

CHAPTER 12

Using Fatawa within Islamic and Muslim Bioethical Discourse: The Role of Doctrinal and Theological Considerations- A Case Study of Surrogate Motherhood

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Introduction

Studies of *fatawa*, or legal opinions issued by Muslim scholars based on the Islamic ethicolegal structure, are the cornerstone of Muslim and Islamic bioethics studies. Islamic bioethics researchers utilize *fatawa* as source texts for study, clinicians use *fatawa* to understand the permissibility of medical interventions, health policy advocates use *fatawa* as the basis for constructing health policy options, and Islamic studies experts use *fatawa* as source texts from which to derive and prioritize principles for a global Islamic bioethics. In all of these and other disciplines, regardless of methodology, the focus is on analyzing *fatawa*. "For the study of twentieth century Islam it is almost the only channel through which Muslim scholars' attitudes and legal opinions can be learned." [1]

Why use Fatawa as a basis of bioethical discourse?

As we study ethical issues that arise in human biology and medicine, bioethicists, clinicians, historians and sociologists delve into the principles that a fifth of the world's population use to guide their daily lives, form the basis of their ethical constructs and normative goals, and drive their actions. Yet, the study of Islam and Muslims is complex. The study of Islamic doctrine and principles of the faith, legal theory, and bedrock ethical values as the basis of an "Islamic" bioethics is substantially different from the observation and study of activities of Muslims, including the writing of *fatawa*, and what we might refer to as "Muslim" bioethics. We believe that Islamic bioethics is the realm of religious studies scholars, philosophers, and theologians, in other words those who have content expertise within the religion. Muslim bioethics, on the other hand, is the subject of study of social scientists, historians, documentarians, and others who study the practice of those who adhere to Islam on societal and personal levels. Both

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those who study Muslim and Islamic bioethics attempt to answer the question: how do Muslims reconcile questions of faith, normative goals, and medical science? While one might argue that there is substantial overlap and only subtle differences between Islamic and Muslim bioethics, we believe the distinction to be important. More immediately, it is relevant to the question of using empiric data (written fatawa) to draw conclusions about a global faith and to construct an ethical framework that ostensibly represents the normative goals of that faith (Islamic tradition).

It is with this in mind that we observe the efforts of bioethicists to construct yardsticks against which bioethical theories can be scrutinized, compared, and assessed for adequacy. [2] Islam as a bioethical theory, when measured against such yardsticks, may seem to come up short. This is not because Islam has nothing to say on such matters, nor is it because Islam provides no framework. Rather, it may be because efforts to answer the question, "what is Islamic bioethics," is made more confusing by attempts at the study of Muslim bioethics.

At first glance there is much appeal to the use of fatawa as primary source material to study Islamic and Muslim bioethics. Until recently, no contemporary scholars have attempted to present a single comprehensive construct of bioethical theory based on Islamic theology or doctrine. Thus, given the complexities and challenges of the study Islamic Jurisprudence, the study of fatawa is much lower-lying fruit.

As with any methodology of research and method of inquiry, the study of fatawa has its own implicit dogma, challenges, and pitfalls, and as source-texts they contain implicit assumptions and provide areas of intellectual emphasis. In particular, this paper focuses a potential pitfall of failing to remember and acknowledge the underlying framework of Islamic legal literature and its elements. However, in our review of applied and academic Islamic bioethics materials we find little analysis or critique of the study of fatawa *as a methodology*.

These methodological issues of using fatawa are, in all likelihood, well known to those who study Islamic law. However, there are other writings of Islamic and Muslim bioethics where the methodological issues we raise would be less obvious. For example, physicians, bioethicists, and policy experts, in their effort to serve Muslims, may not be as cognizant of the shortcomings inherent to this method of inquiry. A few examples are enumerated below:

Medical Literature

In a study of published works on Islamic bioethics in the medical peer-reviewed literature, we found that most works were written by authors (and, presumably, for audiences) who have little working knowledge of Islamic law or, for that matter, bioethics in general. [3] Further, length restrictions in medical journals may preclude the discussion of religious constructs and analyses of ethical frameworks. Given the authors, the readers, and the restrictions on attempts to publish works on Islamic bioethics, the use of short, to-the-point answers on immediately pressing religious questions has much appeal. With that in mind, those looking to share Islamic bioethics to a general medical audience would find fatawa appealing to their needs.

