

Pathology of Article 56 of the Family and Youth Protection Law from the Perspective of Islamic Teachings and Iran's Criminal Policy

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Abstract

The Family and Youth Protection Law aims to support population growth and encourage couples to have children, but this law, like other laws, despite its advantages and merits, also has some disadvantages. The disadvantages of this law are, especially Article 56 of this law, because it is related to the issues of abortion and mother's health, it has many challenges. Therefore, with a library method and a descriptive-analytical approach, the author has discussed and investigated "the pathology of the approach of Article 56 of the Family and Youth Protection Law from the perspective of Islamic teachings and criminal policy", and the research results show that the legislator in Article 56 The Family and Youth Protection Law has adopted a deterrent approach, in fact, with this approach, the legislator is trying to increase the population and prevent abortions, etc., but the application of severe restrictions in the field of fetal health and abortion treatment is a result other than Endangering the lives of mothers and increasing the number of abortions will not be a crime, and it will provide the basis for the abuse of lawbreakers and their profit-seeking. Also, due to the different bases and opinions of jurists and jurists regarding abortion and the time of soul rebirth and the lack of determining a single and specific time for soul rebirth in different sciences of jurisprudence, law, and medicine, it is not possible to leave the issuing of permission or disallowance of therapeutic abortion to the judges. With the cooperation of jurists, jurists, and doctors, correct decisions should be made regarding the criteria and criteria and the spirit of the soul.

Keywords: Pathology, Family and Youth Protection Law, Islamic Teachings, Criminal Policy, Abortion, Soul Destruction

INTRODUCTION

According to demographic studies and expert opinions in this field, if the current fertility trend continues, Iran's population growth will reach zero around the years 2041-2042. Subsequently, population growth will turn negative, and the population structure will shift towards an aging society in the next 20 years. One of the measures to increase the country's population is to prevent indiscriminate legal and illegal abortions. This important issue was first addressed in the Therapeutic Abortion Act of 2005 and later in the Family Protection and Youth Population Act of 2020.

With medical and population growth approaches in mind, the Family Protection and Youth Population Act was approved by the Islamic Consultative Assembly on October 27, 2021. Some articles of this law, especially Article 56, take a deterrent approach to certain issues such as abortion and the mother's rights in this regard. In other words, the legislator in this article aims to impose punishments for those who perform abortions. Although these punishments may be effective in increasing the population, the stringent approach of this article and the deprivation of the mother's rights suggest that there are gaps and shortcomings in this law.

To date, no comprehensive research has been conducted on the gaps and shortcomings of Article 56 of the Family Protection Act. However, some works have been published with titles such as:

Fallahi, Ahmad (2022), "Rethinking Problem Identification and Solutions: A Critical Look at the Criminalization Approach of the Family Protection and Youth Population Act"

Khaghani Esfahani, Mehdi (2022), "Analysis of the Family Protection and Youth Population Act from the Perspective of 'Critical Legal Criminology'"

Mirkamali, Seyyed Alireza, Khalafi, Faezeh (2023), "The Family Protection and Youth Population Act in Light of

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Criminal Law Principles"

Shariati Nasab, Sadegh (2022), "Abortion Due to Maternal Hardship in the Family Protection and Youth Population Act"

None of these authors have specifically examined the approach of Article 56 of the Family Protection Act. Therefore, in the present study, the author aims to investigate the pathologies of the approach taken in Article 56 of the Family Protection and Youth Population Act. The main questions addressed in this regard are: What are the effects of the approach taken in Article 56 of the Family Protection and Youth Population Act? What are the shortcomings of Article 56 of the Family Protection and Youth Population Act?

To answer these questions, the author first studies Article 56 of the Family Protection and Youth Population Act, then identifies its deficiencies and gaps in light of Islamic teachings and criminal policy and finally proposes solutions.

