade, as the case is with blood. Such mothers will be from the lower classes which undoubtedly suffer many diseases.

“I cannot see this project as a humanitarian one, because it will encourage mothers to stop breastfeeding their own infants. There is, in addition, the psychological impact on the child. Research and studies have proved that the process of breastfeeding is not merely a matter of nourishment. It also provides a baby with a certain amount of tenderness, love, warmth, and kindness that comes from the mother. This is supported

by the Freudian theory that the mere act of offering a breast to an infant gives it, at the early stage of its life, a kind of satisfaction. Every normal infant must go through such a stage, and a child who is deprived of it will later develop certain psychological disorders."

"Such a child would grow into an anti-social creature because it has been partially deprived of tenderness."

Muhammad Fu'ad Isma'il, specialist in milk refrigeration and preservation, says:

"God, the Most Sublime, has honoured man and made him superior to all other creatures. With due respect for all mothers, I believe a milk bank system would reduce a mother to something like a milking cow or goat, whose milk is collected and processed in the various methods of refrigeration and evaporation.

"Such a method is categorically unacceptable to any human being."

The question now is why does the society of Islamic researchers not take up such vital issues and come up with the necessary studies to show, at the outset, whether they are lawful or unlawful?

## **TEST TUBE BABIES**

### **A QUESTION OF MORAL VALUES SUBSTITUTE MOTHERS--FETUSES BY PROXY**

Louise Brown was the first. Her birth was breathtakingly announced in evening newscasts and in bold newspaper outlines in hundreds of languages.

She is the founding member of a club which is losing its prestige with the constant addition of new members. Mass media are almost denying these new members the slightest mention.

112 test tube babies have seen the light, after being conceived inside laboratory tubes, since Louise Brown arrested the world's attention on July 25, 1978.

Since then, that is within some five and a half years, the techniques of laboratory fertilization have improved. This is one of the fields of which medicine is most proud.

The method, which was originally conceived as a last chance for women incapable of fertilization either because of the obstruction of Fallopian tubes or due to a natural inability, is now used as a radical treatment for an increasing number of sterility problems, including male sterility.

Some researchers are even making serious effort to explore new possibilities, such as the freezing of fertilized embryos, the transfer of an ovum from one woman to another, and using donated semen for fertilization.

Some of the pioneers in this field have been betraying signs of concern and nervousness to the extent that some big names repeatedly called, at the International Conference on Fertilization Techniques, recently held in Carmel, California, for formal principles and regulations.

Dr. Patrick Steptoe, the British Gynecologist who developed the technique together with his colleague Dr. Robert Edwards, says, "There is

an urgent need to set a framework of ethics in this field. Every institution that undertakes this process should have a special ethics committee."

Another pioneer researcher, Dr. Ian Johnson (?) of Melbourne University, Australia, says that test tube fertilization technology is still being developed and requires a great amount of research.

A specialist physician says studies are being made to transfer a fertilized ovum from the uterus of a fertile woman to that of a sterile one. He adds, "As soon as we are sure about this, we will not hesitate to use a substitute uterus for a woman that has no uterus or that is unable to conceive despite having one."

The process of taking a woman's ovum, have it fertilized in a laboratory, and then plant the fertilized embryo into the uterus of another woman is an extremely difficult and complicated one.

The only medical team that is said to have tried the process of transferring the ovum of a woman to another is the team of Dr. Allen Trounson (?) of the University of Monach (?) in Melbourne. Dr. Trounson says that he has tried to use surplus ova taken from women in the test tube fertilization programme or donated ova to plant them in the wombs of women who produce no ova or transmit hereditary diseases after having them fertilized by the husbands of these recipient, "surrogate" mothers.

The surrogate uterus process goes even further; it employs test tube fertilization for pregnancy by deputation. An ovum is taken from a woman who has no uterus, is fertilized by her husband, and is then implanted into the uterus of another woman who agrees to bear the child, giving it nothing of her genes, and to give it back to its original parents after it is born.

The procedure of this parenthood by deputation includes a contract signed with a woman who agrees to be artificially inseminated by the husband of a sterile woman. The "surrogate" mother thus gets pregnant and delivers a baby.

