

ISLAMIC ETHICS AND ABORTION IN THE SCHOOLS OF HANAFIYAH AND MALIKIYAH

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Abstrak

Penelitian ini bertujuan untuk mendiskusikan tentang aborsi dalam mazhab-mazhab etika Islam, yakni Hanafiah dan Malikiyah. Etika dan aborsi diselidiki, serta pendapat dan argumen tentang hal itu. Ini adalah penelitian kepustakaan dilakukan untuk mencari prasyarat dan argumen tentang aborsi berdasarkan etika Islam. Ia melihat dan menganalisa perbedaan interpretasi dan pemahaman tentang aborsi. Penelitian ini kemudian menemukan bahwa untuk mazhab Hanafy, masa iddah terjadi setelah 120 hari atau 4 bulan, sementara beberapa yang lain mengatakan bahwa itu terjadi setelah 80 hari ada beberapa juga menyatakan bahwa itu terjadi setelah 42 hari. Jika tidak, penganut Malikiyah menyebutkan bahwa itu terjadi setelah 40 hari. Aborsi sebelum iddah bagi sebagian besar mazhab Hanafy diperbolehkan. Sebaliknya, sebagian besar penganut Malikiyah benar-benar melarang bahkan janin masih dalam jangka kontrasepsi.

This study aims to discuss about abortion in Islamic ethical schools; Hanafiah and Malikiyah Schools. Ethics and abortion are investigated, as well as their opinions and arguments about it. This is a library research conducted in order to find preconditions and arguments on abortion based on Islamic ethics. It sees and analyzes their different interpretation and understanding on abortion. This study then find that for Hanafiyans School, the iddah happens after 120 day or 4 months, while some of others say that it happens after 80 days there are some also state that it happens after 42 days. Otherwise, Malikiyans mention that it happens after 40 days. Abortion before iddah for most of Hanafiyah School is permitted. In contrast, most of Malikiyans totally forbid it even the fetus is still in the contraception period.

Kata Kunci: Islam, aborsi, etika, Hanafiyah, Malikiyah.

A. Introduction

The development progress of science and technology has been accompanied by a parallel success in biotechnology and medical ethics. The rapid advanced in technology over the last few decades have provided the genetic testing tool for a number of disorders and have led to the new hopes in the treatment of some genetic conditions and diseases.¹ This development has also raised ethical concern about how emerging technologies were implemented, and how the implementation impacts the different communities. Here of course, ethical value must help us to know how medical ethics knowledge applied in order to maximize the benefits and minimize the harms.

Medical ethics are based on the moral, religious and philosophical ideals, and principles of the society in which they are practiced. It is therefore not surprising to find that ethics in one society might not be ethics in another. It is mandatory for practicing physicians and critics of conduct to be aware of such backgrounds before they make their judgment on the different medical moreover religious practice decisions.² The ethical attitude of the individual, whether a patient or a treating physician, is often colored by the attitude of the society, which reflects the interest of theologians, demographers, family planning administrators, physicians, policy-makers, sociologists, economists, legislators and the like.³ Responsible policy-makers in the medical profession in each country have to decide on what is ethically acceptable in their own country, guided by international guidelines which should be tailored to suit their own society. Truly ethical conduct consists of personal searching for relevant values that lead to an ethically inspired decision.

Indeed, in humans' life activity, we always deal with ethical issues, but we rarely know how to deal with them. A recent review of articles by Cherrington, uncovered a whole array of issues being faced

¹ Fazaneh Zahedi and Bagher Larijani, *Medical Genetic Ethics, Islamic View and Considerations in Iran*, Endocrinology and Metabolism Research Center, Shariati Hospital, North Kargar, (Tehran, Iran: 2006), p. 48

² Serour GI., *Islam and the Four Principles*, in Gillon R., (ed.) *Principles of Health Care Ethics*, (London, Wiley: 1994), p. 75–91

³ *Ibid.*

by employees: stealing, lying, fraud, deceit, and etc.⁴ On the other hand, it sometimes also difficult to make decision related to medical issues, such as euthanasia, cloning, abortion and the like. Abortion is one of hot ethical topics among them that usually provoke controversy and noisy debate among societies. However, these debates often can be long on emotion and short on fact and reason. The truth is, like all-important issues, the abortion controversy deserves careful and considered reflection and understanding. Nevertheless, what is most needed here is often what is most lacking. Furthermore, abortion also is an issue which has been the subject of intense debate.

