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Analytical Study of the Legitimacy Of Abortion in Islamic Jurisprudence

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Abstract

Abortion is one of the debatable topics faced by the human community these days and a matter of profound debate in penal law due to special circumstances i.e. abortion for controlling birth, abortion in rape cases, and termination of the fetus on the ground where the human body is considered to be personal property and legitimacy of abortion due to fetus abnormalities. So, according to Islamic jurisprudence abortion is prohibited except in certain cases. Islam respects both the life of the fetus and mother and prevents danger to the lives of both. Sharia rulings permit abortion only on the ground when doctors are convinced that the maintenance of pregnancy will put the existence of the expectant mother at risk in specific duration of time. The legitimacy of this justification for abortion may be related to the Islamic legal principle known as al-ahamm wa 'l-muhimm, which refers to the smaller of two damages that are acknowledged (the most important and the least important). The consequences of

illegal abortion are very alarming because it is harmful to the health of women and puts in danger a new life. However, the grounds for legitimizing abortion in crucial cases differ in Islam and secular laws as situations vary from case to case. In many countries, abortion is carried out as a method of family planning. There are limited clinical causes for abortion that represent a very low proportion of all cases of abortion. This paper discusses abortion concerning Islamic Jurisprudence and international and Pakistani laws. Qualitative and descriptive research methods are used for this study. A variety of books, journals, research papers, articles, case laws, and other sources are analyzed by the researchers.

Keywords

Abortion, Women, Rape, fetus, Islamic law, embryo

Introduction

Since security and the right to life are the fundamental rights of every person, the right to life has remained a contentious topic throughout history. One kind of right of security is life before giving a fetus birth or aborting him is one of the most debated topics between Islamic jurisprudence and contemporary medical sciences as it involves two lives i.e. a fetus and the mother. Islam with other teachings of humanity and human rights greatly respect this sanctity to the point that even the life of a fetus is also viewed as a very valuable creature.

Generally, the Muslim authorities view abortions as an act of interference with the rule of Almighty Allah as autonomy on one life and death. In Islam, Allah has the power to procreate so the fetus is formed in the womb, afterward; Allah gives spirit to the fetus, not to the woman. Considering this reasoning, women are not allowed to terminate pregnancy willingly. However, this doesn't mean that Islam opposes abortion at all beyond the question. As there are many schools of thought amongst Muslims and every one of them has his point of view, as a result, the interpretation and analogies of Hadiths applied to the Verses of the Quran, namely murdering humans, are what give rise to the ban or approval of abortion.

Liberal theory proponents counter that since a woman and her fetus are in a relationship and the fetus is a part of the mother's body, she should have complete freedom to choose to have an abortion. Islam, on the other hand, recognizes the conception of new life and does not provide women complete freedom in all cases. Different contemporary fatwas permit abortion in cases of serious fetal abnormalities, while some fatwas permit abortion in cases of rape victims during times of war, except Kuwaitis.

In Pakistan, unnecessarily performing abortions is illegal, and under sections 338 to 338-C of the Pakistan Penal Code (PPC) 1860, there are penalties provided as Ta'zir. Internationally, several ideologies of Basic rights besides feminist publications advocate abortion as a right for women. The paper is a

descriptive analysis of the issue of abortion considering Islamic principles while advocating for the cause of anti-abortion laws. The results require revision of anti-laws to the extent that health of mother and value of life of fetus are also accounted.

Definition of abortion

The practice of ending an unwanted pregnancy before the fetus attains life, that is before it is capable of extra-uterine existence, is known as abortion or 'azal in Arabic.

In contrast to the rest of the unacceptably high number of unsafe abortions, induced abortion is regarded as one of the modest and safe ways to end a pregnancy.¹

Definition of Abortion According to the World Health Organizations' 2011

The World Health Organization (WHO) claims that unsafe abortion is performed by an individual who lacks the essential abilities, takes place in surroundings with subpar medicinal values, or both.²

Concept of abortion in the quran and sunnah

Quran

It is clear in Quran that Allah has forbidden the killing of people, as Allah Says in Quran

مِنْ أَجْلِ ذَلِكَ كَتَبْنَا عَلَى بَنِي إِسْرَائِيلَ أَنَّهُ مَنْ قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِي الْأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا وَلَقَدْ جَاءَتْهُمْ رُسُلُنَا بِالْبَيِّنَاتِ ثُمَّ إِنَّ كَثِيرًا مِنْهُمْ بَعَدَ ذَلِكَ فِي الْأَرْضِ لَمُسْرِفُونَ.

*"We decreed upon the children of Israel that whosoever kills a soul for other than manslaughter or corruption in the land; it shall be as if he killed all mankind, and whosoever saves the life of one, it shall be as if he saved the life of all mankind"*³

The Quran also states

وَلَا تَقْتُلُوا النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ وَمَنْ قُتِلَ مَظْلُومًا فَقَدْ جَعَلْنَا لَوْلِيهِ سُلْطَانًا فَلَا يَسْرِفُ فِي الْقَتْلِ إِنَّهُ كَانَ مَنْصُورًا.
*"And do not kill anyone whom Allah has made sacred, except for a just cause....."*⁴

This applies to killing anybody and one's kids are particularly prohibited by Allah as says in Quran

قَدْ خَسِرَ الَّذِينَ قَتَلُوا أَوْلَادَهُمْ سَفَهًا بِغَيْرِ عِلْمٍ وَحَرَّمُوا مَا رَزَقَهُمُ اللَّهُ افْتِرَاءً عَلَى اللَّهِ قَدْ ضَلُّوا وَمَا كَانُوا مُهْتَدِينَ.

