

## When Does the Muḍghah Become a Living Soul? The Framework of Fetal Protection by Sunnī Legal Schools in Light of Hellenistic as well as Judeo-Christian Traditions<sup>1</sup>

*Due to the general practice of calling Islam an 'Abrahamic religion', many assume (and actually the majority of Muslims would assume) that the Muhammadan religion's relationship with the issue of fetal protection and the practice of abortion reflects the conservative spirit of the Bible. However, nor the primary Muslim texts, nor the practice of Sunnī legal schools substantiate this assumption. In fact, in this comparative textual analysis I intend to show that Islamic jurisprudence resulted in homogeneous adjudication regarding abortion, just like the practice of Muslim states reflect versatile legislation. The end result is that most Sunnī schools of law allow first trimester abortions (and in some instances even further), something which reflects Aristotelian 'pragmatism' much more than the values of Judeo-Christian culture.*

**Keywords:** *abortion, Sunnī Islam, Islamic jurisprudence, fetus, maddhabs, Shari'ah, ensoulment, Judeo-Christian ethics, Hellenism*

### 1. Introduction

If someone takes a short detour from the Education City of Doha, capital of Qatar to the Sidra Hospital, one would encounter an enormous group of sculptures. It is *"The Miraculous Journey"* by English artist *Damien Hirst*, and it depicts the stages of fetal development on large bronze statues from conception until right after birth. Nowhere in the world can one see a testament to the life within the womb on such scale, especially not in the West where the issue of abortion has become an ever polarizing subject. But does this artistic proclamation represent a testament of the Islamic world's relation to unborn children?

Due to the general assumption that Islam is a conservative religion that derives many of its moral tenets from the Judeo-Christian faith system, one might think and in fact even the majority of Muslims would proclaim that the Mohammedan religion generally prohibits abortion. However, as we shall see, the adjudication of abortion is far from the strictness of Christianity. While there is no unified Islamic stance in this regard, it is anything but absolute prohibition.<sup>2</sup> Some call the

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2 MUSALLAM, *Sex and Society in Islam* 59.

versatile legislation attested by the Islamic world as the sophistication of Islamic jurisprudence,<sup>3</sup> others may simply call it a separate set of norms when it comes to the value of life in the womb.

In this paper I venture to provide a comparative textual analysis regarding this issue, first explaining what the primary sources of Islamic law state vis-à-vis the fetus and its potential for life. Then I will delve into how the specific schools of *Sunni* Islamic law interpreted these stipulations in practice, where the issue of delayed ensoulment will be of central focus (as the moment when the soul enters the fetus; generally seen in Islamic thought as the deadline for abortion to be available). We shall elaborate on the specific situations that made certain branches of the *Shari'ah* allow the termination of pregnancy. Finally, I will shortly compare these views with that of Judeo-Christian heritage as well as Greek and Roman philosophy and practice. My final assessment is that the Islamic approach has more to do with Aristotelian pragmatism than Biblical values.

Throughout my paper I rely on the most accepted English translations of primary Arabic sources, and when it is necessary, I indicate the original Arabic words. For the romanization of Arabic words, I relied on the transliteration of the Library of Congress ('Apa-Lc system'), except in case of direct quotes from other sources and in personal names known in English.

## 2. Islamic perception of life in the womb

### 2.1. The Qur'an on the development of life

Since the main two sources for Islamic law are the *Qur'an* and the *Sunnah*, first it is necessary what these say about the issue at hand. The *Qur'an* briefly relates to the life in the womb. In *Sūrah al-mu'minūn* ('The Believers') we read a verse that describes the Muslim approach to fetal development. The original Arabic expressions are highlighted in the text as these named stages of fetal development are key in the abortion regulation of the different *Sunni madhhabs* (مذاهب, i.e. schools of Islamic law).

The Muhammadan text goes like this: *"And indeed, We created humankind from an extract of clay, then placed each 'human' as a sperm-drop [nuṭfah] in a secure place, then We developed the drop into a clinging clot ['alaqah], then developed the clot into a lump 'of flesh' [mudghah], then developed the lump into bones [izam] then clothed the bones with flesh [lahm], then We brought it into being as a new creation [khalqan akhar]."*<sup>4</sup>

This section is the main foundation on which Islamic jurists built up a teaching of ensoulment that occurs later than conception. This attests to the Islamic perception that before ensoulment, before the fetus becomes *khalqan akhar* (a new human being), it is necessarily something less than a human being.

### 2.2. Primary Islamic sources on fetal life

Pre-modern Islamic sources only sporadically and unsystematically mention the intentional removal of the fetus, rather they tend to deal with accidental losses of life in the womb. This is mostly covered in the realm of the law of torts.<sup>5</sup> The *Qur'an* does not explicitly deal with the issue of abortion, but repeatedly puts forward the prohibition of infanticide. Relevant sections in this regard are: 6:137, 6:140, but it is especially worthy to highlight 6:151 and 17:31 which prohibit infanticide: *"And do not kill your children for fear of poverty. We provide for them and for you. Indeed, their killing is ever*

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3 BOWEN, Abortion, Islam, and the 1994 Cairo Population Conference 161.

4 QUR'ĀN 23:12-14.

5 KATZ, The problem of abortion in classical *Sunni* fiqh 25.

a great sin” (17:31). “(…) do not kill your children out of poverty; We will provide for you and them. And do not approach immoralities – what is apparent of them and what is concealed. And do not kill the soul which Allah has forbidden [to be killed] except by [legal] right” (6:151).

It is however not described in any way what the author regards as ‘children’ specifically, and there is no obvious reference here to those not yet born, hence these sections alone are insufficient to form an authoritative Islamic position regarding abortion.

