

# The Rights of the Fetus: Ensoulment as the Cut-Off Point Legislation on Abortion

## Running Title: The Rights of the Fetus in Legislation Abortion

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### Abstract

**Background:** Unwanted pregnancy is believed to be one of the toughest experiences of pregnant women. In the majority of cases, unintended pregnancy leads to illegal abortion, infection and finally the death of mother. Abortion is one of the serious problems in human communities today, and major discussion in penal law. In the holy religion of Islam, it has been paid attention since human soul is highly revered. So, Sharia law has banned abortion. Does the fetus possess capability and capacity to turn into a perfect human being as a potential man? Does he have the right to “be kept safe” and to “live”? Does he deserve respect and reverence? What is the evidence for supporting the rights of fetus in Islam?

**Method:** This research developed by documentary and library studies.

**Funding and conclusion:** Supporting fetal rights is not limited to supporting the right to live through banning abortion or other means of ending the life of the fetus. Rather, in Islam, fetus possesses a spiritual right and the parents are obligated to observe these rights for the safety of the fetus before, during and after pregnancy. Also, the issue of the mother’s independent life has stipulated that the fetus or embryo deserves the right of inheritance and in the case of the death of the fetus after ensoulment (the moment at which a human being gains a soul), all ordinary rites and rituals for burying the adult dead must be observed for the dead fetus as well.

**Keywords:** Abortion; Fetus; Right

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### Introduction

Putting an end to pregnancy before gaining life by the fetus, that is done at the request of the pregnant woman and not because of the medical reasons, is called voluntary or illegal abortion. This type of abortion is a major problem for women in their reproductive years and it is one of the highly neglected healthcare problems in the world [1]. In the world, 13 % of the women’s mortality rate is because of the unsafe abortion [2]. The unsafe methods of abortion are operated by unskilled people and

outside legal systems and in places with minimum medical and sanitary standards [3].

One of the items of human rights observation in the 20<sup>th</sup> century was considering freedom of sexual relations. Freedom of abortion came next by the proponents of human rights. In the majority of countries in the world, women were deprived of the rights of abortion. Therefore, the human rights in the 20<sup>th</sup> century officially recognized abortion as a right and women enjoyed the abortion services since it was included as an article in the laws on the

rights of women to let them determine their destiny [4].

Legal strategies to introduce barriers that impede access to legal abortion services, such as mandatory waiting periods, biased counseling requirements, and the unregulated practice of conscientious objection, are emerging in response to this trend. These barriers stigmatize and compromise their health [4].

Public health evidence and human rights guarantees provide a compelling rationale for challenging abortion bans and these restrictions [4].

Until 1967, abortion was illegal in almost all Western democratic states except Sweden and Denmark. Then, UK changed laws to authorize abortion [5].

In 1973, the US Supreme Court in a landmark decision in connection with companion case *Roe V. Wade* authorized abortion up to three months of pregnancy [6]. In this connection, the majority of Constitution researchers including Richard Mohr, Richard Posner, Laurence Tribe, and Robin West passed a collection of 60s and 70s decisions of the Supreme Court on invalidity of the laws on anti-pregnancy and anti-abortion under "sexual freedom cases" to reflect official recognition of a Constitutional law for involvement in free sexual activity [7].

In a study in US in 2011, women aged 20-24 and 25-29 years accounted for 32.9 % and 24.9 % of all abortions, respectively [8]. In 2012, an estimated 51,500 induced abortions occurred in Senegal and more than 16,700 women were treated for complications resulting from unsafe abortion. The abortion rate was around 17 per 1000 in women aged 15-44 and the abortion rate per live births was 10 in 100 births [9].

Therefore, by virtue of human rights, women's rights and the principle of the rule and legitimacy of mothers, accepting uncontrolled freedom of sexual relations and its spread to various age groups led to the unwanted pregnancy [10].

Unplanned and unwanted pregnancy show a serious responsibility of public health in the world and the five countries of China, Russian Federation, Vietnam, United States, Africa and Ukraine have the highest number of abortions respectively [11].

Despite absolute permission for abortion, there are opponents. For example, according to new Catholic Christian instructions the fetus is not a potential man, but a practical man immediately after fertilization. Catholic Christians are of the opinion that at conception, God breathes His spirit into it; then human life begins in the fetus. This is why they oppose abortion [12]. Many countries have considered minimum requirements for abortion [13].

Some Western thinkers wrote articles in opposition of abortion. They believe that when a woman is voluntarily involved in sexual activity, she should undertake the responsibility of the embryo and she cannot commit abortion [14].

Although abortion is a legal and penal subject, gradually it has turned into the gravitation of medical sciences on one hand, and humanities such as philosophy, ethics, religions, faiths, sociology, psychology and law on the other hand [15]. In view of the followers of Deontology, some see legality of abortion in

connection with the right to live, freedom, and physical health of women but some others give priority to the right of the fetus [16].

