Maliki Perspectives on Abortion

Thomas Eich

1 Introduction: *Maliki* Islam

The history of Islamic religion starts ca. 610 CE in Mecca (situated on the western half of the Arabian Peninsula) when Muhammad received first revelations which continued until his death in 632 and were eventually collected in the Quran. In Islam, those revelations are considered the verbally inspired speech of God conveyed to Muhammad by an archangel. In 622, Muhammad and his followers left Mecca because of increasing sociopolitical pressures on their community. They relocated to Medina where they successively increased their religious and political influence which eventually also encompassed Mecca. After Muhammad's demise in 632, a series of four of his adherents successively emerged as his followers in his role of political leader of the Muslim community, the so-called rightly guided caliphs (*al-khulafa al-rashidun*): Abu Bakr (632–634), Umar (634–644), Uthman (644–656), and Ali (656–661). Struggles about this leadership position intensified especially under Uthman and Ali and led to a split in the community. This eventually culminated in the emergence of *Sunni* and *Shi'i* Islam, nowadays comprising approx. 90% and 10%, respectively, of today's worldwide Muslim population.

Over the first centuries of Islamic history, *Sunni* jurisprudence formed the so-called schools (*madhahib*, sg. *madhhab*), four of which exist until today and took their names from leading scholars: *Maliki* (named after Malik b. Anas (d. 795 in Medina)), *Hanafi* (Abu Hanifa (d. 767 in Kufa)), *Shafi'i* (Muhammad b. Idris al-Shafi'i (d. 820 in Cairo)), and *Hanbali* (Ahmad Ibn Hanbal (d. 855 in Bagdad)). Those scholars, among others, developed their legal thinking in engagement with the Quranic text which was collected as a stabilized text during the seventh century and prophetic sayings (*Hadith*) which were transmitted in interpersonal exchange

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A. Bagheri (ed.), *Abortion*, https://doi.org/10.1007/978-3-030-63023-2_11

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EBSCO Publishing : eBook Collection (EBSCOhost) - printed on 6/7/2022 11:38 AM via UNIVERSITY OF CHICAGO
AN: 2913159 ; Alireza Bagheri.; Abortion : Global Positions and Practices, Religious and Legal Perspectives
Account: s8989984.main.eds

through the generations. First efforts to collect *Hadith* in written form can be dated to ca. 700.

Malik spent most of his lifetime in Medina where he attracted many disciples from various areas such as Iraq and Egypt. His *Muwatta* is foundational for the *Maliki*. It is arranged in topical chapters mostly of legal content in which separate statements of Malik on a certain issue are grouped together. Those statements can quote exemplary behavior of the Prophet or his companions, refer to the Quran, or simply express a position based on the authoritativeness of Malik's expertise. The *Muwatta* has been handed down in several recensions which have been published together only recently. The text material pertaining to prenatal life does not show significant variation between the recensions.

Another major writing in the *Maliki* school is the *Mudawwana* of Sahnun b. Sa'id al-Tanukhi (d. 854) from Qairouan, Tunisia. It is also arranged in topical chapters, and the presentation of the material is more dialogical, reflecting a teaching situation in which a pupil engages his teacher on a specific issue. In addition, writings by other, later authors (esp. tenth to thirteenth centuries) who mostly originated from the Maghreb or the Iberian Peninsula command significant standing within the *Malikiya* which can be deduced from the fact that they are quoted continuously until today. Some of those writings are commentaries written on the *Muwatta* and the *Mudawwana*. In the contemporary world, *Maliki* law is most influential in states of the Maghreb and West Africa.

2 Abortion in *Maliki* Perspective

The *Maliki* sources discuss several scenarios addressing the premature loss of an unborn. Depending on the context of the discussion, the question whether this loss occurred for natural or external reasons is not necessarily raised. Therefore, it is not always clear whether the discussed case was a miscarriage or an abortion. Two contexts stand out. One set of statements or rulings is situated in the law of torts and discusses a premature loss of an unborn caused by an external reason, e.g., a blow to the pregnant woman's belly. However, the question whether the blow aimed at ending the pregnancy is not prominently discussed. The second context is the discussion about *idda*, the waiting period a woman has to observe after her legal relationship to the man (who had been legally entitled to sexual relations with her) has come to an end. This relationship can be ended through divorce or through the man's demise. The *idda* can differ between the respective scenarios. It was supposed to establish whether the woman was pregnant or not. In this context, the discussion arose if an *idda* could be ended prematurely through miscarriage or abortion. These discussions are situated in the area of personal status law, especially the divorce scenario. The second scenario will not be systematically addressed here because respective text passages do not discuss abortion as such. The foundational passage in Malik's *Muwatta* for the first scenario can be found in the "Book of Blood-Money" (*Kitab al-uqul*) which contains a "Chapter on the Blood-Money for

