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Review article

An analysis of abortion in Iranian law and Imamia Fiqh: a cursory look at international law

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ABSTRACT

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The pregnancy is considered to be a beautiful and pleasing event from a medical and social perspective, and conversely abortion is seen as a social problem in all human societies, and a universal inevitable phenomenon, particularly in different populous countries and can undermine the general health of family and society. On the other hand, in addition to legal and juristic (Fiqh) considerations, abortion is concerned with a combination of medical, psychological, moral and philosophical issues. Unfortunately, due to cultural and economic poverty, people commit the illegal act of abortion which can afflict mother with severe consequences and mental disorders after and before abortion. Abortion violation is an illegal practice pertinent to women and this social problem has affected criminologists and lawyers opinions. From a juristic (Fiqh) point of view, abortion is taken into consideration before and after birth of the infant, and mothers are considered as the most critical pillars of the society due to their fundamental roles in nurturing and developing constructive personalities into the society, taking care of their husbands and finally strengthening the basic pillars of family. Nowadays, among a myriad of countries throughout the world, only twenty six countries

including UK, China, France, Russia and Germany(since 1948 and by adopting relevant regulations) regarded abortion as a completely legitimate and valid act, and in Australia, abortion is a crime and doer should be punished. Punishment is not the most influential practice to prevent or reduce abortion. This is because this illegal act is committed by the formal consent of fetus's parents, a doctor or other persons in a completely secret manner and with a high rate of incidence.

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1. Introduction

Nowadays, due to some social problems such as addition, poverty and moral corruption and weakening of moral and religious motivations, abortion has been a severe problem which lawyers and authorities interventions are compulsory. "Annually, 175 million pregnancies take place throughout the world, which of them, 75 million happens unwillingly and 45 million leads to abortion".(Malek Afzali, Hossein, 1999). "In the other words, of roughly 210 million pregnancies which occur in the world annually, 38% happen unwillingly and 22% leads to abortion"(Tew and Kirchgaessner, 2001). "According to the statistics reported by World Health Organization(WHO), about 50 million abortions ensue in the world each year and more than 5 million women become afflicted with the severe consequences of abortion".(Tehran Medical Association, 2004). "Every three minutes, one woman is died due to committing intentional abortion. Mortality rate related to intentional abortions happens mostly in the countries in which abortion is an illegal practice. Regardless of legal, moral and cultural situation of all communities, there are women who commit abortion to terminate their unwanted pregnancy".(Rosenfeld). "In southern east of Asia, for each 1000 women of 15 to 409 years old, 21 cases of insecure and risky abortion happen and mortality rate related to these abortions is 66 % of 1000 live birth".(World Health organization, 1997). "In addition, in US, 49% of pregnancies are unwanted and about half of such pregnancies lead to abortion".(Guttmacher, 2003.). "In UK, prior to the legitimacy of abortion rule in 1968, 40% of mothers' mortality rate was related to criminal abortion".(Williams, 2001). "Still, based on the criminal law 1900, abortion in Central States of Australia is regarded as a crime and people involved are sentenced to 10 years imprisonment. In addition, abortion is prohibited in Tasmania State and is under special regulations and limitations. While in other states of Australia, abortion is easily practiced in private centers and a myriad of medical and clinical centers are free to advertise on practicing abortion. However, in the same states, some public hospitals have adopted special regulations on abortion and relevant medical commissions must give consent to practicing abortion cases. Of course, in the states in which abortion is regarded as a crime, it is practiced based on clinical and sanitary regulations, and also the consent of special medical commissions on abortions".(Hosseini, Seyed Hadi, 2009). Based on the statistics issued by Iran Ministry of Health, Treatment and Medical Education, more than 80.000 abortions(200 cases per day) happens annually, which most of them is illegal and unsanitary".(Akhondi, Mohammad Mehdi & Zohreh Behjati Ardakani, 2003)