Bioethicists

Greco-Roman traditions, along with those of Christianity, have traditionally dominated the cultural sphere of bioethics as a discipline. However bioethicists are increasingly interested in faith traditions and other sources from outside Western traditions as population diversity increases. In their efforts to form meaningful comparisons, bioethicists look to fatawa as ready explanations of "what Muslims believe" or "What Islam says" about a particular bioethical question.

Healthcare practitioners and professional societies

Muslim healthcare practitioners, and the professional societies of which they are members, may seek fatawa in response to a spiritual crisis and a need to manifest an Islamic identity within the medical sphere. When facing complex ethical challenges clinicians may desire to know which practice is condoned, and which prohibited, according to Islamic ethico-legal values. As traditional jurisconsults are those charged with helping the laity to understand the requirements of Islamic law, and more specifically those actions that will bring about sin and reward, physicians and other medical professionals seek their guidance in person or through published fatawa. Furthermore those who practice in pluralistic multicultural healthcare environments may seek fatawa not in response to a personal inquiry but rather as an intellectual exercise posed to them by working in hospital ethics committees or policy-making organizations dealing with cultural challenges and obstacles posed by Muslim patients. The need for a quick pragmatic response required by a medical audience not necessarily trained in Islamic ethics and law, may be easily served by fatawa and this group may view fatawa as the preeminent, if not the only, source of Islamic bioethics.

The risks of using Fatawa as source material

When fatwa studies are examined as a source of inquiry for applied religious bioethics, the assumptions that form the framework of their methodology might become essential in ways that are less important in academic circles of discourse. Scholars of applied religious bioethics need to be mindful of the process that leads to the development of a fatwa, and fundamental aspects of Islamic law and Muslim legal scholarship that might get little, if any, attention in the study of fatawa as an academic enterprise.

Perhaps the most important of the fundamental questions of how and why fatawas are developed are what we believe are *implicit* and *unspoken* assumptions that are part of Islamic legal discourse and might (or might *not*) lead to the writing and declaration of a fatwa. We pose several questions to those who, in their pursuit of bioethics research, use fatawa as source material:

1. Does the fatwa literature represent the *entirety* of thought and discussion surrounding a question of Islamic Bioethics?
2. If the answer to the above question is *no*, what, then, is missing that should be considered when studying fatawa?
3. What are the implications and/ or consequences of the study of fatawa without consideration of the two above questions?

We believe these questions need to be considered by researchers to best inform the questions they ask through their study of fatawa. Without a clear identification, comprehension, and analysis of these three questions, those who review of fatawa, might miss essential elements of Islamic ethico-legal theory.

The Definition of a Fatwa

Before proceeding to our analysis of the methodological concerns of using fatawa to build Islamic bioethics, defining a fatwa is necessary. *Fatawa* (singular fatwa), are legal opinions rendered by Islamic jurisconsults in response to a religious ethical or legal question, and have two essential aspects. First, they are derived with consideration of, and using the techniques of argument within, the sources of Islamic law and ethics, *usul al-fiqh*. Second there are formulated in the context of a question, thereby are tied to the social, cultural and legal circumstances of the questioner. Fatawa are therefore quasi-religious documents that inform Muslim behavior and public policy. [4] In the absence of modern case law derived solely from an Islamic juridical framework, fatawa are given increased importance within

Muslim communities, particularly those within non-Muslim majority nations. For the seeker of the fatwa, different opinions allow a personal choice as to which fatwa has the stronger argument and sets the seeker's heart at ease. In practice however, the seeker often consults a particular expert whose opinion he trusts, and will consider it binding on the subject. The choice of jurisconsult is frequently based on adherence to a particular school of jurisprudence, cultural background, or content expertise. There are multiple reasons why the questioner may seek a fatwa. Inherently the questioner is faced with an ethico-legal challenge and unsure of the "right," or Islamically condoned, course of action. Alternatively, the questioner may find the normative ruling on the matter to be wanting in terms of nuance, appropriate considerations, or not be specific to one's situation.

