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ORIGINAL ARTICLE

Abortion in Malaysian Law: A Comparative Study with Islamic Jurisprudence

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ABSTRACT

This study aims to address abortion between Malaysian law and Islamic jurisprudence which will look into Malaysian law to extract ruling on abortion, and at the same time trying to know the ruling on abortion in light of Islamic jurisprudence by taking advantage of scattered issues mentioned by scholars and jurists on this subject. The study will then identify areas of agreement and differences between Malaysian law and Islamic jurisprudence. The study will also discuss the negative effects left by abortion in Malaysian society in particular. The study adopted inductive approach to collect the information in Malaysian law and Islamic jurisprudence in this regard and followed by an analytical study to understand the texts contained in the Malaysian law and Islamic jurisprudence and also compared them to identify the similarities and dissimilarities between jurisprudence and law. The study discussed the historical dimension of abortion in search of the roots and origins of this dilemma in order to develop solutions. The study reached to some results the most important ones are that: The Malaysian law prevents abortion except in cases of necessity and when there is an acceptable excuse. Furthermore, the scholars differed in ruling on abortion before the fetus starts breathing (before four months) but they are consensus on its prohibition when the fetus starts breathing.

Key words: Abortion, Malaysian law, Islamic jurisprudence, Punishment

Introduction

Man is a living thing that has high sense of realization which is the secret of his excellence, especially his humanity and the effect of that is what is known that he is social, religious in nature; he has the owner of power that he asks for help at the time of fear and hope to find a bond. This feeling is what differentiates man from other creatures because he has physical and mental perceptions, feeling, and inspiration. He is also different from other creatures because Allah has prepared him to know the realities and to reach out to the unknowns and to ask about the mysterious unknown facts in the light of that information.

Abortion is among the biggest issues that is spread and is being talked about due to its gravity; and abortion is prohibited in many countries in the developing world and many other countries except in some exceptional cases (Islamic Issues, discussions and replies, 1985). In spite of this, a large number of abortion cases are being performed annually which according to World Health Organization (WHO) may reach to more than fifty million yearly. This phenomenon has attracted the attention of a large number of Muslim scholars and others towards addressing this social issue (Ezzat, Abortion and Dignity Crimes between Shariah and law, 1984). Thus, various books and articles were written on this subject by scholars of Islamic jurisprudence, positive law and medical expert.

Although, the issue of abortion is an old phenomenon and Muslim jurists conducted researches on it, but the issue renewed in these days where new motivations of abortion appeared which was the result of knowledge update on the conditions of the fetus at various stages and with knowledge about the freedom of pregnant women to get rid of fetus they do not want, it has become useful to explain the views of Muslim jurists in abortion and to identify the preferred opinion based on the fact surrounding the fetus and the purpose of Shariah.

The Concept of Abortion in Malaysian Laws:

Through the study of Articles 312 of the Malaysian Penal Code 1998, this is as follows:

Abortion of Fetus outside the mother's womb at any stage of pregnancy before the completion of his term (Law of Crimes with List of Malaysia Cases, 1998).

The Concept of Abortion in Islamic Jurisprudence:

In Islamic jurisprudence, abortion is referred to as a situation where a woman's pregnancy is dropped after settling in her womb whether before embryogenesis or after (Ibrahim, Care of Children in Islamic Law). The literal meaning of abortion is applicable to doing the action by someone which according to the jurists is not out of the literal meaning but in many occasions they express it more often by projection, subtraction, dumping and stillbirth (Jurisprudence Encyclopedia, Vol. 2).

Concept of Abortion according to doctors:

According to Dr. Ali Abdul Nabi, abortion is the termination of pregnancy before life of the fetus; the life of the fetus is estimated by twenty-eight weeks, and it is equal to seven months, where the fetus would have complete organs and has the ability to live. In forensic, abortion means expelling components of pregnant woman at any time before the end of nine months (Mustafa al-Khatib, 1982). If the fetus drops from the womb before twenty weeks or the weight is less than five hundred grams, it is normally not capable of living. But if he drops between twenty-four and thirty weeks is called preterm and mostly is viable of living but needs a good and focused medical attention. Abortion may be confused with menstruation; for example where abortion happens in the first two weeks of pregnancy and the woman thinks it is menses and the menses delay for some reason and she thinks it is a pregnancy and if her period comes after that she may think it is abortion (Kan'an, 2000). Dr. Tajuddin Muhammad Januni said: "abortion or miscarriage can be defined as to exit or extract pregnancy or the fetus inside the womb dead or alive before reaching twenty eight weeks. If the fetus is miscarried after the twenty eight weeks is called preterm and is called early birth not abortion" (Aljanuni, 1993). Based on the above, we can conclude that the doctors are not unanimous on the name given to fetus before its completion on whether it is considered an abortion, projection or preterm. Some of them considered the fetus that drops before twenty eight weeks an abortion or projection, and some of them considered the drop of the fetus at any time before the end of the thirty-six weeks an abortion and before twenty weeks is called a miscarriage and if he drops between twenty-week and twenty-four and thirty-six is called preterm.