In Islam, there is a controversy or a difference to interpret and understand abortion, either it is permissible or impermissible. Some of them permit it and some of others do not, even in one or similar schools. *Hanafiyah* School for instance, most of them, allow abortion but others do not. On the other hand, most of Moslem scholars in *Malikiyah* School forbid abortion and the only some of them permit it. Therefore, in this paper, I will examine critically the idea of abortion through Islamic ethical school (*Hanafiah* and *Malikiyah*) overview. Here, I just focus on *Hanafiah* and *Malikiyah* Schools even actually there are at least four familiar schools, in Islam. I will first define ethics in general and ethics in Islam itself. Then, look at what and how abortion has been discussed and responded by scholars generally and Moslem scholars (schools) especially, to find preconditions and arguments of them. Furthermore, I will see and analyze also what makes them have different interpretation and understanding on abortion.

B. What is Ethics?

In general, the word *ethics* means set of moral principles. It is also a branch of philosophy which deals with moral.⁵ By another definition, it is the philosophy of what is right and wrong that the

⁴ Cherrington, J. O. and Cherrington, D. J. *A Menu of Moral Issues: One Week in the Life of the Wall Street Journal*, *Journal of Business Ethics*, 11, 1993, p. 255-265.

⁵ Beauchamp TL., Childress JF. *Principles of Biomedical Ethics*, (New York: Oxford University Press, 1989), p. 205

society has accumulated a set of value throughout its history which are recognized and intrinsically right and wrong.⁶ According to Galert that ethics concerns with two different target aspects; the first is concern with the question of the “success” of one’s life; the standards and principles that enable a person to have happy and fulfilled life, and the second is the standards and principles of living together; building regulation that creates the condition for happy life. For me, what Galert offers is Eudemonistic ethics and the common good based on normative rules. It seems to me that he is very influenced by Aristotle who states that the highest and the end value is happiness, and happiness itself is the activity of soul; to think---not to enjoy. It means to think like philosophers because it is only for human beings and do not enjoying developing capacity. All in all, ethics does not make people to be good people but it is the basic of acting, it is the way to be a critical person and it is also a critical thinking about humans’ actions. Indeed, everybody needs norm in order to be a good people but not all need ethics. However, ethics will give us rational basis for the norms.

In Islam, many Muslims acknowledge Islamic ethics as synonymous or identical with Islamic morality (*akhlaq*). However, ethics and morality are different. *Ethics* originates from Greek “*ethos*” means appropriate and rational whereas *moral* originates from Latin “*mores*” which is commonly felt and done (habit or custom). In fact we will also find that Islamic morality (*akhlaq*) is merely one field within Islamic ethics. Thus, Islamic ethics is closer to be understood as *Islamic value system* which stands and operates as the basis of the entire construction of Islamic norms, judgments and values. According to Aryn B. Sajoo that an ethos is readily identified as a body of sacred rules, some finding their way into law or *fiqh*, and the rest into wider *shari’a* as a normative expression of what Islam is.⁷ In addition, law and ethics are inseparable. Two terms, *fiqh* and *shari’a*, signified what we call the law. The *shari’a* refers to revealed

⁶ See...Bulger RE., Heitman E., and Reiser SJ., (eds.), *The Ethical Dimension of Biological Science*, (New York: Cambridge University Press), 1993

⁷ Aryn B. Sajoo, *Muslim Ethics: Emerging Vistas*, I.B.Tauris Publishers London-New York in Association with The Institute of Ismaili Studies, (London: 2004), p. xi

normative discourses; *fiqh* (literally meaning “discernment”) is the interpretation and application of these discourses. Indeed law or *fiqh* has to meet two ends; practices and simultaneously serve as act of salvation.⁸