The other important sources of the law in Islam are the *hadīths* (the sayings and actions attributed to *Muhammad*) that are part of the *Sunnah* (tradition).<sup>6</sup> There are several *hadīths* that Islamic scholars refer to when discussing abortion, particularly concerning the stages of fetal development and ensoulment. One of the most significant *hadīths* is the following (narrated by *Abdullah ibn Mas’ud*): “Verily, the creation of each one of you is brought together in his mother’s womb for forty days as a drop (*nutḡah*), then he becomes a clinging clot (*‘alaqah*) for a similar period, then a lump (*mudḡḡah*) for a similar period. Then the angel is sent to him and breathes into him the soul (*ruh*), and he is commanded to write four things: his provision (*rizq*), his lifespan (*ajal*), his deeds (*‘amal*), and whether he will be happy or miserable.”<sup>7</sup>

Based on this *hadīth*, as we shall see shortly, the general assumption in Islamic jurisprudence is that the ensoulment (when the soul enters the fetus) occurs after 120 days (cca. 4 months) from conception.<sup>8</sup> The last stage of development in which the fetus is not yet regarded to have a soul is the *mudḡḡah* phase (which is loosely parallel to the embryonic stage).<sup>9</sup>

This interval of 120 days (cca. 17 weeks) is most relevant in the analysis of Islamic abortion-regulation, despite the fact that even this number comes into question when reading for example the following *hadīth* (narrated by *Hudhayfah ibn Usayd*): “When forty-two nights have passed over the drop (*nutḡah*), Allah sends an angel to it, who shapes it and forms its hearing, sight, skin, flesh, and bones. Then he says: ‘O Lord, is it male or female?’ And your Lord decrees what He wills, and the angel writes it down. Then he says: ‘O Lord, what about his lifespan?’ And your Lord decrees what He wills, and the angel writes it down. Then he says: ‘O Lord, what about his provision?’ And your Lord decrees what He wills, and the angel writes it down. Then the angel goes forth with the scroll in his hand, and nothing more is added to it nor subtracted from it.”<sup>10</sup> This section causes some to argue that ensoulment may begin at 42 days (approximately 6 weeks) rather than 120 days.

Another *hadīth* emphasizes the gravity of unjustly terminating a pregnancy: “A case was brought to the Messenger of Allah (...) about a woman from (the tribe of) Hudhayl who had struck another woman and caused her to miscarry. The Prophet (...) ruled that compensation (*diyyah*) must be paid for the fetus, which is a slave boy or girl.”<sup>11</sup> While this section is used to argue that even an unborn child has a recognized legal status in Islam,<sup>12</sup> reinforcing the sanctity of life, it does not specify all aspects of fetal life and all cases of abortion, making this verse an insufficient basis for a taxative regulation. It opens the semantic debate for defining when the termination of pregnancy constitutes killing.<sup>13</sup>

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6 FALUS, The Legal Institutions of Charity in the Traditional Islamic Law 16.

7 Sahih al-Bukhari, Ḥadīth 3208; Sahih Muslim, Ḥadīth 2643.

8 BOWEN, Abortion, Islam, and the 1994 Cairo Population Conference 163.

9 MUSALLAM, Sex and Society in Islam 54.

10 Sahih Muslim, Ḥadīth 2645.

11 Sahih al-Bukhari, Ḥadīth 6910; Sahih Muslim, Ḥadīth 1681.

12 MUSALLAM, Sex and Society in Islam 57.

13 BOWEN, Abortion, Islam, and the 1994 Cairo Population Conference 163.

While there is some degree of sanctity attributed to an unborn child, it is a recurring theme in the *hadīths* that preserving the mother's life takes precedence. The health of the mother is treated as a necessity.<sup>14</sup> This principle is included in this *hadīth* too: “*There should be neither harm nor reciprocating harm.*”<sup>15</sup> Scholars use this to justify abortion when the mother's life is in danger (to whom a high degree of respect is attributed<sup>16</sup>), applying the principle of “choosing the lesser harm” (*al-akhaffu dararayn*).

Though it is close to impossible to reach a comprehensive consensus from the Sunnah, it is apparent that abortion is not a supported action, more of a necessary evil permissible in certain situations. Drawing on several *hadīth*, it seems apparent that preventive (and therefore less detrimental) forms of “family planning” are preferred, such as the practice of *coitus interruptus* (*al-‘azl*) which is an entirely different debate (in this regard I recommend the summary of *Abdel Rahim Omran*).<sup>17</sup> The natural outcome of the lack of normative regulation regarding abortion is that juristic deliberation is increasingly significant herein.<sup>18</sup>

### 2.3. The classification of actions in Islam

There is a momentous consequence to the fact that the most important Islamic legal sources do not explicitly address the comprehensive issue of fetal life and its procured abortion. In Islam only something that is explicitly forbidden by the main sources of religion can be considered *harām*, that is a criminal act. Islamic jurisprudence (*uṣūl al-fiqh*) set out the so-called *aḥkām al-khamsa* (meaning the “decision of five”), a special typology by which actions are classified and judged. As its name suggests, it uses five categories for this end.<sup>19</sup>

In the first category (called *farḍ* or *wājib*) are actions that are obligatory for Muslims (such as the well-known five pillars of their religion), while in the second (*mustaḥabb* or *mandūb*) are recommended albeit not compulsory acts. The third category denotes a neutral act which is neither good nor bad (*mubāḥ* which literally means ‘allowed’). The fourth category (*makrūh*) includes deeds that are considered repugnant or despicable, but not explicitly forbidden (e.g. divorce), while the last denotes the already mentioned *harām*, i.e. forbidden, criminal acts (e.g. apostasy, drinking alcohol, adultery, murder).<sup>20</sup>

Since abortion, as we shall see shortly, is not necessarily considered murder (which is *harām*), depending on the circumstances it is carried out, the act can fall into a more clement category. What matters most in this is the intention (*niyya*) of those involved in the abortion decision – proper justification evades that the action would be called a sin.<sup>21</sup> To understand better how abortion is adjudicated under *Shari‘ah*, it is necessary to analyse how the four *madhhab* of Sunnī Islam related to the issue over time.

