Abortion in *Hanafī* Law

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1 The *Hanafī* School of Law

The *Hanafī* School is one of the four *Sunnī* schools of law, which are distinguished from the non-Sunnī Khārijīs and Shi'īs by the perception that all of the Companions of the Prophet are reliable transmitters of his *Sunna* (precedent). The difference between *Sunnī* schools and non-*Sunnī* sects is that *Sunnī* schools mutually recognize each other as following the *Sunna* of the Prophet. The *Hanafī* School is the oldest extant Islamic legal school and the one which currently has the greatest number of followers, being the dominant legal school among the Muslims of the Balkans, Turkey, Pakistan, Bangladesh, India, and China. It was founded by Abū Ḥanīfa (d. 767) and his students Abū Yūsuf (d. 798), Muḥammad b. Ḥasan al-Shaybānī (d. 804), and Zufar b. Hudhayl (d. 775) who transmitted Abū Ḥanīfa's opinions, as well as their own, when they differed from their teacher. With respect to transmission, *Hanafī* legal methodology differs from other *Sunnī* schools in two respects. First, the *Hanafī* School does not allow preponderant (*ẓannī*) legal evidence to modify the clear meaning of certain (*qaṭ'ī*) legal evidence. Hence, a report narrated from the Prophet that is not well-known (*mashhūr*) cannot provide clarification for a specific command or provide specification for a general command of the Qur'ān (Ibn 'Ābidīn 1979, 17, 69–71). Second, the *Hanafī* School prefers transmissions from the Prophet that have been followed by the Companions and Muslim jurists than transmissions that are selected solely on the bases of the memory and integrity of transmitters and identifiable continuity of transmission without corroborating

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application to certify their status as legal precedents (Stodolsky 2012). As regards legal reasoning, the *Hanafī* School is distinguished by its subtle and systematic application of legal analogy in the absence of an explicit statement from the Qur'ān or the *Sunna*, as opposed to the *Ẓāhirī* or *Atharī* approaches according to which legal analogy is rejected or minimized ('Abd al-Majīd 1979, 284). At a time in which many jurists refused to consider hypothetical cases, Abū Ḥanīfa and his students were among the first jurists, if not the first, to systematically suggest solutions to hypothetical legal questions (Abū Zahra 1997, 202).

2 The Ethico-legal Status of Abortion and Its Relationship to Gestational Age

The ethico-legal discussion of induced abortion in the *Hanafī* School deals with its religious and penal consequences. The Arabic expression *Hanafī* jurists most commonly use for abortion is *isqāṭ*, which literally means to drop. *Ilqā'*, which means to throw, and the wasting of the fetus *(itlāf al-janīn*) are also used. Issues pertaining to induced abortion are discussed by traditional legal manuals in the laws of marriage (*nikāḥ*), physical transgressions (*al-jināyāt*), pecuniary compensation for physical transgression (*al-diyāt*), and forbidden and repugnant acts (*al-ḥaẓr*).

There is consensus within the *Hanafī* School on the fact that abortion after *istibānat al-khalq* (the clear manifestation of the creation of the human being in the womb) is a sin and is prohibited. However, diversity of opinion exists as to what clear manifestation refers to and whether abortion is sinful prior to this stage. According to some jurists, clear manifestation corresponds to the time of ensoulment, the manifestation of the spirit in the physical body, which as a metaphysical occurrence has to be determined based upon transmissions from the Prophet. Other jurists take clear manifestation to refer to the physical formation of the fetus. One of the most distinguished *Hanafī* jurists, Imam Fakhr al-Dīn Ḥasan b. Manṣūr, famous as Qāḍī Khān (d. 1196), writes in his respected *fatwā* collection, *Fatāwā Qāḍīkhān*, the following:

> If she drops the child through a procedure [i.e. intentionally], they [i.e. other *Hanafī* jurists] have said that if nothing becomes manifest from his creation, she does not commit a sin. I do not accept this opinion, since if the *muḥrim* breaks the eggs of a prey, he becomes liable, as this is the origin of the prey. Since he is penalized with a penalty there, at least sin is attached to her here if she drops the child without a [legally valid] excuse. However, she does not commit the sin of killing. If she drops the child after his creation becomes manifest, the [penalty of] *ghurra* [equivalent to five hundred silver coins] becomes obligatory.