Within an Islamic context, according to Ebrahim Moosa that term “ethics” most closely related to *khuluq j. akhlaq*.⁹ *Akhlaq* is right conduct constitutes the sum of prudential knowledge that shields one from all error in speech, act, and character.¹⁰ On the other hand, the holy Qur’an also uses a whole array of terms to describe the concept of goodness: *khayr* (goodness), *birr* (righteousness), *qist* (equity), *‘adl* (equilibrium and justice), *haqq* (truth and right), *ma’ruf* (known and approved), and *taqwa* (piety). Pious actions are described as *salihat* and impious actions are described as *sayyi’at*.¹¹ In addition, ethics is about what is right and wrong with reference to norms and values rather than to instrumental calculations for self-seeking purposes. Within this approach, there are many schools and traditions that I will not go further into here: Deontology (or duty ethics), Virtue ethics, Utilitarianism etc.

Furthermore, in Islam, there are differences on ethical principles or sources of Islamic law especially in *Sunni* and *Shii* scholars. Sunni scholars discern four sources of Islamic law, they are: the holy Qur’an; the direct expression of divine will, Hadith; the teaching of Prophet Muhammad SAW., *Ijma’* or “consensus”; an agreed interpretation among scholars of a given legal issue. *Ijma* was an effective means of establishing conformity of opinion; the last is *Qiyas* or “reasoning” on the basis of analogy; it proved to be a useful tool with which scholars could reach legal decision on issues of which the *Qur’an* and the *Hadith* provided unclear guidance. On the other hand, Shii scholars differ from Sunni colleagues in placing greater

⁸ William Schweiker, (ed.) *The Blackwell Companion to Religious Ethics*, in Ebrahim Moosa, *Islamic Ethics: Muslim Ethics?*, (USA-UK- Australia: Blackwell Publishing, 2005), p. 239

⁹ *Ibid.*, p. 237

¹⁰ Khanzada, 1980: 4 cited by Ebrahim Moosa, *Islamic Ethics: Muslim Ethics?*, in William Schweiker, (ed.) *The Blackwell Companion to Religious Ethics*, (USA-UK-Australia: Blackwell Publishing, 2005), p. 238

¹¹ Majid Fakhry, *Ethical Theory in Islam*, (Leiden: E. J. Brill, 1991), p. 12-

value on the exercise of human reason and intellect. Therefore, instead of *Qiyas*, the Shiis have *Aql* or *Ijtihad*, “individual reasoning”.¹² All in all, it can be understood that actually the only *aql* or *ijtihad* makes Sunni and Shii differ in ethical principles. As I understood, Sunnis do not include *aql* or *ijtihad* as a basic source (*fiqh*) because *qiyas* is stronger than *aql* or *ijtihad*.

C. What is Abortion?

1. Definition of Abortion

Abortion is ending pregnancy, whatever the way it is, before the fetus expands enough to survive outside of womb.¹³ Another definition is the termination of pregnancy (by certain effects) at a pregnant woman before the pregnancy is in 22 weeks or the fetus cannot survive outside of womb.¹⁴ In *fiqh* literatures, abortion means *al-ijhadh (jahada)* or *isqath al-haml*, means maternal bears whether spontaneity or non-spontaneity in incomplete creation.¹⁵ Generally, abortion can be understood as to abort the uterus in maternal womb whether before or after ensoulment. However in this case, it seems to me that the definition of abortion based on medical perspective is different with Islamic perspective.