¹ Marge Berer, "National Laws and Unsafe Abortion: The Parameters of Change," *Reproductive Health Matters* 12, no. sup24 (2004): 7, doi:10.1016/s0968-8080(04)24024-1.

² Shirin Shahbazi.2011. *The consequences of unsafe abortion: a qualitative study. Journal of Advanced Nursing* 68, no. 6 : 1247–1255 , doi:10.1111/j.1365-2648.2011.05826.1270.

³ Quran 5:32

⁴ Quran 17:33

"They are lost indeed who kill their children foolishly without knowledge, and forbid what Allah has given to them, forging a lie against Allah; they have indeed gone astray, and they are not the followers of the right course".⁵

The Quran condemns taking life kids for want, or fear of want, Allah says in Quran:

قُلْ تَعَالَوْا أَنُؤَلِّمُوا مَا حَرَّمَ رَبُّكُمْ عَلَيْكُمْ أَلَّا تُشْرِكُوا بِهِ شَيْئًا وَبِالْوَالِدَيْنِ إِحْسَانًا وَلَا تَقْتُلُوا أَوْلَادَكُمْ مِنْ إِمْلَاقٍ نَحْنُ نَرْزُقُكُمْ وَإِيَّاهُمْ وَلَا تَقْرَبُوا الْفَوَاحِشَ مَا ظَهَرَ مِنْهَا وَمَا بَطَّنَ وَلَا تَقْتُلُوا النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ ذَلِكُمْ وَصِيَّتُكُمْ بِهِ لَعَلَّكُمْ تَعْقِلُونَ.

Kill not your children on a plea of want. We provide sustenance for you and them. Come not near to shameful deeds whether open or secret. Take not life, which Allah has made Abortion sacred, except by ways of justice and law. Thus does He command, that you may learn wisdom".⁶

Allah says in Quran:

وَلَا تَقْتُلُوا أَوْلَادَكُمْ خَشْيَةَ إِمْلَاقٍ نَحْنُ نَرْزُقُهُمْ وَإِيَّاكُمْ إِنَّ قَتْلَهُمْ كَانَ خِطْئًا كَبِيرًا.

"Kill not your children for fear of want. We shall provide sustenance for them as well as for you. Verily the killing of them is a great sin".⁷

Sunnah

What is the worst evil? Prophet Muhammad (SAW) was asked by Ibn-i-Masood a companion of the Prophet Muhammad (SAW). He (SAW) replied. "That you associate anything with Allah, who created you." afterward, asked Ibn-i-Masood. "That you slaughter your children out of fear that they would share your food with you." The Prophet Muhammad (SAW) said.⁸

Muslims generally believe that an embryo produced at its most basic stage of development is alive, although it cannot be considered fully human until its en soulment.

Opinions of classical jurists regarding abortion

Hanafi and Shafi'ee

The Sunni schools of thought such as Hanafis and Shafis scholars have the opinion upon abortion that it is allowed within four months of conception on legitimate grounds.

Maliki and Hanbali

On the contrary, Malikis and Hanbalis are on the opinion over the abortion that termination of pregnancy is permissible till the forty days of conception on legitimate grounds at the request of both parents but it is prohibited onwards

⁵ Quran 6:140

⁶ Quran 6:151

⁷ Quran 17:31

⁸ M, Al Bokhari, Sahih Al Bokhari. Maktabat Al Nahda, 1956, Cairo.40:60.

forty days.⁹ In the opinion of most Malikies, abortion is forbidden absolutely despite the difference of opinions among all schools, yet they agree on the point that after four months of conception the fetus is considered a child (emolument) so they prohibit termination of pregnancy. However, on certain legitimate grounds, an exception for abortion is provided in all legal schools to defend the natural life of an expectant female. All the various school of thought allows abortion with differentiation in duration but it has not been supported by contemporary Fatwas except on legitimate grounds.¹⁰ The Maliki School and Imam Al Gazali have both discouraged abortion at all times, except for situations where it is essential to safeguard the life of a lady.¹¹ On the contrary, some jurists permit abortion based on social reasons such as the conception of pregnancy by rape; the nursing child will be affected by the continuation of pregnancy, the non-availability of the wet nurse, or the father is unable to pay for a wet nurse.

Ibn-i-Sina

The well-known scholar of medicine Ibn-i-Sina composed a chapter in his famous book 'Al Kanoon fi Tibb' about the method and medical indication of abortion. It is implied that recognizing the necessity for abortion because pregnancy might negatively impact a woman's health or life is more sincere and humanistic than the position taken by the Catholic Church today or the clergy in medieval Europe.¹²

Abu baker al-rhazi

He as a physician of the Islamic faith states in his encyclopedia "Al Hawi" and book "Al Mansouri" that only when continuing a pregnancy poses a danger to the health or life of the expectant mother is abortion legal. Abortion can be performed using abortifacient substances and procedures.

