
The fetus between the legal text and the changing reality - an original and objective study

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ABSTRACT:

In the face of scientific and cognitive development, man is confused in the field related to his physical and psychological entity, especially in the field of genetics and embryology, as medicine has become able to image the fetus inside its mother's womb using advanced medical devices, which allows knowing the condition of the fetus; The issue of the deformed fetus has raised a jurisprudential and scientific controversy, where man stands stunned in front of the employment of this flood of discoveries that he has reached in its various types and innovations in the field of medicine and how to apply them according to general principles and rules in the approach of legal foundations to correct human life, enlightened by the objectives of God Almighty's law and its general rules, and disciplined by its controls in the legislative and ethical structure of the medical profession. Therefore, this study came to stand on the legal and religious text on the issue of the fetus in general and the provisions of aborting the deformed fetus in particular. The researcher concluded through this study that this issue has been disputed by contemporary researchers and jurists, between those who prohibit abortion absolutely, and those who permit it with specific controls and conditions. The Algerian legislator did not separate either, as there is no legal text that prohibits or permits abortion of a deformed fetus, and the existing texts remain open to all interpretations and explanations.

key words Deformed fetus - jurisprudential rules - legal texts – abortion

Introduction:

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One of the issues that has been difficult for jurists and doctors is the issue of the deformed fetus; as genetic engineering has revealed - through examining the fetus inside the womb - the extent of the fetus's infection with congenital deformities and genetic diseases as a result of the infection of certain genes inside its body; which often causes some of its vital organs and functional systems to be deficient or atrophied, and thus the loss of some of its necessary benefits. The severity of these deformities varies in the event that a pathogenic gene is detected according to the degree of the defect and the extent of the impact of this fetal deformity. In the face of this scientific and cognitive development, man is confused about his situation in the field related to his physical and psychological entity, and the impact of that on his social reality; as he stands stunned before employing this flood of discoveries that he has reached in their various types and innovations in the field of medicine and how to apply them according to general principles and rules in the approach of legal foundation to correct human life, enlightened by the objectives of God Almighty's law and its general rules, and disciplined by its controls in the legislative and ethical structure of the medical profession. Due to the difficulty of this balance, the statements of scholars have varied and their opinions have multiplied regarding the extent of the legitimacy of aborting a deformed fetus. Hence, this research paper entitled "The Deformed Fetus between the Fixed Text and the Changing Reality" came to clarify the legal ruling from the statements of jurists and the decisions of the Fiqh Councils and shed light on the objective dimension that removes the embarrassment from researchers in this field of various orientations.

Research problem

The question that arises is whether it is permissible to abort a deformed fetus to remove the actual or expected embarrassment? This proposal in the ruling on these genetically infected fetuses has raised a number of sub-questions: What is meant by the deformity that this gene encodes? What are the causes of these deformities that occur to fetuses, are they genetic causes or environmental factors or others? What is the ruling of Sharia on aborting them and what is the impact of that on the stability of the family system

-What are the jurisprudential and objective rules that can be applied or the rulings on the deformed fetus can be derived according to or in light of them

Importance of the research

Islamic law has made it obligatory to preserve the fetus since its creation in its mother's womb, and has surrounded it with a fence of maintenance and means of protection in the provisions of pregnancy, its care and its inheritance; it has legislated mitigating concessions for pregnant women, such as breaking the fast if she fears for herself, or fears for her pregnancy. It has also prohibited her from intentionally fasting if she thinks it will lead to miscarriage. If the pure law has permitted and allowed a pregnant woman to break the fast out of fear for her

pregnancy and compassion for her fetus, then it is even more appropriate to prevent her from assaulting it by aborting it. Although the psychological, social, moral and economic reasons are many, they will not be a justification for killing a soul whose existence the wise lawgiver has preserved and guaranteed its preservation in terms of existence and nonexistence

