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The Experiences of Islamic Minorities in non-Islamic States

**A DESCRIPTIVE ANALYSIS OF SOUTH AFRICAN AND ISLAMIC
ABORTION LEGISLATION AND LOCAL MUSLIM COMMUNITY
RESPONSES**

Najma Moosa*

Abstract: The issue of abortion has been the subject of much debate in the recent past in South Africa. Prior to 1996 abortion legislation was punitive and therefore one with which conservative Muslims could identify. Since 1996 the law has been liberalized and replaced by a new Act. The final Constitution (1996) took a neutral stance regarding abortion. The enactment of the Choice on Termination on Pregnancy Act (1996) finally ensured this right. The Act, a critical milestone for gender equality, secured all South African women (including minors) the right to make decisions about reproduction and according to their individual beliefs. Muslim organizations participated in this abortion debate making formal but opposing submissions to Parliament. These opposing views of Muslims came as no surprise and reflect the different norms of Islamic law which varies between countries and was indicative of the interpretative duality evident in most matters of Islamic law.

Keywords: Abortion; legislation; South Africa (progressive); Islamic law (conservative).

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INTRODUCTION

The issue of medically induced termination of pregnancy (TOP) or abortion has been the subject of much debate in the recent past in South Africa. Prior to 1996 abortion legislation was punitive and therefore one with which conservative Muslims could identify. Since 1996 the law has been liberalised and replaced by a new Act. Muslim organizations participated in this abortion debate. Two organisations made formal but opposing submissions to Parliament. One organisation recommended that abortion on demand (request)¹ be made illegal constitutionally while another condoned, albeit subject to qualification, abortion on request. These opposing views of Muslim *ulama* and intellectuals came as no surprise. It reflects the different norms of Islamic law which varies in and between countries and different schools of law/sects and was indicative of the interpretative duality/plurality evident in most matters of Islamic law.

I will outline abortion legislation in South Africa prior to and after our democracy. This will be followed by a brief look at statistical data in this regard since the demise of Apartheid. Issues raised and responses to the new legislation will then be briefly discussed, followed by a summary of the Islamic law position and the position of Muslims in South Africa and local Muslim community responses to the new legislation.

SOUTH AFRICAN ABORTION LEGISLATION

PRIOR TO 1975

The common law

Until 1975, abortion was regulated by the South African common law which is a hybrid of Roman-Dutch and English law. Abortion was prohibited and considered a crime in terms of the common law except in the case of absolute necessity. An abortion would only be granted if the continued pregnancy would endanger the mother's life.²

1. The word "request" is preferred to the harsh connotations attached to "demand" and will be used as such throughout this paper. See note 39.

2. No 17 p 21.

1975 TO 1996

The Abortion and Sterilisation Act³

Since 1975 the Abortion and Sterilisation Act prescribed specific parameters within which abortion was permitted.⁴ The law delegated the decision to terminate pregnancies to the medical profession and in so doing did not necessarily side-step ethico-legal issues. In fact the act prohibits abortion only allowing medical exceptions under stringent conditions such as cases of rape (which had to be documented) and incest.⁵ Abortions were, for example, only permitted where there was a “serious threat” or “permanent damage” to a woman’s physical and mental health respectively.⁶ For the purposes of the act abortion was defined as “the abortion of a live foetus of a woman with intent to kill such a foetus”.⁷ The conservative stance adopted by this act is not surprising especially when considering the fact that the commission of enquiry appointed to examine the question of abortion before the promulgation of the act lacked women’s representation.⁸ True to its nature, the Apartheid government passed the act without consulting with South African women. Further support for the view that the decision to abort was not necessarily left to the discretion of a doctor, was the fact that the act also included a conscience clause⁹ permitting a doctor who does not want to perform an abortion to refuse to be involved. This indirectly had negative practical implications that such doctors would in turn not refer patients to doctors willing to perform an abortion. The act further required that stringent procedures be complied with in order to obtain an abortion.¹⁰ It also set out identical penalties for medically unqualified people who perform abortions and medically qualified practitioners who abort without correct certification, who issue a

3. 2 of 1975.

4. S 2.

5. S 3 (1) (d).

6. S 3 (1) (a) and (b).

7. S 1.

8. No 22 p373.

9. S 9.

10. For detail see *op.cit* note 8 at p374.

false certificate, or who operate from an institution not authorised for that purpose.¹¹