Ibn al qayyim's opinion

Ibn-i-Qayyim is known as a great scholar of the 08 century A.H. He raises the query, "Is the embryo regarded a life before the ensoulment (to breathe spirit in the embryo) of spirit?" in his work "Attibian Fi Aksam Al Qur'an." he answers his query that like a growing plant embryo has the capacity of growing and sustenance when once the spirit is breath into embryo it acquires the perception and volition".¹³

⁹ Iqbal, Hawwa, Amin Habib, and Saad Amer, "Abortion: An Islamic Perspective" *Ethics* 2, no. 1: 1. 2019.

¹⁰ Mathias Forteau, "The UN Secretary-General and the Advisory Opinion," *The Law and Politics of the Kosovo Advisory Opinion*, 2015, 184, doi:10.1093/acprof:oso/9780198717515.003.0009.

¹¹ , "Induced Abortion and Feticide," *Professional Ethics in Obstetrics and Gynecology*, 2019, 126, doi:10.1017/9781316841037.009.

¹²M, Shaloot, "Islam: Creed and Shari'ah,"

¹³ Al Qaiyim,Ibn," *Attibian fi Aksam Al Quran*," Maktabat Al Kahira, Cairo. P. 255

Ibn hajar- al- asqalani's opinion

According to Ibn Hajar Al Asqalani, the liver is the first organ to develop in the embryo and serves as the site of nutrition and growth. After the spirit is ensouled into the embryo, voluntary movement and perception begin.¹⁴ The embryo passes through many stages and finally, ensoulment occurs. According to the Holy Quran:

*"Man was made from the purest kind of clay. Then, we make him stay in a firm lodging as a drop of fluid (Nutfa) (the womb). The Nutfa is then made into a clinging substance (Alaqah), which is then made into a lump that resembles chewed gum (Modhgha). The lump is formed into bones and coated in flesh after being eaten up like a lump. Then we help him create another work of art. Blessed be Allah, the Master craftsman."*¹⁵

Jurists of the Islamic Nation

The period of ensoulment, or the act of breathing spirit into the fetus, is considered to be the act of creation, and Islamic legal experts and scholars who have studied the Holy Quran concur. The holy Quran makes it plain that human beings are created in stages, but those who are created before the last stage are not regarded as beings of the same species.¹⁶ The Holy Prophet Muhammad (SAW) says in the Hadith reported by Ibn-i-Mas'ood (R.A) that:

*"Each of you was formed forty days in the mother's womb before you were born. And for forty days he turns into something that clings (Alaqah), after which he turns into Modhgha (a chomped lump) for another forty days. His supply (sustenance), life expectancy, acts, and whether he would be unfortunate or fortunate are all recorded by the angel who is sent to him."*¹⁷

In essence, this indicates that Supernatural causation happens from the time of conception until a hundred and twenty days later. In other Hadiths cited by Huzaiifa Ibn-i-Aseed, Muhammad (SAW) said that,

*"An angel from Allah delivers the Nutfa a system and develops its skin, bone, vision, hearing, and flesh when it enters the womb and spends forty nights there. The angel then cries out: "Is it a boy or a girl, O Allah? Allah also makes the decisions that He does. He then questions how Allah selects his means of subsistence."*¹⁸

Organogenesis is the process in which the organs in the embryo are formed. This process occurs between four and eight weeks of pregnancy calculating since the egg is fertilized and takes 42 days to reach the zenith. However, Islam respects the right to life so throughout history Abortion is not

¹⁴Al-Askalani, Ibn Hajr, *"Fath Al-Bārī: Victory of the Creator,"* (2017),11:481.

¹⁵ Quran 23:12-14

¹⁶ Jonathan E. Brockopp, *Islamic Ethics of Life: Abortion, War, and Euthanasia* (Columbia: University of South Carolina Press, 2003), 265.

¹⁷M, Al Bokhari, *"Sahih Al Bokhari,"* Maktabat Al Nahda, 1956.Cairo.

¹⁸ Sahih Muslim, "Bishareh Al Nawawi," Dar Al Fikr, 1972.Beirut.

permitted by Islamic jurists unless there are compelling medical justifications for a specific duration of time not at all.

Fatawa regarding the abortion

The islamic world league's islamic fiqh council's 1990 fatwa (decision)

According to this Fatwa, abortion or miscarriage can be carried out at any time to safeguard a pregnant woman's life if her life is endangered. It is further provided in this Fatwa that there is agreement among three expert medical physicians on the decision of abortion with clear medical indications.¹⁹

Zaidi School of thought

There is also an exception for abortion based on societal and therapeutic reasons in the Zaidi School of Jurisprudence.

Sheikh yusuf al-qaradawi

According to Sheikh, Yusuf Al-Qardhawi's the lawful and the Prohibited in Islam:

"It is allowed to prevent pregnancy in Islam, but it prohibits any harm to pregnancy once it takes place. Muslim jurists reached to unanimous agreement that abortion is haram after the completion of the fetus and giving its soul to it. It is considered a crime and Muslims are prohibited to commit such crimes because it amounts to an offence against a living human being".²⁰ In Islam, the child in a womb is entitled to the father's lineage and the share in the bequest will be retained for her or him till supply in case of the father's death before transfer.