In Islam, *fuqahas* do not emphasize the maximum days, whether abortion is done before or after 22 days is absolutely considered as abortion.¹⁶ Historically, the Muslim legal positions range from unqualified permissibility of an abortion before 120 days¹⁷

¹² See...Matthew S. Gordon, *Islam: Origins, Practices, Holy Texts, Sacred Persons and Sacred Places* on “*Ethical Principles*,” (New York: Oxford University Press, 2002)

¹³ F. Gary Cunningham, M.D., Paul C. MacDonald, M.D., and Norman F. Gant, M.D., *Williams Obstetrics*, Joko Suyono and Andry Hartono (trans.), Devi H. Ronardy (ed.), 18th Edition, (Jakarta: Penerbit Buku Kedokteran EGC, 1995), p. 571

¹⁴ Abdul Bari Saifuddin, (co. eds.), *Buku Acuan Nasional: Pelayanan Kesehatan Maternal dan Neonatal*, YBP-SP; (Jakarta: Yayasan Bina Pustaka Sarwono Prawiroharjo, 2006), p. 145

¹⁵ Mariah Ulfah Anshor, *Fiqh Aborsi: Wacana Penguatan Hak Reproduksi Perempuan*, (Jakarta: Penerbit Buku Kompas, 2006), p. 32

¹⁶ *Ibid.*, p. 34

¹⁷ The majority of Muslims scholars and schools opinion.

and 80 days¹⁸ while others before 42 days¹⁹ and 40 days²⁰ into the pregnancy, on the one hand to categorical prohibition of abortion altogether on the other. Even within a single legal school such as *Hanafiyah* and *Malikiyah* Schools, the majority position was often accompanied by dissenting minority positions.²¹

Abortion is a fact that becomes a serious problem among societies. It is really a controversial issue, moreover if it is related to moral norms and ethical values (religious ethical values, in this case, Islamic ethical values). It may be caused by the assumption that abortion is only done under certain condition, like “MBA” (Married by Accident or pregnant by free sex). However, it is only small case or it does not mean so. Abortion here means not only for those who do free sex then pregnant but also for those who have legality to do sex (spouse) then do abortion. Therefore, we should know what abortion is.

According to Nasaruddin Umar in Maria Ulfa Anshor that the thoughtfulness of society on abortion can be categorized into two categories; first, (pro-life) agree and maintain the life and argue abortion. Second, (pro-choice) support the woman freedom of reproduction and consider that abortion is one of woman’s rights.²² From within the Islamic perspective, according to Sa’diyya Sheikh that there is room for a pro-choice perspective where the individual *khalifah* engages all sources of Islamic guidance i.e. the Qur’an the prophetic traditions, the legal positions, as well as his or her own intellectual, moral and ethical capacities to inform a decision about

¹⁸ Muslim scholars’ opinion (*Hanafiyah* School), See... Mariah Ulfa Anshor, 2006

¹⁹ *Op.Cit.*, Maria Ulfa Anshor, 2006, p. 98 some of *Syafi’i* scholars’ opinion in the case of ensoulment.

²⁰ *Ibid.*, p. 102 “some of *Malikiyah* scholars’ opinion in the case ensoulment.

²¹ See...Sa’diyya Sheikh *Family Planning, Contraception, and Abortion in Islam: Undertaking Khalifah*, in Daniel C. Maguire (ed.), *Sacred Right: The Case of Contraception and Abortion in World Religions*, (New York: Oxford University Press, 2003), p. 105 – 124.

²² Nasaruddin Umar, *An Acknowledgement on Abortion*, in Mariah Ulfa Anshor, *Fiqih Aborsi: Wacana Penguatan Hak Reproduksi Perempuan*, (Jakarta: Penerbit Buku Kompas, 2006), p. xxvi

abortion.²³ In Islam, while scientific inquiry has illuminated the process of fetal development with progressively more clarity, the question of when a fetus is considered a human being is open to varying interpretations,²⁴ especially in discussing on abortion. Where actually, as I mention previously that the main case the scholar discussing on abortion is when did ensoulment happen? Here, according to Aristotle (based on his biological perspective) that before 40 days (man)/90 days (woman) there is a form of life but not human's life. Indeed, he categorizes the process of human being as follows; for plant; vegetable life-embryo, for animal; sensitive life, and for human; intellective life-this makes human being becomes human being. Rather than Islamic scholars view, as I mention earlier, in majority that abortion is impermissible after 120 days or 4 months, while others before 42 days and 40 days. Furthermore, in Islam, the following Qur'anic verses are the central verses to understand some of the ways in which Muslim thinkers approach the issues.