Of import is that since fatawa are highly contextual they may not represent the normative Islamic legal ruling, *hukm*. With that in mind, fatawa may represent exceptions to the rule, where secondary contextual considerations allow for deviation from normative legal injunctions. Furthermore since fatawa are by their nature addressed to specific questioners and context, they are not timeless. Any myriad of changes in context necessitate reexamination of the fatwa, and they are not automatically portable from one person to next, one society to the next, nor from one time period to another.

Shortcomings in using fatawa:

There are several shortcomings in using fatawa to develop a framework of Islamic bioethics without consideration of unmentioned assumptions. Fatawa that are misunderstood, without the requisite understanding of them, may be rejected. As mentioned above, Fatawa are tied inextricably to *context*; the study of religious assertions made in fatawa out-of-context may lead some to compare conflicting fatawa in a spurious fashion. Fatawa outside of their context may fail to make rational sense. Fatawa attempting to answer one question, when used to consider a different question, might seem disconnected from the needs of contemporary Muslim society.

The converse of the previous concern is equally true. The consideration of fatawa out-of-context may lead to wholesale acceptance of such a fatwa, even in instances where it might not apply. The failure to consider scholars and adherents of differing legal traditions, historical periods, or other key elements that make up the context of a fatwa might lead to their inappropriate application to questions they do not attempt to answer. While previously the result is a seeming disconnect, here the result is application of rules and principles that, while they may seem to be relevant and applicable,

may have key elements where other important Islamic principles and laws might take precedence.

Another serious shortcoming of the sole study of *fatawa* is that this methodology of inquiry fails to examine the Islamic legal tradition in its entirety. Ethical frameworks and theories are judged based on their clarity, coherence, comprehensiveness, simplicity, power, and practicability. [2] The effort to build an understanding of bioethics, or any construct of Islamic tradition, by relying on *fatwa* literature alone, ignores essential elements of Islamic tradition. As a result, when compared to other ethical frameworks or theories, frameworks of Islamic law derived solely through a keyhole of *fatawa* may seem to lack critical elements of other ethical constructs.

From our caveat about the study of *fatawa*, a question arises: what, if anything, unites Islamic tradition, available writings from Muslim religious scholars, and Muslim bioethics? We believe that the study of Islamic bioethics must be grounded within Islamic law and be cognizant of the assumptions of Islamic legal theory.

Our assumption about the relationship between Islamic law and Muslim bioethics raises a second question: If we hold that the study of bioethics should be grounded in Islamic law and jurisprudence, then how does one measure the quality of a *fatwa* in that light? As we construct bioethical principles and theories from the writings of Muslim scholars, how should Islamic jurisprudential theory and processes be used as a yardstick against which the quality of *fatawa* should be measured? Although this question is beyond the scope of this paper, we make a brief attempt to answer in order to give the reader an understanding of our goal: to best understand current writings on Muslim and Islamic bioethics in the light of fundamental aspects of Islamic Law.