Sheikh mahmood shaltout

The Grand Imam Sheikh Mahmood Shaltout Al-Azhari from the 1940s to early 1950s stated:

*"In the view of the Old scholar abortion is forbidden when quickening takes place within four months of conception as it constitutes wrongdoing to a living thing. Hence, diyah is owed when the infant is delivered dead or 1/20 of diyah is owed when the baby is born alive and passes away shortly upon the delivery."*²¹

Sheikh of Al-Azhar

¹⁹Al Ganin Al Mushawah (Aborting a congenitally malformed fetus)",The 4th Resolution, Islamic jurist council of Islamic World League, Makkah Al Mukaramah, 12th session 10–17th February 1990 and also quoted appendix No 1, in M. Albar: Dar Al Qalam Damascus and Dar Al Manara Jeddah. 1991:439.

²⁰ Yusuf Al-Qardawi, *The Lawful and the Prohibited in Islam* (Islamic Books, 1997), 197.

²¹M, Shaltout, "Islam: Creed and Shari'ah," Dar al Qalam. 1966.

In 1998 and again in 2004, the top Islamic body in Egypt, Sheikh of Al-Azhar, issued a theological decree allowing unmarried women to abort their unborn children at any time if they fall pregnant as a result of rape.²²

But it could not be agreed upon such fatwas as there is a precedent in the era of the Holy Prophet (SAW), that such practice was acted upon but he (SAW) didn't permit so.

A Religious Edict from Jordan

Termination of pregnancy is permitted in the religious edict from Jordan after being allowed one hundred and twenty days for verified fetal abnormalities without the consent of parents. It is permissible to terminate the pregnancy after one hundred and twenty days with the consent of parents in case of a fetal anomaly if such anomaly is documented by three specialists.²³

The current Shi'ite opinion on terminating pregnancies due to fetal abnormalities

The Iranian parliament changed its position on June 21, 2005, by a suggestion made by the Guardian Council that followed the doctrine of the Shi'ite faith.

"In the following conditions, Therapeutic abortions are allowed. Firstly the fetus must be less than four months or one hundred and twenty-day old which means before ensoulment. Secondly, the fetus's profound developmental lag, severe deformities, or defects are documented in the fetus. Thirdly these complications must contribute to causing suffering or obstacles for the mother or fetus. Fourthly the life of an expectant mother is at risk. Fifthly both parents agreed to the process. The doctor who performs abortion must not be punished for his abortion services".²⁴

Restrictions on abortion

Keeping in view history the introduction of a restriction on abortion took place due to three reasons.

1. It was considered dangerous to abort a baby because abortionists killed a considerable number of women. Due the laws were based on the intention of public health to save the lives of women. Who nevertheless carried out abortions and put at risk their lives. As they still do today if they have no other Organization of the Islamic Conference.
2. Abortion was to be believed to transgress the laws and the intention of the laws is punishment and deterrence.

²² Grand Mufti of Al-Azhar," International Women's Rights Action Watch. The Women's Watch," Vol.12, Nos.1/2, December 1998. Cited In: Hessini. L. Abortion and Islam: Policies and practice in the Middle East and North Africa. *Reprod Health Matters* 2007, 15(29):75-84.

²³ S, Al-Hagawi, "Advisory opinion and approval of abortions for abnormal fetuses," Mufti of Jordan. Bahrain. *Al Wasat Arabic Newspaper*; 2007.

²⁴ Abdulrahman Al-Matary and Jaffar Ali, "Controversies and considerations regarding the termination of pregnancy for Foetal Anomalies in Islam," *BMC Medical Ethics* 15, no. 1 (2014): 10, doi: 10.1186/1472-6939-15-10.

3. There was a restriction on abortion due to the fact to save the life of a fetus in cases where there were no complications in pregnancy.²⁵

Legalization or decriminalization

It is interesting to note that no human right body has demanded to allow abortion at the wish of females, yet some have called to decriminalize abortion. On the international level, the abortion rights movement is involved to call for safe abortion. The emergence of calls to "decriminalize abortion" has been seen most recently. Decriminalizing abortion refers to the removal of criminal penalties associated with abortion, whereas legalizing abortion refers to granting validity to abortion based on some legal reasons.

In this sense, abortion is legal on a single or several occasions, but only Canada has formally legalized abortion; no other nation, regardless of how liberal, has not yet done the same.²⁶

Legal status of abortion in pakistan

Two decades ago, it was acceptable to induce abortion to preserve a mother's life. The colonial 1860s Indian Penal Code served as the foundation for most of the Pakistan Penal Code (PPC). Sections 338, 338A, 338B, and 338C of the Pakistan Penal Code 1860 are connected to the Penal punishments for abortion however in 1997 a new phrase was introduced to Chapter XVI.

Section 338 of the PPC provided that whoever induces miscarriage in a mother carrying an embryo with unformed organs, not in good faith is believed to contribute to *Isqat-i-hamal* (اسقاط حمل) and section 338-A of the said provided punishment for *isqat-e-hamal*, confinement of either type that may last for a long time with a woman's agreement to a term of three years; or In case of causing *isqat-i-haml without a woman's permission*, The penalty is imprisonment of any kind, which may include a term of ten years.²⁷ The convict will be held accountable for the punishment of harm or death, whichever comes first if a woman suffers injury or dies as a result of *isqat-i-haml*.²⁸ But in the case of *isqat-e-janin*, section 338-B stated that whoever causes a woman to miscarry while she is carrying a child, if the miscarriage is not caused in good faith to save the woman's life, is said to be responsible for *isqat-i-janin*.²⁹

Under section 338-C of PPC, the punishments for causing *Isqat-i-Janin* are:-

- a. If a dead baby is born, the offender is responsible for one-twentieth of the *diyat*.
- b. When a kid is born alive and later any act results in death committed by the perpetrator, the culprit is accountable for full *diyat*; and
- c. The perpetrator is subject to imprisonment under any category, which has a maximum sentence of seven years.