1.1. Abortion

"In law, abortion means intentional and unnatural exclusion of a premature fetus in a way that the fetus discarded is not alive and viable".(Goldouzan, Iraj, 1999; Yad, Ibrahim, 1968; Nouri, Reza, 2005). In Fiqh(Jurisprudence), abortion happens when "a woman or animal intentionally discards a premature fetus in either dead or alive form, and that fetus is not able to survive intentionally or by medications; and jurists regard this case as rejection or exclusion".(Nemati, Ahmad, 2001). In medicine, abortion means "a premature exclusion of products resulted from pregnancy, especially a fetus from mother's uterus"(English Dictionary of Medical Terms, <http://allseve-rug.ac.be/rvdstich/euggloss/DIC/dictio>)

1.2. The types of abortion

Legal Abortion:

"It involves terminating pregnancy by the formal consent of forensic medicine"

Illegal Abortion

"This type of abortion is an unauthorized termination of pregnancy without formal consent of forensic medicine and with different ways including use of some drugs such as some abortifacients, white phosphorous or doing some injuries to genital organs or lower abdomen."(Mohammadi Vahidi, 2005)

1.3. The basics of abortion

Although all divine religions recommend bearing children and having a generation and there is a consensus on this issue, there is not any agreement or consensus on abortion. "In common law of some countries, especially in UK (1307-1803), abortion of an unived fetus which has not yet received a soul was not long considered as a moral deviation in community and no punishment was imposed on it". (Kommers, 1992), And even if a fetus transformed into a soul was aborted, the act was regarded as a type of misbehavior and disobedience to rules."(David, 1981). The following is a list of legal and legitimate cases of abortion in Islamic Law:

Before fetus becomes mature (prior to imaging of entire body), it becomes apparent that mother dies in case pregnancy continues

Before fetus has a soul, it becomes apparent that mother dies in case pregnancy continues

After fetus has a soul, it becomes apparent that mother dies in case pregnancy continues, with taking necessary actions and legal precautions

Before fetus becomes mature (prior to imaging of entire body), it becomes apparent that fetus can damage mother in different ways

Before fetus has soul, it becomes apparent that fetus can damage mother in different ways

After fetus takes a soul, it becomes apparent that fetus can damage mother in different ways

Abortion becomes necessary to prevent spiritual losses, keep mother's honor and in case mother is under severe pressures and limitations

In case mother is afflicted with a dangerous disease and is forced to undergo some operations and treatments, so abortion must happen, regardless of fetus in any stage of development(of course, fetus must not be able to live outside uterus and there is a very little chance for it to survive)

It becomes clear that if fetus is born, he/she becomes afflicted with mental and physical incapacities or some severe diseases and parents cannot tolerate such infant and they may undergo much suffering and persecution.(Mohammadi Hamedani, Asghar, 1998)

According to Talmud, if a woman undergoes sufferings and risks during childbirth, her life must be saved even by abortion:

"If a woman while childbirth experience risky situations [and her death becomes probable], her fetus must be cut from her body, because the life of mother is privileged over the fetus. If a main part of fetus [or its head] is extruded from mother's body, the fetus must not be damaged. This is because nobody is authorized to kill somebody to save another one.(Solaimani, Hossein, 2005)

In Australia as a developed country, based on the new WA Law, abortion is permissible in accordance with the following conditions:

A woman personally and also socially suffers from giving birth to a child and she experiences many unpleasant economic consequences

Mother's mental health could be severely damaged

Two specialized and authorized physicians confirm that the continuance of conception is highly risky for mother's mental and physical situation and can have hazardous consequences for her

In addition, Australia has legalized abortion of a fetus of more than 20 weeks old, in case of mothers consent.(Hosseini, Hadi, 1990)

1.3.1. Abortion from the perspective of fiqh and religion

Although all religions emphasize child bearing and fertilization, there is not any universal agreement on abortion. However, abortion has undergone a variety of historical, cultural and legal transformations in different communities.

Some communities have made many attempts to legalize abortion and to claim more emphatically that punishment could not prevent people from doing abortion and some other have still insisted on banning abortion.

A) Abortion from the perspective of Fiqh

Undoubtedly, abortion at all stages of development, from conception to birth is subjected to inviolable decrees and any sentence and opinion in this regard depends on the Holy Quran, the Tradition, Consensus and Reason.

The Almighty God in Quran emphatically prevents creatures from demolishing their children and regards the act as inappropriate and reprehensible.

According to al-Isra Sura, Verse 31":

"And do not kill your children for fear of poverty. We provide for them and for you. Indeed, their killing is ever a great sin".