The Family Protection and Youth Population Act

Since the beginning of the 2010s, following various statistics on declining population growth and the shift of the population pyramid towards an aging society, various officials have commented on the need for changes in population policies. (Fouladi, 2019, p. 42) The formulation and announcement of general population policies in 2014, which aimed to compensate for the decrease in population growth and fertility rates, can be evaluated in this context. Alongside these programs, policymakers attempted to create conditions for population growth through incentive policies. Increasing maternity leave from 6 to 9 months, granting incentive leave to fathers for each child born, and providing and paying for expenses resulting from increased leave periods to the Social Security Organization are some of the measures taken in this regard.

In addition to these approvals, efforts were made to expand the range of incentive and supportive solutions through the enactment of a special law. As a result, in 2013, the "Comprehensive Population and Family Excellence Plan" was submitted to the Islamic Consultative Assembly. Although various efforts were made to approve this plan in different parliaments, it was not passed due to various reasons. (Moghaddasi and Roustaei, 2021, p. 66)

In the 11th Parliament, a new bill titled "Youth Population and Family Excellence Plan" was once again submitted by several representatives. Initially, this plan focused on expanding incentives and supportive measures, such as extending the permissible academic years for women who give birth during their studies, increasing annual child benefits, and offering interest-free loans and financial grants. However, as discussions progressed, other topics like restrictions on prenatal screening and banning free distribution of contraceptives were added to the bill.

It's worth noting that population growth and childbearing are not inherently coercive matters. Rather than reactive tools, they require a multifaceted approach involving persuasion, cultural shifts, improved economic conditions for families, enhanced societal economic status, creating peace of mind, and fostering an optimistic outlook on the future.

This law, which was renamed "Family Protection and Youth Population Act" after its final return from the Guardian Council, includes some penal measures. It attempts to achieve population growth through a combination of incentive policies and criminal mechanisms. Although most of the criminal sanctions in this law are related to abortion (Articles 56, 58, 60, and 61), Article 71 also introduces new offenses for refusing to implement the law, negligence, omission, or preventing the execution of the law's provisions.

While this law wasn't discussed in an open parliamentary session, making it difficult to ascertain the drafters' primary intentions regarding the expansion of abortion-related crimes, the discourse of representatives in the media following its approval suggests that their concern about high abortion rates was a key driver behind the new criminalization. According to unofficial statistics, over 350,000 illegal abortions occur annually.

Despite the advantages and merits of this law, examining each of its provisions reveals flaws, gaps, and challenges that may lead to inefficiency and ambiguities. This is particularly true for Article 56, which deals with abortion and contains numerous ambiguities. The author will analyze this article after introducing it.

Article 56 of the Family Protection and Youth Population Act

Article 56 of this law addresses the prohibition of abortion and its permissible cases:

Abortion is prohibited and is considered a crime in public aspects. According to Articles 716 to 720 of the Islamic Penal Code and the provisions of this law, it is punishable by blood money, imprisonment, and revocation of medical licenses.

A mother can only submit a request for abortion to forensic medical centers if she believes the following conditions may be met. All forensic medical centers in provincial capitals are required to immediately refer incoming requests to the Legal Abortion Commission. This commission, consisting of a special judge, a committed specialist physician, and a forensic medicine specialist employed by the Legal Medicine Organization, must convene within a week at most. The necessary ruling is issued by the judge member of the commission, adhering to the principle of non-permissibility of abortion in cases of doubt. The judge member of the commission, upon being certain about one of the following conditions, issues a legal abortion permit valid for a maximum of fifteen days:

A. If the mother's life is in danger, and abortion is the only way to save her, provided the fetus is less than four months old and there are no signs of ensoulment.

B. In cases where, if the fetus is not aborted, both mother and fetus will die, and abortion is the only way to save the mother.