“He creates you in the wombs of your mothers. In stages, one after another, in three veils of darkness, Such is Allah, your Lord and Cherisher” (QS., 39: 6). “We created the human being from a quintessence of clay, then we placed him as semen in a firm receptacle, then we formed the semen into a blood-like clot, then we formed the clot into a lump of flesh, then we made out of that lump, bones. And clothed the bones with flesh, then we developed out of it another creation. So Blessed is Allah the Best Creator” (QS., 23: 12-3).²⁵

Based on those verses, many Moslems scholars and schools have different interpretation and understanding in it. Nevertheless, before explaining their differences in interpretation and understanding, let us

²³ Sa'diyya Sheikh, *Op.Cit.*. 2003

²⁴ *Ibid.*,

²⁵ See...Qur'an, *Islamic Holy Scripture* (QS., 39: 6 and QS., 23: 12-3), and also Sa'diyya Sheikh's article *Family Planning, Contraception, and Abortion in Islam: Undertaking Khalifah*, in Daniel C. Maguire (ed.), *Sacred Right: The Case of Contraception and Abortion in World Religions*, (New York: Oxford University Press, 2003), p. 106.

know the kind of abortion firstly, based on medical and *fiqh* (Islamic) perspectives.

2. Kinds of Abortion

a. Medical Perspective

In medical perspective, as mention in *Glorier Family Enciclopedia* in Mariah Ulfah Anshor, “An abortion is a termination of a pregnancy by loss or destruction of the fetus before birth. An abortion may be spontaneous or induced.”²⁶ Furthermore, abortion, in this case, is divided into two kinds, they are:

- 1). *Spontaneous Abortus*; unintentional abortion (abortion which happens naturally, whether on the certain case or not). Furthermore, spontaneous abortus is divided into some parts, they are:
 - a. *Imminens Abortus* (threatened abortion); there is a symptom threats abortion,
 - b. *Incipiens Abortus* (inevitable abortion); there is a symptom that abortion will happen but the fetus is in the womb,
 - c. *Incompletus Abortus* (incomplete abortion); some of the fetus are outside of the womb and some of others are inside,
 - d. *Completus Abortus* (complete abortion); abort all the fetus from the womb.
- 2). *Provocatus Abortus*; intentional abortion (abortion which happens based one wishes, like maternal or others). Indeed, this kind of abortion has two varieties, they are;
 - a. *Artificialis therapicus Abortus*; the abortion which is done by medical tools (physician) because of medical factors, such as to save mother’s life.
 - b. *Provocatus Criminalis Abortus*; the abortion which is done without any causes from medical side, such as economic problems, defend the beauty.²⁷ Therefore,

²⁶ Mariah Ulfah Anshor, *Op.Cit.*, p. 35

²⁷ Devi Yulianti, S.Kp (trans.) and Ns. Pamilih, S.Kep (ed.), *Buku Saku: Manajemen Komplikasi Kehamilan & Persalinan---Managing Complications in Pregnancy and Childbirth: A Guide for Midwives and Doctors (original book’s title)*, (Jakarta: Penerbit Buku Kedokteran; EGC, 2006), p. 93-5

this kind of abortion is discussed indeed by most scholars in its relation to law and religious ethics.

b. Fiqh (Islamic) Perspective

In *fiqh* literatures, abortion is grouped into five kinds, they are:

- 1). *Spontaneity Abortion (al-isqhath al-dzaty)*; unintentional abortion which happens naturally without any influences.
- 2). *Emergency or Treatment Abortion (al-isqhath al-dharrury/al-'ilajih)*; the abortion which is done because of physical indication threatens mother's life if she is pregnant.
- 3). *Unintentionally Abortion (khata')*; unintentional abortion which happens without any intention or wish to do it.
- 4). *A Looks Like Intentionally Abortion (syibh 'amd)*; the abortion which is done as if it is done intentionally; such as a husband hits his pregnant wife and it caused his wife's fetus or pregnancy broken.
- 5). *Intentionally or Planned Abortion (al-'amd)*; the abortion which is done intentionally and it is planned before; such as a mother drinks drug or something like it that treats her fetus safety.²⁸