Abortion in Malaysian History:

The history of family planning in Malaysia dates back to about 36 years ago. In 1966, parliament passed the Malaysian national family planning activity and established a council of family planning. The comprehensive family planning program is considered a part of the sixteen programs in Malaysia between 1991-1995 (Abortion Policies: A Global Review, 1992). Malaysian law has given the worker a leave of sixty days in the case of child delivery or mortality in 1955. But in 1976 this duration of leave was not given if the woman has two or three children (John, 1993). Abortion is a sensitive issue and a source of contention in Malaysia since the old to the present day. Article 312 of the Malaysian Penal Code permits abortion in order to save the life of the mother; thus, it is understood from this Article that abortion is not allowed if the mother's life is not in danger (Penal Code (Act 574, 1998), Section 312-316). In 1989 of the Malaysian Penal Code legalized abortion if it is at the request of a physician or specialist. Abortion process is free in Malaysia if it is done in government hospitals, and it has to be done before one hundred and twenty days of pregnancy with the consent of the pregnant woman; doctors who perform abortion for the pregnant women from early pregnancy without their consent would be punished, and perhaps the doctor or the pregnant woman may be imprisoned for three years or fined. But if it is late pregnancy (after one hundred and twenty days) the imprisonment is more than seven years or fine, and the doctor who performs the abortion without the consent of the pregnant woman would be imprisoned for twenty years or fined. And if the abortion leads to the death of the pregnant woman, the doctor who does the abortion without the pregnant woman's consent would be imprisoned for ten to twenty years (Abortion Policies: A Global Review, 1992). It is worth knowing that report on abortion in Malaysia has been mentioned in Malaysian Medical Journal and the first conference on abortion was held in Malaysia in Penang in 1973 (John, 1993).

Abortion in Islamic History:

When Islam came abortion was not widespread in the society as it is today, but they had the culture of killing young boys after their birth in the days of ignorance; they used to bury their children on the fear of poverty and to ease their expenses, and they used to bury their daughters alive for fear of captivity and shame. When Islam came, this act was prohibited and became tough on those who practiced it; that act of burial of

children and daughters were considered among the greatest sins by Islam. Allah (swt) has sent down several verses that prohibited this act. Allah (swt) says: (When the female (infant), buried alive, is questioned -, for what crime she was killed) (Al-Kawthar, 8-9). After that the act of burial totally disappeared in the Islamic society, but unfortunately people began to return to the ignorance period by practicing abortion and miscarriage on the claim that it is a personal and legitimate issue (Kan'an, 2000). And the Muslim scholars began to refer to it as induced abortion because of the severe damage it causes to the mother and the fetus, because the fetus is considered alive from the beginning of pregnancy, and his life is respectable in all stages especially after the soul is breathed into the fetus (after the fourth month). Given all that, most scholars hold the view that induced abortion is prohibited except for a legitimate reason both before and after breathing the soul in the fetus. But few of them are of the opinion that abortion is permitted before breathing soul into the fetus, while others allow it only before forty days of the age of the fetus. However, if a legitimate reason for abortion arises then it is allowed, e.g. if the continuous existence of the fetus will put the survival of the pregnant woman at risk, then in this situation abortion is allowed either before or after breathe. And a woman who got an illegal pregnancy must be given a medical precaution; it is not permissible to abort her fetus unless when there is a necessity in that regard because the fetus has no any fault and his life is inviolable religiously in all roles (Kan'an, 2000). The ruling of this case would be covered while discussing the ruling of abortion in Islamic jurisprudence.

Types of Abortion:

Generally, the scholars and doctors classified abortion into various categories depending on the degree of the abortion either its completion or decreasing. These types are: Spontaneous abortion, inevitable abortion, disappeared abortion, recurrent abortion, criminal abortion and medical abortion (Al-Bar, 1987). The writer tries to classify abortion into two and study them in the following aspect:

First: Spontaneous Abortion:

Spontaneous abortion is the natural way to prevent the birth of an abnormal child. The cause of most cases of abortion according to doctors is decrease of semen or egg, or a combination of both (Rorvek, 1983). This usually occurs shortly after the rope. Dr. Muhammad al-Bar says: "A lot of medical sources say that almost fifty percent of the cases of spontaneous abortion are at early stage and before women know that they are pregnant." Most doctors said to avoid abortions in this case is impossible.

Second: Induced Abortion:

This type of abortion is also called intentional abortion, and its meaning is that there is an intention and it has been planned for (Rorvek, 1983). This type is also classified into two:

A- Therapeutic Abortion

Is to stop the function of pregnancy to save the mother's life; it is to cure a condition that happens to the pregnant woman that threatens her life or safety (Siba'i,1977). And the reasons that make a pregnant woman to do abortion among others are:

1- **Inverted Mother:** the one who is suffering from heart disease. In this situation the pregnancy would increase the burden of the heart which requires twice the effort needed in a normal situation, and cardiac cases that need abortion are (Siba'i,1977) are:

- A relaxed heart in a previous pregnancy
- Cardiac injury at the beginning of pregnancy
- Severe heart disease which is on the verge of breaking the netting
- High arterial tension mixing facility chronic heart or kidney

2- **Kidney Disease:** It activates kidney circulation throughout heart and increases the burden of work on the kidneys which rises ratio of cold kidney, blood pressure, or increases albumin in the urine or retinopathy or effectiveness of the kidney and abortion becomes necessary in order to save her life in the following cases ((Januni, 1993):

- 1) Inflammation and Chronic
- 2) Acute kidney failure

3- **Lung Disease:** There must be availability of respiratory capacity of (1500) ml so that respiratory organ can do the required effort. Thus, weakness of lung might threaten the fetus and the mother with death (Siba'i, 1977).

