

# Ensoulment and the Prohibition of Abortion in Islam

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Ensoulment and the Prohibition of Abortion in Islam Arif Abdul Hussain Al-Mahdi Institute, Birmingham UK

# Ensoulment and the Prohibition of Abortion in

# Islam

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## Abstract

This article identifies ways in which philosophical ideas of personhood influence rulings concerning abortion. The terms 'life', 'soul' and 'spirit' are clarified through a comparative study of authoritative Shi'a texts. There is a consensus that ensoulment occurs at four months, when the spirit causes the emergence of potentiality for rational thought. This stage marks a significant change in the status of the foetus, and abortion after this stage is prohibited except in extreme circumstances when the mother's life is threatened.

Recent rulings by Shi'a scholars on abortion at earlier stages are interpreted in terms of potentiality for ensoulment. The distinction between active and passive potentiality for ensoulment clarifies the reasons why jurists hold different views on whether the prohibition of abortion applies before the stage of implantation. The relevance of this discussion to some methods of contraception is indicated.

## Introduction

The notion of personhood in ethical inquiry in Islam about issues of life and death is associated in the minds of many with the possession of an entity known as the human soul. By virtue of this, a person's life is deemed sacred and is to be preserved as far as possible. Within Islamic thought there exists no ambiguity about the possession of souls by living human beings as well as by foetuses in the later stages of their development. What is less clear is the case of a fertilized ovum, or the foetus in the earlier part of its development.

Can it be said to have a soul? And if so can it be said that the law prohibiting killing applies to it? Is there a particular stage in the development of the foetus when it acquires a human soul, which may be known as 'ensoulment', such that abortion before that stage is not prohibited? Or is ensoulment itself extraneous to the question of the right to life and the prohibition of killing, and is it the potentiality for ensoulment that determines the law? We are then faced with the further questions of whether the distinction between active and passive potentials is significant, and how this may relate to the application of the prohibition in particular cases.

The primary task is to clarify the meaning of the term ensoulment. To prepare for this, the article will first concentrate on the clarification of the terms 'life', 'soul' and 'spirit' from various perspectives and attempt to determine how these terms relate to each other. This will then allow us to consider the meaning of

ensoulment in the Islamic understanding and to establish the basis for our inquiry into its relevance to the prohibition of abortion. After this, relevant religious texts will be used to identify the time of ensoulment and the status of the foetus at ensoulment. Rulings of Shi`a scholars on the issue of abortion will be examined in relation to the concepts of ensoulment and potentiality for ensoulment, so that the Islamic legal and moral perspective on the criteria for the prohibition of abortion can be identified.

It needs to be clarified from the outset that the issue of the right to life will be discussed in the context of the prohibition of the termination of pregnancy. This is because it can be argued that a foetus does not possess the sort of existence that would qualify it as having that right, whereas it is possible to consider what constitutes the criterion for the prohibition of killing a foetus.

With this let us begin with the clarification of certain terms.

## **Life**

According to Hasan al-Basri, an eighth-century theologian, life is an expression of knowledge and ability (Basri, 12). This implies that life is not an independent existence but rather the description of a particular existence possessing certain qualities. The definition restricts life to those subjects that are described as possessing knowledge in whatever sense the word is used. Human beings are the most obvious examples and the qur'anic verse which states:

***'We have made from water all living beings, and from them there were those that crawled on their bellies, while others took to walking on two and yet others on four', (Q 24.45)***

apparently limits life to the animal kingdom.

Rida al-Sadr states that life is an expression of mobility and reproduction, or a thing's ability to move and to reproduce (Sadr, 1986, p. 271). He appeals to common sense in stating that a growing tree would be attributed with life as opposed to a withered dry tree in which the growth has ceased. This understanding would then extend the notion of life to plants since motion and reproduction can both be related to growth.

Sadr al-Din al-Shirazi, in agreement with Nasir al-Din Tusi, describes life as being an expression of perception and ability (Sajjadi, 1375/1996, p. 305). This definition has been interpreted by Rida al-Sadr to mean sense perception and motion, in which case it would be limited, as in the above definition of Hasan al-Basri, to the animal kingdom (Sadr, 1986, p. 271). However, in the view of Mohsin Fayd al-Kashani, Sadr's student and follower in philosophy, perception means self-consciousness which extends in some way either essentially or accidentally to all existence (Kashani, 1362/1984, p. 22). If this is the case, plants as well as animals can be said to be alive as they have the ability to grow.