D. What do They Say about Abortion?

1. Hanafiyah School

Most of *fuqahas* in *Hanafiyah* schools permit abortion as long as the fetus has not been formed. On the other word, abortion is allowed before ensoulment under certain plausible reasons. It means abortion is permitted under certain reasonable reasons and of course before ensoulment. Even though, when exactly the time of ensoulment happens is still questionable by some Muslim scholars because it is not explained explicitly both in the Qur'an and Hadits or it still and only becomes "*the secret of God*". It means the only God who knows when exactly ensoulment happens. Otherwise, most of *Hanafiyans* state that ensoulment happens after 120 days or 4 months. Indeed, it is not the only one statement of *Hanafiyans* that ensoulment happens after 120 days or 4 months but also 80 days like what some

²⁸ Mariah Ulfah Anshor, *Op.Cit.*, p. 38-40

Hanafiyans believe, and moreover, on the other hand, there are also some *Hanafiyans* believe that ensoulment happens after 42 days like what Abdullah Mahmud al-Mushili believes as a *Hanafiyah*.²⁹

Al-Haskafi, a *Hanafiyah*, for instance, allows abortion before ensoulment. Ensoulment here according to him is after 120 days or 4 months. It is similarly with Ibnu Abidin's, a *Hanafiyah* also, argument on abortion. In addition, al-Buti states that abortion is permitted before 4 months, for only three cases. *First*, to save mother's life, otherwise, the doctor worries if the pregnancy threatens mother's life. *Second*, the pregnancy assumed can cause disease in the body of the mother. *The last* is the new pregnancy causes the breast feed process stop, otherwise, mother is still in breast feed process to her baby and breast feed is the only one way to save the baby's life, including father is not able to buy something to change breast feed position as a basic food for the baby.³⁰ All in all, three of them allow abortion as long as the fetus has not been formed yet. The fetus has not become a real human being. In this case, a fetus (before ensoulment) like what Aristotle considers as vegetable and sensitive life not intellectual life or human's life.

The three-argument mentioned previously is objected by some *Hanafiyah* scholars by saying that actually ensoulment happens after 8 days. Therefore, abortion after 80 days is impermissible. Indeed, according to some Moslem scholars that even before 120 days or after 80 days, abortion is absolutely impermissible. On the other hand, Abdullah Mahmud Al-Munsili argues that actually ensoulment happens after 42 days.³¹ Based on the arguments of the representatives of *Hanafiyah* School, it seems that only Abdullah Mahmud Al-Munsili gives the shortest time of ensoulment among others. In contrast, there are also some *Hanafiyah* scholars, Al-Qami and Abu Bakar Muhammad bin Al-Fadhil, forbid abortion, in this case abortion is *makruh* (the avoidance of which yields merit but the performance of which is not sinful). *Makruh* here is more emphasized in the term of *haram* (forbidden, proscribed) and it is not obeyed, the person who

²⁹ For further information on *Hanafiyah* perspective, see... Mariah Ulfah Anshor, 2006, p. 93-95

³⁰ *Ibid.*, p. 93-5

³¹ see... Mariah Ulfah Anshor, *Op.Cit.*, 2006

does it has to be punished equitably according to Al-Asyrussani in Mariah Ulfah Anshor's book.³² Otherwise, Judith Jarvis Thomson argues that even if the fetus is a person with a right to life, it does not follow that abortion is impermissible.³³

In the case of law or punishment of abortion in Islam (*Hanafiyah* School), according to At-Thathawi that if the fetus is aborted in the term of *alaqah* or *mudghah*, the actor may not get fetus punishment but she should pay fine (depends on the judge/*ta'zir*) because she has broken something which has potential to life. In addition, Al-Asyrussani states that the actor is expected to pay compensation if abortion is done after 4 month. Otherwise, if it is done before 4 month, she is not obligated to pay any compensation. Indeed, Abu Bakar Muhammad bin Al-Fadhl cited by Al-Asyrussani in Mariah Ulfah Anshor, encourages that even it is still a clod of flesh, the actor should be punished but she has to regret and atonement to God because she has broken human candidate.