The third question alluded to earlier is the main focus of this paper: If there is indeed a bigger picture of Islamic law that might be missed as we focus on *fatawa* for case study, what are we missing? We believe we can best study Islamic bioethics and observe Muslim bioethics by first studying the fundamentals of Islamic tradition and principles. But we are not sure the reverse is equally true; that we can obtain a thorough understanding of Islamic tradition and principles by first studying observations of Muslims and their writings. The reason is that scholars of Islamic tradition and law, as in other intellectual disciplines, discuss their field with assumptions in mind that are unspoken, and therefore, not available to the studier of their writings and statements. [5] These assumptions in Islam might include fundamental aspects of faith and belief or commonly accepted prohibitions and

requirements. These assumptions, while fundamental to the discourse, and study, of Islamic Law and bioethics, are not routinely discussed in *fatawa*. It is the failure to consider these assumptions, we argue, that lead to the risks we enumerate above. If Islamic tradition is the basis of bioethics, then anything other than the study of Islamic tradition will lead to conclusions about bioethics that are potentially specious.

Perhaps the most important unspoken assumptions that are part of Islamic jurisprudence are those that focus on the *theological assumptions* or *doctrine (aqidah)* that are part of an Islamic scholar's thought process. These assumptions inform the relationship of man to the Divine and the understandings of man's role in ethicolegal inquiry and are so fundamental that many potential *fatawa* never materialize because questions prompting potential *fatawa* are dismissed due to theological precepts that may be explicitly stated to the questioner but not written into formal *fatawa*. Alternatively, these theological considerations are so implicitly part of a legal scholar's theory that they are excluded when speaking to a particular audience, say, their students. As a result, information of import to an academic, non-devotional circle aiming to build a framework for Islamic bioethics is not explicitly offered by the *fatwa*.

In this paper, we will examine the impact of not considering theology as a foundation for the dispensing of *fatawa* by comparing and contrasting various approaches to an Islamic bioethics question, that of permissibility of surrogacy for infertile couples. We do so with several premises:

1. That in their role of answering ethicolegal questions, *fatawa* serve ultimately to facilitate the public and private worship of God by acting in consonance with His decree. Therefore, *fatawa* and their study should be preceded by theological and doctrinal considerations.

2. That Islamic bioethics as analyzed through the study of *fatawa* is inextricably linked to Islamic Law, and that principles of Islamic belief are at the foundation of Islamic (if not Muslim) bioethics.

We hope to convince the reader that *fatawa* are best analyzed when doctrinal understandings of God (Maturidi and Ashar'i as examples) are considered and both Muslim theologians and jurists are involved.

An analysis of a Fatwa question: a comparison of published analyses

Infertility impacts 10% to 15% percent of all couples and has been an area of intense interest in bioethics. Muslim scholars are debating mechanisms of treating infertility in light of recent advances in reproductive

medicine. The Islamic tradition has historically placed importance upon fertility. A couple's ability to conceive a child considered a key part of a healthy and successful marriage: "Men and women are legally justified to not enter or break a marriage on the based of infertility, and Islamic law strongly defends this right." [1]

Definition of surrogacy

There are several solutions depending on the cause of childlessness and infertility, and discussions of treatments for infertility are socially, legally, and ethically complex. For the purposes of this paper, we focus on surrogate methods [6]: In partial surrogacy, a couple will commission a woman to be artificially impregnated by semen from the husband. The surrogate will then carry the pregnancy to term, and upon birth, give the baby away to the soliciting couple. In this case, the child will have the rearing father as the biological father, a rearing mother, and a biological/birth mother. In a complete surrogacy, the commissioning couple will undergo IVF. The embryo created by IVF is transferred to the surrogate woman who gives the baby to the soliciting/rearing couple at birth. In this case, the biological parents are the rearing couple, and the surrogate is the birth mother. This paper focuses on the technique mentioned above.

Arguments and discussions over the permissibility of surrogacy in Islam.

Published Ethico-legal Perspectives

We focus on ethicolegal arguments around surrogacy posed in three sources authored by scholars in different fields who all used fatawa as the basis for their study.