Effects of the Act

The 1975 Act did not succeed in controlling the total number of abortions. In comparison to the large numbers of illegal or backstreet abortions per year, legal abortions were negligible. Statistics reveal that although the act was ineffective in decreasing the total number of abortions, it certainly was successful in restricting the number of legal abortions. Approximately 40% of applications for legal abortions were successful with only 800 -1 000 women obtaining a legal abortion annually.¹² Of these over 70% were done on psychiatric¹³ grounds and mostly on white women. Access was thus largely affected by class position and racial background. Very few black women who might have qualified, had access to psychiatric assessment or knowledge of the qualifications. The private health sector also profited on the state health sector's inability to provide abortions by finding legal ways to provide such services. Women also had legal abortions performed overseas, especially in the United Kingdom. Again such services were restricted to the rich and mainly white women. The act did not succeed in limiting the number of illegal abortions. Many women with an unwanted pregnancy had no alternative but to resort to clandestine abortions. Estimates put the annual number of illegal or backstreet-type abortions at about 200 000 to 300 000. However, because of its illegality accurate statistics were difficult to establish.¹⁴

11. S 10.

12. For example, between November 1984 and October 1985 "there were 712 legal abortions in South Africa. Of these, 78,7% of the women were white; 11,1% coloured, 4,9% were Asian and 5,3% were black...The figures for...the year ending 31 June 1989 show that the statistics have remained constant" (*op.cit* note 8 at p374.)

13. Of all the legal abortions done in South Africa between 1979 and 1984 "20% were indicated for risk to maternal physical health, 48% were for risk to maternal mental health, 25% for risk of fetal malformation and 7% for illegitimate carnal intercourse. Between June 1992 and July 1993, 331 of 502 applications for abortion on psychiatric grounds at GSH [Groote Schuur Hospital, situated in the Western Cape Province] were approved" (No 6 p 470).

14. No 17 p22-23.

Illegal abortions often resulted in serious gynaecological complications, infections and related death. Apparently, "abortion reform was 'sold' to the South African Parliament with data from a 1994 study documenting the toll of illegal abortion. The findings...indicated that about one-third of the nearly 45,000 women admitted to public hospitals in 1994 with incomplete abortions had medical complications suggesting an abortion performed under unsafe conditions, and that approximately 425 women died annually in public hospitals from such complications."¹⁵

SINCE 1996

(i) The Final Constitution

Since 1996 we see the legalisation and decriminalisation of abortion. However, the final Constitution (1996),¹⁶ considered to be one of the most progressive constitutions in the world, has taken a neutral stance regarding abortion. It merely states that "everyone has the right to life".¹⁷ While this does sound more like a pro-life stance, the neutrality of the provision means that our courts can interpret this as allowing women a free choice (to have or not to have an abortion). This neutrality furthermore also recognises that health care workers have an individual right equal to that of the pregnant woman herself to choose whether or not to terminate a pregnancy ("conscience clause").

While it does not expressly provide for a right to abortion on request, the Constitution does provide a regulatory framework capable of or which should be interpreted to include a women's right to choose safe, early legal abortion.¹⁸ While the Constitution also guarantees everyone the right to freedom of conscience, religion, thought, belief and opinion,¹⁹ a court which has to determine the constitution's position on abortion is given a wide scope. One of the reasons advanced in favour of including a right to abortion was that it would safeguard the Constitutional Court from having to make a very controversial policy choice with little guidance for its

15. No 3 p 1.

16. Constitution of the Republic of South Africa, Act 108 of 1996.

17. S 11.

18. No 21 p119.

19. S 15 (1).

conclusion.²⁰ As will be indicated below, the courts were soon put to the test in this regard.

The South African Constitution is, however, also unique in that it specifically includes a section on reproductive rights. In so doing the Constitution has taken a huge step towards guaranteeing the reproductive rights and health of South African women.²¹ The section deals with freedom and security of the person²² and provides that “[e]veryone has the right...to make decisions concerning reproduction”.²³ The formulation of this section is the result of a compromise reached after much debate over whether the Constitution should expressly provide for a right to abortion.²⁴ While a pregnant woman does not have an absolute constitutional right to an abortion on request, this section of the Constitution (on reproduction) nevertheless encompasses her decision to terminate a pregnancy. A fetus would not be protected under the constitutional right to life provision, at least not until viability is determined.

(ii) A new abortion law: the Choice on Termination of Pregnancy Act (CTOP)²⁵

The enactment of the CTOP in 1996,²⁶ and which came into force in 1997,²⁷ finally and officially ensured the right to an abortion.

Background to CTOP

The 1995 Parliamentary Ad Hoc Select Committee on Abortion and Sterilization²⁸ tasked with reviewing the restrictive 1975 Act held public

20. *Op.cit* note 18 p119.

21. No 13 p 317.

22. S 12 (2).

23. S 12 (2)(a).

24. *Op.cit* note 18 p 119.

25. 92 of 1996.

26. 11 December 1996.

27. 1 February 1997.