4- **Neurological and psychiatric causes:** The neurological conditions that require abortion are few; multiple sclerosis and other neurological diseases are not affected by pregnancy (Siba'i,1977). But

psychological reasons can justify abortion in order to save the mother from psychological crisis experienced due to pregnancy (Siba'i, 1977).

5- **Cancer Causes:** Hormonal activity accompanies pregnancy which may activate some cases of cancer that has relationship with hormone such as breast cancer or salivary glands. The leukemia is also a reason to abort pregnancy (Siba'i, 1977).

6- **Rubella:** The rubella can cause deformities and abnormalities to the fetus, including congenital heart diseases, deafness, and the small size of the skull. And the pregnant woman may be subject to abortion if a fetus is affected before twelfth week of pregnancy, and she may give birth to the child and he is dead or may perish during the first year after birth (Januni, 1993).

7- **Vomiting of Pregnancy:** Ordinarily, it is possible to overcome the vomiting of pregnancy and it can be treated; it is very rare not to find a solution which may lead to deteriorating of the patient's condition and in this case it may become necessary to do abortion in order to save her life (Januni, 1993).

8- **Embryonic Indications:** This means those situations where the fetus is expected to be born disabled either physically or mentally.

Social Abortion:

This is the kind of abortion that is intended to avoid birth or birth control, maintain fitness and appearance or to cover up the obscene or economic problem or so. This is of two kinds:

Legal abortion and criminal abortion (Siba'i, 1977).

Causes of Abortion:

The causes of abortion in Malaysia are mainly to save the mother's life and maintain the physical and mental health and economic and social problems. The reasons for permissibility of abortion by the Malaysian government are to save the mother's life and maintain physical and mental health (Abortion Policies: A Global Review, 1992). The permissibility or prohibition of abortion depends on various reasons from the political, religious and cultural aspects. Many countries have prohibited abortion because the fetus has right to life since the beginning of his mother's pregnancy and should not be deprived from that right. Among these countries there are Islamic countries where they prohibit abortion and oppose it to be taken as a way of birth control. Moreover, some European countries also prohibit abortion such as Iceland where to this day it prohibits abortion and considers it a murder. On the contrary, some states permit abortion arguing that the safety of the lives of women should be given a priority, although the fetus also has the right to life, but since there is a conflict between the mother's lives with that of the fetus, the interest of the mothers should come first. Thus, according to them abortion should be allowed if it is clear there is going to be harm to the mother's health. We give example with English law in this regard which can be summarized as follows:

First: The state recognized women's social value and permits termination of pregnancy provided it is not taken as a means of birth control.

Second: The conditions permissible for abortion are that: It has to be before ninety days of pregnancy, or if the fetus is unhealthy because of the mother's health or because of social or economic problem or other problem related to the situation of the family, or if the pregnancy and childbirth damage the lives of the pregnant women after ninety days of pregnancy.

Third: The woman who wants to do abortion must be examined by a certified doctor with the Advisory Council to the problem of the family and the social health, and the approval of the father of the fetus and guardian and the doctor must only exercise the abortion after examination and report.

Fourth: Violation of this law is punishable.

So British law allows abortion but cannot be used as a means of birth control. The law maintains the right of women and the fetus and punishes who aborts her fetus without good reason and in accordance with the conditions mentioned in the law.

If we look and the heavenly religions, we will find that they all categorically forbid abortion because it kills innocent soul.

This chapter is limited to the provision of abortion in Malaysian law and Islamic jurisprudence. At the same time this provision is limited to act of abortion by the mother of the fetus or by others. The writer will not address spontaneous abortion because it may occur without will by the woman either because of mistake or a physical situation she suffers from because this may not have any ruling on permissibility or prohibition under both Malaysian law and Islamic jurisprudence. Thus, the writer will focus in this chapter on the ruling on recurrent abortion in Malaysian law and Islamic jurisprudence.

Ruling on abortion in the Malaysian Penal Code:

Abortion is prohibited in the Malaysian Penal Code in Articles (312-316) except in case of necessity like saving the mother's life. The writer will explain the legal provisions related to this issue:

Anyone who voluntarily causes the abortion of a pregnant woman would be punished by imprisonment which may be up to three years or fine or both except when it is for the purpose of saving the mother's life. As for abortion in the case when the pregnant woman feels the movement of the fetus in her womb, it is punishable by imprisonment which may be up to seven years or fine. This Article is related to abortion with the consent of the pregnant woman (Incorporating ALL amendments as at 15th November: (Penal Code (act574) 1998).

The offender may either be the pregnant woman herself or others because the word (whoever) is general to cover the pregnant and others (Law of Crimes with List of Malaysian cases, 1998).

"A person will "consent" to something by doing the act and causing it, knowing that he does such act with his own consent. "Consent" here means that the doer of the abortion has done it without coercion by others (Penal Code, p. 34).