In Shiite Fiqh, abortion is legal in two stages. The stages include before and after reincarnation of soul. a) Before animation: if conception is harmful to mother and a specialized physician gives consent to abortion, contemporary jurists regard abortion as legal; b) After animation: Shiite jurists do not regard abortion in this state as lawful, unless the survival of fetus lead to the death of mother. In this state, jurists consider abortion as a legal act.(Mohammadi Hamedani, Asghar, 1998).

There are some disagreements on each stage of formation of fetus, sperm, and clot of blood among Sunnite jurists. According to Hanifa, abortion before animation of fetus (prior to 120 days) is permissible and it is not necessary to pay ransom on it in this specific period. According to Malekite, abortion is unlawful in each stage of fetus formation, and Shfi'ite regard abortion as an unlawful act after formation of fetus in uterus. Imam Mohammad Ghazali regards abortion as unlawful and believes that life of a fetus begins when sperms enter uterus and fertilization starts with ovum and abortion at this is stage is not legal.(Khazaeli, Sohaila, 2002; Ne'emati, Ahmad, 2002).

B) Abortion from the perspective of religion

Abortion has been long a significant legal and legitimate issues in different eras, especially in religious systems which respect and values man's life.

1.3.2. Abortion in jewish world

In Torah, intentional abortion has not been discussed. The punishment for aborting fetus during a fight (unintentional abortion) is to pay ransom to wife's husband. According to Talmud, abortion is a crime but it has not retaliation and sometimes convict must be whipped.(Hafez, 1902) Talmud: the most significant source Sharia source which is compiled in 5th century. Judaism interpret it as oral Torah and equal it with written Torah)

1.3.3. Abortion in christianity

At the beginning of the emergence of Christianity, abortion before fetus becomes animated was condemned.(McFarlane D. R., "Induced Abortion: An historical overview", Am J Gynecol Health, 1993)

In Catholic Church, fetus is a complete human from the earliest moment of fertilization and has right to live same as all human. Therefore, taking any action to abort fetus is reproached and is regarded as a crime. In nineteenth century, the Catholic Church rejected this idea and claimed that abortion of fetus in each stage is not permissible and doer must be sentenced.

The Catholic Church's emphasis on the animation of fetus form the earliest moments of conception is due to the fact that the Church believe that all aborted fetuses must undergo ablution same as adult men.(Solaimani, Hossein, 2002). In Protestant Faith, in particular in UK, abortion is legal.(Soleimani, Hossein, 1999).

1.4. Abortion in australia, sweden and international law

Australia

In common law of Britannia and Australia, banned abortion derives from religious and church beliefs. From fourteenth to nineteenth century, western churches believed that fetus does not animated from the earliest moments of sperm formation and it happens a period of time after fertilization. So, St. Augustine believed that a body which has not any form cannot accept a soul. This fact which has been formulated in Fiqh and Christianity writings was officially approved by church in 1140.

In 1951, Pope Gregory XIV theorized that animation occurs 116 days (about 17 weeks) after conception.(Pope Gregory XIV(animation) as occurring 116 days (about 17 weeks) after conception)

b) Abortion in Sweden

"Abortion is a right which a woman can take privilege of it. Before and after operation, woman invites to a backup conversation. If the fetus is less than 18 weeks of years old, abortion is practiced. Those who request abortion after this time are referred to the higher officials of social work. This institution gives consent the abortion cases where mother is at risk or she can retribute her health by doing abortion. In some cases, doctor may do not give consent to abortion due to woman's mental and physical incapability to undergo abortion. If fetus is more than 18 weeks old, abortion happens exclusively when there are certain justifications and officials have sufficient proofs. When a fetus has been animated, there is no way to give consent to abortion. Those who request abortion must be subjects or residents of Sweden, unless they must refer to the aforementioned officials. It is a rule that abortion is free up to eighteenth week of conception. (Vahedi, 2006)

E) Abortion from the perspective of International Law

Among the international human right documents, European human right convention which was compiled in 1969 is the only document which has supported human right from the earliest days of sperm formation. "Child rights convention was adopted in 20 November 1989 by the general assembly of UN. This convention, similar to other human rights documents, affirms the equitable right of entire humanity as the foundation of freedom, equality and peace in the world. Also, it emphasizes paying special attentions to children since childhood."(Aliston Philip, 1990)

Statistical data relevant to abortion is as follows:

Nearly 61% of people in the world live in the regions where either abortion is legally approved or there are many proofs to justify it. About 25% of world population lives in the countries where abortion is legally prohibited. However, abortion has not yet been totally approved or banned in any country.

