DIREITOS FETAIS EM JURISPRUDÊNCIA IMAMI E SHAFI'I

FETAL RIGHTS IN IMAMI AND SHAFI'I JURISPRUDENCE

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Resumo: *Os direitos do feto humano na jurisprudência Shafi'i e Imami são objeto de investigações do presente artigo intitulado "Direitos Fetais na Jurisprudência Imami e Shafi'i". Como uma coisa viva, o feto humano pode estar certo, no entanto, existem dois privilégios que são necessários para o feto ter direitos: 1- Existência do feto na hora de carregar o direito; 2 - Nascer vivo do feto embora morra logo após o nascimento. Na jurisprudência Imami e, portanto, na lei iraniana, não há discordâncias em relação aos direitos fetais, como herança e testamento. Embora não tenha recebido muita atenção nos contextos da jurisprudência e do direito civil, como direito civil, a dotação também é vista como um direito fetal. Por outro lado, como o direito fetal mais básico é o direito de viver, existem certas punições legislativas extremas previstas para aqueles que violam a vida de um feto. Na verdade, o aborto não é permitido em qualquer fase do desenvolvimento do feto e também é proibido proibir as opiniões dos juristas imami e shafi'i. Na jurisprudência Imami e, portanto, na lei iraniana, os únicos casos em que o aborto é considerado lícito são aqueles em que a vida da mãe está em grave perigo ou o feto está de alguma forma doente, sob a condição de que o aborto só ocorra antes para almentar.*

Palavras-chave: *Feto, Herança, Vontade, Aborto*

Abstract: *The rights of the human fetus in Shafi'I and Imami jurisprudence is the subject of investigations of the present article titled as "Fetal Rights in Imami and Shafi'I Jurisprudence". As a living thing, human fetus can be right-bearing, however there are two perquisites that are necessary for a fetus to bear rights: 1- Existence of the fetus at the time of bearing of right; 2- live birth of the fetus though he/she dies right after birth. In Imami jurisprudence and accordingly in Iranian Law, there are no disagreements regarding fetal rights such as inheritance and will. Although that it has not received much attention in the contexts of jurisprudence and civil law, as a civil right, endowment is also envisaged as a fetal right. On the other hand, since the most basic fetal right is the right to live, there are certain legislative extreme punishments envisaged for those who violate the life a fetus. In fact abortion is not allowed in any stage of the development of the fetus and it is also bound to forbiddances in the opinions of both Imami and Shafi'I jurists. In Imami jurisprudence and accordingly in Iranian Law, the only cases in which abortion is considered lawful are the ones in which either the mother's life is in grave danger or, the fetus is somehow ill, under the condition that the abortion must only take place prior to ensoulment.*

Keywords: *Fetus, Inheritance, Will, Abortion*

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Introduction

Different legal systems envisage different rights for mankind. Similarly, a fetus is also a developing human being and therefore it is not an exception to this rule and it can have various rights. What the present paper investigates are fetal rights under special circumstances. In addition, the present paper investigates the criminal penalties of abortion in the views of Imami and Sunni, especially the Shafi'I jurists. Although fetuses have other rights too and one can elaborate on fetal rights through other links too, the goal of the present paper is to investigate the perquisites necessary for a fetus to bear rights in addition to the punishments of abortion in the views of Imami and Shafi'I jurists. Hereby, the present paper investigates inheritance and will-related fetal rights.

In terms of the legal aspect of the fetal age, a fetus has importance both in the context of bearing of rights and being effective on the rights of others and, in the context of criminal law and analysis of the nature of abortion. If the fetus is considered as a human, killing the fetus would be equal to killing a man and therefore it should be punishable by death penalty; in addition even if the abortion was not intentional, there would be a full wergild payment obligation for the defendant. Nevertheless, if the fetus is considered as a man, he/she should be considered as an inheritor and therefore his/her inheritance share should be put aside waiting delivery upon deliverance. However if the fetus is not considered as a human, neither there would be reason to consider its destruction as murder, nor any reason to consider it as an inheritor (Azin, 2012: 128).