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14 BOWEN, Abortion, Islam, and the 1994 Cairo Population Conference 164.

15 Sunan Ibn Majah, Ḥadīth 2340; Musnad Ahmad, Ḥadīth 2865

16 See e.g. Sahih al-Bukhari, Ḥadīth 5971; Sahih Muslim, Ḥadīth 2548.

17 OMRAN, Family Planning in the Legacy of Islam 113–144.

18 KATZ, The problem of abortion in classical Sunnī fiqh 26.

19 JANY, Klasszikus iszlám jog 55.

20 BROWN, Islamic Ethics in Comparative Perspective 186.

21 BOWEN, Abortion, Islam, and the 1994 Cairo Population Conference 165.

## 2.4. How did the Sunnī madhhabs interpret the issue of abortion?

Historically four major schools of law (called *madhhabs*) had formed in Sunnī Islam which all are deemed legitimate by *Sunnīs* despite their differences. These four schools are: the *Hanafī*, the *Mālikī*, the *Shāfiʿī*, and the *Hanbalī madhhab* (all named respectively after their founder).<sup>22</sup> While the issue of abortion is perceived rather differently by these branches of *fiqh*, it is safe to say that no matter their leniency (or the lack thereof), Muslim jurists do not condone the practice of abortion as a means of or as an alternative to contraception.<sup>23</sup> Another consensus among the four *Sunnī madhhab* is that ensoulment (*nafkh al-rūh*) takes place about the 120<sup>th</sup> day (cca. 4 months) of the fetus based on the hadīth previously quoted regarding the stages of fetal development (narrated by *Abdullah ibn Masʿud*).<sup>24</sup>

It is assumed in Islamic jurisprudence that upon ensoulment, at the end of the *mudghah* stage, the fetus becomes a separate being (*khalqan akhar*)<sup>25</sup> through a new act of creation, an actual human being.<sup>26</sup> This is, therefore, generally the ‘red line’ in abortion that can only be crossed if the mother’s life is in danger. With regards to abortion before the 120 days, however, there is significant dissent among jurists.

The largest *Sunnī* school of law, the *Hanafī madhhab* (which is prevalent in Türkiye, Central and South Asia, the Balkans and in certain parts of Iraq, Syria and Egypt) generally accepts that ensoulment occurs at 120 days. Due to the potentiality of life, the majority of this school favors reasonable justification for abortion before ensoulment, which is usually based on avoiding the perceived greater risk with a supposed lesser risk on a case by case basis.<sup>27</sup> However, *Hanafī* scholars permitted abortion for women even without the husband’s approval should she have the sufficient basis for the procedure.<sup>28</sup> Some jurists in this madhhab went so far as to regard abortion before ensoulment is a neutral (*mubāḥ*, i.e. allowed) action, meaning that it can be performed at will, without justification.<sup>29</sup>

The second largest *Shariʿah* school is the *Shāfiʿī madhhab* (in East Africa, Southeast Asia, Yemen and certain parts of Egypt and the Levant) also follows the 120-day ensoulment belief. Regarding abortion before this deadline the school is significantly divided. Such prominent scholars like *al-Ghazālī* prohibited it,<sup>30</sup> but he belonged to a minority (under the obvious influence of *Sufi* ethics<sup>31</sup> that is not to be discussed in detail herein), the majority of the *madhhab*, however, proved to be more lenient.<sup>32</sup> But the time of ensoulment still proved to be a dividing

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22 For a detailed historical overview in Hungarian literature see: JANY, Klasszikus iszlám jog 71–102; FALUS, A jólétkonyság és a közösségi gondoskodás jogintézményei a Shariában 16.

23 OMRAN, Family Planning in the Legacy of Islam 190. BOWEN, Abortion, Islam, and the 1994 Cairo Population Conference 162.

24 Sahih al-Bukhari, Ḥadīth 3208; Sahih Muslim, Ḥadīth 2643.

25 OMRAN, Family Planning in the Legacy of Islam 195.

26 MUSALLAM, Sex and Society in Islam 57.

27 OMRAN, Family Planning in the Legacy of Islam 191.

28 MUSALLAM, Sex and Society in Islam 57.

29 KATZ, The problem of abortion in classical Sunnī fiqh 31.

30 SEE AL-GHAZALI, ‘Ihya’ Ulum al-Din 53. For analysis see: MUSALLAM, Sex and Society in Islam 17–18.

31 On this subject see KATZ, The problem of abortion in classical Sunnī fiqh 39–45.

32 OMRAN, Family Planning in the Legacy of Islam 191.

issue, thus some *Shāfi'i* scholars believe that after 80 days, the expulsion of the fetus amounts to murder, while others pushed this red line to 120 days.<sup>33</sup> Other *Shāfi'i* jurists allowed abortion before the first signs of human form developed in the fetus (around 40 days), yet others imposed even stricter limitations.<sup>34</sup>