²⁵Al-Matary and Ali, "Controversies and considerations regarding the termination of pregnancy," 13.

²⁶Al-Matary and Ali, "Controversies and considerations regarding the termination of pregnancy," 13.

²⁷ Pakistan and M. A. Zafar, *The Pakistan Penal Code, 1860 (XLV of 1860): With Comments* (2005), Sec. 338.

²⁸ Pakistan and Zafar, *The Pakistan Penal Code, 1860*. Sec. 338-A.

²⁹ Pakistan and Zafar, *The Pakistan Penal Code, 1860*. Sec. 338-B.

It is further provided that, if the expecting woman is carrying more than one child, the criminal shall be responsible for the penalty of *diyat* or *ta'zir*, individually, depending on the circumstance:

Additionally, it is expressed that the offender will be kept accountable for the harm or death that was given for such offences if a woman is injured or dies as a consequence of *isqat-i-janin*.³⁰

Induced abortion is also allowed because it is done before the formation of permissible limbs and organs of the baby or for the needed cure. This need for limbs and organs is based on a different school of thought, which allows for the pregnancy termination to twenty sometime after conception before the embryo has begun to "quicken."³¹

It is interesting to note that depending on the fetus's developmental stages different punishments are assigned for abortions. The person performing is liable for the penalty of an illegitimate abortion is three years detention if the woman is willing to have a such an abortion. However, this penalty is extended to ten years imprisonment if it is done without the willingness of the mother. The penalty in the case when the expectant mother is quickened with the child is ten years imprisonment along with paying a fine. The act of a woman causing a miscarriage also comes is covered by these provisions. Abortion is legal in Pakistan merely due to help to protect a woman's life and get her the medical care she needs.³² Sexual morality is frequently strongly connected to the religious standards in a society. For instance, In Pakistan, the Islamic legal provisions have a strong influence on the rules regarding abortion. There are numerous factors of abortion contributing to how the people of a specific culture and dynamic of locality perceive it.

In Pakistan, the laws relating to abortion are strict and rigid due to the fact of religious fundamentalism and social conservatism. In Pakistan's underdeveloped regions, it is thought that pregnancy occurs by Allah's will, and having an abortion is seen as a betrayal of one's family's honor.³³

Forced abortion is the justification for dissolving marriage in pakistan

It is noted in Section 02 of the Dissolution of Muslim Marriages Act of 1939 that the marriage shall be

*"Decreed dissolved on the ground of husband cruelty that means to assault his wife habitually or make her life miserable by his conduct even such conduct doesn't include physical ill-treatment."*³⁴

³⁰ Pakistan and Zafar, *The Pakistan Penal Code, 1860*. Sec. 338-C.

³¹ Muhammad Ilyas et al., "Abortion and Protection of the Human Fetus: Religious and Legal Problems in Pakistan," *Human Reproduction & Genetic Ethics* 15, no. 2 (2009): 57, doi:10.1558/hrge.v15i2.55.

³² Heather Douglas and Caroline De Costa, "Abortion Law Reform Needed," *Alternative Law Journal* 40, no. 4 (2015): 280, doi:10.1177/1037969x1504000414.

³³ Douglas and De Costa, "Abortion Law Reform Needed," 281.

³⁴ The Dissolution of Marriage Act, 1939, Section 2(viii) (a).

Although the word abortion is not mentioned in the said document it comes under the definition of cruelty. It is evident from the following cited report judgment of Peshawar High Court, Peshawar, of Khyber Pakhtunkhwa province.

Pakistani case law

2018 ylr 642 peshawar

The plaintiff filed a divorce petition in the Family Court against her husband because his cruelty resulted in a forced abortion. The family court ruled in favor of the plaintiff based on cruelty following a thorough hearing and assessment of the facts. The defendant filed a writ petition in Peshawar High Court, Peshawar, and contended that the decree of dissolution of marriage on the grounds of cruelty and forced abortion could not be passed as he had been acquitted from the criminal case on the allegation of said abortion. Respondent contended that evidence recorded in a criminal case could not be referred to and relied upon as the same was neither alleged in the written statement nor was produced during the recording of evidence before Family Court.

Petitioner had admitted during cross-examination that the actual cause of the dispute was the issue of abortion. Evidence on record showed that maltreatment, cruelty, and forced abortion had been proved. It was held in the favor of the respondent that according to the Peshawar High Court (PHC), which backed the ruling of the Subordinate court on the subject, forced abortion is a strong cause for divorce and constitutes cruelty.³⁵

International legal status of abortion

The issues raised by the program of action at the international conference on population and development (icpd):

In 1994 the World Population and Development Conference (ICPD) Program of Action is regarded as the first-ever international agreement that addresses unsafe abortions and urges nations and organizations to address them as a matter of public health concerns. It also included recommendations for safe abortions.³⁶It is further provided in this agreement that government shall take into consideration the negative effects of health effects of unsafe abortions on women and further direct the governments to cope with unsafe abortion as a concern of communal healthiness and abortion shall be safe and accessible to women in cases abortion is legal. In addition, the Agreement Committee for the Elimination of Discrimination against Women asked the governments who signed the convention to take steps to prevent forcing women to have illegal abortions

³⁵Aminullah Versus Mst. Robina Pervaiz, YLR, 642(Peshawar High Court 2018).