28. See note 33. At around the same time as the formation of the select committee religious leaders of all faiths formed an alliance in the Moral Standards Commission (the first of its kind in South Africa) whose main task was to oppose moral issues such as abortion.

meetings and in its final report to Parliament in June 1995, it recommended that the 1975 Act be repealed. The recommendations were favourably received by Parliament. The Department of Health thereafter drafted the Termination of Pregnancy Bill which was approved by Cabinet in July 1996. Public hearings on the Bill were held by the National Assembly (multi-party) Portfolio Committee on Health in October 1996. Both pro-choice²⁹ and anti-choice organisations testified before the committee. While the pro-choice submissions placed emphasis on women's reproductive rights and health, the anti-choice or pro-lifers generally argued that the fetus has a right to life from conception. The amendments subsequently proposed by the Portfolio Committee were accepted and resulted in the passing of a modified Choice of Termination of Pregnancy Bill by the National Assembly on 30 October 1996 and by the Senate on 5 November 1996. President Nelson Mandela assented to the Bill on 12 November 1996 thereby making it law. As already indicated, the CTOP Act came into operation on 1 February 1997.³⁰

The CTOP in detail

The CTOP puts South Africa on par with the most liberal abortion laws in the world. In terms of this act legal abortion is to be provided by the state. Not only did South Africa become the first country in Sub-Saharan Africa in which women acquired the right to obtain an abortion on request during the first 12 weeks of pregnancy without any other conditions,³¹ but the new democratic South African government itself led the effort to legalise and decriminalise abortion.³²

Unlike the case with the 1975 Act (now repealed by the 1996 Act), women were part of the governmental process.³³ The act does not include the right of health care workers to refuse to perform an abortion (conscience clause).

29. In 1995 a Reproductive Rights Alliance was formed specifically to introduce a pro-choice position into the Constitution and enabling legislation. It was pro-active in initiating lobbying strategies for the introduction of the Termination of Pregnancy Bill (No 11 p 64).

30. *Op.cit* note 21 at p 312-314.

31. S 2 (1)(a).

32. *Op.cit* note 15 at p1.

33. Of the 26 members comprising the 1995 Parliamentary Committee tasked with reviewing the restrictive 1975 Act, 15 were women and 11 men. There were two Muslim members, one male and one female (*op.cit* note 18 at p 124-125.)

The argument that prevailed was that since such a right is already protected in the Constitution it would be unnecessary to repeat it in the act.³⁴ However, preventing a lawful TOP or obstructing access to an abortion facility is punishable by a fine or imprisonment of up to ten years.³⁵

Soon after the CTOP came into operation³⁶ its constitutionality was challenged in court³⁷, albeit unsuccessfully, by three pro-life groups on the grounds that it violated the rights of the fetus. The act was nevertheless a major advancement for gender equality, ensuring all South African women, including minors, the right to make decisions about reproduction and to control their own bodies according to their individual beliefs. The preamble to the act notes that termination of pregnancy is not a form of contraception or population control.³⁸ The preamble goes on to state that the act affords "every woman [including minors] the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs".

The act provides for unconditional abortion on request³⁹ until the twelfth week of pregnancy or later (between 13 and 20 weeks and after 20 weeks) under certain circumstances (ranging from the mother's well-being, risk to the fetus, rape, incest and socio-economic circumstances).⁴⁰ Furthermore,

34. *ibid* at p129.

35. S 10.

36. In July 1997.

37. *Lawyers Association of SA and Others v The Minister of Health and Others* (Case No 16291/97). The CTOP remained effective throughout the legal proceedings which lasted a year (judgement was delivered by the Transvaal Provincial Division of the High Court of South Africa in July 1998) (*op.cit* note 15 at p2). There were no subsequent challenges to the CTOP. "Anti-abortion groups presumably felt that other courts and the Constitutional Court would adopt the same argument in future cases" (No 22a at p304). For detail on the case see No 22a at p303-304.

38. Although both abortions and contraceptives are available, one cannot rule out the fact that unwanted pregnancies that result because of failed contraception are aborted. The availability of contraceptives are also seen to encourage promiscuity and abortion is a back up should contraception fail - a vicious cycle occurs as a result. "Islam forbids abortion completely in family planning" (No.8 at p133).

39. The CTOP has consistently been characterised by the media and even some literature as granting women abortion "on demand" rather than "on request". See note 1.

40. S 2. From the 13th to 20th week abortion is permitted if a continuing pregnancy would pose a risk to the woman's mental or physical health, if it would end in the birth of an infant

no parental or spousal consent is required for minors or married women respectively.⁴¹

The passing of this act complies with South Africa's international obligations, for example, the provisions of the Women's Convention CEDAW⁴² which South Africa has ratified in 1995. While the legislative component is in place, the challenge for government lies in ensuring its effective implementation.

STATISTICAL DATA

Do South Africans support the new abortion law? Although no national study to this effect was done, the answer really cannot be a simple yes or no. Although sensationalist reporting and a limited understanding of polling public opinion has resulted in the perception that South Africans are generally against abortion or "anti-choice", this ought not necessarily to be the case.⁴³ Prior to the passing of the 1996 Act, it appeared that there were more submissions made to Parliament that were against abortion than were pro-choice.