Objectives of the study

- Clarifying the ruling on dealing with a deformed fetus based on determining the time at which it acquires its humanity and human identity
- Establishing the rulings of the Nawazil related to the deformed fetus from legal sources and using the knowledge reached by genetic engineering
- Knowing the opinion of the Algerian legislator on the issue of abortion of fetuses, whether normal or deformed
- Clarifying the position of jurisprudence and law on the issue of aborting a deformed fetus if it leads to the death of the mother

Research methodology: The study required combining two approaches; descriptive, while describing the deformed fetus, and clarifying the meaning of abortion and its jurisprudential and legal ruling. And the deductive approach in revealing the ruling on abortion among jurists by following their statements from their sources.

THE FIRST TOPIC DEFINITION OF THE DEFORMED FETUS LINGUISTIC AND TECHNICAL

First Requirement:

linguistic Definition of the fetus Taken from the word an offspring of a human or other mammal in the stages of prenatal development that follow the embryo stage (in humans taken as beginning eight weeks after conception):« adequate folic acid is important for the developing fetus (unborn child) »¹

Terminology Definition of the fetus in the origin of the meaning of impurity or fetus according to jurists does not deviate from the linguistic meaning previously mentioned. They apply this term to a child before natural separation from his mother. However, if he is separated dead due to a crime or abortion, then he remains a fetus ²

¹ - Ghosh, Shampa; Raghunath, Manchala; Sinha, Jitendra Kumar (2017), "Fetus", Encyclopedia of Animal Cognition and Behavior, Springer International Publishing, pp. 1–5,

² - Haas JM. Moral Theological Analysis of Direct versus Indirect Abortion. The Linacre Quarterly. 2017;84(3):248-260.

The second requirement: Defining abortion linguistically and technically

Meaning that something is thrown away or quickly removed from its place.

Section One: Natural abortion

This type is called spontaneous or spontaneous abortion. It is the miscarriage that occurs on its own without any artificial intervention by the uterus to expel the fetus for which the elements of life cannot be fully developed or due to an intrinsic defect in the mother or genetic tissue. This type of miscarriage does not manifest the woman's will.¹

- His ruling:

Jurists did not consider this type of abortion to be in line with the objectives of Islamic law, which does not stipulate effects and results on the actions of people without their will or intent, and in line with the jurisprudential rule of matters according to their purposes, and to his saying, may God's prayers and peace be upon him: "God has overlooked my nation's mistakes and forgetfulness." And what they were forced to do..."².

Section Two: Social abortion

It is called clandestine abortion, criminal abortion, or induced abortion, which is the miscarriage resulting from interference with the course of pregnancy with the intention of terminating it or terminating a regular, naturally conceived pregnancy without there being a threat to the mother's life from this mere pregnancy, since the pregnancy is undesirable for multiple reasons, including social, moral, and economic, and this is what it is. Abortion that is not legally permitted in most countries often occurs.

2. Therapeutic miscarriage:

It is an forced miscarriage, which is what a doctor who is trusted in his religion and knowledge does by ordering the woman to do it because there is a danger to the mother's life because of that pregnancy³.

There is nothing wrong with a therapeutic abortion because it does not violate the objectives of Sharia. This type of miscarriage is lawful and determined by the purposes of Sharia, and in this case doctors must be sure that the survival of the fetus poses a real danger to her life, because when the two interests conflict, the mother's life prevails, and this is not considered a miscarriage or a violation of the fetus's immunity and humanity. It was stated in Kashshaf al-Qinaa, "If he strikes A

¹ - Haas JM. Moral Theological Analysis of Direct versus Indirect Abortion. The Linacre Quarterly. 2017;84(3):248-260

² - Osama Ramadan Al-Ghamri, Crimes of Sexuality, Pregnancy and Miscarriage from a Forensic Medical Perspective.

³ - Al-Sabai Muhammad Saif Religion, Abortion between Jurisprudence, Medicine and Law, Dar Al-Kutub Al-Arabiya, (1977)

woman's stomach and she aborted her fetus, whether dead or alive, and then it died, then she must make expiation. If she drank medicine and aborted her fetus, then she must pay expiation.