1. Muslim physicians under the aegis of the Islamic Association of North America who sifted through fatawa to produce a consensus Islamic bioethical "policy" statement. [7]
2. An Islamic studies expert, Prof. Vardit Rispler-Chaim's who researched modern Egyptian fatawa. [1] This is a paradigmatic example of a well-researched and thoughtful review of contemporary fatawa from one locale.
3. A comparative law student who used published fatawa to explore Islamic legal questions regarding surrogacy, [8]

Medical discussions

At the 2003 annual conference of the Islamic Medical Association of North America (IMANA) a session was held about Islamic bioethics and surrogacy. In the written remarks during that session, a variety of viewpoints were expressed around the treatment of infertility as a disease and the permissibility of various methods of treatment. The discussion ultimately played a role in the development of an ethics primer entitled *Islamic Medical Ethics: The IMANA perspective*, which included a section titled "Assistive Reproductive Technologies and Surrogacy". [7] This section derived from the discussion at the meeting, from work authored by Dr. Fadel, a gynecologist and the current chair of the IMANA ethics committee, and writings by Dr. Hathout, a prominent Muslim physician and ethicist.[8-10] The ethics committee statement refer to various fatawa in general and according to the author and ethics committee chair, was informed by multiple existing fatawa.

The relevant section from IMANA reads:

"...We believe infertility is a disease and the desire for a cure by an infertile couple is natural. However, in Islam, for an action to be permissible all means of achieving that action are also to be pure...We believe in the sanctity of marriage and the importance of preserving lineage. The Qur'an says: '...It is He who has created man from water: then has He established relationships of lineage and marriage: for thy Lord has power (over all things).'...IMANA holds the following positions:

1. All forms of assisted reproductive technologies (ART) are permissible between husband and wife during the span of their marriage using the husband's sperm and the wife's ovaries and uterus. No third party involvement is allowed. We believe in the sanctity of marriage and that the death of the husband terminates the marriage contract on earth, thus frozen sperm from a deceased husband can not be used to impregnate his widow.
2. Sperm, ova and embryo donation are not permitted.
3. Additional embryos produced by IVF between husband and wife can be discarded or given for genetic research, if not to be used by the same couple for a future attempt.
4. Surrogacy involving a third person is not permissible, as we believe that it exceeds the boundaries of the marriage contract and lineage.
5. Use of fertility drugs is permissible. An infertile couple, if they can not find a permissible cure, can care for an orphan or someone else's child as their own within the Islamic guidelines of adoption, not the legal adoption as practiced in the United States." [7]

In the other two works the *fatawa* cited, and the subsequent analysis for and against surrogate motherhood, focuses on the questions of lineage,

whether the act of surrogacy is equivalent to adultery, and the potential commoditization of motherhood. In summary, the major reasons noted for the prohibition of gestational surrogacy are:

1. Surrogacy using a third party, in any form, is believed to be a form of *zina*, or unlawful reproduction out of wedlock. When a fertilized egg is implanted into a surrogate mother's womb, these scholars consider that act to be a form of unlawful procreation.
2. Third-party donation confuses issues of kinship, descent, and inheritance by mixing the relations and confusing lines of descent. This assertion was detailed within Rispler-Chaim's work where she notes that because of the potentially dubious lineage of the child and relationship between child, mother, and father, the child might end up with the status of *laqit* (foundling), or worse, a *walad zina* (bastard child), with all of the stigma associated with each epithet.
3. Lastly, scholars argue that surrogacy commodifies motherhood. This law journal article emphasized this point and suggests that process of surrogacy in non-Muslim countries is simply a contractual relationship. "The *primary* objection [in Islam] is that it results in the commodification of motherhood (emphasis added). Motherhood is reduced from a value to a price. As a result, children become a commodity and the process of procreation becomes a business enterprise." [11]