Considering the legal importance of human fetus, Islamic jurisprudence has also envisaged the concept of fetal rights and it has ever since been seeking for the best absolute verdict regarding it. When we talk about personality, we can be referring to both legal and real personalities. In other words, we may conclude that a human being is comprised of both of the former personalities. In this case, human fetus is also a person and therefore he/she is subject to the entire rights that would be given to a real person. Also even if it is not proved that the fetus has been ensouled, there may be partial or full rights subject to it. Envisaging fetal rights shows credibility and therefore no government can be challenged because of having envisaged fetal rights. Since the law gives the title of person to the fetus, it is concluded that the fetus has a legal personality (Azin, Previous: 129). If the human fetus is considered as a person, he/she will have both a legal personality and a real personality. On the other hand, the law may at some point entitle a non-ensouled fetus as a person as it has done in the context of endowed properties. In this scenario, the legal personality of the fetus will remain even if one cannot entitle the fetus as a person.

According to the above content, the aim of the present article is to investigate and study fetal rights. To this end, we firstly review the lexical definitions of fetus and then, we will proceed towards the inference of the Imami and Shafi'I perspectives. Overall, this paper tries to propose its own theory through the adoption of a perspective that is more comprehensive compared to other theories'.

First Topic: Concepts

First Word: Terminology

First Clause: the lexical and idiomatic definitions of Right

The equivalent of the word Right in Persian language is "Haq", which is a borrowed word from the language of Arabic antonymous to void and shrinkage of justice and synonymous to existing and persistent (Trihi, Bita: 318). Similarly this word has several equivalents in the language of Persian as well. These include true, truth, justice, benefit, worthiness and competency (Amid, 1999: 417). The plural form of the word "Haq" is "Hoqooq" (rights) and also this word has several equivalents and meanings in the language of Persian too. The following includes some of the most important ones:

1 - Set of rules and regulations that rule over people who share a community. On the one hand, in its nature human is a social being and it must live among its own kind so that its needs are satisfied and on the other hand, because of the similarity of the nature and temperament of the mankind, most humans have similar demands and almost all human beings are in need of one similar thing. Therefore there would be conflicts on having more interests and a better life. After getting to know himself, man perceived that the survival of humane communities would not be possible with chaos and bullying. Therefore there

should be rules governing the relationships between people who are the members of a same society. The set of these rules is nowadays being referred to as law (e.g. Iranian law or Islamic law).

2 - The advantages that the rules of law provide for some entities against some others. For every person, the law and rights consider certain advantages over the others and somehow empower the person. These advantages are referred to as law (Katoozian, 1990: 2-1). In this sense, law is also interpreted as personal rights.

Second Clause: The Lexical and Idiomatic Definitions of Fetus

The equivalent of the word fetus in the language of Persian is "Janeen" and similar to the word "Haq", it is also a borrowing made from the language of Arabic. In the language of Arabic, the plural forms of "Janeen" are "Ajene" and "Ajnon" (meaning fetuses) (Trihi, Bita: 319). In lexical terms, the word "Janeen" (fetus) refers to every covered and concealed object (Amid, 1999: 451).

Considering the above content, the Arabic root of the word "Janeen" is the word "Jinn" which means concealment. The other interpretation of the word "Jinn" that refers to the concept of elf refers to a being that is hidden from the sights. Therefore, the being that is inside the womb of a woman is called a "Janeen" (fetus) since it is concealed from the sights. In some juridical documents the "Janeen" (fetus) is defined as a concealed thing within the womb of a woman. The holy book of Quran defines "Janeen" (fetus) in the same way too: and when you were embryos concealed within the wombs of your mothers (Najm: 32).