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a Fetus" (*Bab aql al-janin*). In the chapter, the term *aql* (pl. *uqul*) is not used, but the terms *ghurra* and *diya*. The *diya* is the technical term for the fine which is due for the injury or killing of a human, whereas *ghurra* applies to the killing of an unborn.

The chapter starts with two *Hadith*s transmitted via Malik. In the first one, two women from the tribe of Hudhayl had a fight. As a result of the physical violence, one of the women miscarried (*fa-tarahat janina-ha*, "she ejected her fetus"). It has been said that the Prophet ruled that a *ghurra* was due, a term explained as the giving of a male or female slave (Malik (2003), IV: 195). In the second *Hadith*, the person ruled upon to give the *ghurra* objects how he could be possibly made to pay damages for something (*ma*) or someone (*man*)[1] who did not drink, eat, make expressions, nor eject the neonatal cry (*istihlal*). The Prophet rejected this criticism. This passage is followed by several dicta. In the first one, Malik says that he had heard from Rabi'a b. Abi 'Abd al-Rahman that the *ghurra* is 50 dinar or 600 dirham, respectively, and that the *diya* for the killing of a free Muslim woman is 500 dinar or 6000 dirham, respectively. This is followed by several dicta of Malik himself from which two fundamental aspects emerge. First, Malik establishes a rule that the *ghurra* is always a tenth of the *diya* of the mother which might vary according her legal status – the explicit examples being a slave or a non-Muslim woman.

This means that the unborn is not looked at independently of his mother, because the *ghurra* is as a rule always arrived at in relation to the mother's *diya*. Second, the *ghurra* is only due if the prenatally dead embryo has left the woman's body. According to Malik, neonatal death could only be established through the *istihlal* which would automatically entail the *diya*, i.e., the act would then be considered the killing of a born human. Both aspects formulate the principle that the fetus is treated as a part of the mother's body and not as an independent entity as long as it is in the womb (Malik 2003, IV: 195–7; Sahnun 1999, VII: 2570–3).[2] In legal practice, it was not clear from the outset whether a premature loss of an unborn or something else had happened. Therefore, it was decisive to establish the nature of the object which had left the woman's body. (I am not aware of any foundational *Maliki* text in which the scenario of intrauterine cutting of the embryo is discussed.) In this process, *Maliki* law allowed to rely heavily on the statements of the respective woman about her bodily functions and their interpretation as well as the testimony of expert women such as midwives (e.g., Sahnun 1999, I: 173f and III: 947–9). This reliance on expert testimony had the consequence that for *Maliki* legal reasoning, the premature loss of an unborn in its early developmental stages could entail legal consequences. The classification of the object under scrutiny as an early embryo did not have to rely on criteria visible to nonexperts such as limbs or human shape in general. The formulation which can often be encountered in *Maliki* sources is simply "from which it is known that it is a fetus/child".[3] The *Muwatta* does not

[1] The wording differs between recensions (Malik (2003), IV:195f).

[2] This principle becomes most clear in exchanges with different positions of other *madhhabs* such as the Hanafis.

[3] I do not see a systematic differentiation in Maliki sources whether the unborn is termed "child" (walad) or "embryo/fetus" (janin).

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formulate a specific elaborate model of prenatal development as it is expressed in several passages from the Quran and *Hadith*s. Two Quranic passages and one *Hadith* stand out. The Quran states the following:

> O mankind! If you are in doubt as to the Resurrection, [consider] that we have created you of earth; then of a drop of semen (*nutfa*); then of a blood-like clot (*alaqa*); then of a lump of flesh (*mudgha*), [which is] formed or not formed (*mukhallaqa aw ghayr mukhallaqa*); so that we may demonstrate to you [our power], and we establish in the wombs what we will, till a stated term; then we bring you out as infants (22:5).