The problem is that a number of such woman have refused to observe the terms of the contract and to give the child up after its birth. A British court has ruled that such a mother may keep the child she has born. Many expect that better and less expensive methods will make test tube fertilization a preferable substitute for the major surgeries usually performed to open obstructed Fallopian tubes, which are the passages through which ova are released to go to the uterus and where fertilization takes place. In the United States, there are 500,000 women who are

sterile due to the obstruction or absence of these tubes. A Fallopian tube operation, whose chance of success is about 33% and costs 10,000 U.S. dollars, has so far been the only treatment.

(Special from A.P.)

## **CHILDREN THROUGH A CATALOGUE? A BLOND CHILD OR A BLACK CHILD: IT MAKES NO DIFFERENCE**

In its issue no. 11, volume 18 (May 8, 1982), *Usrati* published an article with the title "Embryo Banks and Wombs for Hire," which said:

"This small fertilized seed can be kept now at an embryo bank. We thus enter a new scientific era, where science fiction has turned into reality.

"In the future, there will be wombs for hire at the service of married couples to bear their children. It is a great hope and a rare chance of happiness for 200,000 sterile woman in France alone."

In issue no. 45, volume 15 (January 5, 1980), *Usrati* had published a report on the same subject under the title "A Woman's Womb for Hire." It said that "it is possible now to take a fertilized ovum out of the womb of one woman and plant it in another's." The report added:

"The child in this case is the first woman's. The second undertakes the process of pregnancy and delivery, after which she hands the baby over to its real mother."

Our comment was:

"This way it is possible for a poor woman to offer her womb for hire to a rich one who does not want to go through the trouble of pregnancy and child birth. When the pregnancy is over, the child is turned over to its real mother, and the surrogate mother receives her fees."

*Usrati* continues to introduce the latest in this field, with all the scientific, social, and religious reservations concerning such innovations. It is our view that the excitement on the night of July 25, 1978, when Louise Brown, the first test tube baby, was born, has been greatly reduced by the new discoveries in the field. There are many new stories which are sensational and controversial. The first is that of artificial insemination!

Some physicians have proposed to inject semen received from an anonymous person into the vagina of a woman for several consecutive

days during the period of ovulation!

Stranger still is the comment made by the physicians who have made the proposal. They say that naturally this procedure is allowed only in one case, which is that of a sterile husband!

But does a man with a sense of dignity accept such an experiment?

Is it compatible with a man's pride to accept for his wife to bear the child of another?

What kind of a man is he who does?

And the mother: can she stand the pain involved in the situation?

Would a married couple agree to have a child that is religiously and legally illegitimate?

The British Medical Association is attempting to have a law passed that would grant legitimacy to such children. But British authorities have so far declined.

Physicians argue their point of view saying that their job is humanitarian in the first place, and that they are trying to help the sterile have children of their own!

What humanitarianism!

Rita Parker agreed to be a surrogate mother by bearing the child of the married couple Pauline and Harry Taylor for a fee! It is the same crazy idea we have mentioned in earlier issues. This situation brought on a series of developments that posed problems for every body:

The surrogate mother fell in love with the father!

The wife felt jealous because of the pregnancy in which she had no biological part.

The surrogate mother considered keeping the child after its birth! Those who are unable to recognize human feelings and humanitarian considerations say that such things should not be an obstacle, for such problems can be overcome by controlling the participants through a binding legal contract signed by all involved parties!

In Los Angeles, U.S.A., a "Society of Surrogate Mothers" has been formed. A great number of married couples come to this society, ready to pay thousands of dollars to a woman who is willing to carry a child for them through artificial insemination!

It is illegal to purchase a child! Moreover, the problems of adoption in Britain are many and complex! No adoption can take place without a court's approval, and the court might disapprove adoption if the child is purchased from its real mother.

Even if legal problems can be settled, it is unreasonable to believe that a mother who feels a baby moving inside her and experiences the inevitable feelings and emotions of motherhood can easily part with the child forever by giving it to others. Undoubtedly everybody would greatly suffer in such a situation: the original mother, the husband, and the surrogate mother, not to mention the child itself.

### **Grade A Babies for Sale**

Do you want a baby of Abraham Lincoln's posterity?

Do you want a baby of the offspring of great scientists who have won the Noble Prize?

Dr. Robert Graham, of the State of California, U.S.A., says this is indeed possible.

How?