This viewpoint claims the lives of thousands of innocent and defenseless fetuses every year. In this paper, the researcher intends to review the right of the fetus in view of Islam (Imamiyah Jurisprudence) on importance of the right of the fetus.

## Method

This study is a revision over religious texts regarding the aims. There are related keywords such as Ethics, religious, fatwa of the Islamic jurists, fatwa of the Shiite jurisprudents, and have also used the databases such as Google, pub med and magiran SID and also the section of the Muslims authority website which answers to religious

## Funding & discussion; conclude the study with core findings and future prospects

### Evidences on importance of spiritual rights of fetus in islam

Islam attaches special significance to the physical and mental upbringing of the fetus, that includes a period of time from selecting one's wife to the end of the pregnancy, such as meeting the qualifications for a matching wife, emphasis on the physical and mental health of mother, motivation for marriage, observing the religious recommendations for intercourse, observing religiously banned behaviors and religious precepts in the time of intercourse, way of nutrition in the time of pregnancy and finally the physical and mental health of the parents in the overall physical and psychological integrity of fetus. Islam has prescriptions for each of the above and the minimum negligence can expose the health of the mother and the fetus to danger [17].

In this connection, the researchers have claimed that pregnancy and delivery create stress for the mothers who always experience anxiety. The mothers have always pre-birth serious concerns and anxiety on infant abnormality, delivery pain, undertaking the responsibility of her child and performing the motherhood duties [18].

One of the important rights of pregnant mothers is "the type of father's relations with her" and sentimental supports of the mother. When fathers share the pregnancy experience of their wives, they play the role of father better. According to these findings, the participation of men in pregnancy procedure of women is very influential in the health of father, mother, infant and all the family members [19,20].

The second issue is the "father's relationship with the fetus". A study by Wilson and Associates (2000) strongly proved that father-fetus affection in prenatal period is a foretelling factor for the infant affection [21].

Therefore, the traditions placing emphasis on the duties of father during mother's pregnancy (including physical and mental supports), all and all are in line with protecting the full rights of the fetus.

## Evidences on respecting the prenatal right of fetus in Islam

1- In the case of the possibility of harm to the fetus, some religious duties have been taken away from the pregnant women. In one of the religious obligations that pregnant women are exempted from, is the following: "If there is the fear of harm to the fetus, the obligation of fasting shall be removed from mother" [22].

2- Also in the case of violation of law by mother, her punishment shall be done after his period of pregnancy. The Holy Quran says: "No one is punished for the sin the other one has committed" [23] and everyone is punished only according to the degree of sin he commits. On an adulterous woman Imam Ali (AS) said: "Take care of her until she delivers the baby and when the child was born and someone was found to take after the child, then punish her" [24].

Inspired by the Sharia law, some articles of the penal law including articles 443 and 437 of Islamic Penal Code (passed 2013/04/21) have emphasized the above subject.

Article 437: A pregnant woman cannot be subjected to

Qesas (retribution) before giving birth. Additionally, after delivery, the implementation of the sentence will be postponed as long as the life of the infant depends on the mother.

Article 443: If a pregnant woman is sentenced to Qesas of a body organ and if in enforcement of Qesas, there is the fear of harm to the fetus or child before or after giving birth, the Qesas will be postponed until the fear is removed.

3- If a husband dies while her wife is pregnant, the child's inheritance share will be preserved after birth [22,25].

4- Burying the miscarried fetus has certain rules. If the miscarried fetus is four months old or more, ceremonial washing and embalment should be done. If it is less than four months old, it will be wrapped in a fabric and buried without ceremonies. In the case of touching the dead child aged full four months, full ablution of the one touching the body will be religiously obligatory [22].

## Right to live

Life and health are the most valuable gifts the Almighty God has bestowed on man. Various verses in the Holy Quran attest to the illegality and religious forbiddance of abortion.

First group: The verses totally condemning homicide: [26] By virtue of these verses some say abortion is an instance of homicide.

Second group: Verses stating that killing a child is a religious haram and is forbidden.

The importance of the life of fetus in Islamic jurisprudence is that in the case of the death of pregnant woman the life of the fetus should be saved [27,28].

If the fetus is still alive in the womb after the death of its mother

and if there is the possibility of its survival after removing from the womb, it is obligatory to remove the fetus immediately. As far as the death of the fetus is not ascertained inside the womb, it is not recommended to bury the dead pregnant mother and if a live fetus was buried along with its mother and even after burial there is the possibility of its survival, it is necessary to exhume the body and remove the fetus from her womb. Also, if the survival of fetus depends upon postponement of the burial of its mother, it is recommended that she must not be buried until the survival of fetus is assured [22].