Furthermore, for these two philosophers life is an attribute of being in the sense that it is synonymous

with existence, so that the extent to which every existent entity is alive is relative to the level of its existence (Kashani, 1362/1984, p. 24). As well as being inconsistent with the above definition of Hasan al-Basri, this would extend life to beings below the plant kingdom that in general possess what the philosophers term 'nature', in which the forms coming upon matter direct things to their completion.

However, these two philosophers would distinguish between life as a quality of being and life in its complete sense, where the former is described as accidental while the latter is seen as essential due to the existence of the immaterial soul (Kashani, 1362/1984, p. 24). This second definition would restrict life in its full sense to the animal kingdom.

From this discussion we see that life is not an independent existence but rather an attribute of being, so that when being displays certain properties or qualities, such as motion and perception, it is said to be alive. Beyond this, all the above views are in agreement that at the very least animals are properly described as possessing life in the full sense of the term.

It is apparent that there is no differentiation, when we refer to life in this sense, between animal and human life in terms of ensoulment and so this definition of life has little relevance when it comes to determining the right to life of a foetus, if that right is based on the view that ensoulment distinguishes human life from animal life. Moreover, if life in this sense is proposed as a criterion for the law, it can be said that a foetus does not possess perception or ability of this type, except potentially. The concept of life does not itself allow any variation in the extent of the right to life of a foetus during the stages of its growth since it seems that this potential is present in the foetus throughout its development.

It will be necessary to identify the cause that generates the form of life within beings that allows them perception and ability, and first the factor in living entities that is perceiving, or self-aware, and has ability. Discussion of the soul in the next section will consider responses to the questions: 'What is it within living entities that is described as having perception and ability?' and 'Does this factor mark animal and human life alike or is it different in the two cases?' The following sections will then consider what causes the existence or emergence of the above factor, what time is stipulated for its occurrence, and the relevance of this to the prohibition of abortion and the right to life of the foetus which may be contingent upon it.

## **Soul**

Although there are extensive deliberations on the soul in Islamic religious and ethical literature, this article will only be concerned with the issue of the soul specifically insofar as it is connected with life. According to Rida al-Sadr, soul is in fact life, thus the animal life is the animal soul while the human life is the human soul and so on, and every higher form of soul would necessarily include lower forms, as is the case with life itself (Sadr, 1986, p. 303). However, if we accept that the soul is equivalent to life, we will face the same problem as that stated above and the question of ensoulment will be reduced to a matter of a specific stage of human life within the foetus. This is not satisfactory since, as yet, we have

not defined how human life differs from animal life, nor have we determined what is responsible for causing this progress in the life of a foetus.

Beyond this, we find an obvious difference in the usage of the two terms, for whereas the word 'life' and its derivatives can be used to denote any form of existence that displays particular properties of motion and perception, or at least growth, so that we say a tree is alive, or a child is alive, or an elephant is alive, the same cannot be asserted confidently of the word 'soul', for it would be difficult to assert that a tree has a soul, or an animal has a soul, without specifying that it is a plant soul or an animal soul.

Moreover, the wider literature would suggest that the above identification of soul with life is inaccurate. Whereas life, as described above, is merely an expression of perception and ability or growth, the soul is awareness and ability, or at least it is an expression in the general sense of an entity's self-awareness allowing a particular type of living being to function in accordance with its abilities.

The entities possessing higher souls will, of necessity, include the lower forms of soul: for if the soul is the factor that manifests the properties that are an expression of life, and if the lower forms of life are subsumed within the higher, then it logically follows that higher forms of souls will contain the lesser forms. In this case we can inquire about the stage in the growth of the living foetus at which it can be said to be attributed with a particular kind of soul and its distinct properties. This will then enable us to consider the time of such ensoulment and the relevance of this to the prohibition of killing the ensouled being, insofar as it is contingent upon it.

The above understanding can be deduced from certain religious sources such as a narration from the first Shi'a Imam, `Ali ibn Abi Talib, when he was asked about the soul by a faithful companion of his, Kumayl ibn Ziyad. The following is the Imam's reply:

The souls are four, the growing vegetative soul, the sensually perceiving animal soul, the rational human soul and the Godly soul. Each one of these has five strengths/abilities (dispositions) and two properties.

The vegetative soul has the ability to retain, absorb, digest, repel and grow. Its two properties are increase and decrease. The origination of this soul is from the liver.