By taking semen from living Noble Prize winners, men of great intelligence, and preserving it through freezing. Later, the semen is used to fertilize women in order to produce an excellent generation. According to Dr. Graham's theory, the semen can stay potent up to ten years when it is kept with liquid nitrogen freezing.

Any lady can order an insemination catalogue, which lists the names, biographies, characteristics, areas of distinction, and hobbies of semen donors in detail. All what the prospective mother has to do is to make a choice and send her order to the semen bank to get what she wants for only £500!

Dr. Graham chose about fifty women and experimented with them; a child named Victoria Kowalski was born six months ago.

Dr. Afton Blake, an unmarried, forty-year old lady who has a doctorate degree, has given birth to a child, following this procedure. She was fertilized with the semen of a university professor chosen through the catalogue! She has decided to tell her child the truth when he is old enough to know that he is a product of the donor semen bank.

Scientist George Bunker rejects Dr. Graham's idea, which he



believes should only be used to supply us with information concerning certain abnormal chromosomes which carry cancer or Down syndrome.

Scientists at Cambridge University are meanwhile experimenting with two-day old sperms in the hope to discover the causes of male sterility. They are also following up the medical research conclusion of Dr. David Whittingham, who believes that an ovum can be kept at a degree of 196 below zero, and when the need calls, it can be restored to normal temperature, fertilized, and planted in a woman's uterus.

What else?

If we believe that life begins with conception, how can we allow physicians to tamper with it?

Science has made great leaps in this field. Even when the basic component to produce an embryo is lacking, substitutes, closely resembling the human structure, can be used in such experiments.

What else is going on behind closed doors under the guise of civilization, progress, and science?

In fact there are three teams working separately to investigate artificial insemination. Their work might come to an end in 1984.

The question remains whether it is possible to stop this tampering with human life and religious values in the name of science.

**OTHER RULINGS  
ON THE TEST TUBE BABY  
PUBLISHED IN NEWSPAPERS**

On March 15, 1984, the daily *Al-Siyasah* published a ruling (fatwa) made by the Fiqh Academy in Makkah. The study leading to the ruling was made by Professor Mustafa Al-Zarqa. Later, *Al-Sharq Al-Awsat* daily published an opposing opinion on the same issue by the Honourable Sheikh Ali Al-Tantawi.

Because of their importance and great relevance to the topic of the seminar, we have decided to include these opinions in this book, regardless of whether they agree or disagree with the seminar's recommendations.

Editor

## **A RULING OF THE FIQH ACADEMY OF MAKKAH:**

### **THE TEST TUBE BABY THREE CASES WHERE IT IS LAWFUL AT TIMES OF NECESSITY**

(Special from Riyadh)

At its seventh session in Makkah, the Fiqh Academy has passed a resolution concerning artificial insemination and test tube babies in which it urges true believers who value their faith not to resort to such a procedure except in cases of maximum necessity in which they take all precautions against any confusion of sperms of fertilized seeds.

The resolution says that "artificial insemination with the purpose of getting children in a way different from the normal one, which is direct sexual intercourse of a man and a woman, can take one of two forms.

"The first is internal fertilization by injecting a man's semen into the proper place of a woman's body."

"The second is external fertilization of a man's sperm and a woman's ovum in a test tube at a medical laboratory, and then planting the fertilized ovum into a woman's uterus."

"In either method, the woman has to expose her body to the doctor performing the procedure."

"The Academy Council has found out that artificial insemination for the purpose of getting children, whether internal or external, can be applied in seven different cases. Regardless of whether they are lawful or unlawful from the Islamic point of view, in actual practice, there are two cases of internal, and five of external fertilization.

#### **Internal Artificial Insemination**

The First Case: Semen of a married man is taken and injected into his wife's vagina or uterus, so that a sperm would naturally unite with an

ovum released by the wife's ovary. Thus fertilization takes place and, by God's Will, the fertilized ovum embeds itself in the uterus lining as in normal intercourse. This is followed when the husband has some kind of deficiency which makes his semen unable to get to the right place when intercourse occurs.

The Second Case: A man's semen is injected into the proper place of another man's wife so that fertilization would take place and the fertilized ovum would be embedded in the uterus as in the first case. This is resorted to when a man is sterile, his semen being spermless, and therefore another man's semen is used.