Despite the fact that the provisions of the CTOP basically reversed the previous *status quo*, the government did not do much by way of an information campaign to inform the public about the new law. This resulted in just over half of the population being aware of its existence in 1998. Furthermore, just under half (48%) considered it to be morally wrong, 41% condoned it only in the case of rape and merely 10% considered it a

with a severe mental or physical abnormality, if the pregnancy resulted from rape or incest or if carrying it to term would significantly affect the woman's social or economic situation. After the 20th week, terminations are allowed only if the continuing pregnancy would endanger the woman's life or result in a severe fetal malformation or a risk of fetal injury (S 2). The Act also provides for terminations for women who are severely mentally disabled or in a state of continued unconsciousness (S 5 (4)).

41. The CTOP requires only the informed consent of the woman and not her spouse (S 5 (1) and (2)). A minor (female person under 18 years) does not need permission of a parent or guardian (S 5 (3)).

42. Article S 16 (1)(e) of CEDAW requires states to ensure that all women have "the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights." CEDAW protects fetal health from a women's position in that it safeguards the function of reproduction (S 11(1)(f)).

43. No.10.

woman's right.⁴⁴ Attitudes varied sharply along racial lines with the black majority, in comparison to the white minority, being more inclined to a pro-life attitude.⁴⁵ The attitude of many health care workers followed the trend of the general public.⁴⁶

About 70 000 abortions have been performed since the passing of the CTOPI in 1997. A Parliamentary Health Portfolio Committee probe in mid-2000 as to why backstreet abortions⁴⁷ are still rife in South Africa despite the fact that the state makes provision for legal abortion, revealed that less than half⁴⁸ the designated state hospitals and clinics have chosen to provide termination of pregnancy (TOP) procedures. Religious beliefs of health care workers, although not instrumental, have clearly played a role in this.⁴⁹

ISSUES RAISED AND RESPONSES TO NEW LEGISLATION

The government's efforts to legalise abortion and to make it equally available throughout South Africa's nine provinces is presenting many challenges. Difficulties are being experienced in implementing the new law. To some degree this is due to a lack of funding to provide the free abortion services mandated by government.⁵⁰ For specific groups such as rural women and teenagers, access is also problematic. A review assessing the implementation of abortion services sums it up thus: "What is...required is a need for research to generate solutions for health services and community on how to: increase equity in access; introduce curriculum into present training of health personnel, and transform and sustain attitudes of current gate-keepers of the service in order to institutionalise the delivery of abortion as a routine service at all levels of health care; provide support for

44. *Op.cit* note 15 at p 2-3.

45. 54% Africans vs 19% whites see abortion as morally wrong while 24% whites as opposed to 8% Africans view abortion as a woman's right (*ibid* at p3).

46. *ibid*.

47. More than 500 women's lives are claimed each year.

48. Of the 269 hospitals and clinics only 103 were providing performed abortions. According to the South African Health Review 1999 the figures are even lower - of 246 such public health facilities only 73 are providing the service. Of these, the proportion varied greatly between urban (favourably) and rural provinces (No 7).

49. No 5 at p750.

50. *Op.cit* note 15 at pages 1 and 4.

providers and users of the service; increase information on ones' own body and health rights; push society's acceptance of human rights; increase women's confidence in themselves; and ensure male responsibility."⁵¹

The above statistics highlight that, although legalised, abortion is not currently supported by adequate facilities and trained personnel. It also appears that while women and minors lack information and knowledge about reproductive matters in order to so exercise a choice, some health care workers also lack adequate knowledge and training.⁵² Some health care workers (state doctors and nurses) deny pregnant woman access to abortion services for religious reasons and victimise colleagues who have been performing abortions and have for this reason come under the fire of the Minister of Health who urged health care workers to "place their duty before their beliefs" and not act as "gatekeepers".⁵³ Needless to say, this infuriated pro-life lobbyists and opposition members of Parliament.⁵⁴ Ethical conundrums for health care workers also raise their heads. If a doctor were, for example, to terminate a teenage pregnancy which does not require parental consent and then realise that further surgery is needed, he or she would normally need the consent of the minor's parent or guardian in terms of South African law before he or she can do so. However, although no case law has as yet come to the fore, this ought not necessarily be the case as interpretation of certain statutes will indicate.

SOUTH AFRICAN MUSLIMS AND THE CONSTITUTION

Muslims are a religious minority in a multi-cultural South Africa.⁵⁵ Their public lives are governed by secular laws and the Constitution while their private lives are governed by religion. After three centuries of non-

51. No 23 (Executive summary).

52. Most nurses are ignorant of the new law in this regard and training in Termination of Pregnancy (TOP) has yet to be introduced into our basic nursing education curriculum (*op.cit* note 49 at p750; *op.cit* note 48).

53. *Op.cit* note 49 at p750.