C. If, after obtaining the guardian's statement, all of the following conditions are met:

- Mother's consent
- The presence of hardship (severe, unbearable difficulty) for the mother
- Definite presence of untreatable fetal abnormalities, in cases where the hardship relates to illness or defect in the fetus
- Lack of possibility for compensation or substitution for the mother's hardship
- Absence of signs of ensoulment
- The fetus being less than four months old

Note 1: The issued verdict can be appealed within one week to a special branch or branches of the Court of Appeal, presided over by a judge or judges appointed by the Head of the Judiciary for this matter. The said court must announce its decision within one week at most.

Note 2: Hospitals approved by the Legal Medicine Organization are obliged to perform abortions in permissible cases only after a judge's order and confirmation of the absence of signs of ensoulment. They must record and upload the relevant information, observing confidentiality principles, in the patient's electronic health record or the system mentioned in Article 54 of this law.

Note 3: The Legal Medicine Organization records and uploads information related to all stages of the abortion request up to its result, including the applicant's reasons, commission members, issuance or non-issuance of the permit, and the reason for issuing the permit, observing confidentiality principles, in the patient's electronic health record or the system mentioned in Article 54 of this law. This information is made available annually to the Islamic Consultative Assembly and the Supreme Council of the Cultural Revolution.

Note 4: If a physician, midwife, or pharmacist provides means for abortion or directly performs an abortion outside the procedures outlined in this article, in addition to the punishments specified in Article 624 of the Islamic Penal Code (Book Five - Discretionary Punishments and Deterrent Penalties), their professional license will be revoked. This offense does not require repetition to be established.

Upon reflection on this article, one can say that criminalizing abortion in a non-criminal law, restrictions on submitting therapeutic abortion requests, the time-consuming nature of the judicial process and the possibility of missing the window for therapeutic abortion, disregarding maternal health, ambiguity in the concept of hardship and its criteria, and the impossibility of determining ensoulment and its contradiction with Islamic principles are among the issues we will discuss and examine below.

Repeated Criminalization of Abortion and the Legislator's Intensification Policy

The criminalization of abortion has Quranic and narrative foundations. God Almighty in verse 31 of Surah Al-Isra⁴ and verse 151 of Surah Al-An'am⁵ has declared "killing children" as forbidden. Since the Quran speaks in customary language⁶, the use of the term "child" regarding killing or "pregnancy" regarding abortion is common in custom. Numerous hadiths also refer to the prohibition of abortion, such as the narration of Ishaq ibn Ammar:

"I asked Abu al-Hasan (peace be upon him): 'A woman fears pregnancy and drinks medicine to expel what is in her womb. Is this permissible?' He said: 'No.' I said: 'It's just a zygote.' He replied: 'The first thing that is created is a zygote.'"⁷

The authenticity of this narration indicates the prohibition of abortion at all stages, even if both husband and wife consent to it.

Imamiyyah jurists, citing verses and traditions, consider the religious ruling on abortion to be prohibited (Hilli, 1992, vol. 3, p. 699; Fakhr al-Muhaqqiqin, 2008, vol. 4, p. 427; Fadi Hindi, 1995, vol. 11, p. 473). Those who undertake this act are subject to retaliation or blood money (Khoei, 2001, vol. 42, p. 513; Kashif al-Ghita Najafi, 2002, vol. 3, p. 96; Sabzevari, 1992, vol. 29, p. 112).

Following Imamiyyah jurists, lawmakers have criminalized abortion in various instances. Despite its criminalization in the Islamic Penal Code, the Family Protection and Population Youth Act reiterates the prohibition of abortion at the outset, which was previously stipulated in the Islamic Penal Code. This repetition and inclusion of related penalties seem unnecessary.

Moreover, stating abortion penalties in the Family Protection and Population Youth Act, which is not primarily concerned with abortion punishments, appears inappropriate.

Illegal abortion in this article reflects the legislator's intensifying policy in expanding supplementary punishments. Based on this article, revoking medical licenses has been added to existing sanctions. Although courts could previously impose license revocation and practice prohibition as supplementary penalties under Article 23 of the Islamic Penal Code for physicians performing unauthorized abortions, the explicit mention of medical license revocation has made this punishment mandatory rather than discretionary.