### **External Insemination**

The Third Case: A man's sperm and an ovum produced by his wife's ovaries are placed in a medical test tube under certain physical conditions, so that the ovum would be fertilized by the husband's sperm. After it begins to multiply, the fertilized ovum is planted at the right time into the same wife's uterus in order to embed itself in the uterine wall, where it would grow and take form like every other embryo. At the end of the normal period of gestation, the wife delivers a male or female child. This is the test tube baby technique achieved by science and offered to us by God to make things easier. A number of male and female children, including twins, have been born through this technique, and the international press and other mass media have been reporting the births of these infants.

It is the case of a wife who is sterile due to the obstruction of her Fallopian tubes which connect her ovaries and uterus.

The Fourth Case: External fertilization in a test tube is conducted with the sperm of a man and the ovum of a woman other than his wife, who is called in this case a 'donor.' The resulting zygote is implanted in the uterus of the man's wife. This is resorted to when the ovaries of a wife fail to function or when they have been removed, while her womb is normal and ready to accept fertilized ova.

The Fifth Case: External fertilization in a test tube is conducted with the sperm of a man and the ovum of a woman who is not his wife. The two are called 'donors.' The zygote is planted into the womb of another, married woman. In a case of this sort, a married couple desire to have a child, but the woman, who received the implant, is sterile due to an ovary malfunction, while her womb is normal, and her husband is also sterile.

The Sixth Case: External fertilization in a test tube involves the sperm

and ovum of a married couple and the embryo is planted into the womb of a volunteer. This is a case involving a wife who is unable to have children due to some disorder in her uterus, while her ovaries are normal and productive, or when she is unwilling to get pregnant, so another woman volunteers to bear a child for her.

The Seventh Case: This is exactly the same as the sixth, but the volunteer here is another wife of the man who produces the sperm. One wife volunteers to bear the fertilized ovum of another.

"This case is unknown in countries where bigamy is unlawful. It is restricted to countries where it is legal.

Dr. Mustafa Al-Zarqa, member of the Academy Council, who undertook this study, says, "These are the cases of artificial insemination, which has been made possible through scientific progress as a treatment for sterility."

"The council has reviewed what has been reported as actually taking place in Europe and America, where these new findings are exploited for various purposes, including what is conducted as an attempt to 'improve the human species,' or as a means to fulfil the desire of unmarried or married women who wish to be mothers but are unable to conceive for some reason or another that concerns them or their husbands. It has also reviewed what has been set up for these various purposes, such as the banks of human semen, where technological methods are employed to preserve semen, taken from particular men or from any person who might donate it or receive a fee for it, and keep it good for fertilization for a long period of time, as well as other innovations reported as having been introduced in some of the world's developed countries."

What is the attitude of Islamic Legislation?

The council has come up with the following resolution:

### **General Rules**

1. It is unlawful for a Muslim woman to expose herself before any person other than that who may legitimately have sexual intercourse with her under any conditions other than those sanctioned by Islamic Law as legitimate justifications for such an exposition.
2. A woman's need for treatment for a harmful disease or for an unnatural condition in her body, which disturbs her, is considered a legitimate justification for exposition before a person other than her

husband for the purpose of treatment, as long as the exposition is restricted in degree to what is necessary for that purpose.

3. As it is lawful for a woman to expose herself before any person, other than that who may legitimately have sexual intercourse with her, for a legitimate purpose, the person who undertakes her treatment should be a Muslim woman if possible. Otherwise, it may be a non-Muslim woman, a trustworthy male Muslim physician, or a non-Muslim one in that order. The person undertaking the treatment should not be left alone with the woman; her husband or another woman should attend with them.

## **RULING OVER ARTIFICIAL INSEMINATION**

1. The need of a married woman who bears no children and of her husband to have a child is regarded as one that may legitimately be met through one of the lawful forms of artificial insemination.

2. The first case, in which a sperm is taken from a married man and injected into his wife's uterus as a means of internal fertilization, is lawful within the general rules listed above and when it is established that the woman has to follow this procedure in order to conceive.

3. The third case, where a sperm and an ovum are taken from a married couple, fertilized in a test tube, and then implanted into the uterus of the same woman who has produced the ovum, is, in principle, acceptable in itself, but it is not completely devoid of the possibilities of confusion in its requirements and the circumstances under which it is conducted. Therefore, it should not be resorted to except in cases of extreme necessity and when the above-listed general rules are observed.