The sensual animal soul has the ability to hear, see, smell, taste and touch. Its two properties are pleasure and anger. The origination of this soul is from the heart.

The rational human soul has the ability of contemplation, remembrance, [attaining] knowledge, understanding and alertness; this is the closest in resemblance to the souls of the angels. Its two properties are righteousness and wisdom. This soul does not have [a bodily] source from which it originates.

The Godly soul has the ability to persist after annihilation, [to find] felicity in misfortune, dignity in humility, needlessness in poverty, and perseverance in calamities. Its two properties are pleasure and

acceptance [at the decree of God]. The origin of such a soul is from Allah and to Him it returns.

Allah the most exalted has said: ***'And when I blow my spirit into him' (Q 15.29)*** and: ***'O contented soul return to your Lord being pleased with Him and He with you' (Q 89.28)***. Reason will be at the centre of all. (Kashani, 1358/1980, p. 267)

This narration indicates clearly that human beings are characterized by the third kind of soul, but also possess animal and vegetative souls in a manner that seems to be progressive and evolutionary. This means that the developing human foetus can be described as having the vegetative soul prior to the animal, which in turn is present before the human soul. The narration refers to the soul's ability to function at the level of its particular existence: the vegetative soul has the ability to grow, the animal soul has the ability to perceive, and the human soul has the ability to reason.

It is important that there is a categorical difference between motion or growth or perception and the human soul. Thus it is clear that the earlier definition of life as an expression of movement and perception describes life at the level of the animal soul, but the human soul is a rank above it. This is a crucial distinction, which may be significant in thinking about ensoulment as the time or stage of the appearance of the human soul within the life of a foetus. The relevance of the prohibition of killing to the status of a growing foetus with an undeveloped brain may be based on this understanding of ensoulment as marking the appearance of the human soul and the potential for rationality. Just as it can be said that the foetus is both alive and has the potential to become completely alive, so it may be that at ensoulment it possesses a human soul in as much as it has the potential for rationality.

Fazlur Rahman suggests that for Ibn Sina, following Aristotle to some extent, the soul is an entelechy of the body. This means that the soul can be both a form of the body and either inseparable from it, as in the case of vegetative and animal souls, or separable, as in the case of human souls (Rahman, 1975, p. 196). The similarity between this view of Ibn Sina and the above quoted narration of the Imam `Ali is striking in terms of the statement that vegetative and animal souls have a source within the physical body while the human soul does not.

As for the issue of the relation of matter to the soul, Ibn Sina believes that the universal soul parts with a particular faculty of the soul when the material subject is ready to receive it in the process of its growth. Further to this, it is the soul that is responsible for creating motion within matter due to its love for re-ascending to God (Nasr, 1993, p. 207). This is consistent with the above view of ensoulment as the stage at which the human soul enters the foetus.

For Sadr al-Din Shirazi, the soul is a power or a form that works on matter not directly but through other forms. This would mean that the human soul is a power that operates through the vegetative and animal souls. Furthermore, according to him, the human soul is not something that is separate from the body and enters it, but is something that is produced at a particular stage in the development of the body (Rahman, 1975, p. 199).

Thus ensoulment is more a question of emergence than of the soul entering body. However, both he and Ibn Sina are in agreement that the human soul persists beyond the body in which it emerges or to which it comes. Also, they concur that the human soul is a potential at the initial stage of its occurrence and then gradually actualizes itself through its progression to completion in rational thought, finally existing independently of the body in which it initially occurs.

This brings further clarity in terms of the distinction between ensoulment and rational thought. Ensoulment is the stage of the occurrence of the rational soul, while rational thought is the actual activity of the human soul. This provides a clearer understanding of ensoulment as the emergence or occurrence of the potential for rationality, and not rational thought itself.

It seems so far that life is an expression of the souls of particular existents through which the latter display certain properties and functions befitting their forms of existence. The functions of the existents correspond to the nature of their souls, for whereas vegetative existents have the ability to grow, animals have, in addition to growth, the ability to perceive and move, while humans, in addition to these two, also have the ability to reason.

The question remains of how the foetus progresses from the stage of a vegetative soul to an animal soul and beyond. What causes the emergence of souls progressively within a developing foetus and in particular the rational human soul? Let us now look briefly at the understanding of 'spirit' (ruh.) in Islamic literature to see if it has any connection with the issue of ensoulment.