In another verse also, the Quran states the following:

> We created man of a quintessence of clay. Then we placed him as semen in a firm receptacle. Then we formed the semen into a blood-like clot (*alaqa*); then we formed the clot into a lump of flesh (*mudgha*); then we formed out of that lump bones and clothed the bones with flesh; then we made him another creation (*anshanahu khalq*^{an} *akhar*). So blessed be God the best Creator (23:12–14).[4]

In the most elaborate variant of a *Hadith* transmitted through Abdullah Ibn Mas'ud (d. 652 or 653), the Prophet says the following:

> The creation of [each] one of you (*ahadakum*) is put together in his mother's womb in forty days, then, he becomes a clot of congealed blood (*alaqa*) in a similar period (*mithl dhalika*, lit. "just like that"), then a little lump of flesh (*mudgha*) in a similar period. Then God sends an angel who is ordered to write four things and he is ordered to write down his [i.e. the new creature's] deeds, his livelihood, his date of death, and whether he will be blessed or wretched. Then the soul is breathed into him.[5]

During the first centuries of Islamic history, a widespread understanding emerged that these passages together described embryonic development in three consecutive stages, drop *(nutfa*), blood clot (*alaqa*), and lump of flesh (*mudgha*); that the meaning of "then we made him into another being" in Quran 23:14 marking the end of the three developmental stages was explained in the *Hadith* as ensoulment; and that the whole process until the breathing of the soul into the unborn lasted 120 days (Eich 2009).

In Sahnun's *Mudawwana*, engagement with this terminology is documented. For example, Sahnun asks his teacher, a disciple of Malik:

> What is your opinion if a man beat her [i.e. the pregnant woman] and she expels it [the fetus] as *mudgha* or *alaqa* and nothing of its form has visibly emerged be it fingers, eyes or other – is the *ghurra* due, according to the speech of Malik?
>
> He said: Malik said: If she expels it and it is known that it is a fruit of the womb (*haml*) be it *mudgha* or *alaqa* or blood, then the *ghurra* is due for it (Sahnun 1999, VII, 2570).

This passage shows that the question how the existence of a fetus could be proven was increasingly discussed, possibly in exchange with scholars from other emerging *madhhab*s such as the *Shafi'i* (e.g., Shafi'i (1973), VI: 107). The *Maliki* position specified that human shape of the unborn was not essential for establishing legally

[4] This translation is based on Musallam (1983, 53f.

[5] This translation is based on Ghaly (2014, 58). For a discussion of the variants, see van Ess (1975, 1–32).

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that a miscarriage or abortion had happened as long as experts attested for this. For this reason, the *Maliki* discussions of abortion focused more on the earlier stages of fetal development, and the question of ensoulment at a later stage did not draw much attention.

The above passage from Sahnun's *Mudawwana* shows how the discussion increasingly used terminology from the Quran and *Hadith*, i.e., *mudgha* and *alaqa* which refer to the second and third stages of embryonic development. The position on the first stage (*nuṭfa*) became contested within the *Maliki*. One group argued that it did not have protection rights, while the other stated the contrary.

The abovementioned *Hadith* transmitted through Abdullah b. Mas'ud started by stating that "The creation of [each] one of you is put together (*yujma'*) in his mother's womb in forty days." In Arabic, most words are derived from the so-called roots, a skeleton of usually three consonants which can be expanded upon according to certain morphological patterns. What is translated here as "to put together" has the Arabic root j-m-'. The question what *yujma'* meant exactly arose. For example, in the Quran commentary on Q. 22:5 (see above) of the Maliki scholar Abu 'Abdullah b. Ahmad al-Qurtubi (d. 1273), we can read the following:

> [Abu Muhammad Sulayman b. Mihran] al-A'mash (d. 148/765) was asked: What is it that is gathered (*yujma'*) in the mother's abdomen? He said: Khaythama told me that Abd Allah [b. Mas'ud] said: When the *nutfa* enters the uterus and God wants to create a human out of it, it [viz., the *nutfa*] moves in the woman's skin beneath every fingernail and hair. Then it establishes itself (*istaqarrat*), then it turns into blood in the uterus. This is its "gathering" (*jam'uha*) and this is the time when it is [i.e. has become] a blood-like clot (*alaqa*) (Qurtubi 1967, XII: 7).