Restrictions on Therapeutic Abortion

The legislator has limited the possibility of requesting therapeutic abortion to three cases. It would have been better to restrict only the performance of therapeutic abortions, not the ability to request them. A mother might have various reasons for such a request, such as a history of genetic disorders in relatives, pregnancy resulting from adultery or rape, or suspicion of fetal abnormalities. Allowing requests doesn't necessitate approval.

Experts and specialists in forensic medicine examine the mother's and fetus's conditions and the reasons for the abortion request, then approve or reject it. However, the legislator's restriction of requests to specific cases is debatable. This limitation may lead to criminal and illegal abortions, not only failing to achieve the law's purpose but also potentially increasing illegal abortions. This could result in unsafe, illegal abortions of healthy fetuses where mothers suspect illness or disability.

وَلَا تَقْتُلُوا أَوْلَادَكُمْ خَشْيَةَ إِمْلَاقٍ نَحْنُ نَرْزُقُهُمْ وَإِيَّاكُمْ إِنَّ قَتْلَهُمْ كَانَ خِطْئًا كَبِيرًا (الإسراء/31)

Do not kill your children out of fear of poverty! We provide for them and for you. Surely, killing them is a grave sin!

فَلْيَتَعَالُوا أَتْلُ 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 ذَلِكَمْ وَصَّاكُمْ بِهِ لَعَلَّكُمْ تَتَّقُونَ (الأنعام/151)

Say: "Come, let me recite to you what your Lord has forbidden: Do not associate anything with Him. Be good to your parents. Do not kill your children out of fear of poverty - We provide for you and for them. Do not approach shameful deeds, whether open or secret. Do not take a life which God has made sacred, except by right. This is what He commands you, so that you may understand."

⁶ Salam Mukarram, 1994, p. 306

⁷ Saduq, 1982, vol. 4, p. 171

Limiting abortion in cases like genetic disease history or pregnancy from adultery causes undue hardship for mothers, which contradicts Islamic teachings. The principle of hardship (qa'idah al-haraj) states that duties causing hardship are lifted from the obligated person. Scholars argue that religion does not impose difficulty, and God has not legislated burdensome rulings, removing any excessively difficult obligations (Bojnourdi, 1998, vol. 1, p. 219; Hosseini Ameli, 1998, vol. 2, p. 603). This principle covers both physical (Khwansari Najafi, 1953, p. 226; Najafi, 1983, vol. 12, p. 379) and non-physical hardship (Tabatabai Yazdi, 1998, vol. 1, p. 89; Naraghi, 1996, vol. 1, p. 302). Thus, restrictions on therapeutic abortion may conflict with scholarly views.

Prolonged Legal Process and Missed Therapeutic Abortion Window

Previously, therapeutic abortion was the only legal procedure without judicial review, due to sensitivities regarding fetal age and maternal conditions. This was because abortion is not permitted after 4 months, and a lengthy judicial process could deny the option to a mother in her final days of the fourth month. The new law requires judicial approval for therapeutic abortion, specifying a judge's presence in the abortion commission. This requirement may cause critical delays, even in cases where the mother's life is at serious risk.

Inability To Determine Ensoulment

The main concern with abortion before four months is the possibility of taking a life. Based on verses, traditions, and scholarly statements, abortion before ensoulment is not considered murder, though its promotion may have undesirable social and political consequences, which can be addressed through secondary rulings. However, when necessary to save the mother's life, it cannot be prohibited by primary rulings (Behjati Ardakani et al., 2005, p. 112).

Article 56 of the Family Protection and Population Youth Act lists the absence of signs of ensoulment as a condition for therapeutic abortion. This is problematic due to the impossibility of detecting ensoulment and the lack of definitive signs in jurisprudential, traditional, and medical sources. The Islamic Consultative Assembly should clarify this ambiguity.