54. *ibid.*

55. Muslims constitute approximately 1.1% (500 000 or half million) of total population. Majority are resident in the Cape which is one of nine provinces in South Africa. Muslims are more or less equally divided between the *Sunni Hanafi* and *Shafi'i* schools with the *Shafi'i* school dominating in the Western Cape (No. 12 b at 39-41,43). See also under heading "schools of law" below.

recognition of Muslim personal or family laws (MPL) in South Africa, the recognition of Muslim marriages and related matters is imminent in line with constitutional provisions.⁵⁶ Therefore, in terms of the final Constitution a recognised MPL must be subject to the Bill of Rights.⁵⁷ In other words equality trumps religious rights and not vice-versa as is the case in some Muslim countries where this conflict has been resolved in favour of religion. Therefore Muslim women cannot be denied such a free choice - a choice which they could have been denied had MPL been exempt from constitutional scrutiny and a particular interpretation of MPL prohibits abortion. Traditional and conservative interpretations of Islam generally govern personal law and this causes conflict with the Constitution.

ISLAMIC LAW POSITION ON ABORTION

Both the *Qur'an* and *Sunna* do not provide a clear directive on abortion. While classical jurists and religious authorities do deal with the subject, juristic rulings on abortion differ between the legal schools. This creates a climate of moral confusion for Muslims who have to deal with "unwanted" or risky pregnancies. This is exacerbated by literature and legal opinions by religious jurists (*muftis*) in the popular question and answer format (*fatwas*) which either condones or condemns abortion on the basis of these varying views. Public opinion also varies between these extremes either in support of continued legal restriction or as advocates of the decriminalization of abortion.

Qur'an and *Sunna*

The *Qur'an* is not explicit on abortion. While Islam generally permits preventing pregnancy for valid reasons, abortion is prohibited on the basis of various *Qur'anic* verses not directly related to the issue. Muslim children have an inalienable (first) right to life.⁵⁸ Because God grants life⁵⁹ (and

56. S 15 (3)(a).

57. S 15 (3)(b).

58. See No 12 c for status of Muslim children in South Africa.

59. Q.4:93. Suicide is also discouraged (Q.4:29). *Qur'anic* references in this article normally refer to the translation by Yusuf Ali. References are given between parenthesis. The first figure is the number of the chapter or *sura*. The number following the separating colon indicates the verse or *ayat*.

death)⁶⁰ to both parent and child, it cannot be tampered with by anyone including parents. Hence abortion is a contentious issue. God has granted children to those especially entrusted to be parents⁶¹ and they are thus answerable to God if they breach this trust by failing to preserve and protect this life.

Islam prohibited female⁶² infanticide, a pre-Islamic practice, whereby infants were killed for fear of shame and poverty. It made it a crime against God and did away with one of its causes, namely poverty, by introducing compulsory almsgiving (*zakaat*).⁶³ It seems as if the *Qur'anic* verses relating to infanticide have been misread as applying to abortion. For example, the *Qur'an* talks of the sanctity of life,⁶⁴ that children not be killed on the basis of existing⁶⁵ as well as anticipated poverty⁶⁶ and that "lost" (gone astray) are they who have killed their children.⁶⁷ The *Qur'an* also specifically says that women shall not kill their children.⁶⁸ The logic therefore is that if historically infanticide was carried out by men then this verse must be interpreted to mean that the *Qur'an* prohibits abortion which was the only form of child killing by women. In modern parlance it appears that these verses have been replaced by reproductive rights, of which the right of a woman to choose an abortion forms an integral part.

The *Qur'an*⁶⁹ also describes the various stages of human development but does not specify the exact duration of each stage. However, on the basis of

60. Q.3:145.

61. Q.22:5; Q.42:49-50.

62. Male children were perceived as part of wealth of men etcetera.

63. a tax to aid those in need.

64. Q.5:32.

65. Q.6:151.

66. Q.17:31.

67. Q.6:140 and Q.81:8-9. See also Q.6:137 (report of pagan practice of killing their children as human sacrifices to their gods) and Q.37:99-113 (in testing Prophet Ibrahim to offer his son as a sacrifice to Him, God ultimately discourages the killing of children). See No 19 at p124.

68. Q.60:12.

69. Q.22:5 and Q.23:12-14.

a *hadith* related by Imam's Bukhari and Muslim,⁷⁰ the period of gestation before which an abortion can be allowed is deemed to be 120 days (16 weeks or four months). After 120 days from the time of fertilisation of the female egg the fetus is considered to possess a soul or spirit (*ruh*), the possession of which sets human life above other life forms. Because this *hadith* is considered to be authentic, some classical jurists have used the 120 days as a cut-off point to emphasize the gravity of the sin of abortion. On the basis of a second authentic *hadith* relating to conception and also reported in Muslim texts,⁷¹ other classical jurists set the cut-off time for abortion at seven weeks (49 days). Knowledge of the spirit, however, is essentially beyond the comprehension of mere mortals.⁷²