In the book of "Sharh-e-Lamhe", the author Shahid Sani defines the word "Janeen" as follows: "Janeen" (fetus) is being carried within the body of the mother and its name has been given to it since it is concealed within the womb of the mother. In the beginning it may seem easy to provide an idiomatic definition of the word "Janeen" (fetus) in Imami jurisprudence, Shafi'I jurisprudence and, in Iranian law. This goes to the extent that one can also say that both the lexical and idiomatic definitions of the word "Janeen" are the same not only in jurisprudence, but also in law. However the books written by the Imami and Shafi'I jurists lack any special topic being dedicated to the word "Janeen" (fetus). Therefore most of investigations and analyses regarding fetal rights are based on the holy Quran and the narratives narrated by jurists.

Second Word: the personality of fetus in the view of jurists

There is no absolute specification of the time of transformation of the fetus into a human being in narratives. Although several Sura of holy Quran and various narratives have elaborated on the issue of creation of human and the stages of development of human fetus and also in spite of the detailed descriptions of the stages of creation of human fetus in divine books, there is no absolute affirmation regarding the nature of fetus. Jurists have also remained silent regarding it and have merely quoted narratives regarding the wergild of the fetus during development stages. One may be able to identify and infer the criterion of ensoulment through the induction of quoted narratives. In the book of "Kafi" there is a narrative being quoted from Imam Ali in which the second stage of creation that is stated in the holy Quran has been explicitly considered equal to ensoulment and it has been stated that from this moment one, the fetus is subject to the full wergild right just like a person (Kalinin, 1407A.H: 342).

In another narrative quoted from Imam Sadeq it is stated that in the answer of a person who had asked a question about the abortion of a five-month old fetus, Imam Sadeq has said warned the person not to do so because after five months of existence, there must have been a life being set in motion within the fetus and therefore abortion would oblige the mother to pay the full wergild for the fetus (Toosi, 1407A.H: 284).

In another narrative regarding Imam Sadeq, it has been stated that in Imam's view, the mother who intentionally aborts her fetus will be deprived of the inheritance rights of her unborn since killers cannot benefit from the inheritance right of ones they've killed (Toosi, Previous: 284-285).

One of the most detailed descriptions in this context is a narrative quoted from Imam Zein-Al-Abedin. In this Hadith, Imam Zein-Al-Abedin has talked about ensoulment in a specific stage of

fetal life and therefore this hadith can be considered as the equivalent to the ensoulment stage in the popular juridical theory; the stage after which the abortion of the fetus is punishable by full wergild payment since after this stage, the fetus gains a humane form and a soul has been granted to it (Toosi, previous: 286).

The interesting point in the upper mentioned hadith is the repeated question of the narrator asking if the evolution and growth of the fetus within the womb of the mother is caused by the ensoulment or not?

As the answer, Imam Zein-Al-Abedin said: this evolution is the result of the conventional life-giving spirit which has been transferred from men and women and if the fetus is not fed by this life-giving spirit, it cannot transform from one form into another within the mother's womb. In this case, the one who kills the fetus is not subject to any wergild payment. This narrative beautifully points to the distinction between the life-giving spirit and mind spirit; also some extent it reminds us of Aristotle's view on evolution of the animalistic soul into humanistic soul.

On the other hand, Imam Zein-Al-Abedin has explicitly and directly talked about the humane dignity of the fetus prior to ensoulment. He states that as soon as the fetus has formed (life-giving spirit has been granted) and even before the occurrence of the ensoulment, people have a duty to preserve the life of the human that is to be born.

Second Topic: fetal inheritance right in jurisprudence

In terms of the civil law, inheritance has been referred to as a right that is transferred from a dead person to a living person who is either a relative of the deceased or his/her spouse (Jafari Langroodi, 2009: 654).

Considering the good of the fetus, it may even be given rights before its birth. However the condition for this is that the unborn should have a live birth. On this basis and in case of existence of a will, the fetus will have a right to inherit. However this right is unstable and it becomes stable only when the fetus is born alive (Safaei & Ghasem Zadeh: 39-40). The theory of inheritance right of the fetus in case of live birth has roots in narratives quoted from the Imams and prophets (Najafi, 1994: 586).