³⁶G. K. Shapiro, "Abortion law in Muslim-majority countries: an overview of the Islamic discourse with policy implications," *Health Policy and Planning* 29, no. 4 (2013): 490, doi:10.1093/heapol/czt040.

when adequate services are not readily available to them.³⁷It is permissible to terminate pregnancy in all Muslim countries under the exemption of necessity. It is, however, noticed that forty-seven percent of countries of the Organization of Islamic Conference allow abortion only on this one indication, 18 percent permit abortion under the circumstances of issues with physical and emotional health, any anomaly in the fetus, while abortion is legal upon request in 18% of OIC nations, pregnancy is the consequence of rape or incest.³⁸

The Part International Human Rights Organizations played in Calling for Legal Reform

It has been noticed that a new movement and advocacy for safe abortion has emerged that analyze the effect of existing laws on women and girl, as well as to see that these laws fulfill the requirement of international human rights canons. The Special Reporters on the Right to the Highest Achievable Standard of Health, the Rights of Women in Africa and Torture, as well as the Human Rights Committee, the Committee on the Elimination of Discrimination Against Women, the Committee on Economic, Social and Political Rights, the Working Group on Discrimination Against Women in Law and Practice, and the Committee on Economic, Social and Political Rights, have all played significant and crucial roles in advocating for progressive legal reforms on a variety of human rights issues.³⁹

Regional organizations like the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights, and the European Court of Human Rights have all made significant contributions in this regard. Outraged by the Maputo Protocol-compliant African Commission on Human and Peoples' Rights' decision (ACHPR) to call for the legalization of abortion both January 2016 and January 2017 were spent in Africa, 2017.⁴⁰

Is the human body the property or amanah?

In the view of Islam body (soul) is a gift of Allah and therefore, one cannot have complete ownership of one's body. The ownership of human individuals' bodies, on the other hand, might be considered a form of "stewardship."⁴¹

In liberal societies, pregnancy is considered a condition in and relationship between a fetus and the woman in which the woman has given her full and voluntary consent.

Everyone is entitled to freedoms and such freedoms will not interfere with

³⁷Elizabeth A. Cook, Ted G. Jelen, and Clyde Wilcox, "From Rights to Policy: The Future of the Abortion Debate," *Between Two Absolutes*, 2019, 200, doi:10.4324/9780429042317-7.

³⁸Leila Hessini, "Islam and Abortion: The Diversity of Discourses and Practices," *IDS Bulletin* 39, no. 3 (2008): 24, doi:10.1111/j.1759-5436.2008.tb00458.x.

³⁹P. Gerber and J. Gory, "The UN Human Rights Committee and LGBT Rights: What is it Doing? What Could it be Doing?," *Human Rights Law Review* 14, no. 3 (2014): 420, doi:10.1093/hrlr/ngu019.

⁴⁰Rafael D. Glatz, "THE DECRIMINALIZATION OF THE ABORTION OF ANENCEPHALIC FETUSES: RELEVANT DISCUSSIONS," *PANORAMA OF BRAZILIAN LAW* 1, no. 1 (2018): 262, doi:10.17768/pbl.y1n1.p253-274.

⁴¹Aramesh, Kiarash, "The ownership of human body: An Islamic perspective," *Journal of Medical Ethics and History of Medicine* 2 (2009).

the freedoms of others unless it will be considered supremacy or dictatorship. This boundary on one's freedom is due to the reason to respect others' freedom and faith to maintain harmony in society. The rights of every person reciprocate to his or her duties. According to proponents of female abortion rights, the fetus is a component of the woman's body, and may thus be removed with her permission. The fallacy regarding the fetus is that it is considered another body in the womb of a woman produced by both parents and capable of independent life that requires a woman's womb and placenta for growth and nourishment. Abortion means to kill a fetus even in the early stages of development and such an act is viewed as killing the prospect of another life.

According to the Islamic dogma, human is the creation of Allah and human shall obey the orders of Allah according to the teachings of the Messengers. Allah confers a degree of autonomy over mankind to opt among things and mankind has to be answerable for the deeds they do. In the opinion of Van Bommel that absolute autonomy over the body is rare for a Muslim patient because there exists a feeling of responsibility and one cannot commit suicide or kill himself since he is not the one who gives life. The absolute autonomy of giving life and taking life belongs to Allah and transgressors will be held answerable to Allah for their deeds when judgment day comes. According to the principles of Islam the human being's body, talents, youth, money, and so on are handed to him. Man is only allowed to do acts in the manner prescribed by Allah. Human is not allowed to mutilate their body or hurt someone's body if they smoke or use medications and liquor. Marriage is the only way to regulate sexual relations and extramarital affairs or sex is forbidden.⁴²

Abortion in the case of a disabled fetus

Recently a religious fatwa has been issued to clarify the position of contemporary Muslims on abortion. The debates came up with the conclusion that in nations with a high proportion of inter-family and consanguineous marriages, the women are allowed to abort their babies in case the fetus is suffering from certain impairments. The religious leaders of Saudi Arabia in 1991 issued a Fatwa on the subject of abortion after much discussion and allowed women to terminate a pregnancy before one hundred and twenty days of conception in case of any abnormality in the fetus. Ayatollah Yusuf Saanei, the Grand Mufti of Iran, issued a fatwa in 2005 that permits abortion in the first trimester if the fetus has a genetic abnormality.⁴³

Abortion of rape victims

Muslim religious readers acknowledged that abortion is a legal justification for ending a pregnancy that was the product of rape. A religious decree released

⁴² Mohammed A. Al-Bar and Hassan Chamsi-Pasha, *Contemporary Bioethics: Islamic Perspective*, 2015.160.