This means that it is not necessary that the baby begins movement. The projection means to accelerate the removal of fetus outside the mother's womb at any stage of pregnancy before it is viable for life. But the practice of abortion to save the life of the pregnant woman is not considered a crime on the basis of this article. This is not only in the Malaysian law but also in order laws. For example in the British law there is a case that emphasizes what we said and it is (Law of Crimes, v. 2., p 1567) where a girl of less than fifteen years got pregnant as a result of rape and a specialist doctor in a London hospital performed abortion for her; this doctor was regarded as an offender because the jury was of the opinion that the process has not been conducted in order to save the life of the pregnant. It is the responsibility of the doctor to do abortion only when there is reasonable cause with sufficient knowledge that the patient is at the verge of death; and according to the doctor had the pregnant continued in her situation that would have been detrimental to her health and spirit and thus there should be no punishment.

The following are two cases to illustrate how the law deals with the crime of abortion in Malaysia. In the case of *Dr. Nadson Kangalingam v PP* (1985) 2 MLJ. 1), the court sentenced the defendant according to Article 312 of the Penal Code of the Federated Malay States for being a cause of abortion to a pregnant woman. Based on the evidence, the defendant did not take certain things into consideration and did not reach to a convincing result that abortion was necessary in order to save life of the woman. In addition, there was no indication that the woman's life was in danger if the pregnant continues.

So the court was satisfied that the accused shall be sentenced for causing abortion. The judge said: Abortion is dangerous and cannot be done except as a last resort to save the lives of pregnant women from damage, but this argument cannot be established here because the available evidence in the incident confirms that the accused did not think of it carefully and did not take any adequate steps to check the woman. The fact the accused found that the woman was suffering from expansion and swelling, this is only a result of the clinical examination.

The case of *Mona Binti Ali v PP* (24 MLJ (1958), 159) is an example of an attempt by the accused to cause abortion of a pregnant woman. The defense lawyers pointed out that the woman was not pregnant and that the court should be satisfied that the woman was pregnant before sentencing. But the judges rejected this argument and pointed out that the provision on abortion attempt does not necessarily require that the court is satisfied that the woman was pregnant before judgment. The judges referred to Article 511 of the Penal Code which provides that to enter hand in the pocket of someone else for theft, regardless of whether the pocket is full or empty is equal to insertion of a tool in the vagina of a woman for the sake of abortion regardless of whether the uterus is empty or not. This clearly demonstrates that the law on abortion in Malaysia is strict and severe.

Regarding "Good Faith" we refer to Article 52 as follows:

"Good Faith" is not accepted on something or performing it if it is not done with caution (Penal Code, p. 36).

Fetal Movement:

A pregnant woman is feeling the movement of the fetus in the third or fourth month of pregnancy. Fetal movement "quick with child" means that the baby begins to move in the womb.

Article 312 related to abortion provides the following (Penal Code, p 118):

Any person who commits the crime stipulated in Article 312 without the consent of the pregnant woman, whether the pregnant woman feels the fetal movement or not, shall be punished by imprisonment of up to twenty years and fine. This Article is clear except the word "consent". To know the meaning of this word, we refer to Article 90 of the Penal Code:

Consent given under fear or misunderstanding and the approval of child or mentally deficient person (Penal Code. P. 42).

Approval or consent given under the following is not considered under this Article:

(a) Consent given by a person in a state of fear or misunderstanding, or if the person who does the act knows and has what to believe that the consent was given as a result of fear or misunderstanding.

(b) Consent given by mentally deficient person or under the influence of intoxicants, or person that cannot know the truth and the result of his consent.

(c) Consent of those under the age of twelve years, unless provided otherwise in the text.

We know from this Article that a pregnant woman must be full of reason and not drunk and can know the truth and the result of her consent, and consent must not be given in a state of fear and misunderstanding, and the age of the person that gives the consent must be more than twelve years, otherwise her consent is not accepted.

Article 314 states as follows:

Death resulting from abortion attempt without the consent of the pregnant woman (Penal Code, p 118):

Whoever causes the death of a pregnant woman as a result of abortion attempt would be punished by imprisonment of up to ten years and fine. And whoever causes death of a pregnant woman in abortion attempt without her consent would be punished with imprisonment of up to twenty years.

Article 315 states:

Practice which aims to impede the fetus to be born alive or die after birth and whoever involves in any exercise designed to impede the fetus to be born alive or die after birth, if it is not done with the purpose of saving the life of the pregnant woman is punishable with imprisonment of up to ten years or fine or both (Penal Code, p 119).

Article 316 provides:

Causing the death of the moving fetus in the womb of a pregnant woman of attempt murder:

Whoever causes the death of moving fetus in the womb of a pregnant woman by any attempt has committed murder, and would be punished with imprisonment of up to ten years and fine (Penal Code, p 119).

After studying the provisions of criminal law in Malaysia, the writer was able to summarize those relating to abortion in the following: Abortion is prohibited unless when there is necessary reason, such as the aim to save the mother's life otherwise it is prohibited. Abortion is also permissible with the request of a specialist doctor, and is not detrimental to the health of the pregnant woman, and must be performed before the fourth month of pregnancy with the consent of the pregnant woman.

With regard to consent in the Malaysian Penal Code, a person must not be in the state of fear or misunderstanding, and from a person of full reason and not drunk, and can know the truth and consequences of his consent and must be more than twelve years old.