Schools (*madhhabs* or versions) of Islamic law (*Shari'a*)

A basis and validation for conflicting views on particular human rights issues can be found in the same *corpus* of Islamic law (according to the four main schools of jurisprudence). It can, for example, be argued that abortion is not permitted. Islamic scholars, whose views vary from one extreme to another, have as yet not come up with a creative solution to this moral problem. Is it a life? When does it become so? Right at the beginning or later? [When] is it ever right to take a life? What is clear, however, is that there are views for and against abortion. In some Muslim countries abortion is legal whereas in others it is criminalized. Reproductive policies vary from country to country. In Tunisia, for example, contraception and abortion are legal and freely accessible, while in Pakistan and Sudan contraception is allowed but abortion is criminalized.⁷³

70. "Each of you is constituted in your mother's womb for forty days as a nutfah (drop of semen), then it becomes an 'alaqa (something that clings) for an equal period, then a mudgha (chewed-like lump) for another equal period, then the angel is sent, and he breathes the soul into it." This *hadith* explains in greater detail the three stages of fetal growth as set out in the *Qur'an* (Q.22:5 and Q.23:13-14) and furthermore makes direct reference to the *ruh* (soul) while these *Qur'anic* verses makes indirect reference to it.

71. The Prophet Muhammad (P.B.U.H) is reported to have said that: "When forty-two nights have passed over the sperm-drop, Allah sends an angel to it, who shapes it and makes its ears, eyes, skin, flesh and bones. Then, he says, "O Lord! Is it a male or female?" And your Lord decides what He wishes and then the angel records it."

72. Q.17:85.

73. Cf *op.cit* note 55. Egyptian law prohibits induced abortions. Although restrictive, Egyptian *ulama* permit an abortion in order to save the life of a pregnant woman even beyond 120 days. If, however, an abortion is performed for any other reason, then both the

Based on the (above) primary sources, the most widely accepted juristic ruling on abortion is that it is generally prohibited. Ensoulment, according to inferences from these sources, occurs only after 120 days after which the fetus is considered as being "alive". There are exceptions to the rule in that abortion is allowed up to 120 days after conception for valid reasons and even thereafter when the continuation of the pregnancy endangers the mother's life. The fetus is not regarded as a human person before 120 days and therefore an abortion at this stage would not amount to a crime. It is not deemed to be murder or even killing. Does an abortion after ensoulment (120 days) amount to murder? "[I]t appears that such an abortion comes perilously close to the sin of killing children, and thus requires clear arguments of necessity, such as saving the life of the mother."⁷⁴

Different positions on abortion are proposed by the four schools of law named after their founders namely, *Hanafi*, *Maliki*, *Shafi'i* and *Hanbali*. While most Muslim scholars agree that abortion is permitted in certain circumstances, they disagree as to the circumstances.⁷⁵ While the views of the four schools differ as to the time when an abortion may be permitted,⁷⁶ they are unanimous that abortion is unlawful and forbidden, irrespective of the fact that the pregnancy is a result of illegitimate sex (adultery (*zina*) or incest) or rape or that physically deformed or mentally retarded fetuses have been conceived. Fetuses cannot be aborted on the ground that the pregnancies were "unwanted" as in the cases of rape or deformed fetuses as

woman and the provider are subject to legal prosecution (No 12 at p101). Because doctors fear prosecution, they refrain from performing elective abortions forcing women to seek illegal abortions to their detriment (No 18 at p129). In Algeria abortion is prohibited except "to save the mother's life or to preserve her physiological or mental health if it is seriously in danger" (No 4 at p112). This is also the case in Pakistan (No 20 at p239). Tunisia and Turkey allow for abortion for various reasons during the first 120 days on the basis that ensoulment only occurs thereafter. While both Bangladesh and Indonesia have strict laws, they allow for menstrual regulation or early vacuum aspiration after a missed period (No 4 at p114).

74. *Op.cit* note 67 at p 129.

75. No.4 at p 114. While disapproved by *Shari'a*, some scholars including some of the *Maliki* school permit social abortions to protect the health of existing children or to ensure a better standard of living for the family during the first 40 days of pregnancy if it occurred by mistake and her husband consents thereto (*ibid*). The Hanafi school, for example, also considers an abortion before the fourth month of pregnancy, if the survival of an already existing nursing infant depends on it, a valid reason therefore (No 9 at p 6).