⁴³ Hessini, "Islam and abortion," 23.

in 1998 by Muhammed Sayed Tantawi, the Egyptian Grand Sheikh of Al-Azhar, stipulates that a single woman have to access to abortion if she becomes pregnant as a consequence of rape. In addition, he said in 2004 that if a woman's life is in danger, an abortion should be performed. As fervent believers Rape was used as a tool of war in Algeria; as a result, in 1998, the Algerian Islamic Supreme Council was a fatwa that permits abortion for rape victims. After significant debate over the subject of Iraqi soldiers raping Kuwaiti women during the first Gulf War, the Kuwaiti muftis, on the other hand, declared that rape was not a legal basis for abortion. The Kuwaiti muftis' claims that the unborn child's life must be protected and that a new life begins at conception are more in line with extreme Christian beliefs than with Islamic law.⁴⁴

Abortions as A Population Control Mechanism

Abortion as a means of population reduction is prohibited by all schools of Islamic law today. Muslim legal experts have written extensively on the issue of birth and agreed that both spouses have consented to birth control and it is not permanent and harmful.⁴⁵

Unfortunately, induced abortion is considered and used as a form of fertility control in many nations. Many gynecologists, lawmakers, Organizations like Planned Parenthood, and others have ties to the United Nations' support inducing abortion as a way to lower the birth rate. Sterilization of men and women is an effective method to be used for birth control. Abortion is not the method to be used for birth control. The means of contraception should be provided to couples to prevent unwanted pregnancies due to various social causes. The use of abortion should be limited to situations where it is necessary, which only accounts for a tiny percentage of all abortions carried out on demand and for social reasons.

Due to the greater introduction of family planning programs and discussions in the 1960s, the Muslim muftis and medical experts stepped up to explain the Muslim perspective on family planning. A pan-Islamic agreement, defined as the incapacity to support more children, permitted birth control usage for financial reasons in Cairo in 1965 and Kuala Lumpur in 1969. This was a step forward since opposers of abortion and birth control had frequently invoked Qur'an texts in their arguments against family planning and abortion, which says that everyone will have plenty because of Allah. A succeeding Islamic family planning conference held internationally in 1971 decided that Islam does not allow to termination of pregnancy except in cases when the expectant mother is at risk after 4th month but it permits abortion before four months on several grounds. Guidelines of Fatwas by Renowned The Pakistan Demographic Policies and Implementation Research Center in Lahore published by Muslim Scholars on

⁴⁴Hessini, "Islam and abortion," 24.

⁴⁵ Moira Stephens et al., "Religious Perspectives on Abortion and a Secular Response," *Journal of Religion and Health* 49, no. 4 (2009): 525, doi:10.1007/s10943-009-9273-7.

Population and Family Planning Issues in 1979, which acknowledges the diversity of views on whether abortion during the first four months of pregnancy is permitted by religious law. Following this, a summit of experts and religious leaders from Asia and The Middle East urged countries to acknowledge unsafe abortion as a public health concern, remove out-of-date abortion legislation, and give women more empathetic care and access to contraception.⁴⁶

Analysis of the Aforementioned Opinions

To abort a baby means to terminate the pregnancy by unnatural means before the expected time of delivery. Abortion is often carried out to safeguard either the mother's or fetus' life or health. However, sometimes it is also caused due to socio-economic reasons as well. Islam never encourages abortion except for the above two mentioned conditions within the period and various arguments are extracted from Quran and Sunnah in support. Secular legal systems allowed abortion on different grounds i.e. Abortion on demand, abortion on request, safeguarding the health of the nursing baby, consent of spouses, rape cases, socio-economic reasons, and abortion for family planning and failure of contraception.

Shari'ah allows abortion only on a clear declaration of doctors indicating that if the pregnancy is not terminated it will have dire consequences for the expectant mother. The permission for abortion is deduced from the principle of preferring lesser evil over another known as the principle *al-ahammwa 'l-muhimm* in Islamic legal terminology which means the more important and the less important. According to this principle when a person must choose between two forbidden things then he must prefer the lesser evil over the greater. In this case, one must cope with two prohibited acts, on one hand, to abort the unborn baby on the other hand to cause the death of a living woman by keeping the pregnancy going. Saving the course of an expectant woman has greater value than saving the life of an unborn baby so abortion is legal to be carried out to protect the life of a woman.⁴⁷

Abortion is allowed in Islam only after marriage if there is any critical and acceptable reason regarding pregnancy.

In war times, rape is often used as a war weapon by enemies which may lead to a huge mental, physical, and social torture for both woman and her family. Thus, Egyptian fatwa allows the abortion of unmarried rape victims. In Algeria, the Islamic Supreme Council allowed abortion in cases of rape during war. While Kuwaitis opined that innocent fetal life must not be threatened and therefore, they did not allow abortion when Iraqi soldiers raped women during the war. And the Islamic arguments support the opinion of Kuwaitis on this issue.