Conflict Between Paragraphs A and B Of Article 56 And Ambiguity in Guardian Statements and Hardship

The focus for therapeutic abortion in paragraphs A and B is "danger to the mother's life". Paragraph A limits this to fetuses under 4 months and without ensoulment, while paragraph B doesn't mention these conditions. Article 718 of the Islamic Penal Code also permits therapeutic abortion for maternal life risk without these conditions. This inconsistency may lead to conflicts between these laws (Zargarian, 2022, p. 88).

Another important point in Article 56 is the requirement for guardian statements, without clarifying their content. It's unclear whether these statements imply consent. If the legislator meant guardian consent, why use the term "statements"? This is particularly puzzling as maternal consent is explicitly listed as a condition for abortion.

The Family Protection and Population Youth Act, like the Therapeutic Abortion Act, fails to define hardship or its criteria, potentially leading to divergent opinions among legal experts and judges. The legislator should clarify, through a separate directive or amendment, the personal nature of the hardship and the need for individual assessment for each mother. It should also address the possibility of compensating or substituting for maternal hardship. Notably, religious scholars and grand ayatollahs consider both parents' conditions. Article 56 of the new law neglects paternal hardship, a significant oversight.

Silence on Abortion Resulting from Rape

Verses 6 of Surah Ma'idah⁸ and 185⁹ and 286¹⁰ of Surah Baqarah pertain to the principle of no hardship. Hardship implies constriction, tightness, or sin, and refers to a situation exceeding normal tolerance (Fazel Lankarani, 2006, p.

⁸ ... مَا يَرِيدُ اللَّهُ لِيَجْعَلَ عَلَيْكُمْ مِنْ حَرَجٍ ..

⁹ ... يَرِيدُ اللَّهُ بِكُمْ الْيُسْرَ وَلَا يُرِيدُ بِكُمْ الْعُسْرَ ...

¹⁰ لَا يَكْفِيكَ اللَّهُ نَفْسًا إِلَّا وُسْعَهَا لَهَا ...

27).

This principle may apply to abortion in rape cases due to the need to protect the victim and the psychological impact of unwanted pregnancy, which jeopardizes her family and social life. Besides maternal distress, there's a rational concern about the potential mistreatment of the child due to illegitimate lineage.

Proponents cite the Supreme Leader's opinion: "Pregnancy from rape undoubtedly imposes severe psychological pressure on the mother, causing extreme hardship during pregnancy and after the illegitimate child's birth. Therefore, permitting abortion in this case isn't far-fetched" (Hosseini Khamenei, 2001, p. 77).

If continuing the pregnancy is utterly intolerable for the mother given her personal, familial, and social circumstances, potentially leading to suicide to avoid disgrace, abortion may be permissible only if the fetus is not ensouled and the situation causes severe hardship (Mohaghegh Damad, 2004, vol. 2, p. 82).

Ayatollah Fazel Lankarani similarly stated that pregnancy from rape certainly causes great pressure and hardship for the mother, and its permissibility isn't unlikely (Fazel Lankarani, 1998, p. 550).

Nevertheless, another issue that has not been addressed in this article, similar to the single-article law on therapeutic abortion, is the permissibility of therapeutic abortion in cases of rape. In such instances where the mother has been sexually assaulted and continuing the pregnancy is accompanied by incidental harm, in a way that the mother will always be under suspicion and the child resulting from this relationship will be rejected if not accepted by the mother and family, and will not have favorable conditions ahead, a solution for aborting such a fetus should be devised with the help of dynamic Shi'a jurisprudence and by invoking the rule of 'no harm and no hardship'. Given that this case was not mentioned in the single-article law on therapeutic abortion, and Article 56 of the Family Protection and Youth Population Law addresses the conditions for issuing abortion permits, it was necessary to mention this case as well and clarify the ambiguity.