## **Spirit**

According to Islamic philosophical and mystical traditions, 'spirit' is seen as a primary emanation from the divine essence (Rahmani, 1376/1997, p. 275). The Qur'an uses the word spirit (ruh.) in various different meanings. Among these is the spirit as a being which is like the angels (Q 16.2), but, according to various Shi'a traditions, above the ranks of the angels, which may be the origin of the philosophical and mystical notion just mentioned (Kashani, 1362/1984, pp. 269–275). In this sense, the term is used in descriptions of prophets and believers as a divine helper assisting them, which is often called the Holy Spirit (Q 5.110). At other times it is used in the sense of a life-giving agency of God, as in the verses referring to the blowing of the spirit into the form of Adam, and the blowing of the spirit into the womb of Mary (Q 21.91, 15.29). It is further used to mean something issuing from the command of God, of which God has given us little knowledge (Q 17.75).

Finally, it is used to refer to something that descends by the command (amr) of God to the earth with the angels and ascends back to the heavens (Q 97.4, 70.4). According to a narration of the fifth Shi'a Imam, spirit is of four types: the Holy Spirit, the Spirit of Faith, the Spirit of Desire, and the Spirit of Body (Kashani, 1362/1984, p. 269).

All of the above would place spirit at the level of humans and above, and suggests that at the very least

the spirit plays a part in the emergence of the human soul and its subsequent evolution through the process of its actualization. This is supported by various commentaries on the verses of the Qur'an describing the stages of a developing foetus (Q 23. 14). According to a tradition from the eighth Shi'a Imam `Ali al-Rida, it is when the bones are covered with flesh that the spirit enters into the body, and subsequent to that it is made into another creature (Kashani, 1415/1995, p. 13). Ibn al-`Arabi states the same in his commentary on the above verses but without quoting any references (Ibn Al-`Arabi, 1978, p. 13). From this it would seem that the stage of ensoulment is the point at which the Spirit enters into the growing foetus.

Let us quickly recapitulate the argument so far, before proceeding to determine the time of ensoulment and its connection to the prohibition of abortion. Life is an expression of certain attributes displayed by existences at particular levels of their existence. Soul is that which displays those attributes that characterize life, and the higher forms of life and soul contain within them the lower forms of life and soul. Spirit is, at the very least, that factor whose inception within the foetus is a cause for the emergence of the human soul.

It would follow from this that ensoulment, in Islamic thought, is a stage in which the spirit causes the emergence of the human soul, that is, the emergence of the potential for rationality. It occurs when the spirit enters into a living foetus that is already displaying features of the vegetative life and animal life and also presumably has within it the full potential of the animal soul. The emergence of the potential for rationality is different from the completion of the potential for rationality in that the first is marked by the stage of ensoulment while the second is probably at the time of birth.

## **The Time of Ensoulment**

There are several narrations from the Shi'a Imams describing the signs of each of the developmental stages and the fixing of the time for each of these stages. Here we shall give only one narration, from the fifth Shi'a Imam Muhammad al-Baqir who states:

The stage of the fertilized ovum is forty days, the stage of the clot is forty days, the stage of the lump of flesh is forty days. When four months are completed the foetus's destiny and gender are determined. Subsequent to this it is another creature. (Bahrani, 1999, p. 335)

This tradition together with that given above from Imam Rida specifies the time of the coming of the spirit, and consequently the emergence of the rational soul within the foetus, at four months.

This is further supported by a tradition from Imam `Ali with regard to the blood money (diya) payable after the abortion of a foetus, in which he states that when a foetus is aborted at four months the full blood money will have to be paid in accordance with its gender since at that time it is a full human being (Bahrani, 1999, p. 336).



So, on the basis of the above narration about the coming of the spirit, we can conclude that at four months the foetus is deemed to possess a rational human soul. However, it is not certain from what the first Imam says about the 'full human' whether the humanity of the foetus begins with the determination of gender irrespective of the potential for rational thought, or at the beginning of the emergence of the potential, or at some stage in the completion of the potential.

There is another report from Imam `Ali cited by al-Rawandi in his *Fiqh al-Qur'an*, in which the Imam is reported to have said that a human is complete at birth. This seems to introduce a difference between the notion of completion for the purpose of blood money and physical completion at birth, which may imply a difference between completion in terms of the emergence of the potential for rationality at four months and the completion of the potential and the beginnings of its actualization at birth. Needless to say, the two options may have contrary implications for the status of the foetus at each stage, and the next section will consider further the relation between ensoulment, the status of the foetus, and the prohibition of abortion.

