

Islamic tradition and medically assisted reproduction

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Abstract

Sunni Islam has no supreme legal authority and disagreement by doctors of Islamic law over all issues not clarified by Islamic law is physiological. This is the case with Medically Assisted Reproduction: after an initially critical attitude, tolerance, limited exclusively to homologous practices, is spreading, whilst recourse to heterologous practices is considered on a par with adultery or fornication and is therefore prohibited. 'Unnatural' reproduction techniques are not generally deemed capable of violating divine will. © 2000 Elsevier Science Ireland Ltd. All rights reserved.

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Sunni Islam (which includes 90% of the world's Muslims) has no supreme juridical–religious authority or teaching. The Sharia (Islamic law) is the Law of divine origin which regulates all human acts on the basis of four sources, the first three being of divine origin:

1. The Koran, that is the direct and literal word of God (the Old and New Testaments are only texts inspired by God, the original contents of which are believed to have been manipulated);
2. the 'traditions' (hadith pl. ahadith) of the Prophet Muhammad (died 632 AD) of varying legislative value;
3. the uninterrupted and unanimous consent of the doctors of the Law (Mufti, Ulama and Fuqaha) and/or the faithful; and
4. reasoning by analogy.

In situations which are regulated neither by the Holy Sources nor by the Sharia, the believer turns to a doctor of Islamic law who can only issue a legal opinion (Fatwa). The value of documents issued by the major pan-Islamic organizations, which may be the object of dispute by other bodies or religious authorities have substantially the same value.

2. Three premises are to be made

(A) From the juridical–religious point of view, the legitimisation of recourse to medical practices absent from the Tradition entails tracing a similar practice or an allusion in the Koran, the 'traditions' of the Prophet or in a classic juridical text. In their absence, a technique may be justified if therapeutically effective, if it does not violate the precepts of the faith, if it satisfies the principle of public benefit (Maslaha) and the principle of the necessity to save human life.

(B) The status of the embryo and the foetus in Muslim law has been influenced by two mainstays (Atighetchi, 1993, 1998):

1. The infusion of the soul on the 120th day after fertilization (minor sources put it at the 40th or 42nd day); consequently the foetus without a soul appears less protected compared to that with a soul. The penalties imposed for an induced abortion (almost always the 'blood price') were more severe after animation.
2. The almost unanimous acceptance of therapeutic abortion as the mother's life is of greater value than that of the foetus.

Before animation, the positions of the four Sunni juridical and canonical schools (namely Hanafite, Malikite, Shafiite and Hanbalite) on induced abortion varied from permission against a valid motive to reprobation and even prohibition. The entire context inevitably reflects on the protection of the embryo in Medically

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Assisted Reproduction, in particular on cryopreservation and experimentation.

(C) In the Koran, offspring are considered a divine blessing. The duty of curing infertility is all the more important when the importance of the family in Muslim society is considered. Sterility damages above all the image, the position and self-esteem of the woman, whose social role has always been conditioned by her reproductive capability.¹

In 1992, the world's Muslim population amounted to ~ 1 billion and 250 million individuals (24% of whom were girls of reproductive age); the average rate of infertility amongst married women of reproductive age wavered between 10 and 15%, mainly attributable to obstruction of the tubes (for example in Egypt) (IICPSR, 1998). In Tunisia, sterility affects almost 20% of married couples.

Initially, the attitude of Muslim jurists regarding the different techniques of assisted reproduction was very critical if not hostile. The reasons included the fear that they would be used outside the principles of the Sharia. The problem of sterility was to be solved by recourse to polygamy, repudiation and marrying someone else. Moreover, fertility and sterility were considered the result of divine will (Koran 42,49–50), therefore all reproductive means except natural methods were to be avoided. Lastly, in practice, the doctor carrying out the assisted reproduction would have to see the parts of the woman's body that only her husband is allowed to see. On the basis of these assumptions, even homologous artificial insemination is forbidden (for example, the Fatwa issued by the Lebanese Shiite sheikh Gawad Mughniyyah and the Penal Code of Libya, 1972).

There are currently religious personalities who prohibit all types of artificial fertilization, such as Abd Al-Halim Mahmud, who was the Sheikh of Cairo's Al-Azhar University (the most authoritative in the Muslim world) from 1973 to 1978.

¹ According to the Sharia, the juridical condition of the woman, within the family, is different from that of the man, and this is confirmed by the different possibilities offered to a husband or wife when the other partner is sterile. In fact, if the wife is infertile, the husband may remarry, as Islamic law allows polygamy up to a maximum of four wives (Koran, 4,3). Alternatively, the husband can repudiate his wife. Unilateral repudiation by the man has always lent itself to abuse and the mere accusation of a wife's infertility was sufficient for the husband to send her away. (Chafi, 1987; Santillana, 1926). On the contrary, when it is the husband who is infertile, the Sharia does not grant the woman the faculty of repudiating him. However, in the legislation of many Muslim countries today, as marriage maintains the character of a private contract, the woman may include a number of conditions in her favour in the contract (e.g. that the husband does not take a second wife, that he is not infertile, etc.) with non-fulfilment by the husband giving her the right to obtain a divorce; or, the wife can put an end to the marriage by paying compensation or redemption to the husband so that he repudiates her. Finally, in some countries, in the event of specific male diseases, the wife may have recourse to judicial divorce (Chafi, 1987).

Following the initial preclusion, acceptance became wider as medically assisted reproduction (MAR) contributes to the stability and continuity of married life, but always within the limits laid down by the Sharia, with these limits basically being respected by positive laws in the different countries (Atighetchi, 1994a, 1997).

3. How is consent to some practices of MAR articulated?

The Koran and the ahadith use the term 'zina' to indicate both fornication and adultery, i.e. any sexual relationship between a man and a woman who is not his wife or slave (Santillana, 1926), and this offence could be severely punished according to the Sharia. At present, sexuality is allowed exclusively within marriage and therefore all the techniques of heterologous artificial reproduction where an individual, who is extraneous to the couple, provides, for any reason whatsoever and independently of the time, sperm, ovules, embryos, uterus, etc. to the couple who are unable to use their own, are assimilated to acts of 'zina'. Vice versa, only homologous techniques are tolerated or accepted.

In Islam, the only legitimate filiation is that with respect to the paternal figure, therefore children generated by heterologous techniques are destined to a very difficult position as they cannot belong to the paternal family; they are not recognized: the illegitimate child (walad az-zina) belongs to the mother who generated it (Santillana, 1926).²

Other factors come into play in favour of homologous techniques. For example, the Tradition allowed the possibility of a pregnancy that did not derive from a direct carnal contact, i.e. penetration (Rispler-Chaim, 1993); the medieval jurists could accept that a woman inserted the sperm which she deemed to be that of her husband into her uterus by herself. Moreover, for those in favour of MAR, reproduction by means of instruments other than natural ones, similarly to recourse to 'unnatural' instruments for contraception, is not considered an infringement of divine will in that any reproductive (but also contraceptive) technique has an effect only if God so wishes (Atighetchi, 1994b). Lastly, Islamic morals do not stand in the way of masturbation if the final purpose is insemination or artificial insemination.

² Sheikh Mughniyyah expresses himself clearly on this: The newborn child is attributed to the mother as it is the result of fornication and inherits from its mother. If a child born out of fornication is attributed to its mother, then all the more reason why so is a child born out of artificial insemination. Moreover, the child is not attributed to the owner of the sperm as the latter did not personally perform sexual intercourse in the form of marriage or any similar union; this child is attributed to the person who gave birth to it because it is really her child and therefore it is hers also by right (Castro, 1974).

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