Qāḍī Khān understands the sentence "if nothing becomes manifest from his creation, she does not commit a sin," which is frequently repeated in *Hanafī* works, literally, as can be seen in his rejection of that view. The passage demonstrates that in Qāḍī Khān's period, there were two opinions on the ethico-legal status of induced abortion prior to the manifestation of creation. According to one opinion, abortion before the manifestation of creation is permissible and does not constitute a sin.

According to the second opinion advocated by Qāḍī Khān, abortion before the manifestation of creation is not permissible and does constitute a sin. While a medical doctor aims to stop any threats to a person's life in the form of sickness, the Muslim jurist aims to stop any threats to one's eternal life in the hereafter in the form of sin, evaluating each action according to its eschatological consequences based on revelation. Qāḍī Khān, unlike proponents of the position that inducing abortion prior to manifestation of creation is not a sin, considers this action to be detrimental for salvation. Another interesting aspect is the subtle but effective argument Qāḍī Khān adduces to support his *fatwā*. There is no known explicit statement from the Prophet that directly addresses the question of whether abortion before manifestation of creation is sinful. Is there an explicit ruling on terminating something the killing of which is forbidden after its creation, so that by legal analogy, the same ruling can be applied in this case? In the special ritual state of *iḥrām*, which is necessary for the pilgrimage to Mecca, hunting prey is prohibited as is breaking the egg of a prey, based on narrations from the Prophet and ʻAlī and Ibn ʻAbbās, who were the Prophet's cousins and among the most knowledgeable of the Companions in legal matters (al-Mawṣilī 2:236, not dated). This is significant because slaughtering an animal that is not a prey is not forbidden. The fact that breaking the egg of a prey is also forbidden shows that even though the egg is not actually an animal or a prey in its current state, the *Sharīʻa* applies the ruling of prey to its origin in prohibiting the killing of both. Thus, through this subtle legal analogy, Qāḍī Khān argues that the prohibition of killing a human being can be applied to the embryo even before it takes human form because it is the origin of the human being. Thus, according to him, induced abortion prior to manifestation of creation becomes contingently allowed only when a legally valid excuse exists.

In a second *fatwā*, Qāḍī Khān describes circumstances that constitute a legally valid excuse for abortion before manifestation of creation:

> If the nursing mother becomes pregnant, and the father of the little one does not have the money to pay for a wet nurse, and the life of the child is feared for, they [i.e. *Hanafī* jurists] have said that it is permissible for her to have a procedure in seeking to bring down blood, as long as what is carried is a sperm (*nutfa*) or *ʻalaqa* or *muḍgha* in which no part of the body has been created. They have estimated that period as 120 days. They only allowed her to terminate what is being carried by seeking to bring down blood because it is not a human being, so it is permissible [to terminate it] to protect the human being. (Qāḍī Khān 2010, 3:296–297)

The Qur'ān describes different stages of gestation as follows: "Then we made him a drop in a stable protected place. Then we transformed the drop into *ʻalaqa,* and transformed the *ʻalaqa* to *muḍgha*, and transformed the *muḍgha* to bones, and dressed the bones with meat. Then we built him through another creation. Blessed is Allah, the best of creators" (23, 13–14). Two of the early stages of the embryo before it takes human form are called *ʻalaqa*, which literally means something that hangs and has traditionally been understood to refer to a clot of blood, although some contemporary jurists interpret it as the ovum implanted in the uterus based on the literal meaning of the root, and *muḍgha*, which literally means a chewed piece of meat and has traditionally been understood to refer to the lump of flesh before it