76. Some showed leniency before seven weeks (40+ days) and some before four months (120 days) after fertilization.

this is seen as adding sin to sin and it was no use doubling it. The only exception being that an abortion is, however, permissible at any stage of pregnancy (before or after 120 days) or even just before birth normally only if the mother's life is endangered on the basis that preserving the life of the mother (as the origin or root of the fetus) is considered to be the lesser of two evils.⁷⁷

The detestation with which Islam views the act of rape and the cruel and crude consequences for women aside, Islamic law generally does not allow an abortion in the case of rape on the basis that the fetus has the right to be born and is innocent of any offence. There are also views espoused that rape victims either use the available medical treatments within a week of the rape⁷⁸ or give up the baby for adoption⁷⁹ if she waited until she found out that she was pregnant at which stage it is too late to undergo an abortion. Some *muftis* permit abortion where a woman has been raped in "severe" cases.⁸⁰ Needless to say the argument that rape is rape, regardless of where it occurred and who perpetrates it, does not seem to carry much weight. Morality and desired legal status aside, many women will clearly not allow certain pregnancies to continue and will request an abortion regardless of societal approval. Rape is one such case. It seems that for both the deformed fetus and the fetus of rape there is "no right not to be born".⁸¹ Despite medical advances related to new problems which could justify an abortion due to fetal abnormalities, this still appears to be the case to date.⁸² As for physically deformed or mentally retarded fetuses, the *Qur'anic* verse⁸³ stating that "...your children may be but a trial..." has been interpreted to mean that Allah has put us to a test which we must bear with patience.

77. See *op.cit* note 55 at p 68-9 and No 9 at p6.

78. No 1 at p 6 of 7.

79. Adoption is, however, prohibited by *Qur'anic* injunction (*op.cit* note 58 at p486).

80. This was as a result of the mass raping of Kuwaiti women by Iraqi soldiers during the 1991 Gulf War and the raping of Muslim women by Serbian forces in Bosnia in the late 1990s (No 18 at p137).

81. For a detailed discussion see No.18.

82. No 9 at p 6-7.

83. Q.64:15.

Modern knowledge and advances in science and technology contradict some of the views regarding ensoulment. There is also the argument by pro-lifers that ensoulment is irrelevant to the abortion issue since the soul can never be killed and that knowledge of it lies with God alone. In abortion the physical body of the fetus is killed and further that the first three months of pregnancy⁸⁴ and indeed the whole pregnancy⁸⁵ must be of some consequence otherwise God would not have constituted a waiting period of these respective lengths for divorced women to determine whether they are pregnant or to carry the baby to term if they are in fact pregnant.

SUBMISSIONS BY LOCAL MUSLIM ORGANISATIONS

Submissions regarding abortion were made to the 1995 Parliamentary ad hoc Committee on Abortion and Sterilisation⁸⁶ (Constitutional Assembly) by two Muslim organizations, namely the Islamic Council of South Africa's Judicial Committee (ICSA)⁸⁷ and the Muslim Judicial Council's Fatwa Committee (MJC).⁸⁸ Both organisations criticized abortion on request. While the MJC's answer to abortion on request was a strong "definitely not", ICSA's response was divided into a "yes" and a "no". In a very brief submission on such a contentious issue, the MJC recommended that abortion on request be made illegal constitutionally. Further that abortion for reasons of birth control or poverty was not Islamic.⁸⁹ In a later (October 1996) more collective⁹⁰ submission with regard to the CTOP Bill, abortion carried out 120 days after conception (ensoulment) was prohibited even if the life of the mother was in danger. While preferring the *Maliki*, *Shafi'i* and *Hanbali* views which appear to forbid abortion even during the 120 day period, the *Hanafi* view which permits abortion during this time for a valid

84. Q.2:228. No 1 at p2-3 of 7.

85. Q.65:4.

86. Cf background to CTOP above.

87. This umbrella body was launched in 1975. It still exists but with little effect. Cf No.12a at p 147 for more detail regarding the establishment of this body.

88. Muslim religious tribunal in the Western Cape which essentially subscribes to the *Shafi'i* school of thought.

89. No 2 at p4.

90. The MJC views formed part of a collective submission of the United Ulama Council of South Africa (UUCSA). The UUCSA is an umbrella body comprising of major theological bodies in South Africa of which the MJC is a founding member.

reason was nevertheless condoned. Thus a pregnancy may be terminated within 120 days (not after) if the physical or mental well-being of the woman or fetus was at risk or “for genuine medical and health reasons” or interestingly, if “advised by a social worker that the pregnancy resulted from unlawful carnal intercourse...(rape or incest...)”.⁹¹ In comparison to the MJC submission, ICSA gave a more detailed and informed view of the Islamic perspective on the matter and even condoned abortion on request, not as the norm, of course, but subject to certain criteria and conditions. The ICSA submission took cognisance of the fact that Muslims who form part of the South African society were not immune to their context and socio-economic milieu, the occurrence of large numbers of illegal abortions despite legislation (1975 Act) and further that abortion should be viewed as providing relief in a process of transformation taking place in South Africa and not as a remedy and alternative solution. ICSA condoned abortion within 120 days for a number of “standard” reasons but which went further to include, for example, impairment of the woman’s integrity, dignity and personal privacy, the right to determine the size of her family (social abortion), affordability (in so far as it may relate to the well-being of existing children), in cases of forcible and statutory rape and incest, the woman’s age and her ability and willingness to accept the responsibility of parenthood. Abortion after 120 days would be permitted by the schools of law only on grounds of ‘necessity’, for example, medical reasons and risk to the woman’s life.⁹² While both organisations condoned abortion on account of rape and incest, only ICSA condoned abortion on grounds of poverty and failure of birth control. While the CTOP allows for abortion on basis of poverty, it is adamant that in terms of its provisions abortion is not a form of birth control. By including impairment of a woman’s “...integrity, dignity and personal privacy” as a valid reason for an abortion, ICSA takes cognisance of the constitutional reproductive right of a woman which encompasses her right to terminate a pregnancy. These opposing views more or less reflect the division among local Muslims, both locally and nationally in matters pertaining to Islamic law and related matters. The Islamic Medical Association (IMA) a national body representing medical practitioners also rejected the government’s attempts to liberalise the abortion law as being “...part of the package of ‘women’s rights’ being