In his *Hadith* commentary, Abu l-Abbas Ahmad b. Umar al-Qurtubi (d. 1258) noted a variant of this *Hadith* pinpointing the transformation from *nutfa* to *alaqa* to the 40th day of pregnancy (Qurtubi 1996, VI: 650). He connected this with other explanatory material also transmitted via Ibn Mas'ud:

> When the *nutfa* established itself (*istaqarrat*) in the uterus, an angel takes it into his hand and says: Oh Lord, male or female? Wretched or blessed? What is its hour of dying? What are its deeds? Where will it die? So it is said to him: Turn to "the mother of books" (*umm al-kitab*), there you will find the story of this *nutfa*. So he turns and finds its story in the mother of books.
>
> Qurtubi adds that in some transmitted variants the angel also aks: "Oh Lord, formed or un-formed (*mukhallaqa au ghayr mukhallaqa*)? And if it [viz. the *nutfa*] is un-formed the uterus ejects it as blood." He writes that the term "When the *nutfa* established itself" meant the point in time when the *nutfa* becomes *alaqa*, because only then the angel could take it into his hand. He concludes that this is the point at which the *nutfa* "has changed into the first state through which it is verified that it is a child." (Qurtubi 1996, VI: 652). In a similar passage of *Hadith* exegesis Qadi Iyad Ibn Musa (d. 1149) had described the change from *nutfa* to *alaqa* as the change to the state of "fruit of the womb (*haml*) and the angel knows that it is a child." (Qadi Iyad 1998, VIII: 127). Against this background, Qadi Iyad and Abu l-Abbas al-Qurtubi drew conclusions for the legal arena similar to the following statement from the Quran commentary of Abu Abd Allah al-Qurtubi:
>
> Beyond a doubt, the semen-stage (*nutfa*) has no [legal significance], and no legal consequences ensue if the woman expels it, because it has not [yet] been gathered (*lam tajtami'*) in the uterus; it is as if it were [still] in the loins of the man. When it turns into a blood-like

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> clot (*alaqa*) we know for sure that the *nutfa* has established itself and has been gathered (Qurtubi 1967, XII: 9).[6]

This passage also shows explicitly that in this reading, the *nutfa* was understood as semen which had not yet merged with the female contribution to procreation.

To sum up, one group of *Maliki* scholars argued that protection rights of the unborn start with the *alaqa* which became commonly understood to begin with the 40th day of pregnancy. Those *Maliki jurists* conceptualized the *nutfa* phase as a period in which male and female contribution to procreation had not merged yet. This understanding was derived from exegetical readings of the Quran and *Hadith*.

Another group of *Maliki* scholars argued for protection rights at a much earlier stage. In the chapter on coitus interruptus, in his commentary on Malik's *Muwatta*, al-Qadi Ibn al-Arabi (d. 1148) writes the following:

> The [unborn] child has three stages [of development]: [1] A stage preceding existence, in which it [viz., the child] can be prevented by coitus interruptus: this is permissible. [2] A stage after the womb takes hold of the semen (*ma'*); at this point, no one should interfere with it to prevent its emergence (*tawallud)*, as lowly merchants do, giving their maids medicine when their menstrual blood takes hold [of the semen] in order to loosen [the menstrual blood] so that the semen flows out with it and birth (*wilada*) is prevented. [3] The third stage is after formation (*inkhilaq*) and before the soul is infused into it [viz., the embryo]: [keeping it, viz., the embryo, from further development] is prohibited and forbidden more strictly than in the first two stages, because of the tradition that is recited as positing that 'the miscarried fetus lingers at the door of heaven, saying: I will not enter heaven until my parents enter.' When the soul has been infused into it, there is no scholarly dissent that it is a person (*nafs*). (Ibn al-Arabi 1992, II; 763).

This statement can be found in several other important *Maliki* writings such as the *fatwa* collection of Ahmad b. Yahya al-Wansharisi (d. 1505 or 1508) or the nineteenth century collection of paradigmatic *Maliki* rulings for daily use in court practice by Muhammad b. Ahmad 'Illish (d. 1882) (1958, I:400). It formulates on the one hand clearly that the process of procreation should not be interrupted externally even in the earliest stages of prenatal development. It puts forward a model of gradually increasing protection rights, and the larger structure of the paragraph suggests a consequentialist argumentation that a born human can possibly emerge from the process. I interpret the formulation that the external interference would cause "the semen to flow out with it," i.e., the menstrual blood, to indicate that Ibn al-Arabi's argument was that the merging process of male and female procreational contributions had started but not yet reached its end. In this sense, the major difference between the two groups of *Maliki* scholars arguing for protection rights for either the *nutfa* or the *alaqa* stage did not necessarily lie in disagreements about the conceptualization of the *nutfa* stage as a process rather than in a decision whether to take the beginning or the end of the process as a cutoff point.