When Hakam-Ibn-Atabe asked Imam Baqer a question about a fetus that had been aborted and there was no assurance about its ensoulment state, Imam Baqer answered: if there is an explicit movement, then it inherits even if its silence is because of being alerted (Hor Ameli, 1414A.H: 586). A narrative similar to this has been quoted from Imam Sadeq by Abu-Basir.

In the book of "Alfaraez-va-Almavaris", Hor Ameli collected 11 related narratives under the title of " The pregnancy inherits and inherits if a child is born alive and knows that he or she chooses to move or choose his or her own choice and to inherit from it and to rule the inheritance of the mother". Imami jurists consider certain signs including the movement of limbs and yelling as the indicators of the live birth of a fetus. They have also described that life signs are not limited to these affairs since a fetus may not be able to yell because of being mute (speechless) and a fetus that is paralyzed is also not able to move. On this basis, the livingness of the fetus must be proved and a mere natural vibration cannot be symptom of life (Shahid Sani & Bita: 210). By referring to the general documents related to wills, Imami jurists believe that a living fetus has also will-related rights (Khansari, 2018: 59), however the perquisite is the live birth of the fetus (Shahid Sani & Bita: 236); other jurists have also accepted this issue in different ways (Heli, Bita: 115; Khansari, 59; Imam Khomeini, 1405A.H: 334).

According to the Imami jurisprudence, the article 957 of the civil law of Iran envisages that the fetus will have civil rights if it is born alive. As a description of the mentioned article, Hasan Imami believes that since the fetus does not have an independent existence and is dependent on the mother, it is not considered as a natural person unless it is born while in a living state (Imami, 1989: 152). On the other hand, in the article 857 of the same law regarding the issue of inheritance, the legislator states: the condition for inheritance is being alive at the time of decease of the person and in case of fetuses, the perquisites are that the fetus should have existed at the time of decease and that the fetus must be born alive, no matter if it dies right after birth. According to the former article of being born alive, the underlying perquisite is the legitimacy of the intercourse that resulted in the formation of the fetus. Hereby, if the fetus is born dead, it is concluded that it never was right-

bearing (Imami, previous: 153). In other words, the existence of the fetus and its live birth must be proved. In this case, references are made to the article 875 stating that in case of uncertainty regarding the existence of the fetus; it is believed that the sperm has not coagulated. On this basis, proving the existence of the fetus requires using methods such as confession and other evidence that would help proving a dispute. In any case, live birth is the index of initiation of childhood and having civil rights (Naghibi, 2008: 198).

On the other hand, if there is an uncertainty regarding the aliveness of the fetus at the time of birth, one can no longer refer to the principle of initiation of childhood since the life of the fetus depends on the mother and it is not clear whether he/she dies without the support from the mother or not. If the fetus is alive during the pregnancy and dies during the birth while for example his/her head, neck, chest and hands have been pulled out but the lower body is still inside the mother's body, it cannot be said that the fetus has been born alive and therefore no childhood has initiated. This is because what human mind is reminded by live birth is that the fetus has exited the womb fully while showing symptoms of life.

Third Topic: Wills-related fetal rights in Imami and Shafi'I jurisprudence

a) The view of Imami Jurists

In the book of "Maqnae", Mofid Ghode states: if the deceased has directly mentioned the fetus in his/her will, the will cannot be altered. If the fetus is aborted the inheritance share would remain among the other assets of the deceased and if the fetus dies after birth, his/her inheritance share would be dedicated to the closest relatives of the fetus.

In the book of "Masboot" we have: will to the fetus refers to the case in which a person wills that something of his/her possession should be given to a fetus in a mother's womb while; will on the fetus may refer to making a will to give the sheep fetus inside its mother's womb to somebody else. Both of these cases hold as long as both fetuses in both cases exist (Toosi, 1995: 312).