## **Ensoulment and the Status of the Foetus**

If ensoulment represents the beginning of the potential for rational thought within the growing foetus, which occurs at the four-month stage, we may ask the question: Does this stage of ensoulment mark any change in the status of the foetus?

We know that in matters of inheritance a foetus, whatever its age, will be considered a potential inheritor. Al-Muhaqqiq al-Hilli states in his *Shara'i` al-Islam-*

A h.aml (pregnancy/foetus) will inherit with the condition of its live separation (i.e. living birth), thus if the foetus is still-born then it will have no share [of inheritance]. If however it dies after birth then its share will be for its inheritors. (Shirazi, 1988, p. 147)

Several texts of the Shi`a Imams support this, such as the following from the sixth Imam al-Sadiq who states: 'My father (i.e. al-Baqir) stated that if a newborn moves in a discernable manner [prior to dying] then it will inherit and will be inherited' (Shirazi, 1988, p. 147).

According to this, when a child is conceived, its existence in the womb as a fertilized ovum or a foetus will bar the second rank of inheritors from inheriting from its father until its birth. However, this legal right seems to be contingent upon the child's being born alive so that, if the child is still-born, it will not have the right of inheritance. The child's right is therefore a potential right contingent upon its having life at the time of birth. This suggests that the stage of actual ensoulment has no impact on the legal status of the foetus and it is the rather potential for ensoulment which is the determining factor.

In the case of blood money, we do find a difference in the status of a foetus prior to and after the stage of ensoulment. There is a detailed narration from the Imam `Ali which states:

If the foetus is aborted prior to the coming of the soul then the blood money will be a hundred dinars divided into five parts as follows in accordance with the stages of the developing foetus as described by the verse:

Fertilised ovum twenty dinars  
Clot of blood forty dinars  
Lump of flesh sixty dinars  
Bones eighty dinars  
Flesh appearing on the bones hundred dinars

After the coming of the spirit (ruh) it will be the full blood money. Since it is a full human it will be a thousand dinars for a male and five hundred for a female in accordance with the gender (Bahrani, 1999, pp. 335–336).

Here we see that the stage of ensoulment is a definite demarcation point in the status of the foetus, as indicated by the requirement to pay the full blood money in the case of an abortion. However, the gradual increase in the blood money penalty prior to the stage of ensoulment indicates that abortion is unlawful and implies that the potentiality for ensoulment within the foetus is a determining factor in prohibiting abortion so that we note an increase in the penalty as the growing foetus approaches the stage of ensoulment.

Moreover, with reference to burial rites, we find reports from both the sixth Imam al-Sadiq and the eighth Imam al-Rida that the foetus will be given full ceremonial rites of washing and shrouding after the completion of its physical formation or at the completion of four months (Amili, 1409/1988, vol. 17, p. 501). This implies that a foetus, prior to ensoulment at four months, does not require ceremonial burial rites, which in turn implies a change in the status of the foetus at the time of ensoulment.

Let us now review the verdicts of some of the recent Shi'a jurists with regard to the issue of abortion, considering their views in relation to ensoulment and potentiality for ensoulment. According to the late Sayyid Abu al-Qasim al-Khu'i, who was the head of the religious seminary of Najaf, Iraq, from the early seventies until his death in the early nineties, the abortion of a fertilized ovum prior to its implantation in the uterus would not be considered as abortion since the carrier cannot be said to be pregnant. Therefore it would not be unlawful. The twenty dinar penalty is only applicable when the ovum is implanted in the uterus, as this is the criterion for the beginning of pregnancy and hence the criterion for application of the prohibition of abortion (al-Khu'i, 1992, vol. 2, p. 305). Based on this understanding the use of certain contraceptive methods, such as the morning-after pill and the coil, were deemed permissible by him, and this is how his public statements are popularly understood.

It has been speculated by some that al-Khu'i may have based his judgement on his understanding of the principle of continuity. This principle, as derived from the fifth Imam al-Baqir, basically says that a state of certainty in relation to a particular subject cannot be undermined by an accompanying doubt (Sadr, 1985, p. 248). In our case it would translate to mean that at the time of cohabitation the female is certainly not deemed to be pregnant. This certain absence of pregnancy is then extended to rule out any possibility of using the notion of pregnancy at the stage when there is doubt, that is, prior to the ovum

embedding itself in the uterus. This would mean that al-Khu'i had no doubt that the stage of the ovum becoming embedded in the uterus definitely marks the beginning of pregnancy, though he entertained doubt as to whether the stage prior to it should be considered pregnancy or not. He therefore uses the principle of continuity to exclude the prohibition of abortion at this stage.