Surrogacy: the view when theological perspectives are considered primarily

We could find, in a limited search, no statements that took issue with the theological questions raised by surrogacy. We thus asked Shaykh Mohammed Amin Kholwadia, to consider the question of surrogacy, particularly in response to the three discussions above. Shaykh Amin is a traditional jurisconsult, *mufti*, who serves as the director of Dar-ul-Qasim, an Islamic post-graduate educational institute in Chicago Illinois. He has expertise Islamic law receiving his formal authorization to issue verdicts and teach the subject from Qadi Mujahidul Islam Qasmi through advanced studies at Imaarate Shariah in India. In addition, Shaykh Amin has advanced training in Islamic theology and theosophy, having studied under Dr. Allamah Khalid Mahmood, a current justice at the Supreme Court of Pakistan, and under the late Shaykh Muhammad Meeran of Sabeelur Rashad seminary in Bangalore, India. His studies encompassed the ethicolegal

theories of al-Ghazali, Ibn Arabi, Shaykh Sirhindi and Shah Walliullah of Delhi.

In his response, Shaykh Amin stated that the fatawa cited "ask the wrong questions," and that they utilize the legal arguments without adequate consideration of the theological frame wedded to the legal mechanisms employed (Kholwadia, 2009). He noted that before framing the legal argument for, or against, gestational surrogacy one must ask: Is infertility a disease, or is it a human fate written for some people in this world? Addressing this theological question a priori governs whether or not one deliberates ethicolegally. Shaykh Amin's reply makes the following commentary:

"I see the following fundamental theological problem. Not all couples in human history have had children. The Quran acknowledges this fact in no uncertain terms:

"To Allah belongs the dominion of the heavens and the earth. He creates what He wills. He bestows (children) male or female according to His Will; "Or He bestows both males and females, and **He leaves barren whom He will:** for He is full of Knowledge and Power.' Surah al-Shura (42): 49/50...There are other phenomena where Islam does not allow Muslims to override Allah's will and thus they do not have the mandate to earn what is contrary to Divine will. If one does, that would be tantamount to fighting with God and become guilty of not submitting to His will." [12]

Shaykh Amin's reply continues by raising a previously unasked question: If some of us are destined to not have children, what efforts might be seen, by God, as an attempt to usurp God's authority in this matter? Using suicide as an example of an unacceptable response to human suffering, his reply asserts that some efforts towards pregnancy are acceptable and others not. He next draws upon examples from the Prophet's life, that teach Muslims that some may not have the destiny of having children. The Prophet himself did not exercise all "available" options, including marrying again, and accepted his fate when his only son died in infancy.

The debate among Islamic legal scholars over potential social implications of a child being a *walad zina* or *laqit* is one that, to the mind of Shaykh Amin, might also be dismissed *ab initio*: "Having children is not a legal right [before God] for every couple who get married. Pursing the idea of conceiving children is a prerogative of every couple. But whether a couple begets or does not beget should not be left for the legal society to decide as society cannot perceive what is sinful or not sinful in the hereafter. *Practitioners of Islamic law must ascertain whether or not there is sin or not*

in any act – as that is there primary agenda. (emphasis added) The reply concludes that “the permissibility of gestational surrogacy does not even exit the gate of theological permissibility.” [12]

Key Differences in approach and implications to Islamic Bioethics

The fundamental difference between the fatawa in circulation and the statement from Shaykh Amin is the question of God’s dominion, and the rights of creation before their Creator. The IMANA statements clearly state, and writings based on other fatawa strongly imply, an assumption of infertility as a disease, the “child product of insemination is not a sin”, and the right of the infertile to seek all “acceptable” means to cure it. [1,7,8] The arguments that follow simply ask the question of which methods are acceptable, and potential consequences of certain approaches. The consequences enumerated are societal: stigma, commodification of family relationships, confusion of lineage. But when infertility is regarded not as a disease, but as a human condition imposed by God, the discussion changes in important ways. The relationship between man and God is now a primary consideration and the challenge to God’s dominion, akin to the challenge to God’s plan by people who commit suicide, becomes immediately evident. In this light, when the implications are profound for the life to come, the societal consequences in the here and now are trivial and pale in comparison.