In the book of "Maqnieh", Ibn-Zohre writes: there is no problem with making a will to a fetus and if the fetus is born dead, the will subject would be inherited by other inheritors (Maqnieh, 1421A.H: 392).

In his book of "Tabsara", Alameh writes: making a will to a fetus hold only when the fetus is born alive.

Also in the book of "Ershad-Al-Azhaan" there is a line (و تصح للحمل و يملك ان انفصل حيا ولو سقطا بطلبت ميتا بعد سقوط في ورثته) that points to three issues: making a will to a fetus is correct as long as the infant is born alive. The other point is that the will would be revoked if the fetus is born dead. The third point is that if the fetus is born dead, the other inheritors would inherit instead of the fetus and there is no need for the acceptance of the other inheritors.

The view of Sunni jurists

In the book of "Alfeqh-Al-Islamic-va-Adelat" a group of Hanafi have been mentioned who believe that it is okay to make a will to a fetus under two conditions: the existence of the fetus at the time of making the will and, the live birth of the fetus.

Similarly, the school of Shafi'I accepts making wills to fetuses as long as the abovementioned perquisites are satisfied. In fact both of the former and latter jurists believe that if a woman has divorced her husband and gives birth to a child more than four years after the separation, it is not correct to make a will to the unborn since the longest pregnancy period can take no longer than 4 years and if the child is born at some time more than four years after the separation, it is obvious that the fetus didn't exist at the time of making the will. However, Hanafi believe that the longest pregnancy time can take no more than two years and if the time difference between the divorce and birth of the fetus is over two years, the fetus will not have any wills-related right (Almardavi, 1978: 114).

Similarly, the Hanbali too believe that it is okay to make a will to a fetus under the same previously mentioned two conditions (Almardavi, Previous).

The Maleki believe that making a will to a fetus is bound to the condition that the fetus is born alive whoever, they do not believe that the fetus must be existing at the time of making the will (Ibn-Abedin, 2010: 98).

The rest of the Sunni jurists believe that it is necessary for the fetus to be existent at the time of making the will in order for the will to be actionable; nonetheless, as it was mentioned earlier, the entire Imami jurists explicitly accept this concept.

The question that comes up is that how is it made clear that the fetus existed at the time of making of the will?

Sometimes, the existence of the fetus at the time of the making of the will is obvious in the sense that the mother herself and or other women are able to say that there is a pregnancy while, some other times not even the mother herself is not able to realize that she is pregnant. E.g. the initial days of coagulation of the sperm which are extremely hard to detect (Ibn-Hazm, Bita: 209).

Jurists have peoposed a way to show if the fetus existed at the time of making the will: in case of married women who are married to their husbands, if the time between making the will and birtch of the child is less than 6 months, it is obvious that the fetus existed at the time of making the will since the infants born after less than 6 months of pregnancy would not live; however if the time between the making of will and birth of the child is longer than six months, there would be no information regarding the existence of the fetus at the time of making the will (Gheblei, 2010: 4-5). However, in case of an unmarried woman or a woman who is far apart from her husband, the way to discover the validity of existence of the fetus at the time of making of the will is that the time between the making of the will and the birth of the child should be equal to or less than the length of pregnancy. For example, if a man makes a will concerning the fetus inside his wife's womb and then impregnates his wife and dies afterwards, if the fetus is born in 12 months or less, the will would be ought correct. However, if the man who makes the will does not day in months after making the will the will would be void (Gheblei, 2010: 4).

We have already mentioned narratives of previous Imami jurists. All of the Imami jurists believe in the condition of live birth of the fetus. Among them, in the book of "Sharaya", Mohaqeq writes: The correctness of pregnancy at the time of making the will must be verified and ….

In addition, the entire Sunni jurists also believe in the condition of live birth of the fetus for the will to be actionable (Bohrani, 1409A.H: 522).