The third school of law in Islam is the *Mālikī* madhhab (mostly in the Maghreb region and West Africa) which is the strictest regarding the issue of abortion. The jurists in this madhhab hold that life begins at conception (a unique stance among Muslim scholars), and abortion is forbidden at all stages, even before ensoulment. Only a minority of *Mālikī* scholars permitted exceptional procedures in the first forty days of pregnancy.<sup>35</sup>

The smallest madhhab is the *Hanbalī* school (in Saudi Arabia, Qatar, the Uae and certain parts of the Levant). Like the other schools, *Hanbalīs* believe ensoulment occurs at 120 days. *Hanbalī* scholars tend to be stricter, and generally put forward that abortion can take place only until the end of the *nutfah* stage, i.e. before 40 days<sup>36</sup> post gestation (for example with abortive medicine),<sup>37</sup> but after 120 days abortion is strictly prohibited, except in life-threatening cases.

All in all, the four *madhhab* agree that ensoulment occurs after 120 days of conception, nevertheless, not all of them allow abortion up until this time. *Mālikīs* are the strictest, forbidding abortion from conception, but *Hanafīs*, *Shāfi'īs*, and *Hanbalīs* have some flexibility before 120 days. Only after 120 days becomes abortion *harām* in the majority of *Sunni madhhab* (unless the mother's life is in danger). It is important to add here that the more liberal scholars of the *Hanafī* and *Shāfi'i* schools believe that abortion before ensoulment is actually analogous with contraception.<sup>38</sup>

Stage of fetal development	<i>Nutfah</i> (sperm-drop in the womb)	<i>Alaqah</i> (blood-clot clinging to the womb)	<i>Mudghah</i> (lump of embryonic flesh)	E N S O U L M E N T	<i>Khalqan akhar</i> (Human being with a soul)
<i>Period of pregnancy</i>	<i>From gestation to 40 days</i>	<i>40 to 80 days</i>	<i>80 to 120 days</i>		<i>120 days till birth</i>
Ḥanafī school on abortion	Generally allowed	Generally allowed	Generally allowed		Allowed only to save mother
Shāfi'i school on abortion	Generally allowed	Majority allows	Some allows		Allowed only to save mother
Mālikī school on abortion	Mostly prohibited, rare exceptions	Prohibited, unless to save mother	Prohibited, unless to save mother		Prohibited, unless to save mother
Ḥanbalī school on abortion	Majority allows	Some allows	Some allows		Allowed only to save mother

*Fig 1: Legality of abortion in the different stages of fetal development according to the Sunnī schools of law*

33 BOWEN, Abortion, Islam, and the 1994 Cairo Population Conference 164.

34 KATZ, The problem of abortion in classical Sunnī fiqh 31.

35 MUSALLAM, Sex and Society in Islam 58. KATZ 2003, 31

36 BOWEN, Abortion, Islam, and the 1994 Cairo Population Conference 164.

37 OMRAN, Family Planning in the Legacy of Islam 191.

38 BOWEN, Abortion, Islam, and the 1994 Cairo Population Conference 165.

Though *Shī'ah* Islam is not in our present focus, it is worthy to note that the *Zaydī* (Fiver *Shī'ahs* is Yemen) and the *Imāmī*/*Ja'fārī* (Twelver *Shī'ah* majority in Iraq, Iran and South Asia) and the *Ismā'īlī* (Sevener *Shī'ahs* in India and East Africa) schools also differ in their adjudication, *Ismā'īlīs* being the most liberal (allowing abortion before 120 days), and *Zaydīs* being the strictest (mostly prohibiting abortion from gestation).<sup>39</sup>

It is also worthy to mention that the 120-days mark is less of an abrupt deadline utilized in practice to set the limit for abortion, “rather abortion becomes increasingly *makruh* [disliked, but not prohibited] as the fetus develops, until it becomes finally prohibited.”<sup>40</sup> This is in line with the view of Islamic *fiqh* that the fetus gradually advances into a ‘fully protected human being’.<sup>41</sup> This 120-days deadline is more of a technicality as the principle of ensoulment that comes with it arguably never became central to assessing the morality of abortion.<sup>42</sup>

It is even more significant to point out that due to the nature of Islamic law, all *madhhab* have to accept each other's positions as legitimate, and therefore all these opposing and drastic differences shall be acceptable in the eyes of the entire orthodoxy.<sup>43</sup>

## 2.5. Justifications for abortion in Islam

It is not only the stage of fetal development that is considered by Muslim scholars in case of abortion but other ethical, social, psychological elements are taken into account as well. Usually some kind of justification should be given to the practice, but there are branches of Islamic jurisprudence that actually allow abortion before 120 days unconditionally. These are the *Shī'ah Zaydī* scholars, and some *Sunnī* scholars in the *Hanafī* and *Shāfi'ī madhhab*.<sup>44</sup> The majority of the *Sunnī madhhab*, however, require some kind of justification of terminating a pregnancy. But even so, the *Hanafī* school would not regard an unjustified abortion before ensoulment a *harām* action, but only *makrūh*.<sup>45</sup>

The ultimate justification for abortion (no matter the stage of fetal development) is the risk to the mother's life, as “the root is more valuable than the branch”.<sup>46</sup> But legitimization for abortion does not stop here. Examples for further justification can be e.g. that the pregnancy disrupts the breast-feeding of an already born child (which enjoys precedence over the unborn).<sup>47</sup> Becoming a mother under the age of 15 can also be a justification for abortion<sup>48</sup> which is significant in light of the prevalent underage marriage in certain Muslim societies. *Ibn Sinna* (*Avicenna*) prominently referred to (often too young) women with small and frail bodies who got pregnant, and

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39 OMRAN, Family Planning in the Legacy of Islam 191–192.

