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Physician’s Juristic Role

This article discusses the normative and descriptive aspects of the physician’s juristic role and responsibilities according to Islamic law. In discussing the normative aspect of the physician’s juristic role in Islamic bioethics, one must first distinguish the juridical aspect of Islamic bioethics from bioethical views of Muslims. While the juridical aspect of Islamic bioethics is based upon the Sharīʿah, the divine law revealed to the Prophet Muḥammad, and the hermeneutic principles established to study and apply its norms and commands to concrete situations, bioethical views of Muslims may not necessarily be based upon this revelation. It is therefore possible for a Muslim physician to view the role of the physician based on bioethical opinions formulated by non-Muslims without referring to revelation. Though this would be a bioethical view by a Muslim, it would not constitute Islamic juridical thinking. Thus the discussion of the normative aspect of the physician’s juristic role will focus not on the bioethical views of Muslims concerning the physician’s juristic role, but rather the physician’s juristic role according to the revelation and Islamic legal methodology (*uṣūl al-fiqh*). Similarly, the related yet distinct subject of *adab* of medicine (medical etiquette), which deals with how health care professionals can achieve excellence in practicing their profession, falls outside the scope of this entry which deals with the procedure by which particular actions of physicians

are assigned into one of the five Islamic ethico-legal categories of obligatory (*farḍ*), commendable (*mandūb*), permitted (*mubāḥ*), disliked (*makrūh*), and prohibited (*ḥarām*).

Issues of Islamic law are of two types: *manṣūṣ ʿalayh*, referring to issues concerning which there are *nuṣūṣ* (sg. *naṣṣ*), that is, explicit statements from the *Sharʿī* (the Revealer of the divine law), and *mujtahad fīh*, referring to issues in which *ijtihād* (juristic interpretation or reasoning) can be used. According to the Qurʾān, where there is an explicit statement from Allah or the Prophet, the Muslim physician, like all Muslims, has to follow the command: "It is not for a believing male or female when Allah and His Messenger decide a matter to have a choice in that matter. Whoever disobeys Allah and His Messenger has clearly gone astray" (33:36). As for *mujtahad fīh* issues, in which diversity of opinion is permissible, there are two possible scenarios. If the physician practices under the legal authority (*wilāyah*) of a Muslim ruler whose government formulates health care policies, the physician has to follow the directives of the Muslim legal authority according to the Qurʾānic command "Oh those who believe, obey Allah and obey the Messenger, and those who are in command among you" (4:59) and the legal maxim "the ruling of the ruler ends dispute (*ḥukm al-ḥākim yarfaʿ al-khilāf*)" (Ḥamawī, 1985; al-Qarāfī, 1995). If the physician does not practice under Muslim rule, another process is applicable since the injunction of following the command of the Muslim ruler is not applicable. The physician has to consult a Muslim jurist when there is uncertainty about the permissibility of a treatment according to the Qurʾānic command "ask the people of remembrance if you do not know" (16:43) (Arozullah and Kholwadia, 2013; Ghazālī, 1993). This understanding of revelation is based upon two hermeneutic and jurisprudential maxims that are widely accepted across Islamic legal schools, "consideration is given for the general import of the utterance not the specificity of the occasion of revelation" (Nasafī, 1998; Rāzī, 1999; Qurṭubī, 1964; Bayḍāwī, 1997) and "the imperative form denotes obligation" (Nasafī, 1998; Rāzī, 1999; Bayḍāwī, 1997; Zamakhsharī, 1986).

As for cooperation between the jurist and the physician in the process of *ijtihād*, the framework al-Ghazālī provides in *al-Mustaṣfā* is useful both because of its influence on later works of Islamic jurisprudence as well as the accessibility and clarity of the model for non-jurists (see al-Ghazālī, 1993). Al-Ghazālī divides *ijtihād* in determining and applying legal causes (sg. *ʿilla*, pl. *ʿilal*) into three categories. The first category is *taḥqīq al-manāṭ*, or the actualization of the legally applicable factor. This refers to rulings in which there is an explicit statement from Allah or the Prophet that identifies the legal criteria, or rulings on which there is consensus among Muslim scholars on the criteria. In such rulings, the obligation of the legal person (*mukallaf*) is to exercise his judgment in applying these criteria. Al-Ghazālī provides several examples. A person who has to look after his relatives has to provide what is sufficient for them, which is the criterion determined by Islamic law. But what is sufficient depends on estimating what is sufficient for that relative. Thus even after one knows the legally applicable factor, one has to use one's judgment for its application in a real-life situation. Another example is indemnity for the destruction of property. If one causes the death of a horse, one has to pay the value of the horse, which is the criterion determined by Islamic law. But the precise amount that is to be paid is based on the estimated value of the item in question. Hence even when Islamic law determines the criteria, one may have to exercise judgment in applying them.