In the late twentieth century Islamic debates about abortion, the *Malikiya* became mostly identified with the position put forward by Ibn al-Arabi and others. For example, in 1986, South African scholar Abul Fadl Mohsin Ebrahim wrote about

[6] This translation is based on Holmes Katz (2003, 36).

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the *Maliki* position: "It is stated that it is not permissible to induce abortion once the semen has been retained in the womb, though it be before 40 days" (Ebrahim 1986, 159). Several scholars trained at Cairo's famous Al-Azhar University portrayed the *Maliki* position similarly and followed its argumentation for protection rights already in the *nutfa* stage (Idris 1995, 27–34; Zubayr 1980, 311–320). Muhammad Mukhtar al-Salami, former Mufti of Tunisia, argued at a meeting organized by the Islamic Organization of Medical Sciences (IOMS) in 1987 that for the historical scholars, fact-finding had been the primary concern, i.e., the technical establishing that a pregnancy existed or that a miscarriage or abortion had occurred. According to the historical circumstances, this had only been possible at later stages of pregnancy. Since modern technology would allow such a diagnosis much earlier than previously, the definition of the beginnings of human life and its accompanying protection rights should be adapted accordingly (Madhkur et al. 1995, 673 and 732).

3 Current Position of the *Maliki School* on Some Specific Issues

Against this broad outline of the historical development and different positions on abortion within the *Maliki* school of thought, I want to address several specific, recent issues in brief manner with primary reference to Salami's statements.

Family Planning At a IOMS meeting in 1985, Salami allowed the techniques which prevent the merging of semen and oocyte. He also mentioned that the state may educate married couples in the use of those techniques. However, he forbids the techniques "aiming at the destruction of the fruit of the womb (*haml*) after its coming into existence by interference of the doctor in order to end the *alaqa* or the *mudgha* stages and the uterus is scraped out." He also wondered out critically why western countries invested so much money in supporting birth control programs in "the third world" rather than in the increase of water quality and food production (Madhkur et al. 1985, 120f; Ghaly 2012, 186).

Contraceptives As is clear from Ibn al-Arabi's legal reasoning quoted above, techniques hindering the merging of semen and oocyte are already historically considered allowed. In 1985, Salami argued further that during the natural processes, not every fertilized oocyte successfully achieved nidation just as not every semen achieved fertilizing the egg. Since coitus interruptus was already historically allowed, an analogy could be drawn to allowing the use of the contraceptive coil (Madhkur et al. 1985, 322f). However, Salami did not consider fertilized oocytes devoid of any protection rights. Rather, he attested them to be the first stage of life and endowed with dignity, which would forbid using them in experiments (Kellner 2010, 284).

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Morning After Pills I am not aware of any systematic treatment of the different techniques summarized under the term "morning after pills." Those techniques aiming at postponing ovulation might be considered analogous to other historical, less sophisticated techniques aiming at hindering the merging of semen and oocyte. Those techniques hindering nidation might be considered analogous to forms of the contraceptive coil.

Assisted Reproductive Technologies These are considered allowed by S*unni* scholars in general if they are carried out within the legitimizing framework of a legal marriage. To the best of my knowledge, there are no dissenting *Maliki* views on this point.

Request for an Abortion In cases of rape, the Mauritanian scholar Abdallah bin Bayyah, based in Saudi Arabia, allows it until the 40th day of pregnancy. In his undated statement, he spoke against the background of rape cases during the war in Syria, adding that if there are other ways to "cover them [i.e. the women]" (*sitr alayhinna*), they should be preferred to abortion. The legal term "covering" refers to the protection of the women's honor and their position within society. He reiterated the *Maliki* position that abortion is considered forbidden under any circumstances except in cases of the mother's life being in danger (Bin Bayyah n.d.). In an interview conducted with Austrian scholar Martin Kellner in Tunis in 2006, Salami also expressed this *Maliki* position, clarifying that he did not consider diagnosis of disability or impairment in an embryo a justification for abortion (Kellner 2010, 285). From this, analogies might be drawn to cases of unwanted pregnancy, minors, late pregnancy, and single or married women in which abortion might be considered allowed in cases where the mother's life is put into danger.

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