THE SCECOND TOPIC : The Jurisprudential And Legal Rules Regulating The Legal Ruling On A Deformed Fetus

First section: General rules and their relationship to the deformed fetus

First: The rule of preserving life

Preserving life is one of the most important objectives of Islamic law, as it is the main objective in medical practices. Medicine seeks and has an impact on treating bodies and removing diseases, although it does not have the power to avert death when the appointed time comes, "but medicine tries to maintain a high level of quality of life until the time of death." The goal of medicine is to preserve or contribute effectively by maintaining the optimal performance of the functions of the bodily organs, and from this the goal of preserving the soul is achieved through treatment and therapy and preserving the mental functions of the human being¹.

Second: Preserving the offspring:

It has been the focus of medicine's attention since ancient times, from treating infertility and the means to provide healthy offspring, and preserving it from both sides of existence and nonexistence, by maintaining its vitality with food and vaccination against fatal diseases to raise offspring that it took care of in the pre-birth stage².

Today, the guardian can, through doctors' identification of genetic diseases or blood diseases that affect offspring, whether by death or disability, decide or enact laws to limit those effects.

The second section: THE APPLICATION OF THE INTEREST AND ITS RELATIONSHIP TO THE DEFORMED FETUS

In every command or prohibition, the interests of the servants in this life and the afterlife are achieved, and they are all justice, mercy, and interests. Among the general legislative principles is that the origin of harm is prohibition³.

Then, harm cannot be caused by necessity, as God Almighty said: "But whoever is forced by necessity, neither desiring nor transgressing, there is no sin upon him" (Al-Baqarah 173). The wise Lawgiver forbade exceeding the permissible amount of what is forbidden in the case of necessity in this legal

¹ - Qasouli, Medical Ethics from the Objectives of Islamic Law, an article published on the Internet on: 3/22/2009 on the Arkab Maana Islamic Forums website, Public Health Section, and was visited on Tuesday 03/05/20, at the link: 3294 ww.arkbmanainfi/vb//showthread.php=3294.

² - Al-Habib bin Khoja, The Inviolability of the Blood of a Deformed Fetus, Journal of the Islamic Jurisprudence Assembly, Issue Four, Year Two

³ - Al-Suyuti, Al-Ashbah and Analogues in the Principles and Branches of Shafi'i Jurisprudence, Riyadh Al-Baz Library, Riyadh, Saudi Arabia, (199)

principle, so what is permitted due to necessity is estimated according to its extent, or in other words, necessity is estimated according to its extent. If a person is forced to do something forbidden, he does not have the right to expand on that forbidden thing, but rather he is limited to the amount that the necessity is repelled by.

First: The necessity considered by Sharia: Since the element of necessity is the one that affects the ruling, we must understand what is meant by necessity, and what is the necessity estimated by Sharia, and in which the criteria for consideration are available.

--Controls of necessity: Necessity has specific controls that must be met in order for us to rule on the permissibility of what is forbidden, and these controls are:

1. That the necessity is included within the objectives that the Shari'ah came to achieve.
2. That removing the necessity does not lead to greater harm than it.
3. The necessity must be real and not imaginary.” allowed to abort her fetus unless the doctors say that this is dangerous for the mother”.
4. The necessity must be assessed according to its degree: Doctors have the right to assess the necessity and give her the appropriate treatment that will eliminate its necessity.
5. It is worth mentioning in these topics of the new developments the necessity of weighing between the application of interests and the prevention of harms, taking into account the order of priorities, some of them over others.

We really need to consider and have a clear objective view of a thorny issue like this, whether or not to abort a fetus due to deformities, because it is related to the right of God in the beginning, and to the right of the human being, the fetus and his mother in the end. Harm in Islam is forbidden in all cases, and if it must be removed, the lesser of two harms is committed to prevent the greater of them. Also, preventing harms takes precedence over bringing benefits, and this rule: "refers to achieving the objectives and establishing them by preventing or mitigating harms".