Inadequacy of Notes 1, 2, and 3 of Article 56 of the Family Protection and Youth Population Law

According to Note 1 of this article, the issued verdict can be appealed within one week in a special branch or branches of the Court of Appeal, presided over by a judge or special judges appointed by the Head of the Judiciary for this matter, and the aforementioned court must announce its decision within a maximum of one week. The ambiguity and question arising from this note is that if the mother appeals the issued verdict and the possibility of therapeutic abortion is confirmed by the special judge or judges in the specialized branches of the Court of Appeal after the fourth month has passed and abortion is prohibited at this time, who will be responsible for the harm caused to the mother? Therefore, it is necessary to devise a measure to ensure that the issuance of the verdict and its appeal are carried out in the minimum possible time so that if the necessary conditions for abortion exist, time is not lost.

As explicitly stated in Article 56 itself, the judge can only issue an abortion permit after confirming that ensoulment has not occurred, and if the absence of ensoulment is not confirmed, the judge will not have the authority to issue a therapeutic abortion permit. Now, when the special judge has issued an abortion permit after confirming the absence of ensoulment, given the importance of time in such cases, what is the necessity of re-confirming the absence of signs and indications of ensoulment in hospitals according to Note 2?

Regarding what indicates the ensoulment of the fetus, various opinions have been expressed by Islamic jurists. The majority of them agree on the fourth month of pregnancy, to the extent that Ibn Idris has stated in this regard: "The fetus is the child as long as it is in the womb, and it first starts as a sperm, and for it after its placement in the womb up to twenty days, twenty dinars, then after twenty days, for each day one dinar up to forty days, forty dinars which is the blood money for a clot, and this is the meaning of their saying 'and between them according to that calculation'..." (Ibn Idris al-Hilli, 1989AH, p. 416)

Therefore, to determine the signs of ensoulment, it is necessary to examine the stages of pregnancy. The pregnancy period is divided into two stages: The first stage is the period of fetal life, which is from the date of conception until before the infusion of the soul, and the second stage is the period of biological life, which starts from the date of the soul's infusion into the fetus and continues until the time of delivery (Asadi, 2017, p. 433).

According to Shi'a perspectives, human formation begins from the moment the zygote implants in the uterus. From

the initial creation of the zygote and its implantation in the womb, various rulings apply to it (Sadeghi, Sadeghi & Hasanpour, 2018, p. 111). Abortion can occur in either of these two stages, with the difference being that the blood money for a fetus in the biological stage is equal to that of a fully formed human.

Fetal Life and Ensoulment from a Medical Perspective

Fetal life begins with the proliferation, differentiation, and development of a fertilized cell. When sperm (the male gamete) and egg (the female gamete) unite, fertilization occurs, and a zygote is formed. The fertilized egg moves along the fallopian tube aided by cilia. About 30 hours after fertilization, cell division begins. One cell divides into two, two into four, four into eight, and so on until it forms a morula. With each division, the cells become smaller, allowing the entire mass, called a blastula, to pass through the fallopian tube. 3 to 4 days after fertilization, the newly formed blastula enters the uterus and floats there for another 3 to 4 days until its inner layer, called the blastocyst, begins to attach to the uterine lining in a process called implantation (Rice, 2019, p. 61).

The blastocyst implants in the uterine wall within the first 14 days after fertilization. The embryonic period begins at the end of the second week, with the embryo forming from a circular cell layer around the blastocyst's center. On the eighteenth day, the embryo is about 0.0625 inches long, with a tail and remnant gills that quickly disappear. At one month, eyes, nose, and ears are not yet visible, but the spine and vertebral canal have formed. Small buds that will later become arms and legs appear. The heart forms and begins to beat, and other body systems gradually take shape (Rice, 2019, p. 63).

By the end of the second month, the first bone structures of the limbs and separate fingers, which distinguish human form, develop in the fetus. Major blood vessels form, and internal organ development progresses. At the end of the first trimester, the fetus is about 3 inches long; most major organs are present, the head is large, and the fetal face is well-formed. The heartbeat can be heard with a stethoscope (Rice, 2019, p. 63).