40 AL-HIBRI, Family planning and Islamic jurisprudence 5.

41 KATZ, The problem of abortion in classical *Sunnī* *fiqh* 31.

42 BROWN, Islamic Ethics in Comparative Perspective 186.

43 MUSALLAM, Sex and Society in Islam 58.

44 OMRAN, Family Planning in the Legacy of Islam 192.

45 OMRAN, Family Planning in the Legacy of Islam 9. BOWEN, Abortion, Islam, and the 1994 Cairo Population Conference 165.

46 OMRAN, Family Planning in the Legacy of Islam 9.

47 BOWEN, Abortion, Islam, and the 1994 Cairo Population Conference 165. OMRAN, Family Planning in the Legacy of Islam 9.

48 BOWEN, Abortion, Islam, and the 1994 Cairo Population Conference 165.

prescribed abortion as a necessity in their case<sup>49</sup> (pursuant to the practice of *Hippocrates*).<sup>50</sup> It is apparent that in practice the justification for abortion can be medical and social, going so far to cite mental health and financial burden as a basis for terminating the pregnancy.<sup>51</sup>

If the fetus is determined to be severely malformed, abortion is generally deemed justified given that the procedure takes place before ensoulment (120 days). A prominent adjudication to this end was that of the Islamic World League which issued a fatwa in 1990 allowing abortion before 120 days in severe untreatable congenital disorders.<sup>52</sup>

Another dividing issue is that of rape, where some scholars tend to be more permissive towards abortion, while others refuse to accept the 'punishment' of the fetus for the sin of rape.<sup>53</sup> The issue of rape is a complicated subject in the Islamic context, with large latency. Certain scholars permitted abortion within the first 120 days, considering the psychological and social well-being of the mother who was raped. For example, during the Bosnian war, in certain instances women raped by enemy soldiers were allowed to use abortifacient medicine within the first 120 days.<sup>54</sup> The grounds for abortion are further elaborated in *Shapiro's* commendable paper.<sup>55</sup>

Since the general rule is that after 120 days of gestation, the pregnancy can only be terminated on very justified basis, while before this 120-days mark, abortion is more accessible (though usually not without the requirement of proper justification), the *mudghah* stage of fetal life is the last in which abortion is more readily allowed in most cases. When the *mudghah* becomes another being, a living soul, however, usually only to save the mother's life can provide justification enough to abort the new life.

Finally, it is of importance that no matter what the underlying reason is for a woman to seek abortion, if she finds the permissive stance of a *madhhab* to her liking (she is conscientiously convinced), she does not have to take into consideration the disagreements within that school or the differing views of another one. Without further ado, she should be able to act upon her license given by the more permissive *madhhab*.<sup>56</sup> This finely reflects the disunity within Islamic teaching and legal practice. This lack of one objective norm results in significant moral heterogeneity in Muslim societies.

## 2.6. A blind spot for fundamentalists?

Members of the Muslim '*ulamā*' (religious scholars) of today try to navigate theoretic findings of their schools with the even increasing demands from society along the lines of secularization.<sup>57</sup> This issue is just one of the many where tradition comes in conflict with modern demands. Many scholars over the past decades expressed justified concern that a more lenient

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49 MUSALLAM, Sex and Society in Islam 69.

50 BROWN, Islamic Ethics in Comparative Perspective 69–70.

51 BOWEN, Abortion, Islam, and the 1994 Cairo Population Conference 167.

52 ALBAR, Induced abortion from an Islamic perspective: Is it criminal or just elective? 31.

53 ALBAR, Induced abortion from an Islamic perspective: Is it criminal or just elective? 31.

54 RISPLER-CHAIM, The right not to be born 137–138.

55 SHAPIRO, Abortion law in Muslim-majority countries 488.

56 AL-HIBRI, Family planning and Islamic jurisprudence 5.

57 BOWEN, Abortion, Islam, and the 1994 Cairo Population Conference 167.



stance of abortion would lead to libertine lifestyles (e.g. extramarital sexual activity) among many Muslims, fearing that thus Islamic societies would step on the path of decay which they perceive from Western liberal countries.<sup>58</sup>

While scholars vie to find the balance, due to its nature this matter could typically be something that becomes part of fundamentalists' agenda. Interestingly, abortion does not seem to be a product of Western impact in the eyes of Islamic fundamentalists, Islamists and other radicals (terrorists, jihadists). While Western dressing codes, sexual mores, state systems, women's role in society and apostasy are in the forefront of fundamentalist warnings against the West, the widespread termination of pregnancies are rarely mentioned among the 'many sins of the West'.

The arguably single most important ideologue for fundamentalists in the 20<sup>th</sup> century, *Sayyid Qutb* was deeply disillusioned by the conditions he met in the United States, but his seminal work *Milestones*<sup>59</sup> misses to address the issue of abortion. Since *Ma'ālim fi al-Ṭariq* influences a large portion of radicals up until today, this is certainly a conspicuous fact. The group *Qutb* was associated with, the *Muslim Brotherhood*, which is probably the last mass-based fundamentalist movement (with millions of members back in its heyday), never attributed much significance to the issue of abortion, even though it opposed secularism in Egyptian and Muslim societies in general.