4. The seventh case, in which a sperm and an ovum are taken from a married couple, fertilized in a test tube, and then implanted into the uterus of another wife of the same man, who voluntarily accept to bear the child of the first wife, whose uterus has been removed, seems to the academy council to be lawful when necessary, subject to the aforementioned general rules.

5. In the three lawful cases, the council rules that the baby is considered to be the child of the husband and wife who produce the sperm and ovum. With lineage thus established, inheritance and other rights are established accordingly, following the rulings covering them as concerns a child and those whose lineage he assumes.

As for the wife who volunteers to bear the child of another wife of her

husband's, as in the seventh case above, she has the same standing as a milk mother of the baby, because it has received from her organism more than an infant receives from a wet nurse from whom it sucks sufficient milk to establish a milk relationship entailing the same prohibition of marriages that applies to a blood relationship.

6. The four other cases of artificial insemination described above, whether internal or external, are all unlawful from an Islamic point of view. There is no way to make any of them acceptable as the sperm and ovum are not produced by a married couple or the woman volunteering to bear the child is not related to the married couple who have produced them.

Because of the circumstances related to artificial insemination in general and of the possibility of sperm or zygote confusion in the test tubes, particularly if the practice becomes more common, the academy council advises all those who value their religious faith to avoid this procedure except in cases of extreme necessity and with great precautions against any confusion of that type.

**In the Name of God, The Compassionate, the Merciful**

## **VIEWS ON ARTIFICIAL INSEMINATION**

**Sheikh Badr Al-Mutawali Abd Al-Baset**

Praise be to God Who utters the truth and guides our steps, and Peace and Blessings be upon our Master Muhammad, the faithful Apostle, who brought us the true message and the right path, and upon his kin and Companions, as well as all those who observe his Sunna and are guided by his instructions until Doomsday.

The question of test tube babies has recently been raised, after the practice, which used to be regarded as merely hypothetical, has become a reality. Our contemporary scholars differ in viewing some of its forms and agree over others. I have sought God's help to deal with all the aspects of this question as far as the ruling of Islamic Law concerning its permission or prohibition, as well as the rulings, or the consequences of such a procedure, such as the establishment of lineage, the rules of inheritance that apply in such a case, and other relevant matters including the permission and prohibition of marriages in light of the situation and other rulings.

Through consulting physicians, who are the authorities on this subject, I have discovered that artificial reproduction may take one of the following forms:

### **The First Form:**

The woman in this case has normal ovaries, but due to some malfunction in the Fallopian tubes, a released ovum cannot get to the uterus. An ovum is obtained from her, fertilized by her husband's semen, kept in a special test tube for a period of time, and then restored to the lady's uterus.

There is no objection to this in Islamic Legislation, provided that the.



physician conducting the treatment does not see of the woman more than he has to. A child born as a result of this process is definitely called after the husband, and its mother is the woman who produces the ovum and bears the child.

But I have to express reservations here and urge extreme caution against the confusion of the fertilized ovum with other fertilized ova. We are all aware of the terrible mistakes made in laboratory tests (blood, urine, etc.), and these can never be as horrible as the confusion of fertilized ova. An error with blood or urine samples may be limited to one person only, while the slightest error of confusing two fertilized ova will effect generations to come.

If we do allow such a practice, there must be a very close supervision of the people who perform this type of treatment. Otherwise, it is better not to allow it altogether, thus acting on the principle of avoiding areas of suspicion to escape committing something unlawful. The physician should act in the presence of the woman's husband or other close relative. If we want to be extremely flexible, we may say the doctor should not be left alone with the woman in a way that allows Satan to join them. This is what I believe to be in line with Islamic teachings.

### **The Second Form:**

A man has more than one wife, one of whom is sterile, although her ovaries are normal. An ovum is taken from this wife, fertilized by the husband's semen, and then implanted into the normal womb of another of the man's wives, where it grows until it is delivered.

There should be an explanation of the question of permission and prohibition in a case of this sort and of its consequences.

I would like to start with the consequences, first to make the ruling on the resulting situation clear, and second to settle the question of lineage, for there is no doubt that the baby is named after the husband of the two women, the ovum producer and the one who bears the child. This is clear because a marriage relationship exists with each of the woman. But which of the two women is to be considered the mother of the child?