Since 1985, there has been a global tendency to legitimize abortion

Developed industrial countries and China have accounted for the highest rate of abortion legitimization

Even in the countries where abortion is strictly banned, a comprehensive legal investigation of abortion has not yet been fulfilled due to the lack of some plaintiffs

46 million abortions take place throughout the world each year, of which 20 million is unsanitary and leads to the death of 80.000 women. However, about 13% of these deaths are preventable. Therefore, 55.000 unsanitary abortions happen per day, which 95% of it takes place in developing countries. It is clear that the real rate is very higher than the present one.

Approximately 4 out of 10 pregnancies are unwanted and it is added to 80 million in a year.

The main reason of committing abortion in the world is roughly the same and is mostly based on economic issues

Single women account for the maximum rate of individuals who demand abortion and also the highest percent of victims

10 to 50% of the women who resort to unsanitary abortion become afflicted with medical problems after operation.

By the discovery of Penicillin, abortion mortality rate has been dramatically increased since 1941

Based on a very interesting statistical report issued by WHO on abortion condition throughout the world, legal causes for authorizing abortion include: a) saving mother's life b) keeping physical health of mother c) sexual abuse or extramarital affairs d) fetus's physical and mental failures e) economic and social causes and f) special personal requests. The abovementioned report has been prepared by investigating legal system of 193 countries, of which some countries such as Chile, Costa Rica, Vatican and Malta have strictly banned abortion and other countries such as Canada, US and Australia have legitimized practicing abortion. Notably, in these countries, abortion is permissible until it has not adverse

consequences on mother's life. It must be added that abortion in Iran is legally permissible only for saving mother's life".(A group of authors, 2004)

2. Conclusion

God has created all creatures based on a pre-determined intention. Although a fetus is alive and mobile, it is incapable and has no authority to defend itself against external forces. Therefore, entire community is responsible for keeping it alive. It is customarily believed that abortion is prohibited, unless mother is in a high risk or fetus itself becomes mentally and physically incapacitated following being born. This principle is fundamentally accepted in all legal systems. The philosophy behind the fact that mothers is prioritized over fetus is that the mother is the main pillar of family and society and is the main responsible for nurturing good children and taking after her husband.

With advancement of medical sciences, health-treatment centers have become the most common centers for women to acquire required information on family planning and unwanted pregnancy. In this regard, presenting adequate sexual trainings and distribution of anti-pregnancy methods can meet some critical requirements.

Nowadays, along with economic poverty, some causes such as addiction and illegal sexual relations can lead to abortion, and abortion takes place as an act to terminate pregnancy, particularly in the second and third months of the pregnancy of women who are not satisfied with keeping their fetus.

It seems that increasingly young population in Iran which due to some factors such as education at higher levels has delayed their marriage and formation of family are very susceptible to risky sexual behaviors which lead to abortion. The results of such training are often hazardous unsanitary and illegal abortions which are harmful to families and communities.

One of the most common causes of abortion is when a woman is raped unwillingly and under duress. In this case, due to family and community pressures and also mental distresses, woman is free to do abortion and nobody can reproach her and if she accepts to do abortion, her decision is a respected and crucial one.

The results indicate and validate those legal limitations and constrictions can never stop somebody doing that and some preemptive and cultural practice can play somehow preventive and constructive roles.

From a psychological perspective, "abortion is accompanied by a series of psychological disorders which derive from external and internal factors. Most of the time, abortion is practiced by women".

"Therefore, compared to men, women are more susceptible to the aftermaths of abortion and its relevant mental problems. In addition, women are more emotional than men and are more easily affected by some poignant incidences such as abortion.(Khzaeli et al., 1995; Mohit Bahram, 1978; Reardon, 2000; Goldberg, 2002)

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