The second type of *ijtihād* is *tanqīḥ al-manāṭ*, the refinement of the legally applicable factor. Al-Ghazālī explains that this refinement refers to cases in which the Sharīʿah links the ruling to a factor that is mentioned with other attributes in a statement, so that the jurist has to identify which of the attributes is relevant. The example al-Ghazālī mentions is that of a Bedouin who tells the Prophet that he had intercourse with his spouse while

fasting in Ramadan. The Prophet tells the Bedouin that he has to emancipate a slave as expiation. Al-Ghazālī observes that here the legal cause of the expiation cannot be that it is this Bedouin who has committed this act, since the ruling is the same whether another Bedouin or a Turk or an Iranian is involved because of the consensus that legal obligations are general for all individuals. Likewise the fact that the fasting of that particular day was violated is also irrelevant, since the violation of another day within that Ramadan or the Ramadan of another year has the same ruling. The legally applicable principle is not the fact that the spouse was involved, since the ruling would be the same for adultery in Ramadan as well. Thus through omitting irrelevant elements the jurist identifies that the legal cause of the expiation is the intentional violation of the fasting of Ramadan. This type of *ijtihād* involves the refinement of the legal cause without legal derivation (*istinbāṭ*), since the legally applicable factor is mentioned within the *naṣṣ*.

The third type of *ijtihād* is called *takhrīj al-manāṭ*, or the extraction of the legal cause, which refers to the legal analogy (*qiyās*) proper. In this type of juristic reasoning, legal derivation is necessary because the *naṣṣ* mentions the ruling without the legal cause. Al-Ghazālī gives the examples of the prohibition of wine and the prohibition of the exchange of unequal quantities of wheat. In both cases, the legal cause of the prohibition is not mentioned, so the jurist seeks to extract it. Jurists agree that in the first case the legal cause of the prohibition is intoxication, while in their derivation of the legal cause of the prohibition in the second case they differ. The Shāfiʿī school's derivation of the legal cause is that wheat is a foodstuff, so that unequal exchange of other types of foodstuff is also prohibited, whereas according to the Ḥanafī school the legal cause is kind and measure, such that anything that is of the same kind and is measured in the same way, whether by weight or volume, can only be exchanged in equal quantities, whether the commodity is a foodstuff or not (al-Maydānī, 2002). Al-Ghazālī states that the extraction of the legal cause cannot be arbitrary or subjective but rather has to be justifiable. He then lists the juristic methods by which the extraction of the legal cause is carried out. One is identifying the legal cause through the indication of the *naṣṣ*, where the primary purpose of the *naṣṣ* is not to identify a particular legal cause, but the legal cause can be identified by its implication or indication. For instance the primary purpose of the Qurʾānic command "the male to which the child belongs must pay their [the mother's] sustenance" (2:233) is to establish that the father has to pay for the mother's sustenance while she nurses the baby. However, by using the phrase "the male to which the child belongs (*al-mawlūd lah*)" instead of the word father (*al-wālid*), the statement indicates that the genealogy of the child belongs to the father, although that is not the primary purpose of the command (Nasafī, 1998; Ḥaṣkafī, 1979). Another method is what jurists and theologians call examining (*sabr*), which corresponds to the valid argument form called disjunctive syllogism, where only a limited number of legal causes are possible and one of them is shown to be true by the elimination of the others. The last technique al-Ghazālī gives is identifying the legal cause through its effect (*taʾthīr*). When the legal cause of a ruling is not explicitly stated, one extrapolates the possible legal cause from another ruling in which the cause is known either through an explicit statement or legal consensus. To illustrate, Ghazālī states that by the consensus of all Muslim jurists the status of a child as a minor is the legal cause of the necessity of parental consent in economic transactions. Since being a minor as a legal cause is effective in economic transactions, it is also the legal cause of the necessity of parental consent for other issues relating to minors. Through these jurisprudential techniques Muslim jurists are able to extract the legal cause when the Sharīʿah does not explicitly state the legal cause of a ruling.