While *al-Qā'idah* blamed the West (and the United States in particular) with a large array of moral and societal "vices" (including the promotion and support of Zionism), abortion never seemed to be on their list. The *Islamic State of Iraq and the Levant* (Isil) imposed strict rules in the territories it occupied, but a criminalization of abortion was never a priority. Rather, they even forced abortion on Yazidi women whom they treated as sex slaves.<sup>60</sup>

While the ultra-conservative *Ṭalibān* imposed restrictions on the availability of abortion in Afghanistan,<sup>61</sup> they never made this issue a rallying point for jihad. Thus, in general it is safe to state that neither the termination of millions of pregnancies in the West, nor the millions of abortions carried out in the Islamic world constitute a severe issue for fundamentalists. This fact becomes all the more quaint if we consider that one of the most important classical points of reference for fundamentalists is *Ibn Taymiyya*, who was exceedingly strict regarding abortion even within *Hanbalī* circles.<sup>62</sup>

### 3. The Islamic perspective on unborn life compared to Judeo-Christian and classic Hellenistic values

It is no secret that the religious and ideological system of Islam was influenced by many (mostly neighbouring) cultures from Judaism (local Jewish tribes, Judaized Arabs and the Himyarite Kingdom in South Arabia) and Christianity (by the Byzantine Empire and the Ethiopian Kingdom of Aksum) to Zoroastrianism (Sasanian Persia). Hellenistic culture had its mark on Islam not from its ascent, but during its golden age in Baghdad during the Abbasid dynasty when Greek philosophy, science and ideology was discovered and translated into Arabic (under heavy Persian influence). It was exactly during this period (the *Abbasid* Caliphate) when the different schools

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58 BOWEN, Abortion, Islam, and the 1994 Cairo Population Conference 170–171.

59 QUTB, *Milestones*.

60 SCHUBERT, Isis forced pregnant Yazidi women to have abortions.

61 WALLACE, The troubling rise of criminal abortion in Afghanistan.

62 KATZ, The problem of abortion in classical Sunnī fiqh 26.

of Islamic law were founded (from the late 8<sup>th</sup> century to the mid-9<sup>th</sup> century). The question at hand is: regarding abortion, which ideology had a bigger impact in Islam?

### 3.1. Judeo-Christian perspective on abortion

While one would have a hard time finding a systematic teaching on abortion in the Hebrew Bible, nevertheless several sections assert the sanctity of human life even in the womb. Exodus 21:22-25 makes it clear that the *Torah* assigned value to the unborn: *"If people are fighting and hit a pregnant woman and she gives birth prematurely but there is no serious injury, the offender must be fined whatever the woman's husband demands and the court allows. But if there is serious injury, you are to take life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise."*

Other sections reaffirm the view that development in the womb is *God's* work. The story of *Rebecca's* pregnancy reflects on the prophetic destiny of unborn children (Genesis 25:22-24). Psalm 139 says *"For you created my inmost being; you knit me together in my mother's womb"* (v.13). In the Book of *Jeremiah* it is revealed that *God* set the prophet apart for his ministry already in the womb<sup>63</sup>.

While later Judaistic traditions were affected by other ideologies and philosophies and therefore interpreted the relevant *Tanakh* sections in several ways, early Christianity was adamant in fetus-protection. The New Testament also reaffirms the sanctity of life from the womb, and clearly follows the Old Testament spirit when it comes to the descriptions of unborn children. *Elizabeth* and *Mary* definitely treated their progeny as humans with living souls (see e.g.: Luke 1:41-44: *"When Elizabeth heard Mary's greeting, the baby leaped in her womb, and Elizabeth was filled with the Holy Spirit"*). In Galatians 1:15 the apostle *Paul* echoes *Jeremiah* when he talks about his calling from the time he was in his mother's womb.

Early church leaders and church fathers generally opposed abortion, reflecting a view that it was morally wrong, regardless of their varied opinions on the exact beginning of life. The early Christian treatise (most likely by 1<sup>st</sup> century *Apostolic Fathers*), the *Didache* explicitly condemns abortion: *"Thou shalt not destroy a child by abortion, neither shalt thou slay him that is born."*<sup>64</sup> While this text was not included in the final Canon, it is nevertheless one of the earliest significant Church sources reflecting a pro-life stance (without further ado to stages of development in the womb).

One of the most significant Christian apologists was *Tertullian* (160–225 Ce). He also strongly opposed abortion, describing it as equivalent to murder. In *Apology*, he writes, *"But Christians now are so far from homicide, that with them it is utterly unlawful to make away a child in the womb, when nature is in deliberation about the man; for to kill a child before it is born is to commit murder by way of advance; and there is no difference whether you destroy a child in its formation, or after it is formed and delivered. For we Christians look upon him as a man, who is one in embryo; for he is in being, like the fruit in blossom, and in a little time would have been a perfect man, had nature met with no disturbance."*<sup>65</sup> *Tertullian* also made it clear that both life and the soul begins at conception.<sup>66</sup>

*Athenagoras* (2<sup>nd</sup> century) in his *"A Plea for the Christians"* harshly condemns abortion as the killing of a child before birth, calling mothers who use drugs to such ends murderers.<sup>67</sup>

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63 Jeremiah 1:5.