⁴⁶International Planned Parenthood Federation, "SpringerReference (n.d.), 149, doi:10.1007/springerreference_75859.

⁴⁷Sayyid M. Rizvi and Vancouver Islamic Educational Foundation, *Marriage & Morals in Islam* (Richmond, B.C.: Vancouver Islamic Educational Foundation, 1990).

There are two procedures adopted for abortion such as safe and unsafe abortion. Safe abortion means to terminate a pregnancy under a standard medical procedure where's is unsafe abortion is carried out in an atmosphere with subpar medical standards and an insufficiently skilled individual conducting the abortion. It is critical to understand the difference between safe and unsafe abortion because lacking Safe abortion services available due to discrimination leads to various social and health issues. When abortion services are not easily available and the government doesn't pay attention to providing them, the women must pay highly for abortions, and sometimes the services are of poor quality. Induced abortions that do not fulfill these conditions are punishable by prison ranging from three to ten years. Pakistan Penal Code doesn't define necessary treatment and doesn't specify the situations in which the women have to carry out an abortion, however; the law leaves it to the doctors and professionals to carry out an abortion when it is needed. It is supposed that people who favor abortion should create incentives for service providers to broadly interpret not only to meet the needs of the woman's physical well-being but also her psychological and emotional well-being various techniques are being tried to change abortion legislation and influence theological discussions to guarantee that women have accessibility to health services.

Many countries still use induced abortion as a method of family preparation. There are limited medical reasons for abortion which makes up a tiny percentage of all occurrences of abortion. Abortion is one of the most controversial, least understood, and socially accepted methods of family planning. Throughout the world some aspects of abortion are subject to debates intensely, these moral elements of abortion may be present, religious, and legal.⁴⁸

It has been a matter of debate, that whether fetal abnormalities should result in abortion or not. Abortion should be permitted in cases of serious fetal abnormalities, according to many contemporary Islamic fatwas but keeping in view the conditions above-mentioned.

In most, all countries of the world abortion are still legally restricted because of historical legacy and prevent uncertain and negative abortion irrespective of the origin of the law. From a liberal's point of view, abortion is a relationship between a woman and her fetus; therefore, she has been given her full consent and freedom of abortion. This point of view is strengthened by the arguments that the fetus is a part of her body thus she can exercise her will. But this statement is encountered by the argument that the fetus is not just a part of a woman's body but it's a new life so her freedom should not disturb someone else's freedom. In Islam, humans do not possess absolute ownership of their bodies rather they have been given a degree of autonomy which may be termed as 'stewardship', therefore a woman is not allowed to abort her fetus.

The term "Isqat-i-Hamal" refers to a kid whose organs are not entirely grown and is penalized by a maximum penalty of 10 years in jail as a Tazir. In

⁴⁸Al-Bar and Chamsi-Pasha, "Contemporary bioethics," 165.

contrast, the term "Isqat-i-Janeen" refers to a child whose organs are fully developed and is penalized by;

- 1) The penalty for a baby delivered dead is to pay one-twentieth of the Diyat (Ghura),
- 2) When a child is born healthy but subsequently passes away, of an offender's action, full punishment is meted out, and
- 3) Imprisonment of either type for a sentence that may last seven years as a Ta'zir. Pakistani laws in comparison to other countries are restricted in the prevention of abortion cases.

Strict legislation and restrictive penal laws regarding abortion do not prevent abortion cases however it may be probable that in such situations the number of unsafe abortion cases may be increased. Thus, it may be concluded based on the statistical data on abortion in different countries, that the number of abortions does not justify the rigidity of the law however; it is a matter of morality.

Conclusion

Life shall be honored and promoted because life is blessed in Islam. It is a shared right between spouses to have children but neither of them is allowed without sufficient justification, to block this right before and after gestation. Safe methods of Contraception are permissible and preferred. After fertilization woman's egg is not allowed to abort the fetus without the mutual agreement of both spouses within a specific period. In the opinion of most scholars, abortion is impermissible after forty days and according to others in thirty-five days, the woman has conceived but there is an exception to this rule where abortion is allowed on the ground that a pressing need exists for abortion which is justifiable in the eyes of Islamic law. On the contrary, all scholars are agreed that termination of pregnancy is not permissible when the fetus reaches one hundred and twenty days after conception. Otherwise, feticide (a term used to describe the act of murdering an unborn human being) is illegal in Islam. Furthermore, in the view of scholars that abortion is permissible in case of a fetus's demise in the womb of a woman at any point, as the soul no longer remains alive.

Traditionally, the sole consideration of abortion was to keep in mind the well-being of a mother. In the contemporary era, some Sunni and Shiite scholars of Islamic countries including Iran allow abortion when the fetus has congenital disorders which may create some deficits that are incompatible with life. It is of great importance to safeguard the misuse of this provision consciously and religiously keeping in mind the Islamic script's focus on respect for human life while also acknowledging the reality that religion should not be a burden for individuals.

The political debates and discussions neither on the topic nor of abortion we neither hold the position think that contraceptives are both forbidden, or that abortion is a mother's unfettered right. Allah has created everything and has

conferred rights upon them. Everyone must preserve these rights. When there is a conflict between rights, the preference should be assigned in the light of divine relations and prophetic guidance.

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