Thus, the conditions that can allow abortion can be classified into four; related to the fetus, the pregnant, the doctor and the abortion as follows:

- (a) Conditions related to the fetus
 - The age of the fetus should not be more than four months.
 - The fetus must not have started moving in his mother's womb
- (b) Conditions related to the pregnant woman
 - She must consent to the abortion; and there must not be coercion and must know the consequences of the abortion.
 - The abortion must not put her health and life in danger.
 - She must be of full reason.
 - She must be more than twelve years of age.
- (c) Conditions related to the doctor
 - He must be a specialist.
 - He must get the consent of the pregnant woman.
 - He must have license to perform abortions.
- (d) Conditions related to the abortion process
 - To be a request from a specialist doctor.
 - Not detrimental to the health of the pregnant woman.

Punishment of abortion in Malaysian Penal Code:

A person that performs abortion for a pregnant woman before the fourth month without her consent would be punished with imprisonment of three years or fine. After the fourth month (i.e. after the pregnant woman feels the movement of the fetus in her womb), the person that performs abortion in this situation would be punished with imprisonment of more than seven years or fine. The one that performs abortion for a pregnant woman without her consent, either before or after the fourth month will be punished with imprisonment for up to twenty years. The person that causes the death of a pregnant woman as a result of abortion attempt will be

punished with imprisonment of up to ten years and fine. Anyone that causes the death of a pregnant woman as a result of abortion attempt without her consent would be imprisoned for up to twenty years. The practice of abortion in order to save the life of a pregnant woman is not considered a crime, and thus the person that performs it will not be punished. Anyone that impedes the fetus in order not to be born alive or die after birth, without the aim to save the life of the pregnant woman will be imprisoned for ten years or fine or both. Also anyone that causes the death of moving fetus in the womb of his mother shall be guilty of murder, and will be imprisoned for up to ten years and fine. The amount of fine is not specified in the Malaysian Penal Code, and thus it is vague; perhaps, the amount changes according to circumstances and situations.

Ruling on abortion in Islamic jurisprudence:

No explicit text directly refers to abortion in Islamic jurisprudence from the Qur'anic verses and hadiths. But there is a prohibition of killing oneself without right, and the punishment of that as Allah (swt) said: (If a man kills a believer intentionally, his recompense is Hell, to abide therein (For ever): And the wrath and the curse of Allah are upon him, and a dreadful penalty is prepared for him.) (An-Nisa'I, 93). With regard to man creation, it is stated in the Holy Qur'an the stages of his creation; Allah (swt) created man from a sperm in the first stage, then the clot, and in the third stage the clot becomes a piece of meat and after that the fetus is made up in the mother's womb, and Allah (swt) put spirit in the body of the fetus. The spirit is the basis of human creation. As reported from the Prophet (saw) the stages of man's creation in his mother's womb from Abdullah bin Masood may Allah be pleased with him that the Messenger of Allah peace be upon him said: "Abdullah (b. Mas'ud) reported that Allah's Messenger (may peace be upon him) who is the most truthful (of the human beings) and his being truthful (is a fact) said: Verily your creation is on this wise. The constituents of one of you are collected for forty days in his mother's womb in the form of blood, after which it becomes a clot of blood in another period of forty days. Then it becomes a lump of flesh and forty days later Allah sends His angel to it with instructions concerning four things, so the angel writes down his livelihood, his death, his deeds, his fortune and misfortune. By Him, besides Whom there is no god, that one amongst you acts like the people deserving Paradise until between him and Paradise there remains but the distance of a cubit, when suddenly the writing of destiny overcomes him and he begins to act like the denizens of Hell and thus enters Hell, and another one acts in the way of the denizens of Hell, until there remains between him and Hell a distance of a cubit that the writing of destiny overcomes him and then he begins to act like the people of Paradise and enters Paradise.) (Sahih Muslim, Sharh An-Nawawi, 1991).

Abortion before the soul is breathed:

The scholars differed concerning the ruling on abortion on fetus that has not reached four months, i.e. the soul has not yet breathed in it. Every school has different direction and different statements in this subject. The writer will discuss most of these statements and the correct view on it.

1- Hanafi

Hanafi jurists are of the opinion that abortion is legal before the soul is breathed into the fetus on condition the husband or wife authorizes it (IbnAbidin, 1966). The Hanafi jurists absolutely allow abortion before the soul is breathed into the fetus with or without excuse provided there is permission from the right owner which is husband or wife.

2- Maliki

Malikis are the most stringent on this subject; they differed in ruling on abortion before the soul is breathed too. The majority of Malikis are of the view that abortion is prohibited after the stability of the semen in the mother's womb even before forty days. As Sheikh Ahmad Ad-Dardir said: "It is not permissible to output semen formed in the womb even before forty days, and if soul is breathed into it there is consensus on the prohibition (Ad-Dardir, 1996). To summarize the Malikis' view; they are consensus on the prohibition of abortion if it is done after forty days, but before forty days, according to majority of them it is prohibited, and some see it as not preferable and this is what is adopted by Shafi'is and Hanafi scholars, and according to Lukhami it is permissible.