It seems more likely that al-Khu'i did not apply the rule prohibiting termination at the earlier stage because of the medical convention that pregnancy begins at implantation.

(Al-Khu'i allegedly had no qualms about seeking the opinions of medical experts on determining the time of this event.) This understanding of when the prohibition of abortion is to apply assumes that the potentiality for ensoulment is a relevant criterion. However, for Al-Khu'i this does not include every form of potentiality for ensoulment. It is the active potential for ensoulment as opposed to the passive potential, the active potential being the capacity of the fertilized ovum in an appropriate location to arrive naturally at the stage of ensoulment, and the passive potential being that of the unfertilized ovum and the spermatozoon either on their own or after coming together but prior to implanting in the uterus. Thus, according to this view, the stage of ensoulment at four months has no significant bearing on the prohibition of abortion; it is rather the active potential for ensoulment that requires the prohibition, which then remains applicable throughout pregnancy.

In summary, it seems in al-Khu'i's view, the potential for ensoulment begins when pregnancy begins, and, according to the specific medical convention, this is at the embedding of the ovum in the uterus. The possibility of using specific conventions to determine Islamic law by providing definitions for the terms used in the legal texts has been a point of debate. In the present context the question arises of whether it is the convention existing at the time of revelation that should determine the meaning of pregnancy, or present-day medical convention. Needless to say, they may have different implications.

Some contemporary scholars, for example Sayyid `Ali al-Husayni al-Sistani of Najaf, Iraq, is popularly believed to hold the view that, although abortion is illegal, it is permissible to abort a foetus prior to the four-month stage for valid reasons additional to a threat to the mother's life. However, al-Sistani's view, contrary to that of al-Khu'i, is that the prohibition of abortion does apply in normal circumstances even prior to the implantation of the fertilized ovum in the uterus. It seems that al-Sistani considers the passive potential for ensoulment as the criterion for the law, not the notion of pregnancy, however it may be defined.

A similar view, with an indication of his legal methodology, has been given on his internet site by the contemporary Iranian scholar Ayatullah Sane'i. His response to a question about abortion of the foetus prior to ensoulment at four months reads:

Abortion under all circumstances is prohibited: even when there exists a doubt in terms of fertilization or delay of menstruation it is not permissible to take medicines or their like [to abort]. This law, even though it is contrary to the principles, yet it is established due to an authoritative report indicating it. However, in

cases of alleviating danger and even the difficulty of bearing a child from the mother, it would be permissible to abort prior to the four-month stage of ensoulment due to the judicial precept of 'absence of sin' (nafy al- haraj). (Sane'i, 2005)

It seems that Sane'i does not believe that the potential for ensoulment would have any relevance to the prohibition of abortion were it not for the authoritative narration indicating the complete prohibition of abortion after intercourse, since according to him it is inconsistent with important principles, most likely including the principle of right over one's self. However, he does indicate that the stage of ensoulment is significant, as it is the point at which the prohibition of abortion becomes absolute, and he allows abortion prior to this stage in cases of difficulties related to the pregnancy by application of the precept of 'absence of sin'.

The precept of absence of sin is derived from verses in the Qur'an such as: 'Allah does not intend to place difficulty upon you' and 'Allah does not burden the people beyond their capacity', or the Prophetic narrations such as: 'My community (umma) is not held responsible for mistakes, forgetfulness and what they cannot bear.' This precept according to Mirza `Ali al-Mishkini, a contemporary Iranian scholar, is sometimes used to lift the imposition of established Islamic laws from individuals incapable of discharging them (Mishkini, 1409/1989, pp. 212-214).

Sane'i's ruling seems to be based on a very literal interpretation of a narration implying the absolute prohibition of abortion at any stage in normal circumstances. However, in cases of difficulty to the mother he sees it as acceptable to employ the precept of absence of sin prior to ensoulment at four months. At ensoulment and beyond, however, he would most probably, like al-Sistani, conclude that an abortion could only be performed in the 'absence of sin' in circumstances where the life of the mother was in danger. This could be due to the fact that the foetus is considered in such narrations as a complete human being and thus it is a question of comparing the right to life of the mother with that of her unborn child. In the opinion of these two scholars it is the mother's life that takes precedence.