The question of acceptance of, versus interference with, God’s decree is not unique to Shaykh Amin’s statement, and is briefly mentioned in Chaim’s work. A review, however, finds little on the question of God’s decree. A study of these fatawa might lead one to the conclusion that Islamic scholars are unconcerned with the question of God’s dominion. Such a conclusion would be inappropriate. On the contrary, we hold that the studier of fatawa should ask why it is not included in the fatwa, and what other fundamental elements remain unspoken.

This omission from fatawa leads us to another question regarding the potential for some responses to ethico-legal questions never coming to light. Instead, the jurisconsults may dismiss the question theologically in the privacy of a questioner-respondent (mufti-mustafti) relationship, and the public would thus have no access to a written fatwa. This is illustrated by the Shaykh Amin’s deliberative process which may have never come to light had we not asked for a “formal” fatawa for citation purposes. As a result, those studying fatawa as a source for Islamic bioethics would not be informed by questions and consideration that lead to the “silent” fatwa dismissed theologically. They have no access to the theological, metaphysical, or philosophical frames that may help to inform Islamic

bioethics. Worse yet, they may consider, wrongly, theological assumptions and presumptions to be of little importance in the question at-hand.

The opposite is also true: It may be that jurisconsults writing fatawa assume theological principles that to them are so fundamental as to not need explanation to a particular questioner, whom they know to share their views. In this example, the jurisconsults who omit theological concerns from a particular fatwa (in this case, surrogacy) may have asked and answered those concerns, and moved beyond them to subsequent questions that ultimately led to their fatawa. But the studier of fatawa nonetheless falls into a trap of erroneous conclusions as they try to build an understanding of a bioethical question from a specific fatwa.

Ultimately, it might be argued, all the cited discussions on surrogacy go the question of *halal* versus *haram* treatments for infertility. Further, the fatawa ultimately fall on the question of whether it is allowable to pursue a child through means that take the biological/ medical therapy outside the marriage bond. At first glance, the reader might conclude that there exist no clear differences between the statements. And for the average adherent to Islam, they might be right. But we are asking a different question: as we attempt to build a working understanding of “what is Islamic bioethics,” does the additional monograph substantially add insight that we previously did not have? Put another way, we repeat our questions asked at the beginning of this paper:

1. Does the fatwa literature represent the *entirety* of thought and discussion surrounding a question of Islamic Law?
2. If the answer to the above question is *no*, what, then, is missing that should be considered when studying fatawa?
3. What are the implications and/ or consequences of the study of fatawa without consideration of the two above questions?

Certainly, the answer to our first two questions are an emphatic “no,” and that a review of fatawa that presume fundamental questions about fate and theology, might miss important insights that are central to Islamic theology, law, and bioethics.

As for the third question: we can only speculate but offer some thoughts to consider. We would guess that all fatawa profess an effort towards improving one’s standing before God and in the afterlife. With that said, we wonder if fatawa that look more closely at social implications may miss addressing the question of one’s standing before God. We might erroneously

infer from a fatwa's focus on the challenges of society (such as that of questions of lineage or stigma associated with being a *laqit*) that the act of third-party surrogacy has no significant theological implications.

Finally, there exists the argument that in fatawa that do not refer to any question of God's decree, the question is actually asked and answered albeit implicitly. This claim speaks directly to the concerns we outline, and the risks of not considering those unwritten assumptions and beliefs that are essential parts of the fatwa-giving. Those with expertise and insight into the legal theory and mechanisms may be able to infer the unwritten assumptions, yet the ground-level consumers of fatawa, i.e. medical practitioners, social scientists, may not have the requisite knowledge-based to infer from, or read into, a fatwa.