3- Shafi'i

The Shafi'i jurists differed with regard to abortion before the soul is breathed into the fetus. Ramli said in Nihayat Al-Muhtaj: "The most correct view is its prohibition – i.e. abortion – after soul is breathed and permissible before that" (Ramli, 1976). This statement indicates the permissibility of abortion before soul is breathed. He pointed out that the permissibility is likely prohibited near the soul breathing. Imam Al-Ghazali differs with other Shafi'i scholars on this subject where he views abortion as prohibited and a crime in all phases and conditions without differentiating between phases and whether before soul breathed in the fetus or after. Imam Al-Ghazali states in his book "Ihya Ulum ad-din" a statement that indicates he sees the prohibition of abortion in all phases, where he says: "This is not – i.e. insolation – like abortion and infanticide because that is

a crime on an existing; it also has different stages: The first thing is fall of sperm in the womb and mixing with the woman's water and preparation to accept life, and spoiling that is a crime; and when it becomes an embryo and clot the crime is severer; and if the soul is breathed, the crime becomes more severer; and the severest crime is after delivery alive" (Al-Ghazali, 1992). Imam Ghazali sees that the prohibition of abortion is not from entering of the sperm at the beginning of embryogenesis, but at an earlier stage in the case of ready integration sperm directed towards embryogenesis and shift to a human being.

Based on the previous statement, the writer observes that Ramli views the permissibility of abortion before the soul is breathed and its prohibition at a time close to that. But Imam Ghazali sees the prohibition of abortion at any stage of pregnancy to birth alive and after childbirth.

4- Hanbali

Hanbali jurists are consensus on the prohibition of abortion after one hundred and twenty days of pregnancy, and differed in ruling on abortion before this period. Some of them authorized abortion as long as the fetus has not been created, and some of them permit it even when life is breathed in the fetus or after four months from the pregnancy. Ibn Qudamah said: "Whoever beats the stomach of a woman and causes miscarriage and if a pregnant woman drinks medicine and she miscarried the fetus, each one of them must perform expiation" (IbnQudamah, 1968). To summarize this statement, Ibn Qudamah did not mention explicitly ruling on abortion before the soul is breathed, but the writer concluded from the words of Ibn Qudamah when he mentioned 'expiation' that he sees it as prohibited before the soul is breathed with forty days because expiation is only required where there is murder. Some Hanbalis legalize abortion before breathing soul in the fetus without making restriction to a certain stage (Mawardi, 1999).

In brief, some Hanbalis prohibit abortion before the soul is breathed, and some sees prohibition when the pregnancy is at the stage of clot, and some at the stage of embryo. And some see the permissibility of abortion before the soul is breathed without restriction to a certain stage.

Abortion after breathe:

All jurists agreed that it is forbidden to abort the fetus after four month of its formation in the womb of the mother, because at that stage Allah (swt) has breathed soul into the fetus and thus, the fetus becomes a living soul. They agreed on the prohibition of killing living creatures without necessary and legitimate reasons. Therefore, the scholars believe that abortion is haram after breathe even if the survival of the fetus puts the mother at risk. Ibn Nujaim Al-Hanafi said: "A fetus objected in the mother's womb and if not cut there is a fear that the mother will die, if the fetus is dead in the womb, there is nothing wrong to do that, but if is alive it is not allowed, the Shariah did not permit killing a soul for the survival of another (IbnAbidin, 1966). Therefore, the jurists are unanimous on the prohibition of killing oneself to save another. As Allah (swt) said: (Nor take life - which Allah has made sacred - except for just cause) (Al-Isra, 33). They are also unanimous that it is not permissible to kill a soul by a desperate person in order to save himself from destruction, like when a ship is about to sink and to avoid that some of the passengers must be thrown in the sea, it is not permissible to vote on throwing one of the passengers into the sea in order to save the rest whatever the number of passengers. It is also not permissible for someone in famine to eat the flesh of a living person to save himself from death (Kasani, 1910). From the foregoing it is clear that scholars believe that the sanctity of soul is above necessities and excuses of non-application of legal rules on the conflict of two evils and the conflict of benefits and evils. Ibn Abidin after Ibn Nujaim said: "if the fetus was alive, and there is fear for the life of the mother on his survival, it is not permissible to abort it, because the mother's death is not certain, and killing of person based on uncertain reason is not permissible". In spite of the consensus between the majority of the jurists on the prohibition of abortion after breathe even if the survival of the fetus puts the life of the mother at risk, some scholars and some committee members of Encyclopedia of jurisprudence issued by the Ministry of Awqaf in Kuwait gave fatwa on the permissibility of abortion with valid necessities and excuses in accordance with the Shariah principle which order committing the lesser of two evils; if the survival of the fetus will cause the death of the mother and there is no other alternative except abortion then it is permissible in that case (Yasin, 1996).

Summary:

The opinions of the jurists on abortion can be summarized as follows:

1- Sperm Stage (first forty days): Majority of Shafi'i jurists see the permissibility of abortion in this stage, and majority of Hanafi jurists, and majority of Hanbali jurists and Lukhami from Malikis. Majority of jurists and some Hanafi jurists and Ghazali from Shafi'i jurists and Ibn Jauzi from Hanbali jurists see the prohibition of abortion at this stage.

2- Clot Stage (Second forty days): Some Hanafi jurists view that abortion is permissible in this stage, and majority of Shafi'i jurists and some Hanbali jurists. And all Maliki jurists see the prohibition of abortion, and some Hanafi jurists, and most Hanbali jurists, and Ghazali from Shafi'i jurists.