The right to live bestowed by God on all human beings is necessary to be protected. Therefore, suicide is not allowed (haram) in Islam by virtue of verses 29-30 of Surah An-Nisa. Also according to verse 97 of the same Surah, it is necessary to protect one's life against the oppression of the others.

One of the examples of murder documented in history which is unfortunately committed abundantly today, is filicide. The Holy Quran has opposed this in verse 151 of An'am.

Modern filicide (abortion) is common in the majority of world countries and there are no deterrent laws and pertinent punishments for abortion. They justify abortion on excuse of the right of mother to live, saying that the fetus is a part of mother's body and she has autonomy on her body.

## The relationship between mother's respect of autonomy and fetal life

Any man in Islam deserves respect and the right to autonomy [29]. The Holy Quran is explicit in this issue. Chapter 2, verse 256, asserts that: "No compulsion in religion, truth stands out clear from error."

There is a question here: Is the respect of autonomy unlimited? Can mother's respect of autonomy on her system of pregnancy violate the fetus's right to live? There are two points here:

1- In the case of abortion in Islamic Sharia, the principles of justice and non-maleficence take precedence over the principle of respect of autonomy, and abortion is considered illegal.

2- The humane dignity of man has no connection with physical and mental perfection and puberty and mother's respect of autonomy or her freedom of choice must not distort the personality of the fetus. By rule of wisdom, fetus has a personality and it must not be attached to or owned by mother and can be decided about its fate. Although the life of the fetus inside the womb depends upon the mother, it is not an independent body organ [30].

If a grown-up creature possesses high value and importance, that creature possesses the same value and importance in its potential state. If killing a grown-up creature is ethically unjust and incorrect, destroying any creature in its potential state will be equally unjust and incorrect [31].

## Fetal right: before or after birth?

Any man deserves the right to live. Therefore, the fetus has the right to live too and abortion is illegal since it is an act of violating

the right of the fetus to live. The important point here is assurance over the moment life begins in human being [32]. Some say, as far as there is no assurance on the moment life begins in a fetus, it is rational and ethical to rule in favor of life when in doubt and avoid abortion. If we make a mistake on the time life begins, we have indeed killed an innocent and defenseless person [10].

According to physicians “viable” stage is when a fetus is able to live outside the mother's womb even with the help of artificial devices [32].

Fetal right in Islam begins after conception. Fetal life has two major stages [33]: after conception until spirit is breathed into it, and from spirit breathing to the birth [34,35].

If the pregnant mother is attacked and the fetus at any stage is intentionally or unintentionally destroyed or injured, the ghurrah blood money should be paid. For example, for the fetus germinated inside the uterus, 2 % of full diya blood money, in clot stage 4 % of full diya blood money, at the stage of mudh'gha 6 % of full diya blood money, and at the stage when flesh and bone is formed but spirit is not breathed in it, 10 % of full diya must be paid. Quranic commentators have interpreted verse 33 of Al-Isra chapter on banning abortion at the stage of alaqah until before breathing spirit into it.

At the second stage, once the spirit is breathed in after 120 days (4 lunar months plus 10 days, equal to 19 weeks and one day or 134 days passed last menstruation), the fetus acquires perception and volition (i.e. becomes a person), and is entitled to the same rights as a living being and its abortion will be an instance of homicide. Verse 151 of Al-An'am attests to illegality of abortion after breathing spirit into it.

In the end, to prevent harm to the fetus and to respect its rights we must admit that unwanted pregnancy is a key factor in unsafe abortion and it can be reduced only when the ground for occurrence of unwanted pregnancy is reduced. In this respect, the following recommendations are made:

- Sex education at high school and pointing out the undesirable consequences of unmarried relations with the

opposite sex, and teaching religious and legal provisions for abortion

- Facilitating marriage and sexual activity after marriage by the statesmen. It is a value in Islamic and Iranian society.
- Distributing free contraceptives devices and pills along with efficient instructions to use, filling the gap of awareness and performance in case of women with unwanted pregnancy. Various articles and studies show that in educational programs the emphasis should be on change of behavior.
- Pursuing strategies by family planning clinics on the right performance by relief seekers
- Better support of young mothers by the government including incentives for continuing education, financial support, provision of jobs for the young fathers, better child care, and boosting ability for housekeeping.

## Conclusion

In the case of abortion after breathing spirit into the fetus, Islamic Sharia law has adopted a moderate rule, i.e. it opposes unconditional freedom of abortion but at the same time it does not absolutely rule out abortion. Sharia law respects fetal right in all stages of perfection and prohibits any harm to the fetus except in some cases (the risk of mother's life) in all stages. In this viewpoint, there is consensus on the principle of the importance of spiritual right of the fetus in Islam, revering the fetal right in Islam before birth, respect of mother's autonomy and fetal life, and supporting fetal right to live as a person. According to Islamic Sharia law, abortion is permitted in limited cases and under special circumstances.

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