By elaborating on the words of Seyed Yazdi it is concluded that he believes that it is not necessary for the fetus to be born alive. He states: in terms of inheritance we have accepted that the fetus must be born alive so that it would become an inheritor, but in terms of wills, we believe that considering the condition of live birth is wrongful.

Fourth Topic: Jurists' views on the birth of the child

a) Sunni Jurists

Sunni jurists believe that the first sounds that the child makes are the very criterions of his/her existence and in order to prove their view, they refer to a hadith that is quoted from the Muhammad Prophet: if the child begins to inherit..

In the book of Alfeqh-Al-Islamic-va-Adelat we red: if nothing could be interpreted from the signs, the judge can take help from experts and or refer to the testimonies of people who were eye witnesses to the birth (Ahmad Alish, 1978: 251-252).

The question that comes to the mind here is that what would be the sentence if half of the body of the fetus is out of the womb when it dies?

First of all, in the book of Alfeqh-Al-Islamic-va-Adelat it is stated that if most of the body of the fetus is born alive, it is considered as a live born child; however the majority of jurists believe that the entire fetus must be born alive so that it becomes right-bearing. The civil law of Egypt and Syria adopt this theory. Second, if there are multiple fetuses and all of them are born alive, the will's subject will be divided between them equally. This equality of division holds even if one child is a boy and the other one is a girl, unless if the maker of the will has mentioned any differences between girl and boy children. For example the will may say that if it was a twin, and one was a boy and another was a girl, the girl should have twice the boy and in this case, the will, should

be enforced as it maintains. This verdict is not specific to the context of making a will to a fetus, however if the will is made to a group of male and females without specifying any sexual difference, the subject would be divided between the males and females equally (Ahmad Alish, Previous). In the book of "Kafayeh", Muhammad Sabzevari believes that this theory is true and in order to back-up his inference, he makes a reference to the Sahiha Zarareh (Baghavi, Bita: 310). Thirdly, if the fetus is born dead it is considered that the will would not affect the fetus and therefore the entire subject of the will is only divided among the existing children of the deceased at the time of death. For example, if the maker of the will has two sons at the time of his death and one of these two sons dies before the abortion of the fetus, the subject of the will is given to the inheritors of the fetus and there is no flaw in this sentence. If two fetuses are born one of which is dead and the other is born alive, the dead fetus will not have any right in the will and the entire subject of the will is given to the live born child (Hakim, 2000: 225). As the fourth point there are a number of possible outcomes regarding the birth of a fetus. It either is born alive or dead. If it was born alive, he/she will inherit but if it dies after the birth, its inheritors would gain the right to benefit from the will. But if the child was born dead, the whole will's power would be revoked since a primary condition for a will on a fetus to be actionable is the live birth of the fetus. Validation of the aliveness of the fetus during pregnancy would not be a solution since it only proves the aliveness of the fetus prior to the delivery while what we are concerned with is the live birth of the fetus.

As an explanation it can be stated that sometimes there is a doubt regarding the Sharia effect of life and being alive. For example at the time of death of the maker of a will, it may not be clear whether the receiver of the will is alive or dead. In such a situation, there should be an immediate effort made for validation of the aliveness of the receiver of the will and the subject of the will would be put aside for him/her.

b) Imami Jurists

By elaborating on the words and ideas of Imami Jurists it is concluded that the fetus must be born completely alive in order to become right-bearing. On this basis, if the fetus dies after being half way pulled out of the womb, it would not be granted with civil rights. This is because Imami jurists have mostly said: there are two conditions that are necessary for a fetus to become right-bearing; these include live birth of the fetus and existence of the fetus at the time of making the will (Gheblei, 2010: 6).

In order to prove this point of view, Sahib Javaher firstly refers to the issue of prohibition of inheritance and then makes references to narratives and states that since the Arabic phrase of "Taharok Tarahorkabina" (movement) is used, it is inferred that the whole fetus must be born alive completely, not only parts of it. It has further been mentioned that there is no flaw in this sentence (Gheblei, Previous).