2. *Malikiyah* School

Unlike *Hanafiyah* School, most of *Malikiyans* including Hasyiah Al Dasuki and Al-Laisy, forbid abortion because according to them that the life begins since conception even before 40 days (*Malikiyans'* consideration on ensoulment) except to save mother's life. Rather that Al-Lakhim, a *Malikiyan*, permits abortion as long as the fetus is not more that 40 days. In this term, the prohibition of abortion can be found in Hasyiah Al-Dusuki in Mariah Ulfah Anshor that "*Abortion is impermissible if the sperm is inside of the womb even it has not been 40 days*".³⁴ In similarity, Don Marquis says that even if fetuses lack the capacity for self-conscious awareness, it does not follow that abortion is permissible because that fetus has right to life or as human being candidate.³⁵ Furthermore, she emphasizes that abortion is impermissible even in order to save the mother's life, a

³² *Ibid.*,

³³ Judith Jarvis Thomson, *A Defense of Abortion : Philosophy and Public Affairs* 1, 1971, p. 47

³⁴ Mariah Ulfah Anshor, *Op.Cit.*, p. 102

³⁵ Don Marquis, *Why Abortion is Immoral*,: A Journal of Philosophy 86, 1989, p. 183

very fundamental and conservative opponent. It seems to me that most of *Malikiyans* and Marquis' argument is a challenge to at least moderate and moreover liberal position on abortion or it looks like conservative opponent.

On the other case, besides to save mother's life, most of *Malikiyans* also allow abortion before ensoulment (40 days in the perspective of *Malikiyans*) if she (the actor) is a rape victim by the assumption that she (the victim) worries about her safety (she is about to be killed if she is known pregnant). Unless those two kinds of reasons on abortion, the majority of *Malikiyans* absolutely and totally forbid abortion whatever the reason is. Furthermore and radically, Al-Azhar *Fatwas* Committee *fatwas* written by Gamal Serour in Mariah Ulfah Anshor states that "*abortion is a part of criminality that must not be done even the contraception (sex relation) is done by legal (a husband and a wife) or illegal couple except to save mother's life*".³⁶ Indeed, most of *Malikiyans* totally forbid abortion because the development of life begins since contraception.

In the case of law or punishment of abortion in Islam (*Malikiyah* School), agree to give a punishment to the actor of abortion before ensoulment and the punishment which is given to the actor depends on the age of the fetus that she aborts. The oldest fetus she aborts, the highest punishment she gets. Unlike the majority of *Hanafiyans* who do not obligate the actor of abortion to pay compensation before ensoulment. Al-Qurtubi, a *Malikiyan*, obligates the actor to pay compensation like what Imam Malik says cited in *Bidayah Al-Mujtahid* in Maria Ulfah Anshor "*whatever thing which comes out from the womb (pregnant woman) even in the form of mudgah (a clod of blood) or alaqah (a clod of flesh), if it is believed as a baby inside of pregnancy means the actor/s obligated to redeem it by ghurrah (punishment or compensation payment)*".³⁷

E. Reflection, Conclusion and Comments

Basically, in Islamic ethical tradition, the killing of a person, whether through voluntary active euthanasia or physician assisted

³⁶ Mariah Ulfah Anshor, *Op. Cit.*, p. 103

³⁷ *Ibid.*,

suicide, for instance, is judged an act of disobedience against God. However, pain-relief treatment or withholding or withdrawing of life-support treatment, in which there is an intention of allowing a person to die when there is no doubt that their disease is causing untreatable suffering, are permissible as long as the structures of consultation between all the parties concerned about the wellbeing of the patient are in place. Nevertheless, how about in the case of abortion especially in ethical perspective?