takes human form. In this text, Qāḍī Khān relates that *Hanafī* jurists estimated the time it takes the embryo to manifest human parts to be 120 days. In modern medicine, pregnancy is counted from the first day of the mother's last period since the date of conception is rarely known; however, gestational age is 2 weeks after the last period since during menstruation one cannot get pregnant. In the writing of classical *Hanafī* jurists, 120 days begin with the conception. As will be seen below, at least some *Hanafī* jurists were aware that human form may be present prior to 120 days. In this instance in which the firstborn baby is only able to consume the mother's milk and would perish without it and the parents cannot afford another source of nutrition, it is deemed permissible to terminate what is not yet considered a human being to save the human being. This is in accordance with the legal maxims "the greater harm is removed with the lesser harm," "when two forms of harm are in conflict, the greater is taken into account by committing the lesser," and "the lesser of the two bad deeds is chosen" (ʻAlī Ḥaydar 2003, 1:40).

Zayn al-Dīn Muḥammad b. Abī Bakr al-Rāzī (d. 1267) in his legal compendium *Tuḥfat al-mulūk* states, "it is permissible for the woman to drop the child [i.e. have induced abortion] as long as nothing becomes manifest from his creation." This suggests that al-Rāzī considers the physical manifestation of the human form or one of its parts as the limit for the permissible abortion. The famous *Hanafī ḥadīth* scholar and jurist Badr al-Dīn al-ʻAynī (d. 1451) in his commentary *Minḥat al-sulūk* on *Tuḥfat al-mulūk* states the legal justification for this opinion: "because he is not a human being as long as his creation does not become manifest." The understanding of Zayn al-Dīn b. Nujaym (d. 1563), another important *Hanafī* jurist, is the same as Rāzī's: "a woman who carries out a procedure to drop her child does not sin, as long as nothing becomes manifest from his creation" (Ibn Nujaym, 8:233). This is also the opinion of al-Mawṣilī in his influential work *al-Ikhtiyār* (al-Mawṣilī, 2:402, not dated).

Rāzī mentions another case which is relevant: "[in the case of] a pregnant woman in whose belly the child is sideways during birth and one fears for her life, and it is not possible to take the child out except by cutting him, it is not permissible to cut him." ʻAynī in his commentary explains the juristic reasoning: "because her death is imagined and it is not permissible to destroy a living human being by an imagined outcome" (al-Qāsim 2007, 4:182, 183). On the same issue, Ibn Nujaym comments, "giving life to a soul by killing another does not occur in *Sharīʻa*." *Hanafī* jurists are consistent in their understanding of the legal maxim "harm is not removed by its like," which restricts the maxim "necessities make the prohibited permissible." For example, according to the latter maxim, one who is about to starve and has no money does not commit a crime if he takes food from someone else without consent, although he has to pay its value once he is able. Likewise, someone who is threatened by death unless he destroys someone else's property can do so. In both cases, the loss of property is preferable than loss of life. However, the starving person cannot take food from someone who would starve if the food is taken, and the person threatened by death unless he kills another person cannot kill the other person, because "harm is not removed by its like" (ʻAlī Ḥaydar 2003, 1:38, 40). The

same reasoning is applied on this issue. After the manifestation of creation, the life of the mother is not prioritized over the life of the child in the womb, since they are both human beings:

> Kamāl al-Dīn Muḥammad b. ʻAbd al-Walīd (d.1456) in *Fatḥ al-Qadīr*, an authoritative commentary on al-Marghīnānī's *al-Hidāya*, identifies a critical issue concerning the timing of the manifestation of creation. Is dropping [i.e. induced abortion] permissible after pregnancy? It is permissible as long as nothing has been gradually created. Then in more than one place they [i.e. the *Hanafī* jurists] have said that that does not happen except after 120 days. This necessitates that they mean by creation the blowing of the spirit [into the body]. Otherwise this is a mistake, because based on observation creation occurs before this time. (Kamāl, 3:274)

Previously, we have seen that several *Hanafī* jurists meant by the manifestation of creation the appearance of the human form or any human part and that this was understood to take place in 120 days. Kamāl al-Dīn explains that since one can empirically observe that such formation occurs prior to 120 days, the manifestation of creation must refer to ensoulment, which occurs 120 days after conception according to certain ḥadīths transmitted from the Prophet.