What I believe to be in keeping with Islam is that the child is the son or daughter of the woman who has born it, rather than the ovum producer, as implied by God's saying, "Their mothers are only those who gave birth to them." There can be no doubt about the verity or meaning of this statement, particularly as it has a restrictive phrasing. The ovum producer

is like a hen that lays an egg. A chick is not regarded as its baby, but rather as that of the hen that sits on it, and the chick, when it is hatched, knows no mother but the latter. God, the Great and Sublime, says, "We enjoined man to show kindness to his parents, for with much pain his mother bears him." Does the ovum producer bear the child with much pain? God also says, "With much pain his mother bears him and with much pain she delivers him." Does this apply to the ovum producer?

This is as far as texts on the subjects are concerned. In reality, the fertilized ovum is nourished for its growth with the blood of the woman who bears it. This woman also suffers the pains of pregnancy and delivery. Does it then make sense to look at the infant as the child of someone else?

Therefore, the infant is the child of the woman who bears and delivers it, and all rulings covering the mother-child relationship apply to them, including those related to inheritance, support, nursing, and marriage permission and prohibition that cover parents and grandparents, issue, siblings, and so on.

A word should be said on whether the ovum producer is to be considered as having the same standing like a milk mother. According to the Hanafi school of thought, the reason for marriage prohibition based on milk relationships is that an infant derives part of its physical makeup from a milk mother. The least that can be said in the case we are considering is that the child similarly derives part of its makeup from the ovum producer, which calls for the same marriage prohibition as a milk relationship.

But I do not feel satisfied with this explanation and tend to believe that the ovum producer's contribution is negligible and calls for no special rulings.

When a woman nourishes an infant with her blood in one of the methods known today, does that entail the same kind of marriage prohibition as a milk relationship? It seems to me that when God says, "your milk-mothers who have nursed you," This constitutes a statement that nursing implies partial contribution to the physical makeup of the child.

What I feel certain of is that this woman is no more than a step-mother for the child (another wife of his father's). Anything more than that, i.e. marriage prohibition that includes parents and grandparents, issue, and siblings is something imagined, rather than a valid point of view.

The claim of some scholars who have discussed this question that the true mother is the ovum producer is rejected on the basis of the evidence of passages from the Quran and Sunna and of common sense. It is also

rejected because of the grave consequences it might lead to, with one woman producing ova and others going through the pain and suffering of pregnancy and labour without being given the right even to the title of mothers, at a time when the first woman may have one embryo or more every month.

It is clear how serious such consequences are, which gives more reason for prohibiting the whole procedure on the basis of the many problems involved, or at least on the grounds of suspicion regarding the relationship between the infant and the ovum producer. It is only God who has perfect knowledge.

### **The Third Form:**

A woman's ovum may be fertilized with the semen of a man who is not her husband and then the fertilized ovum is restored to her uterus.

This form is absolutely unlawful, because of the confusion of lineage it involves. But is the punishment of adultery to be applied in such cases? The answer is in the negative, though all people involved in the procedure should be very strictly chastised.

Whose lineage does such an infant follow? If the woman is unmarried, the child, like a baby born to an adulteress, is called after her, but not after the semen producer, whose contribution is neglected. If the woman is married, the Prophet, Peace be upon him, settles this question with his statement, "A child belongs to the marriage bed, and an adulterer bites the dust." The child is called after the woman's husband. If the latter denies that the infant is his, the right procedure is to deny this lineage to the infant, the husband and wife take the oath of damnation, the marriage is dissolved, and the infant is only called after its mother.

If the father knows the infant is not his and yet accepts to have it as his own, he would be committing a sin, and the daughters and sisters of this man should veil in the presence of the infant, if it is male, when he becomes of age. If the child is female, caution requires that none of the man's sons should marry her. The basis of this is that the Prophet, Peace be upon him, told his wife Sawdah to veil in the presence of the son of Zim'ah's female slave, although he (the Prophet) confirmed the child's lineage as a son of Zim'ah, Sawdah's father.

I hope I have explained the forms and the complications of this issue. If I have succeeded in doing so, that is by the Grace of God. If not, the fault is mine and the influence is Satan's. Only God has perfect knowledge.