Second word: Intentional abortion prior to the ensoulment

In this section, we firstly mention the views held by the jurists of four main Shia and Sunni religions while counting their differences. Afterwards, the views would be analyzed and an answer to the problem at hand would be sought for.

a) Hanafi Religion

There are three theories regarding the intentional abortion of the fetus prior to the ensoulment in the jurisprudence of Hanafi (Ibn-Abedin, Bita, 2: 304).

1. Approval of the intentional abortion: this mentioning is true in the jurisprudence of Hanafi and as its interpretation it has been stated that at this stage, the fetus is not a human, in other words, it does not have a soul and therefore it cannot be killed. As it was mentioned earlier, killing refers to the taking of the soul, but when there is no soul, there is no murder. In this regard, it is not included as a referent of this verse of Holy Quran: killing a soul would not be forgiven by God. In general, this view maintains that whether excused or unexcused, abortion prior to the ensoulment is approved (Ibn-Abedin, Bita, 2: 495).

2. Approval of the intentional abortion of the fetus prior to the ensoulment is abominable since the very entrance of man sperm into female womb will ultimately result in the creation of a human. Therefore it is not allowed to waste the fetus (Ibn-Abedin, Bita, 2: 495).
3. Venerability of the intentional abortion of the fetus since human sperm is considered as the basis of a human being and therefore it is not allowed to intentionally abort a fetus at any stage. It should be mentioned that this group of jurists believe that under acceptable excuses, it is approved to abort the fetus. For example if the father of the family cannot afford a wet nurse in case the mother loses her capability of milking the infant as the result of continued pregnancy, the fetus is allowed to be aborted (Ibn-Abedin, Bita, 2: 495).

b) Maleki Religion

Not unlike the Hanafi religion, there are also disagreements regarding the issue at hand in the religion of Maleki. These different views are divided into three main categories that follow.

1. The majority of Maleki jurists believe that abortion is unapproved once the man sperm is implanted inside the womb, even during the first 40 days of impregnation (Ahmad Alish, Bita: 399).
2. Some other Maleki jurists believe that abortion is not banned prior to the ensoulment, however only if the fetus if the fruit of adultery and especially if it is possible for the mother to get killed if pregnancy signs are revealed in her (Ahmad Alish, Bita: 399).
3. Some other jurists such as Lakhmi believe that abortion before the first 40 days (before the ensoulment) is totally approved without any conditions.

c) Hanbali Religion

Similar to the previously mentioned religions, there are three main categories of views regarding abortion in the religion of Hanbali too.

1. This religion maintains that abortion before the first 40 days of pregnancy is approved but after this period, it is not allowed, it has also been mentioned that taking abortifacents during the first 40 days of impregnation is allowed (Almardavi, 1978: 386).
2. Ibn-Jozi who is one of the scholars of the religion of Hanbali believes that intentional abortion is not allowed even before the ensoulment (Almardavi, 1978: 386).
3. Some other jurists of the Hanbali religion believe that it is generally approvaed to abort a fetus perior to the ensoulment.

d) Shafi'I Religion

This religion also includes three main views:

1. The general accepted theory in the Shafi'I religion is that intentional abortion prior to the ensoulment is approved (Ghelyouni & Amireh, Bita, 4: 571).
2. Some other jurists including Ghazali believe that in general, it is not allowed to abort the fetus after four months of pregnancy. As an interpretation, he adds that abortion is a crime against a being that has already developed (Ghelyouni & Amireh, Bita, 4: 571).
3. The abortion would be approved during the first 40 days of pregnancy only if the fetus is the fruit of adultery, since the child would not be welcome in this case (Alramli, Bita: 491).