-The sound standards by which interests are realized and harms are prevented in the pure Sharia are the application of sound reason And critical insight in understanding the texts of the Holy Qur'an and the hadiths of the Prophet, may God bless him and grant him peace, by means of which we remove harm without

harming others if possible, otherwise by a lesser measure. Sheikh al-Islam Ibn Taymiyyah, may God have mercy on him, says: "Considering the amounts of benefits and harms is according to the scale of the Sharia. So when a person is able to follow the texts, he does not deviate from them, otherwise he strives with his opinion to know similarities and counterparts. - No one can rule that a deformed fetus should be aborted based on the rule of "no harm and no harming", as this major rule, which is considered one of the mothers of general rules, is restricted and linked to general controlling rules branching from it. "Harm is removed", but "harm is not removed by harm." ¹

-Considering the harm caused by aborting a deformed fetus, which is a transgression of the limits of the Shari'ah, and the expected harm caused by keeping it in a state in which it was born deformed, it is necessary to apply the Shari'ah rule "If two evils conflict, the greater harm is taken into account by committing the lesser of the two". This is because harm varies in itself and in its effects. If it is impossible to remove it and some of it is more severe than others, then it is necessary to take into account facilitation and removing hardship and "the greater harm is removed by the lesser harm" and the rule: "the lesser of two evils is chosen."

-Abortion is nothing more than a double-edged sword and a type of contemporary infanticide, as no one has the right to dispose of his body or his fetus, as it is a living being that it is not permissible to abort. It is known that preserving the offspring is one of the five essential principles, and abortion An assault and violation of this college from the side of nothingness, and a waste of the right of God Almighty that He has commanded us to preserve in ourselves and our children².

The doctrine of those who forbid the prohibition of abortion is strong and preponderant, not to mention that the effects of these genetic deformities do not appear until the age of the person affected by them increases, and some of them can be corrected, then the deformed fetuses fall automatically before the time of blowing in a spontaneous abortion and God knows best.

The third requirement: The position of the Algerian legislator on the abortion of a deformed fetus

The Algerian legislator, through Articles 304 to 313 of the Penal Code, prohibited all types and forms of abortion, and did not differentiate between the fetus into which the soul was breathed or not, and between the fetus resulting from a legal relationship or resulting from an illegal relationship such as adultery and

¹ - Ibn Taymiyyah, Majmu' Al-Fatawa, edited by Abdul Rahman bin Muhammad bin Qasim, King Fahd Complex for Printing the Holy Qur'an in Medina, Kingdom of Saudi Arabia, (1416 AH-).

² - Ahmed Jawdat Pasha, Al-Ahkam Al-Adliya Magazine, published by Bassam Al-Aai, Beirut, Lebanon, Ibn Hazm House, (2011)

rape, where the word pregnancy is used, which is what It includes all stages of the fetus in its mother's womb, from its being a fertilized egg settled in the uterus until the soul is breathed into it and it is ready to emerge, and it does not differentiate between being deformed or normal.

Algerian law established protection for the fetus while it was in its mother's womb by attaching penalties to the abortion process and its practitioners. It did not differentiate between a deformed fetus and a non-deformed fetus, as the legislative texts did not differentiate between the two cases.



The text of Article 306 states: "Doctors, midwives, dental surgeons, or pharmacists, as well as medical or dental students, pharmacy students, pharmacy users, drug preparers, medical bandage manufacturers, surgical instrument dealers, nurses, masseuses, and masseuses who guide or facilitate abortion. Or they do it, the penalties stipulated in Articles 403 and 305 will be applied to them, depending on the circumstances."