3- Embryo Stage (Third forty days): Some Hanafi jurists see the permissibility of abortion in this stage, and most of Shafi'i jurists, and some Hanbali jurists. And a collection of Hanafi jurists and majority of Hanbali jurists, and Imam Ghazali from Shafi'i jurists see its prohibition.

4- All scholars agreed that abortion of fetus before breathe is not considered killing of a human being.

5- They also agreed that abortion of fetus after breathe is a crime and regarded as killing oneself, there is no disagreement for it being a crime.

Penalty for abortion:

The jurists are unanimous that the penalty for crime on fetus of a free woman is freeing a slave. The scholars agreed that 'garrah' is estimated as half of one-tenth of complete diyyah (blood money). Ibn Rushd said: "As for embryos, they agreed that the penalty for crime on fetus of a free woman and the fetus of a slave from her master is 'garrah' because of the hadith of Abu Hurairah and others previously mentioned. They agreed that the value of slave is half of one-tenth of the diyyah of his mother according to the majority" (IbnRushd, 1960).

Abortion because of adultery or rape:

The jurists focused their efforts on abortion and its rule and its consequences in general, and did not pay attention to the detail in the abortion because of adultery or rape. Perhaps, it might be they consider that they have the same ruling with abortion resulting from a valid marriage because abortion resulting from a valid marriage after breathe into the fetus is prohibited in a normal circumstances. As for abortion which arises from adultery and rape, there are different rulings; there are no explicit rulings in the books of fiqh with regard to abortion resulting from adultery or rape except from Ramli from Shafi'i jurists where he permits it before soul breathe, but some scholars from Hanafi and Hanbali schools of law did not restrict the permissibility with a valid marriage or other (Ramli,1976). Dr. Buti preferred inadmissibility of abortion in adultery as he said in the issue of birth control: "Regardless of statement (in the legalization of abortion) in the word of many scholars in this issue, and the fundamental principle we have strong evidence that prohibits a woman that got pregnant by adultery from abortion, whatever is the timing; whether soul is breathed in the fetus or not (Buti,1988).

Comparison and Evaluation of abortion and what is related to it in the Malaysian law and Islamic jurisprudence:

The law on abortion in Malaysian law is similar to abortion in Islamic jurisprudence in terms of the basis. Abortion is prohibited in both Malaysian and Islamic jurisprudence except in exceptional cases. Abortion in Malaysian law is prohibited based on Articles 312-316 of the Malaysian Penal Code. As for abortion in Islamic jurisprudence, there is no explicit text with regard to it directly from the Qur'anic verses and hadiths on its ruling. And the view of scholars on it is different before the soul is breathed into the fetus and after. The Hanafi jurists permit abortion before soul is breathed (before four months) provided the pregnant woman gives her consent and her husband with or without excuse. And if the woman aborts the fetus herself she must take her husband's permission. Imam Ramli from Shafi'i jurists and Imam Lukhami from Malaki jurists and some jurists of Hanbali see abortion as permissible before soul is breathed in the fetus.

The Malikis are the most rigid in their opinion in relation to this issue; majority of them say it is prohibited while others see it as not preferred. Ghazali from Shafi'i also sees the prohibition of abortion in all stages of the pregnancy to birth alive and after childbirth. Ibn Hazm did not mention the ruling on abortion before soul breathe but says that abortion of the fetus before the completion of four months is not considered murder not deliberately and not by error, and no expiation on that, but 'garrah' is required. The majority of jurists are unanimous that abortion of fetus after soul is breathed is prohibited. In spite of the consensus between the majority of the jurists on the prohibition of abortion after breathe even if the survival of the fetus puts the life of the mother at risk, some scholars and some committee members of Encyclopedia of jurisprudence issued by the Ministry of Awqaf in Kuwait gave fatwa on the permissibility of abortion with valid necessities and excuses in accordance with the Shariah principle which order committing the lesser of two evils; if the survival of the fetus will cause the death of the mother and there is no other alternative except abortion then it is permissible in that case. The Malaysian law did not classify the ruling on abortion into two; abortions before soul breathe and after classified the ruling before and after the fetal movement. In fact, both the two issues occur during that period that is if Allah (swt) breathed soul into the fetus the mother feels the movement of the fetus in her womb. Thus, the ruling of abortion in the law is similar to the ruling in Islamic jurisprudence; prohibited after the fetal movement in the mother's womb (after souls breathe in the fetus). And Malaysian law is like Islamic jurisprudence for requiring the consent of the pregnant woman and other requirements, and the pregnant woman must be of full reason and not at the state of drunkenness, and can know the truth and implications of her