91. No 14.

92. *Op.cit* note 89 at p 4-5.

campaigns for by the feminist lobby".⁹³ The IMA has issued a national policy statement on abortion after seeking local and international advice from *ulama*. This statement concurs with the generally held view that an abortion is permissible under specified circumstances before ensoulment (120 days) and thereafter only if the pregnancy constitutes a serious threat to the mother's life.⁹⁴

CONCLUSION

Abortion is not only a complex subject in Islamic law. It is a topic of contention and division in many societies. Furthermore, not only do religions vary in their belief as to when life begins and should be protected but discrepancies are also found within religious communities. Abortion itself is also subject to many restrictions and both sides of the debate (pro-life and pro-choice) will no doubt raise social, religious, moral, health and legal issues to name but a few.

Pro-lifers regard all life as sacred and consider abortion a form of murder. They consider both "baby" and "mother" as victims of an abortion when it occurs. Their view is consistent with Islamic law as generally interpreted. Pro-lifers are, however, often accused of being conservative, wealthy and educated people who are out of touch with social and poverty-related realities. Pro-choicers on the other hand consider legalisation of abortion as securing women's reproductive rights and freedom.

While abortion is now both legal and a woman's personal choice in South Africa, the moral debate still looms large. The primary sources namely, the Qur'an and Sunna remain eternally valid. Although these sources do not pronounce on the issue of abortion, they generally do not condone killing of children, whether before or after birth. Islamic law also does not favour abortion both on the basis of these sources and the knowledge that classical jurists possessed at a certain period in history. Modern medical knowledge on the beginning of life contradicts some of the views of these jurists leaving Muslims face to face with a moral dilemma as to whether or not new knowledge should override these views.

Having due regard to the fact that both legal and illegal abortions were already being widely performed, reproductive rights for women were

93. No 15 at p7.

94. No 16 at p 3, 14-15.

advanced by the government in pluralistic South Africa by the final Constitution and the enactment of the CTOP. However, effective implementation did not necessarily follow suit. The government, although not without fault, is striving to ensure implementation but its efforts are often thwarted by health care workers acting as moral and religious "gate-keepers". Constitutions, laws and courts should therefore be viewed as vehicles through which social change can be achieved rather than merely instruments through which human rights are protected. Ultimately protections and promises provided by laws are realised by people and tradition rather than by rules and regulations.

Islamic conservative and restrictive views have failed to make an impact on policy-makers in South Africa. While they often pose problems like these as examples of concern with the *Qur'an* and its proper interpretation, it really boils down to the extent to which Western influence on the secular and religious aspects of life should be tolerated.

Progressive local religious leaders take cognisance of the fact that abortion must not be seen in isolation. If one adopts a holistic view of life, then we cannot ignore our immediate surroundings, the moral vision and religious conscience of society. South Africa today is a society in transition with high crime statistics. Rape, child abuse and abandoned children are rampant and on the increase. Before 1996 backstreet abortions played a significant role in maternal mortality. Do we apply the general principle of Islamic law, that of choosing the lesser of two evils to perform the abortion or do we apply the principle of necessity? Necessity permits the prohibited until matters normalise.

Women are supposed to be the beneficiaries of the abortion legislation yet their voices did not form part of the submissions by the (male) *ulama* to the government. The government has made it clear that its decision to pass the CTOP was not to encourage abortion, nor to promote it as a method of family planning. The government can, however, reduce the need for abortions by providing better family planning services. Prior to the CTOP women often died because of a lack of safe abortion services to protect their health. Abortion is not only legal in South Africa, but the government has also provided women with the choice to abort which is safe and medically supervised. Ultimately, whether Muslim women wish to use this choice or not, is a matter of individual, cultural and religious conviction, which is not the function of the government or *ulama* to dictate. The individual has the right to choose an ethical/moral path from a multiplicity of paths provided

in the Islamic code. The government must allow the choice to be exercised in a safe environment and the *ulama* must provide ethico-religious guidelines.

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