From this discussion it seems that the various views on the prohibition of abortion can be interpreted in terms of the significance of the stage of ensoulment and the distinction between active and passive potential for ensoulment. The stage of ensoulment brings about an absolute prohibition of abortion of the foetus with the exception of instances when the mother's life is under considerable threat.

According to some, however, before that stage the foetus can be aborted for lesser reasons. For some the prohibition applies from the stage of implantation when there is active potential for ensoulment. Other scholars maintain that the termination of pregnancy is absolutely forbidden at any time after the sexual relations that resulted in conception. In this case the criterion for application of the prohibition is simply potentiality for ensoulment, irrespective of whether it is active or passive.

This could be based on their interpretation of a narration about a woman who feared conceiving, and so permission was sought from the Imam to allow her to take medication at a very early stage to cause an

abortion. However, the Imam refused to allow it, stating that the fertilized ovum was the beginning of the creation of a child (ʿAmili, 1409/1988, vol. 29, p. 24). As a result of the theological discussion of ensoulment, the significance of the stage of ensoulment is recognized, but potentiality for ensoulment is also important for scholars in their legal judgements and one point over which they differ is the type of potentiality which should constitute the criterion for the applying the prohibition of abortion.

## **Ensoulment as the Criterion for the Right to Life**

From what has been said above about the rights of the foetus, we can see that it is difficult to ascertain a single criterion for the prohibition of abortion. It is clear that the presence of rational thought cannot be the criterion as this would lead to the permissibility of aborting the foetus at any stage prior to birth. However, it can be concluded from the previous section that the stage of ensoulment, when there is potential for rational thought, is directly connected with the status of the foetus.

Certain rights seem to be constant, such as that of inheritance, which may at first glance be based on life or its potential and not ensoulment and its potential. This is because, according to the law, the only condition for a foetus becoming an inheritor is that it should be born alive. If ensoulment were the condition, the potential for rationality would be assumed. But if a child is born without a fully developed brain such that it cannot reason, it would still inherit because it is alive. However, it can be said that an undeveloped brain may be deemed to be the beginning of the potential, even if it is never completed, so that the criterion of ensoulment is satisfied, which is the emergence of the potential of rationality and not necessarily its completion. Other rights fluctuate in terms of their intensity and degree, as is indicated by the permissibility, prior to ensoulment, of aborting a foetus for reasons less than a threat to life.

If the criterion for prohibiting abortion is the potentiality of ensoulment, the law would be dependent upon specifying whether passive or active potentiality was meant. If the passive potential of ensoulment were taken as the criterion for the prohibition, it would permit the aborting of foetuses that do not have sufficiently developed brains after the four-month stage. But this would be regarded as a totally unacceptable conclusion by Shiʿi scholars. On the other hand many scholars may not have a problem with giving permission for aborting a foetus that does not have a brain at all after the four-month stage as it is merely a lump of flesh and bones which apparently has life only in terms of growth. This brings us back to the possibility described above, that if ensoulment is seen as the beginning of the emergence of the potential for rational thought, without necessarily entailing its completion, the potentiality for ensoulment may provide a satisfactory criterion for the prohibition of abortion which, when applied in different ways, can accommodate all the situations and options discussed above.

## **Ensoulment and modern day challenges**

If the potentiality of ensoulment is the criterion for the law of prohibition of abortion then we may ask in relation to the status of a fertilised ovum and foetuses in artificial wombs. There seems little doubt that it

would be seen unlawful to kill fetuses that have reached the stage of ensoulment be it in artificial wombs however the case may not be so clear with regard to the fertilised ovum in its early stages. It maybe seen lawful to terminate at such instances if as the late al-Sayyid Muhammad al-Husayni al-Shirazi states that the life of the growing foetus prior to the stage of ensoulment is an expression of the life of its mother<sup>1</sup>.

If this is the case then it can be concluded that a fertilised ovum prior to ensoulment can be aborted due to not having life derived through the mother. This is because the criterion for the law in this case will be seen as not only the potential for ensoulment which in other words is the particular type of independent human life for the foetus rather this life in addition to life it has accidentally through its mother.