consent. And the consent cannot be obtained in a state of fear and confusion and misunderstanding and the age of the woman given the consent must be more than twelve years and if not the consent is not acceptable. These conditions in the Malaysian law is similar like the conditions of criminal responsibility in Islamic jurisprudence, and on this basis the researcher has not discussed the conditions of abortion in Islamic jurisprudence because they have been mentioned by Malaysian law. As for the punishment of abortion in the Malaysian law and Islamic jurisprudence, both the person that aborts the fetus and the one that supports would be punished. The punishment under Malaysian law is imprisonment or fine, and the term of the imprisonment is different between the abortion before and after the fetal movement. The punishment before fetal movement and without consent of the pregnant woman is 3 years imprisonment or fine. But after the fetal movement, the punishment is for the person and the pregnant woman is more than seven years or fine. The one that performs the abortion for her without her consent, either before or after fetal movement will be punished by imprisonment for twenty years or fine. The punishment of abortion in Islamic jurisprudence is 'garrah' or expiation according to the jurists. The jurists are unanimous that punishment for a crime of a fetus of a free woman is 'garrah' and they are consensus that 'garrah' is estimated by half of one-tenth of diyyah. The 'garrah' of a dhimmi woman is like that of a Muslim fetus according to Hanafis and Hanbalis, because the diyyah of a non-Muslim is like the diyyah of a Muslim according to them. And the 'garrah' of dhimmi woman fetus is equal to one-tenth of the diyyah of the mother according to Malikis. And the Shafi'is see that the 'garrah' of Jew or Christian fetus is one-third of that of a Muslim based on the fact that 'garrah' is estimated with one-tenth of the father's diyyah.

The scholars differed in the necessity of expiation, where Shafi'is and Hanbalis see it as compulsory on the offender, while Abu Hanifa did not see that and Malikis accept it based on 'al-istihsan'. Therefore, the writer says that 'garrah' and expiation in Islamic jurisprudence resembles fine in Malaysian law in terms of the foundation but can be differentiated on the fact that expiation erases effects of the abortion in the hereafter and that does not exist in the law because the law does not extend to the hereafter and does not bother about the affairs of hereafter. Abortion in the case of necessity in the Malaysian law and Islamic jurisprudence is an exceptional case which is to save the life of the mother according to Malaysian law, but in Islamic jurisprudence is versatile according to Dr. Buti, like if the pregnant woman's life is in danger if abortion is not performed, and where there is a clear illness in the woman's body that cannot be avoided except by abortion based on the report of a specialist doctor. And where the birth endangers the life of the fetus like where there is no milk in the breast as a result of the pregnancy and there is very likely that the father cannot afford to hire someone to breast-feed the baby. The writer believes that the cases of necessity mentioned in Islamic jurisprudence if they occur in Malaysia, the court will also include them in the exceptional cases. Generally, the writer finds that the ruling on abortion and its punishment in Malaysian law and Islamic jurisprudence are similar to a large extent; there is no big difference between them but the spiritual dimension in the legal texts that include punishment is absent that will push the concerned to adhere or keep away from abortion, and the law has no role in the affairs of slaves in the hereafter, and hence the law cannot be a deterrence from performing abortion, while the Sharia'ah has this deterrence nature and is employed in many areas that keep people away from committing what is detrimental and harmful to them and their families, and if they managed to flee and escape from punishment of this world, there is no way to run away in the hereafter and that the punishment will surround them except those that Allah (swt) Has mercy on.

Most correct opinion:

The foregoing shows us clearly that the view of the Islamic jurisprudence of the provisions related to abortion and the punishment of the offender is better for adoption because of the benefits it has to women, family and community as well as its appropriation with nature and protection of interest of the fetus saving his life from aggression, and not to subject him to bear the responsibility and punishment of others for something he has not committed. Allah (swt) says: (No one shall bear the burden of another) (Al-Isra, 218).

Conclusion:

First: the results of the study:

The writer has reached through the study of abortion; its ruling and penalty in Malaysian law and Islamic jurisprudence to several results which are as follows:

1) Abortion in Malaysian law is prohibited by Articles 312-316 of the Penal Code. Abortion is permitted in Malaysian law except in the case of necessity and excuse such as the aim to save the life of the mother, request from a specialist doctor, is not detrimental to the life of the pregnant woman, and must be done before four month of pregnancy with the consent of the pregnant woman. Whoever violates this law in Malaysia will be punished by imprisonment or fine.

And abortion in Malaysian law makes sense and has no any negative effect for Malaysia as the writer stated before.

2) And there is no direct provision in the Qur'an and hadiths concerning the ruling on abortion, and the scholars differed on the ruling based on different stages. The Hanafis and most of Shafi'is and some Hanbalis and Imam Lukhami from Malikis and Zahiris see the permissibility of abortion before the soul breathe in the fetus. The jurists are unanimous on the prohibition of abortion after four months of the pregnancy because at that time Allah (swt) breathed the soul in the fetus and becomes a living soul, and they also agreed on the prohibition of killing someone without a legitimate or necessary reason.

The jurists are unanimous that the penalty for a crime on the fetus of a free woman is 'garrah' which is estimated with half of one-tenth of complete diyyah, and for the fetus of a dhimmi woman the jurists have different opinion. Moreover, some jurists enjoined expiation for killing i.e. freeing a slave or fasting for two consecutive months. But abortion in cases of necessity in Islamic jurisprudence is an exception which has no punishment.

Second: Suggestions and Recommendations:

1) The author see the need to publish and distribute newspapers, records and books related to damage created by abortion so that people will be aware that it is harmful to women's health if there is no necessity.

2) The writer recommends to the specialists from the scholars to issue scientific research from the aspects of jurisprudence, medicine, psychology, economics and politics and to discuss abortion from the negative and positive sides and to publish in various magazines.

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