In *al-Nahr al-fā'iq*, a commentary on al-Nasafī's *Kanz al-daqā'iq*, the Egyptian *Hanafī* jurist Sirāj al-Dīn ʻUmar b. Ibrāhīm b. Nujaym (d. 1596) writes, "it remains whether dropping [i.e. induced abortion] is permissible after pregnancy. Yes, it is permissible as long as nothing has been gradually created from him. That does not happen except after 120 days." The author then transmits Kamāl al-Dīn's comment translated above. He then states, "their unrestricted statement [that abortion is permissible before 120 days] means that the permissibility of her abortion before the mentioned time does not depend on the husband's permission." In other words, according to this jurist, a woman does not need the husband's permission for abortion if it is performed before 120 days. Here, Sirāj al-Dīn b. Nujaym is using the legal principle "what is unrestricted goes without restriction as long as there is no evidence of restriction through an explicit statement or indication." Since the previous generations of *Hanafī* jurists who argued that induced abortion was permissible before manifestation of creation did not state the restriction that this is only the case if the husband allows it, this suggests that the permissibility of abortion does not depend on the husband's permission within 120 days. The author then presents the alternative opinion that abortion is not possible without a legally valid excuse prior to 120 days from passages in other *Hanafī* works. The first of these is Qāḍī Khān's *fatwā* translated above. The second is from *al-Dakhīra* of Burhān al-Dīn al-Bukhārī (d. 1219):

> It is transmitted from *al-Dakhīra*: if she wants the throwing [i.e. induced abortion] before the passage of the time in which the soul is blown [into the body], is that permissible for her or not? They [i.e. the *Hanafī* jurists] have disagreed upon this. The jurist ʻAlī b. Mūsā used to say it is *makrūh* (legally repugnant). The water after it falls into the womb results in life, so that it has the ruling of life just as in the egg of the prey of the *ḥaram* [i.e. in Mecca]. A similar statement is in *al-Ṭahīriyya*. Ibn Wahbān has said that the permissibility of abortion is interpreted to mean in the case of a [legally valid] excuse or that she does not commit the sin of killing. From what is in *al-Dakhīra* it is clear that they only meant by creation the blowing of the spirit. (Sirāj al-Dīn 2002, 2:276–277)

‘Abd al-Wahhāb b. Aḥmad known as Ibn Wahbān (d. 1367) seems to reinterpret the position of previous *Hanafī* jurists who state that abortion is permissible without sin prior to 120 days. According to Ibn Wahbān, permissible in these statements means permissible with a legal valid excuse, not absolutely, and without sin means without the sin of murder, not without any sin. One can at least say that this is not how Qāḍī Khān and Burhān al-Dīn al-Bukhārī understood the *fatwā* for the permission of abortion before 120 days since the former said, “I do not accept this opinion,” and the latter said, “they have disagreed upon this.” In other words, Qāḍī Khān and Burhān al-Dīn al-Bukhārī understood the *fatwā* of permissibility without sin prior to 120 days literally, and Qāḍī Khān rejected it, whereas Ibn Wahbān reinterprets it non-literally so that it agrees with the *fatwā* that abortion is not possible prior to 120 days without a legally valid excuse.

One of the most authoritative *Hanafī* legal works of the modern period is Ibn ‘Ābidīn’s (d. 1836) multivolume *Radd al-muḥtār*, which is a multilayered work consisting of his extensive gloss on al-Ḥaṣkafī’s (d. 1677) *al-Durr al-mukhtār* which in turn is a commentary on al-Timurtāshī’s (d. 1595) *Tanwīr al-abṣār*. Because of the structure of the work, Ibn ‘Ābidīn discusses the issue in more than one place. In the law of marriage, Ibn ‘Ābidīn transmits the section from *al-Nahr al-fā’iq* (Ibn ‘Ābidīn 2003, 4:336). Ibn ‘Ābidīn also quotes *al-Dakhīra* of Burhān al-Dīn al-Bukhārī and cites the passage from Qāḍī Khān translated above (Ibn ‘Ābidīn 2003, 9:537). Elsewhere, al-Ḥaṣkafī quotes the famous legal poem known as *al-Wahbāniyya* of Ibn Wahbān:

> It is repugnant for her to drink to drop her pregnancy
> And permissible for an excuse if there is no form

The couplet shows, as we have seen above, that Ibn Wahbān’s position is the same as that of Qāḍī Khān. Abortion is not permissible both before and after the manifestation of creation, and the manifestation of creation is indicated by the physical formation of the fetus. In his gloss, Ibn ‘Ābidīn adds that the form is the appearance of hair or a finger or a foot or the like (Ibn ‘Ābidīn 2003, 9:610).

3 Penal Consequences of Induced Abortion

There is consensus within the school on the fact that abortion after clear manifestation of the creation of the human being in the womb necessitates compensation for the father or the inheritors of the baby if the mother induces abortion without the father’s permission. It is a remarkable aspect of Islamic law that while in the pre-Islamic tribal custom women and children did not inherit, under Islamic law, not only women and children but even the fetus is given the right of inheritance (al-Maydānī 2002, 657). In this case, a mother inducing abortion will not inherit according to the general principle of Islamic inheritance law that the killer does not inherit from the killed (al-Maydānī 2002, 652). The penalty is called *ghurra*,

equivalent to 500 dirhams (silver coins), which is one-twentieth of the penalty (*diya*) for accidental killing.

In *al-Fatāwā al-Bazzāziyya*, Muḥammad b. Muḥammad al-Kirdarī al-Bazzāzī (d.1424) writes the following:

> [In case] she strikes her belly or drinks to throw her child [i.e. have a miscarriage] and subsequently throws, the *ghurra* is upon her '*āqila*. Expiation does not become obligatory upon her according to the opinion of the Imam [Abū Ḥanīfa]. It is [also] said that expiation is necessary according to the opinion of the Imam. If it is with the permission of the husband, nothing becomes obligatory [in terms of compensation]. The procedure for miscarriage is like drinking [something that would cause a miscarriage]. If she carries out a procedure or drinks not for a miscarriage, there is no penalty. If she commands a woman to do that and the woman does it, there is no [penal] liability for the one who is commanded. (al-Bazzāzī 2010, 3:221)

In Islamic law, if killing is not intentional, compensation is paid by the '*āqila*, which in traditional Arab society was the extended family or clan of the culprit. If there were no '*āqila*, the compensation was to be paid by the treasury, although some jurists state that the culprit should pay. If the woman induces abortion without the husband's permission, the '*āqila* have to pay the *ghurra*. Al-Bazzāzī sheds light on whether expiation for accidental killing, which is either emancipation of a Muslim slave or, if that is not possible, two continuous months of fasting, is obligatory for a woman who has abortion. Al-Bazzāzī observes that there are two narrations from Abū Ḥanīfa on this issue, but the fact that he relates the necessity of expiation with the passive voice, which in Arabic indicates doubt concerning the reliability of the transmission, shows that he prefers the opinion according to which no expiation is due.

Ibn Wahbān, in the poem mentioned above, corroborates the penalty:

> If she drops a dead body, there is a *ghurra* concerning the dropped
> Presented to his father from the '*āqila* of the mother

In another passage in Ibn 'Ābidīn's work, al-Timurtāshī states, "the '*āqila* of a woman who drops a dead body through medicine or an action without the permission of her husband become liable for the *ghurra*. If he [i.e. the husband] permits it, then no [penalty is due]." Al-Ḥaṣkafī in his commentary on this sentence states, "she does not commit a sin as long as some of its creation does not become manifest (Ibn 'Ābidīn 2003, 10:254–255)." Ibn 'Ābidīn in his gloss writes, "it is not ambiguous that she commits the sin of killing if his creation does become manifest and he dies by her action." This is an important statement that shows that according to Ibn 'Ābidīn, induced abortion after the manifestation of creation is killing from the religious perspective although from the penal perspective it is not considered murder in deference to the *Sunna* of the Prophet, who imposed the *ghurra*, not the punishment of murder on one who caused a miscarriage by striking a pregnant woman. However, Ibn 'Ābidīn's position seems not to have been unanimously accepted by *Hanafī* jurists. Mufti 'Abd al-Qādir al-Rāfi'ī on his gloss on *Radd al-muḥtār* comments, "How does she commit the sin of murder given the fact that his humanness has not become established [by birth]?" (Ibn 'Ābidīn 2003, 14:809).