The second section: Aborting the deformed fetus after the breath of the soul, and its survival was a threat to the life of its mother

We have previously shown that Algerian law, through its articles: 304 to 313 of the Penal Code, prohibited all forms and forms of abortion, and did not differentiate between the fetus into which the soul was breathed and the one into which it was not, but it excluded from that a case that creates a real danger to the mother's life. In the event that the deformed fetus remains in her womb, as it is permissible to abort it in case of this necessity. Article 308 of the Penal Code stipulates: "There is no penalty for abortion if it is necessary to save the lives of mothers from danger, when it is performed by a doctor or surgeon in secret and after informing the administrative authorities."¹

The draft health law in 2017 included proposals permitting the abortion of a deformed fetus, which is stipulated in Article 81 of the draft law, which was as follows: "When it is proven with certainty through prenatal diagnosis that the embryo or fetus is afflicted with a disease or serious deformity that is not allows them to grow normally, The regular doctor or the relevant specialist doctors, in agreement with the treating doctor, must inform the husbands of this and obtain their approval for every measure required by the circumstances. However, if the mother's life is in danger, the doctors can terminate the pregnancy." This project sparked widespread controversy among Algerians,² as it it permits the abortion of a

¹ - Order No. 66-156 dated Safar 18, 1386 corresponding to June 8, 1966, which includes the Penal Code, amended and supplemented.

² - Munia Ghanimi, Al-Arabiya Net, published on 09 November, 2017: 12:00 AM, Algeria.. Controversy over a draft law permitting abortion, access date, 07/10/2021 at 10:00 AM Website: <https://www.alarabiya.net/north-africa/2017/11/09/>

deformed fetus, but these texts that explicitly permit the abortion of deformed fetuses have not been approved by the committee, which proposed including a text.

☑ Article 77 bis of Law No. 18-11, dated July 2, 2018, relating to health, which stipulates the following: “Therapeutic termination of pregnancy aims to protect the health of the mother when her life or her psychological and mental balance is threatened by danger due to pregnancy.”¹

, which proposed including the text of Article 77 bis of Law No. 18-11, dated July 2, 2018, related to health, which stipulated that The following: “Therapeutic termination of pregnancy aims to protect the mother’s health when her life or psychological and mental balance is threatened by danger due to pregnancy.” Article 78 of this law also stipulates that therapeutic termination of pregnancy is only carried out in public hospital institutions.²

However, with the cancellation of the aforementioned articles explicitly permitting the abortion of deformed fetuses and replacing them with the text of Article 77, the problem of aborting deformed fetuses remains, since the text of Article 77 did not specify the diseases or conditions that lead to the therapeutic cessation of pregnancy, which leaves the field open to interpretations and possibilities, as one of the things that affects the psychological and mental balance of the mother is her knowledge and awareness that she is carrying a deformed or disabled fetus in her womb. Is it possible in this case to abort this deformed fetus according to the text of Article 77, under the name of therapeutic cessation or not?

Conclusion :

1. .If it is medically proven that a woman is carrying a deformed fetus, it must be treated with medications and therapeutic means if possible.
2. Doctors are looking forward to inventing modern techniques that enable them to treat fetuses while they are in the womb, and perhaps a new branch of medicine called fetal therapy will develop in the future.
3. Clarifying the ruling on abortion and the extent to which it applies or does not apply to aborting a deformed fetus in light of the objectives of Islamic law and the rules of jurisprudence.
4. The urgent need to apply the objective dimension in the issue of the deformed fetus, as it relates to the right of God from the beginning,

¹ - Official journal: Issue 46, issued on Sunday 16 Dhu al-Qiddah, 1439 AH, corresponding to: July 29, 2018

² - Official journal: Issue 46, issued on Sunday 16 Dhu al-Qiddah, 1439 AH, corresponding to: July 29, 2018

and to the right of the human being, the fetus and his mother, ultimately.

5. It is not permissible to abort a deformed fetus after the soul has been breathed into it, according to the consensus of scholars, even if the medical report proves that it is deformed in creation.
6. Exempting the case of aborting a deformed fetus if it poses a danger to the mother's life from the prohibition, with conditions and controls stipulated by Islamic law.

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