Discussion

We have shed a light on an important example of what might be missed when the study of Islamic bioethics focuses on *fatawa* as source material. We believe the consideration of theology in all discussions of Islamic bioethics deserves special mention because it refocuses the discussion of bioethics in Islam to normative goals as being based in God and the Divine, rather than more profane general normative goals. With that in mind, there may be other considerations missed by the sole study of *fatawa*, raising a more general question of what is commonly known in medical research and literature as *publication bias* [13]. Publication bias denotes a state where the published literature is systematically unrepresentative of the population of completed studies. Simply put, when the research that is readily available differs in its results from the results of all the research that has been done in an area, readers and reviewers of that research are in danger of drawing the wrong conclusion about what that body of research shows. In medicine this can have dramatic consequences where ineffective or dangerous treatments are falsely viewed as safe and effective. We argue, that in a study of selected source material that is considered (or asserted) to be representative of the field of inquiry, we need to consider and evaluate the same threats to research validity. As we consider the vast extent of Islam and Muslims around the world as an object of study, we might wish to evaluate the methods of study in addition to the subject of it.

Publication bias is a potential threat in all areas of research, including qualitative research, primary quantitative studies, narrative reviews, and quantitative reviews. It has come to prominence in recent years with the widespread adoption of the use of systematic review and meta-analytic methods to summarize bodies of research. As methods of reviewing medical

ethics become more systematic and quantitative, it might be possible to empirically demonstrate the existence of publication bias and to evaluate its impact. Thus, a problem that was viewed hazily through a limited review of Muslim literature might come into sharper focus under the lens of a more deliberate approach to the same question that suggests outward expressions such as fatawa are necessary, but not sufficient, to best understand "what Islam says" on a particular subject.

Reason vs. Tradition in Islamic Jurisprudence and Ethics

It may be that not all people interested in Islamic and Muslim bioethics agree with our initial premises regarding the central role of theology in Islamic bioethics. Given that so much of contemporary bioethics focuses on the development of normative goals, one might consider that Muslims might be able to develop their own bioethical frameworks based on a shared sense of Muslim values rather than traditional thought. However, the debate over this question is nearly as old as Islam itself. Since the time of Prophet Muhammad's demise a considerable debate has ensued over the role of intellect (*'aql*) in matters of religion. Specifically, with regards to the questions of good and evil, right and wrong, and the framework around which ethical theories are built, a dispute exists over what questions can be answered using only *wahi*, revelation, and what can be determined by rational thought.

Methodology and Islamic Bioethics: Implications for Western-Christian bioethics

As we undertook this effort to evaluate the study of Islamic and Muslim bioethics, we wondered if the existence of implicit and unspoken assumptions is unique to Islam. If not, we ask whether the relatively closer relationship between Western religions and academia, where the two have a longer history of interaction and dialectical development, has allowed for assumptions within inquiry to become explicit. As we look through "Western" eyes at Islam, perhaps we should re-examine not only our current state of bioethics, but also the methodologies by which we do so.

Obviously, such an undertaking goes beyond the scope of this paper. However scholars are increasingly considering the *study of bioethics* as a discipline distinct from bioethics itself: consider *Methods in Medical Ethics* as an example. [14] We believe that the study of bioethics will benefit from a more rich and interdisciplinary approach that includes provocative questions about our own "culture of bioethics." Importantly we believe that the normative goals of humanistic or secular bioethics, oriented towards societal outcomes, differ greatly from those of religious bioethics, which ostensibly

focus on goals of the afterlife. Further, we argue, there are places where rational thought, which is a cornerstone of other methods of ethics, may have little place in Islamic bioethics.

This raises a host of questions, all beyond the scope of this paper. What key differences, such as the once we point out above, exist between secular and religious bioethics? What differences exist between Islamic and other faith traditions within religious bioethics? How do these differences inform our understanding of regionally predominant norms of bioethics? And how can these differences best be studied and understood, and what are the shortcomings of any particular method of study of Islamic bioethics? It is these questions, starting with the questions raised by using fatawa as source material that we hope to grapple with in our study of Islamic bioethics.

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