It also seems possible that many would not object in cases of aborting fertilized ovum prior to ensoulment where the spermatozoon and the ovum are from unknown donors. In both of the these cases we see that in addition to the potential of ensoulment the factor of parent is influential in the law and an artificial womb does not seem to be a satisfactory substitute. In the case when the parents are known and are by the assistance of an artificial womb trying for a child it seem difficult to ascertain the law since on the one hand the element of the mother's life is non-existence but on the other the identity of the parents and their intention to have the child are known.

It appears from all of this that the case for artificial womb is far less clear then that of a fertilised ovum in a natural environment where the potential ensoulment seems to be a sufficient criterion. The natural environment being either the womb that produces the ovum or the one that carries it as in the case surrogacy.

Although it can be argued that when discussing the law of prohibition in terms of the natural environment the whole notion of the natural environment itself is overlooked and hence the assertion that the potential for ensoulment is a sufficient criterion for the law is not entirely accurate. Rather the criterion, more accurately, is the potential for ensoulment in a natural environment prior to the actual ensoulment in which case if the natural environment is removed then there remains theoretically no problem is terminating a foetus prior to ensoulment. From this it can be said that the actual criterion for the law is the potential of ensoulment in a natural womb, where the natural womb is seen as the potential while ensoulment per say in the case of an artificial womb.

This although it includes most of the above cases of the artificial womb yet it omits the instance when consenting parents chose, for whatever reason, to have an ovum fertilised and grown in an artificial womb. Here it would not appear so clearly that they would have the right to terminate the foetus prior to ensoulment.

If the criterion is of identity of parents and their initial want for a child then the law of permissibility of terminating a fertilised ovum will be restricted to cases where the identity of the parents is either not known or that it is known but the parents do not chose to have a child and are no more than consenting

donors. The parents through choice in this case will include both the natural carriers of the spermatozoon and the ovum and their recipients through whatever means.

The other case that seems difficult to answer is one in which a foetus is developed in an artificial womb whose parents are unknown and is just prior to the stage of ensoulment. Here the criteria of the law of prohibition as presumed above are not satisfied in as much as the parents are unknown and the stage of ensoulment is not yet reached. It is obvious that due to the great resemblance that the foetus may have at this stage with the members of the human species would not make the judgement an easy one. In this case we may have a different criterion for the law of prohibition through unlawful nature of killing humans or potential humans through the very form of the human species.

If this is a true assessment then what difference should a potential within a foetus nearing ensoulment make to its status by merely resembling a human through its physical form? Surely in this case it is more appropriately the potential of ensoulment that may give it the right to life.

If this is true then why should there be a difference in law in terms of the different potentials within a fertilised ovum in an artificial womb?

From all of this it does seem that the potential for ensoulment without entailing its completion is the only criterion without it entailing the necessity of completion for the law prohibition of abortion whether in a natural environment or in an artificial womb regardless of the issue of the identity of its parents or of their choice.

From this it becomes clear that the production of embryos for the purpose of research, whether naturally or through artificial means, is non-permissible by primary law. However it can be seen as allowed by secondary law if the research is necessary and benefiting mankind at large through the notion of weighing the rights of living people with the rights of the foetus.

Needless to say that the issue of the rightfulness of research conducted on the aborted fetuses does not fall in this discussion

## **Conclusion**

The issue of ensoulment does seem to be influential in one way or another within the Islamic legal system in the context of the laws relating to the human foetus. The stage of ensoulment, or the beginning of the emergence of the potentiality of rational thought, corresponds to a significant change in the penalty incurred if an abortion is performed. It also marks a point where, according to some interpreters of the law, the foetus cannot be aborted except in the most compelling circumstances such as a threat to the life of its mother, whereas prior to this the pregnancy can be terminated for less compelling reasons. This stage also has a bearing on some ceremonial rites such as the ritual washing and shrouding of a dead person.

Ensoulement as ensoulment, however, does not form the criterion for prohibiting the abortion of a foetus. Rather it is the potentiality for ensoulment that constitutes the criterion, whether after implantation or at any point after sexual intercourse, depending on which scholars are followed.

It remains to be seen medically whether the developing brain of the foetus shows any discernable signs of activity at four months, deemed to be the point of ensoulment. It should also be noted that any interpretation of ensoulment and its connection to the issue of the right to life or the prohibition of the termination of pregnancy may have a bearing on the legal-ethical understanding of the issues of the right to end one's own life or provide assistance in ending another's life.

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1. Al-Fiqh v. 91 p.198.

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