It seems to me that most of the arguments are in classical literatures rather than contemporary literatures. Nevertheless, the basic term they discuss is about when does the life of a human begin? It does not explain explicitly both in the Qur'an and Hadits. Therefore, they (Moslem scholars) are really expected to discuss and rethink about it before issued *fatwas*. On the other word, nobody knows when exactly the life begins. It still and the only God secret and none of us including science and technology are able to know it. Otherwise, it does not mean that we are not allowed to rethink and discuss it. Thus, I think, we especially Moslems scholars and all people generally are expected to rethink about it deeply. All in all, some of *Hanafiyans* state that the ensoulment happens after 120 day or 4 months, while some of others say that it happens after 80 days there some also state that it happens after 42 days. Of course, it is different with *Malikiyans* who mention that it happens after 40 days.

Otherwise as I have mentioned earlier that *Malikiyah* School, for me, looks like conservative opponents of abortion maintain that a human being exists from the time of conception and has the same right to life as any other human. Indeed, it seems to me that *Malikiyans* in general have similar opinion with Don Marquis who says that even if fetuses lack the capacity for self-conscious awareness, it does not follow that abortion is permissible because s/he is a human candidate. In contrast, *Hanafiyah* School, for me, looks like a more moderate position is that a fetus does not have an equal right to life until it has reached viability (ensoulment), and the capacity to survive outside the womb. In addition, *Hanafiyans* have a similar position with Judith Jarvis Thomson who states that even if the fetus is a person with a right to life, it does not follow that abortion is impermissible however before ensoulment.

Indeed, Moslem scholars from some schools and different background begin to talk and issue different *fatwas*; some of them permit it and some of others absolutely forbid it. This controversy does not only happen in inter-schools (different schools; *Hanafiyah* and *Malikiyah* Schools) but also in intra-schools (same schools; the scholars among *Hanafiyah* and *Malikiyah* Schools). Generally, the majority of Moslem scholars agree if abortion is done after ensoulment is impermissible unless in a plausible reason. However, it seems to me that the controversy on law and ethical aspects on abortion among Moslem scholars (*fuqaha*) end in the term that abortion after 120 days or 4 months is forbidden and including a criminality. Nevertheless, abortion which is done before ensoulment, as I mentioned previously, can be concluded that most of *Hanafiyah* School permit it. In contrast, most of *Malikiyans* totally forbid it even the fetus is still in the term of contraception.

Furthermore, in talking about abortion, it seems to me that commonly classical *fuqaha* more disposed to debate on when the human's life begins in the womb without considering the reality and social ethics, for instance, the responses of *Hanafiah* and *Malikiyah* schools as I mention earlier. For me, one thing that we cannot deny that actually no body knows when exactly the ensoulment happens in the womb unless God, therefore, it is expected for the thinkers whether from medical or religious thinkers to rethink this problem without ignoring the reality, social context and religious social ethics and of course other thing that should be considered is *Mashlahat Mursalah*. In this case, we should not only think and implement the relation to God in decision-making but also the relation to other humans of course. Therefore, here it is very much needed at least four foundations or ethical theoretic sources in decision-making like what I have mentioned previously in part B (What is ethics?).

All in all, it seems to me that most of scholars inclined to understand and interpret a problem like abortion in the context, condition and sphere where they live. Otherwise, in my point of view, we should not see, moreover issue a *fatwa* in a certain case only by ignoring the reality and social context which are faced in a certain place. For example in Indonesia, the Moslem scholars only adopt the

opinions or arguments from others' context, condition and sphere while it does not closely possible that what applied in others are different with what should be applied in one place like in Indonesia. The *fatwas* of MUI (2000), NU and Muhammadiyah on abortion, for instance, they are more textual and look like adopt classical *fiqh* perspective³⁸ without considering the reality and social context of Indonesia in general. Therefore, the reality and social context should be more emphasized rather than theological aspect in a moral decision making such as abortion.

³⁸ I do not explain it more "MUI, NU and Muhammadiyah perspective on abortion, I just want to give a little bit comments. Otherwise, my concern is in *Hanafiyah* and *Malikiyah* School, therefore for further information, see...Mariah Ulfah Anshor, *Op. Cit.*, p. 121

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