64 ALLEN, *Didache*, Chapter II. 2.

65 REEVE, *The Apology of Tertullian* 32.

66 TERTULLIAN, *A Treatise on the Soul* 333–334.

67 ATHENAGORAS, *A Plea for the Christians* 147.

*Hippolytus of Rome* (c. 170–235 Ad) agreed with him in “*The Refutation of All Heresies*”.<sup>68</sup> Even later Christian theologians, such as *Basil of Caesarea* (c. 330–379 Ad) and *John Chrysostom* (c. 349–407 Ad) strongly rejected the practice of abortion. In his letter “*To Amphilocheus, concerning the Canons*” he puts forward that “*Women also who administer drugs to cause abortion, as well as those who take poisons to destroy unborn children, are murderers.*”<sup>69</sup>

When *John Chrysostom* wrote against abortion and infanticide, he linked conception with personhood in his “*Homilies on Romans*” (c. 391 Ad) and regarding the fruit of the womb he stipulated: “*Why then dost thou abuse the gift of God, and fight with His laws, and follow after what is a curse as if a blessing, and make the chamber of procreation a chamber for murder, and arm the woman that was given for childbearing unto slaughter?*”<sup>70</sup>

In the same century, *Gregory of Nyssa* (c. 335–395 Ad) explicitly stated that life begins at conception and that the soul is present from the beginning: “*There is no question about that which is bred in the uterus both growing and moving from place to place. It remains therefore that we must think that the point of commencement of existence is one and the same for body and soul.*”<sup>71</sup> It is not by chance that several of these sources mention abortion in the context of esoteric practices that involve the usage of drugs and other substances. Even the Bible makes a correlation between the magic usage of herbs, potions (*pharmakeia*) and sexual deviances (see e.g. Galatians 5:20) which many sources interpret as to equate *pharmakeia* with the wilful termination of pregnancies resulting from immoral lifestyles. Cultural commentary does reaffirm that especially in Roman times abortion became a method of contraception, hence more and more apologists raised their voices against such practices.<sup>72</sup>

More libertine Christian teachings on the beginning of life arguably started with *Augustine of Hippo*, who himself was opposed abortion, but in the meantime also incorporated pagan ideas regarding ensoulment. Nevertheless, even the Catholic Church generally upholds that life begins at conception, and Protestantism also joined traditional churches in the protection of unborn children, though in modern times this resistance waned somewhat concurrently with the secularization of Western societies.<sup>73</sup>

It is safe to state that the Augustinian perception is just as much under the influence of *Aristotle’s* idea of fetal development in certain stages as are the relevant teachings of Islam.

### 3.2. Hellenic perspective on abortion

Though the Hippocratic vow includes a clause prohibiting the administration of abortive medicine, Greek philosophers tended to be surprisingly lenient towards abortion. In the “*Republic*” *Plato* discusses population control and advocates for state-controlled reproduction. He writes: “*Of course, when women and men pass the age for producing children (...) If there is a pregnancy, then ideally the embryo should never see the light of day. If one does force its way into existence, the parents must deal with it on the understanding that they cannot bring up a child of this sort.*”<sup>74</sup> *Plato*

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68 HIPPOLYTUS, *The refutation of All Heresies*.

69 ST. BASIL, Letter CLXXXVIII 656.

70 JOHN CHRYSOSTOM, Homily XXIV 520.

71 GREGORY OF NYSSA, *On Soul and Resurrection* 459.

72 SCHMIDT, *Hogyan változtatta meg a kereszténység a világot?* 63–64.

73 SCHMIDT, *Hogyan változtatta meg a kereszténység a világot?* 65–66.

74 PLATO, *Republic* V, 461c.

considered children conceived over the appropriate age of the parents (age 55 for men and 40 for women<sup>75</sup>) prone to be sickly and therefore unfit for an ideal society.

While *Plato* did not elaborate on fetal development, his disciple went at great length to discuss this subject. In *“Politics”* *Aristotle* wrote: *“let there be a law that no deformed child shall live, but that on the ground of an excess in the number of children, if the established customs of the state forbid this (for in our state population has a limit), no child is to be exposed, but when couples have children in excess, let abortion be procured before sense and life have begun; what may or may not be lawfully done in these cases depends on the question of life and sensation.”*<sup>76</sup> This clarifies that the philosopher also regarded human life to be formed in stages during the pregnancy. In other works of his he explains his idea of *hylomorphism* which states that the psyche gives life to the flesh, but this develops in stages (and these stages vary according to the sex of the fetus).<sup>77</sup>

Later philosophical schools debated the issue of abortion with the *Stoics* being more supportive (for they generally believed that ensoulment happens at birth<sup>78</sup>), and *Pythagoreans* vehemently rejecting it (which was rooted in their belief of reincarnation). *Cynic* and *epicurean* philosophy, with its pragmatic and/or materialistic approach did not change perception of life in the womb for the benefit of the fetus.

Hence, the ideas of *Plato* and *Aristotle* had a long lasting effect, and it was for the most part integrated in Roman society as well.<sup>79</sup> Roman *Stoics* did not look upon the fetus as a rational being, therefore had little problems with the widespread Roman practice of abortion. Roman law did not prohibit abortion,<sup>80</sup> regarding the fetus as part of the mother’s body (*pars viscerum matris*). The Laws of the Twelve Tables stipulates that *“A notably deformed child shall be killed immediately.”*<sup>81</sup> Even though from the 3<sup>rd</sup> century Ad certain limitations were introduced in the practice, still *“it was the father’s rights, not the child’s, that were essentially at stake”* says *Watts*.<sup>82</sup>

#### 4. Assessment

Deducing from the above-mentioned, we can establish that many church fathers affirmed that human life begins at conception, rendering the termination of pregnancy a grave sin. Their condemnation of abortion as murder reflects the belief that the unborn child is a living person from the earliest stages: a view that remains central to many Christian denominations up until today.

This stands in stark contrast to the Islamic perception of fetal development. The most apparent contemporary evidence for the striking difference between the Christian and the Islamic approach to abortion was produced by the International Conference on Population and Development in Cairo. The 1994 event saw an arguably unprecedented effort to harmonize Catholic and Muslim stance regarding women’s status and family planning. Interestingly it was mostly the issue of abortion which proved to be a deal-breaker as the Muslim side found the conservative, non-permissive approach of the Vatican too rigid for their own interpretation of Islamic jurisprudence. As *Bowen* wrote, despite the

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75 PLATO, Republic V, 460e.