Al-Ghazālī's classification provides a methodology for the division of labor between the jurist and the physician. The first type of *ijtihād* in the actualization of the legally applicable factor is necessary for all Muslims and is not limited to the jurist. For instance, according to the Sharīʿah all

Muslims must face the direction of the Kaʿbah, which is the legally applicable factor in the orientation of prayer, but the determination of the direction is left to the judgment of the person when there is no one to ask. One cannot avoid this type of *ijtihād* (al-Ghazālī, 1993). The refinement and extraction of the legal cause, however, require legal expertise and is the domain of the jurist since these are based on technical legal knowledge. In the framework of Islamic bioethics, in issues that are open to legal interpretation, the duty of the jurist is to identify the legally applicable factor through the refinement (*tanqīḥ*) or extraction (*takhrīj*) of the legal cause, while the responsibility of the physician is the application of the legal factor in actual cases (*taḥqīq*). To give a concrete medical example, according to the Ḥanafī school there are three criteria for the use of prohibited substances in medicine: necessity, the absence of a legally permissible treatment, and certainty or satisfactory knowledge that the treatment is effective (Ibn Nujaym, 1997; Ibn ʿĀbidīn, 2003). Once the Ḥanafī jurists articulate these criteria based on revelation, the physician is the one who is best equipped to determine whether these criteria are met in a specific medical case. The physician can judge whether not using the prohibited substance may lead to the loss of life or limb, whether there is an alternative treatment option, and whether the treatment is effective based on research or previous experience. Hence in the process of cooperation between the jurist and the physician, the jurist articulates the criteria for the permissibility of a certain medical treatment and the physician exercises his judgment in determining whether the criteria are met in any particular case.

As for the descriptive aspect of the physician's juristic role, contemporary physicians do not always follow the framework of classical Islamic legal methodology, engaging instead in determining legal criteria as opposed to merely applying them. Several factors have facilitated this. One is the spread of the phenomenon that Zaman (2009) refers to as collective *ijtihād*. In classical Islamic jurisprudence, even though jurists often discussed their opinions with their colleagues and at times changed their positions, the final position was the articulation of a single jurist. In modern times, jurists increasingly come together to form institutions that issue collective decisions in which biomedical scientists participate. Other factors include the rapid advances in medicine and the fact that the literature on these advances is mostly in Western languages in which the traditional *ʿulamāʾ* in the Muslim world may lack fluency. As a result, the *ʿulamāʾ* have increasingly relied on physicians and other biomedical scientists in understanding biomedical issues. This in itself does not contravene any principle of Islamic legal methodology, since jurists in the past have relied on expert opinion when necessary in fields such as astronomy and medicine (Stearns, 2011). However, the physicians involved in these institutions that issue Islamic bioethical guidelines do not only inform jurists, but also offer their own religious opinions based on their interpretations of the sources of Islamic law (Ghaly, 2013 and 2015).

According to classical Islamic legal methodology, this normative role is acceptable only if the physician meets the same standards of legal expertise that are required of the jurist as detailed in works of Islamic jurisprudence. This is because determining the legal status of an action in which there is no explicit statement in the Sharīʿah or consensus constitutes normative *ijtihād*, which traditional Islamic jurisprudence defines as "the jurist doing his utmost to obtain probable knowledge of a ruling of the Sharīʿah" (Ḥaṣkafī, 1979; Ghazālī, 1993). The requirements for normative *ijtihād* consist of knowing the meaning of the words of the Qurʾān and the sunnah according to the Arabic language and the Sharīʿah, their hermeneutic categorizations and applications, the reliability of Prophetic reports, rulings on which there is consensus, and various aspects of legal analogy. Traditional Islamic jurisprudence makes no exception to these requirements based upon one's expertise in any other field; hence physicians and

biomedical scientists who do not possess these qualifications cannot engage in normative *ijtihād* that articulates legal criteria. However, they can play an invaluable role in consultation and application of the legal criteria as experts in their fields.

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