## VIEWS ON ARTIFICIAL INSEMINATION

Sheikh Ali Al-Tantawi

More than a year ago, in *Al-Sharq Al-Awsat's* issue of February 10, 1983, I answered a question about the test tube baby technique:

- (1) whether it is a challenge to God,
- (2) what the Islamic ruling on it is, and
- (3) What the ruling is on taking the seeds of a husband and his wife and planting them in the uterus of another woman.

My answer was similar to the resolution taken by the Council of the Fiqh Academy in its most recent meeting except in one point on which I offered a different view. What I said was:

"If we take a sperm from a man and an ovum from his wife, and we are able to fertilize them by making them unite, then implant the fertilized ovum (the zygote) into the uterus of the same woman, there is nothing unlawful in the procedure, provided that no 'awra' is exposed or looked at and no foreign hand touches the woman except in cases of necessity or urgent need which is ruled to be the same as necessity.

"As for taking a sperm and an ovum from a married couple and implanting them in the uterus of another woman, to be a surrogate mother, this is categorically unlawful, because a woman's womb is not something like a cooking pot, which can be emptied into another. The woman who bears the child contributes to its formation, since as a fetus it is nourished by her blood."

I gave more details in the ruling published then.

I have read in the issue of the 'Okazh daily of March 2, 1984, the resolution taken by the Council of the Fiqh Academy, which rules as lawful the case I said to be unlawful.

According to the newspaper report, the Academy has based its resolution on a study submitted by Professor Mustafa Al-Zarqa.

My comment is:

1. Sheikh Mustafa is my brother, friend, and mate at the School of Law, which we attended together and from which we graduated together in 1933, i.e. fifty two lunar years ago. He is a fiqh scholar both in the amount of his knowledge and in his understanding of Islamic fiqh. His father, Sheikh Ahmad, was a fiqh scholar, and his grandfather, Sheikh Muhammad, was one. So is his son, Dr. Anas. It is a chain of gold. Moreover, the members of the Academy Council are great venerable scholars. This, however, does not keep me from having a different point of view and to rule differently. What counts is the evidence.

2. They decide that the woman who bears and delivers the baby is not its mother, whom he inherits and by whom is inherited. They base this conclusion on the fact that the ovum belongs to the other woman. A rule of Islamic Law--and Professor Mustafa Al-Zarqa is the author of a paper that expalins such rules--says that "when an explicit statement exists, implications do not count." In the Quran, God explicitly says that a child's mother is the one who gives it birth, and He makes this statement using the shortest way to limit the meaning, which is the combination of the negative and affirmative. He says, "Their mothers are those only who gave birth to them." This means that God denies motherhood to the woman who does not deliver the child.

3. A mother is a '*walidah*' (birth-giver); the two words are synonyms. The word '*walidah*' denotes the person who does the action expressed in the verb '*walada*' (to give birth). So how can a woman actually give birth to a child and not be its legal mother?

4. God says, "A mother [*walidah*] should not be allowed to suffer on account of her child...." It is well known that actual denotation takes precedence over figurative meaning. The actual denotation of *walidah* is the one who delivers a child. How is it possible for the Academy, when God calls the infant her child, to call it the child of someone else and to say that its real mother, the one it inherits and is inherited by, is the other woman, who has not given birth to it?

5. God also says, "Men shall have a share in what their parents [*walidan*] leave behind...." A woman is inherited by a child she has given birth to, which renders her as its actual mother (*walidah*). This does not apply to the woman from whom the ovum is taken.

6. God says, "Mothers shall give suck to their children...." It is well-known that the woman who nurses a child is the one who gives it birth, even if the ovum belongs to another.

7. God also says, "With much pain his mother bears him and with much pain she delivers him." This indicates that the woman who bears and delivers an infant is his mother.

8. Moreover, the case of a woman whose ovum is planted into someone else and out of which a child is formed is not covered in fiqh books. This is not due to negligence on the part of fiqh scholars, who point out God's rulings on all cases they have known to occur among people. In fact, they even go too far in assuming possibilities and showing the rulings that cover them. In my first piece of writing, which was "On the Epistles of Reform," published in the Hijri year 1347, which was about sixty years ago, I criticized their making all these assumptions.

9. Because this procedure is not a normal one, and because of the complications and problems involved, I believe that the validity of the Academy's ruling that it is lawful is questionable. It better behooves them as scholars who fear God to reconsider their decision. I believe prohibition of the procedure has better grounds than permission. Only God, however, has perfect knowledge.

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