From what is presented above, one can infer the legal response of the advocates of the two positions to the issue of inducing abortion in case of pregnancy from rape. According to jurists who do not consider induced abortion to be a sin before the manifestation of creation, induced abortion in case of pregnancy from rape would not be sinful prior to the manifestation of creation. According to jurists who consider induced abortion to be a sin before the manifestation of creation unless there is a valid excuse, the response would depend on the mufti's evaluation of the particular case. According to both positions, since after the manifestation of creation the fetus is a person and inducing abortion is sinful and constitutes a crime, as a rule, induced abortion in case of pregnancy from rape would not be permissible after the manifestation of creation. In such a case, if a mufti issues a *fatwā* permitting induced abortion due to individual circumstances, the onus would lie on the scholar to justify his position.

While the focus of this work is on classical juridical positions, it is important to note that these debates continue into the modern period. Some contemporary leading *Hanafī* jurists maintain that after 120 days, induced abortion remains impermissible and sinful irrespective of circumstance using the rationale outlined previously; others allow it contingently "where the mother's life is in grave danger" (al-Kawthari 2006, 56). Similarly among those who consider abortion prior to 120 days to be impermissible, debates continue regarding what circumstances constitute legally valid excuses for induced abortion prior to 120 days. Based on a hadith from the Prophet in *Ṣaḥīḥ Muslim* (d. 875) that states that the angel comes to the womb after 40 or 45 nights (Muslim, 4:2037, not dated), other contemporary *Hanafī* scholars maintain that the spirit comes to the embryo at this point rather than in 120 days. According to this view, abortion is prohibited after 40 days and only permissible before then if there is a legally valid excuse (Ucatli 2009).

As for an evaluation of the two main arguments, the perspective that induced abortion before manifestation of creation is permissible is based on the premise that the embryo before manifestation of creation is not a human being. Jurists who argue that abortion is not permissible at this stage without a legal excuse acknowledge this, but they argue that the origin of human life is protected just as human life proper is protected, since *Sharī*'a prohibits breaking the egg of a prey the hunting of which it prohibits. It seems, therefore, that the opponents of the permissibility of abortion before manifestation of creation have a compelling legal argument against the proponents, whereas the proponents have not articulated a defense responding to the argument of the opponents.

4 Conclusion

Hanafī jurists have agreed upon the following points. Inducing abortion after 120 days postconception is prohibited and constitutes a sin. In this case, if the female induces abortion without the father's permission, compensation for the husband or the inheritors of the fetus who is considered a human being is necessary in

the form of the *ghurra*, equivalent to 500 silver coins. The mother will not inherit from the fetus according to the legal principle that the killer does not inherit from the killed. If the abortion is induced with the permission of both parents, there is no pecuniary penalty. However, the *Hanafī* jurists differ on the following points. Jurists disagree upon what the manifestation of creation refers to: some jurists state that it refers to ensoulment, while others take into consideration the appearance of human form or features. Prior to the manifestation of creation, some jurists have said that abortion without a legally valid excuse is prohibited and is a sin, while others have said it is permissible and is not a sin. Both sides agree that before the manifestation of creation, the being is not considered a person. However, those who support the position of impermissibility consider that the natural result of pregnancy is the birth of a human being so that pregnancy is sufficient to prohibit abortion without a legally valid excuse. In other words, those supporting the permissibility of abortion before manifestation of creation consider the actual state of the being, while those supporting the prohibition consider its potential and natural outcome. As for the nature of the sin, those who argue for prohibition agree that prior to manifestation of creation, the sin is not the sin of killing. After the manifestation of creation, some jurists consider the sin of abortion as akin to the sin of killing, while others hold that before birth, such equivalence is not warranted.

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