Analysis of the identified views

1. Sperm stage: most of the jurists of the religions of Hanafi, Shafi'I, Hanbali and also some the jurists of the religions of Maleki believe that it is approved to abort the fetus during the first forty days of pregnancy; however most of the Maleki jurists and some of the Hanafi jurists and Ghazali from the Shafi'I jurists and Ibn-Hozi from Hanbali Jurists believe that abortion is unapproved in any stage.
2. Ensoulment stage: most of the Hanafi and Shafi'I jurists and also Ibn-Aqil who is a Hanbali

Jurist believe that it is better not to abort the fetus in this stage; however the entire Maleki jurists and also some of the jurists of the Hanafi and Shafi'I religions consider it as a totally unapproved act.

3. None of the jurists of the mentioned fourfold religions believe that abortion prior to the ensoulment (during the first 40 days of pregnancy/impregnation) is equal to killing a person; on this basis Ibn-Qodame believes that before the ensoulment, the fetus is a lifeless being and therefore in case of being aborted before forty days of pregnancy, it neither needs to be baptized nor needs a prayer since it did not have a soul and therefore is not considered as a dead person.

This also validates that abortion of the fetus prior to four months of pregnancy is not considered as killing an ensouled person and in this case, only a fetus has been aborted an nothing more; no one has been killed (Ibn-Hazm, Bita, 8: 30).

Based on the content mentioned to this point, it can be stated that according to the previously mentioned religions, intentional abortion is generally only approvable during the first four months of pregnancy and in case of threatening the life of the mother; however based on the sentences of jurists such as Ibn-Aqil who believe that abortion during the first four months of pregnancy is approvable without the need for any excuses, the reasons are clear. On the other hand, according to jurisprudences such as Maleki and or jurists such as Ghazali who believe that abortion is unapproved even before the first four months of pregnancy, this sentence can also be considered as valid too. This is because all of the investigated four religions believe that abortion of the fetus prior to four months of pregnancy is not considered as killing an ensouled person. According to this and as it has already been mentioned, at this stage (prior to the ensoulment) the fetus is nothing more than a piece of blood and therefore wasting it would not be anything more than wasting a thing. It has also been found out that if physicians diagnose that the fetus should be aborted, not only it is not approved to keep the child, but also it is an obligation to abort it. This is because in such a circumstance, the importance of a soul-less thing would never be more than the importance of the mother who is alive and healthy; who is needed by her family.

Conclusions

The present article has tried to investigate fetal rights in Imami and Shafi'I jurisprudences and it has born the following conclusions. The existence of the human being initiates as soon as the sperm is implanted within the womb and therefore, wasting the fetus at any stage is equal to wasting a certain stage of human development. Therefore wasting the human fetus even prior to the ensoulment stage cannot be compared with the wasting of a totally lifeless thing. In general, the entire jurists believe that intentional abortion of the fetus after the ensoulment is not approved even if it is for the sake of the mother. This is because the fetus has a soul in this stage and this soul is referred to as "self". Hereby it is included in the scope of verses including: no one should waste any soul. However, there are disagreements among the jurists regarding the intentional abortion of the fetus prior to the ensoulment. Considering the different views that have already been stated, intentional abortion of the fetus, when it threatens the life of the mother, not only is approved, but also can be mandatory. This is because at this stage the fetus still lacks a soul and while choosing between the life of the mother and the fetus to save, the life of the mother is prioritized sine she does have a soul, self and life.

In narratives, abortion has been hindered and a certain amount of wergild (blood-money) has been considered for the wasting of the fetus at every stage of the development. Considering this content it is concluded that no matter the stage of development, abortion without an acceptable excuse is prohibited and banned.

Both the Sunni and Imami jurists agree that the fetus has a right of inheritance and a right in wills. Some of the Sunni jurists have maintained that the fetus has preemption and the Shia jurists have also agreed with it. But there are disagreements among the jurists regarding the endowment related to fetuses. The conditions required by the fetus to be having these rights is to be existent at the time of making the will and live birth of the fetus.

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