76 ARISTOTLE, Politics VII, part 14.

77 See e.g. ARISTOTLE: On the Generation of Animals II, chapter 3.

78 WATTS, Ovid, the Law and Roman Society on Abortion 98.

79 SCHMIDT, Hogyan változtatta meg a kereszténység a világot? 62.

80 WATTS, Ovid, the Law and Roman Society on Abortion 91.

81 Lex XII Tabularum, Table IV(1).

82 WATTS, Ovid, the Law and Roman Society on Abortion 92.

fact that even the majority of Muslims worldwide “would state that Islam forbids abortion, the Muslim theological position on abortion does not approximate the Roman Catholic condemnation of the practice.”<sup>83</sup>

Though Islamic theology and legal practice may reflect Judeo-Christian influence when it comes to moral views on the sanctity of life, however Greek philosophical and medical theories (especially the view that the fetus is non-human in the early stages of gestation) have more in common with the practical adjudication of *Sunni madhhabs* (except that of the *Mālikīs* whose adherence to child protection from gestation resonates with Judeo-Christian tradition). Especially the leniency towards abortion by the two largest *madhhab* (the *Hanafīs* and the *Shāfiʿīs*) reflects Aristotelian views, resulting in most Muslim scholars to allow abortion in some form or another.<sup>84</sup> This creates a huge discrepancy between the theory of the “sanctity of life” and the actual practice in several Muslim countries where a large number of abortions are carried out annually.

At the end of the day, it is definitely indisputable that the Muslim world is anything but unanimous regarding fetal life and this fact, together with the different colonial law influxes, creates a baffling variety of abortion practices in Muslim societies. Since the Islamic world is not ruled by a Caliphate anymore, but was divided into several states, today the decision on abortion rests with the governments of these states, making this issue heavily political and less theological in the contemporary setting.<sup>85</sup> With regards to politics, it is essential to see that most parts of the Middle East was colonized by foreign powers, and the legal systems thereof seeped into the legislation of Muslim countries. This affects their regulations up until today, resulting in Morocco having French, Jordan having Ottoman, Libya having Italian and Bahrain having English elements of law in their own abortion regulations. Iran, Saudi Arabia and Yemen are the only countries where Islamic law has predominance in this regard.<sup>86</sup> For an exhaustive list, I recommend *Hessini*’s publication.<sup>87</sup>

Probably the most liberal of all Muslim countries is Tunisia which introduced a basically secular law for abortion. The Tunisian law of 1973 virtually allowed the practice on demand even in the second half of the pregnancy, fundamentally defying all fatwas regarding abortion that require some perceived justification for terminating the pregnancy.<sup>88</sup> If we take into consideration that most Tunisians actually adhere to the strictest *Mālikī* schools, it becomes evident that Islamic theory and state practice do not always follow the same track.

Even “secular” Türkiye is slightly more rigid than Tunisia when it comes to socio-economic reasons for abortion.<sup>89</sup> Türkiye legalized abortion in 1983, but in ten years the Turkish society came nowhere near the abortion rates of the United States or Russia.<sup>90</sup> For further details regarding contemporary regulation on abortion in Muslim countries, I refer the reader to *Donna Lee Bowen*’s work in the subject.<sup>91</sup>

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83 BOWEN, Abortion, Islam, and the 1994 Cairo Population Conference 161.

84 AL-HIBRI, Family Planning and Islamic Jurisprudence 4.

85 BOWEN, Abortion, Islam, and the 1994 Cairo Population Conference 162.

86 SHAPIRO, Abortion law in Muslim-majority countries 492.

87 HESSINI, Islam and Abortion.

88 ALBAR, Induced abortion from an Islamic perspective: Is it criminal or just elective? 34.

89 BOWEN, Abortion, Islam, and the 1994 Cairo Population Conference 173.

90 BOWEN, Abortion, Islam, and the 1994 Cairo Population Conference 174.

91 BOWEN, Contemporary Muslim Ethics of Abortion.

It is noteworthy that the legality and availability of abortion is not necessarily reflected in the number of procedures carried out in Muslim countries. Though Tunisia is uniquely liberal in this sense, the number of abortions per year is in the few thousands, while Pakistan sees millions of abortions per year despite stricter rules.<sup>92</sup> It would be the basis of a fascinating new research to analyse the social, historical, religious and other reasons for this discrepancy.

I agree with *Bowen* in that the assessment of abortion practices in the Muslim world entails several other issues connected to the social order in Islam.<sup>93</sup> The subject at hand begs for the further analysis of issues like the status of women, family planning and contraception, the relation of men and women to each other in Islam, the influence of colonial law and the potential or lack of modernization in Islamic law.

Our present task was to analyse the historical approach to the deliberate termination of pregnancy, and along the way we established that the way Muslim jurists divided the life of the fetus to separate development stages invokes not the Judeo-Christian way of thinking (with which many associate Islam when it comes to the appreciation of human life), but that of Hellenistic culture. Surprisingly, it seems that even radical fundamentalist entities have little trouble with this phenomena, as abortion is conspicuously missing from the list of ‘crimes’ with which such groups regularly charge the West. The Muslim world is not only deeply divided on the authorization of first and second trimester abortions, but major branches of Islamic jurisprudence demonstrated permissiveness herein on levels that are virtually unfathomable in Christianity, and which is therefore, hardly reconcilable with the worldview of the Bible.

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