At the end of the fourth or fifth month, the mother usually feels fetal movements. The fetus's skin is covered with fine hair that typically falls out before birth. At the end of the fifth month, the fetus weighs about one pound and is 12 inches long. It sleeps, wakes, sucks, and changes position. By the end of the sixth month, eyes, eyelids, and eyelashes form. The eyes are sensitive to light, and the fetus can hear uterine sounds and respond to vibration and sound stimuli. During the third trimester, the fetus's head and body become more proportionate, and fat layers form under the skin. At the end of the eighth month, the fetus weighs about 5 pounds and is 18 inches long. By the end of the ninth month, nails grow on the fingertips and toes, and the skin becomes smoother. At this point, the baby is ready for birth (Rice, 2019, p. 63).

Upon examining medical sources, we found that medical science does not define a stage called "ensoulment," and it is not possible to detect it based on medical signs or indicators.

Fetal Life and Ensoulment from a Religious Perspective

The Quran, in verses 12-14 of Surah Al-Mu'minun, explains the various stages of fetal life as follows: "And certainly We created man of an extract of clay, then We made him a small seed in a firm resting-place, then We made the seed a clot, then We made the clot a lump of flesh, then We made (in) the lump of flesh bones, then We clothed the bones with flesh, then We caused it to grow into another creation, so blessed be Allah, the best of the creators."¹¹

According to religious teachings, life is defined as the infusion of the soul into the body. The term "infusion" is derived from Quranic verses where God, in explaining the creation of humans and granting them a soul, uses the word "nafakha" (to breathe into). In verse 29 of Surah Al-Hijr, God states: "So when I have made him complete and breathed into him of My spirit, fall down making obeisance to him."¹²

Regarding the signs of human life and the time of ensoulment in humans, various hadiths have been narrated.

¹¹ وَلَقَدْ خَلَقْنَا الْإِنْسَانَ مِنْ سَلَالَةٍ مِنْ طِينٍ * ثُمَّ جَعَلْنَاهُ نُطْفَةً فِي قَرَارٍ مَكِينٍ * ثُمَّ خَلَقْنَا النَّطْفَةَ عَلَقَةً فَخَلَقْنَا الْعَلَقَةَ مُضْغَةً فَخَلَقْنَا الْمُضْغَةَ عِظَامًا فَكَسَوْنَا الْعِظَامَ لَحْمًا ثُمَّ أَنْشَأْنَاهُ خَلْقًا آخَرَ فَتَبَارَكَ اللَّهُ أَحْسَنُ الْخَالِقِينَ

¹² فَإِذَا سَوَّيْتُهُ وَنَفَخْتُ فِيهِ مِنْ رُوحِي فَقَعُوا لَهُ سَاجِدِينَ (الحجر/29)

A: Developmental Signs

One group of hadiths considers the infusion of the soul into humans to occur after a developmental stage in the fetal body. In hadith sources, three developmental signs for ensoulment in the fetus are mentioned. According to some narrations, the soul enters after flesh grows on the fetus¹³. Other narrations state that the soul will enter after the fetal body is completed¹⁴, and another group suggests that ensoulment occurs when the fetus has acquired human features¹⁵.

B: Temporal Signs

Some hadiths, instead of naming fetal stages, merely mention a time frame. In this group of narrations, three timeframes for ensoulment are mentioned. Some narrations state that the soul is given to the fetus at the end of four months¹⁶. Other narrations, mentioning three forty-day periods for the material formation of humans, indicate that ensoulment occurs after these three periods¹⁷. One narration declares that the soul is given to the fetus at the end of five months¹⁸.

¹³ عَلِيُّ بْنُ إِبْرَاهِيمَ عَنْ أَبِيهِ عَنِ ابْنِ فَضَالٍ وَ مُحَمَّدِ بْنِ عَيْسَى عَنْ يُونُسَ جَمِيعاً قَالَا عَرَضْنَا كِتَابَ الْفَرَائِضِ عَنْ أَمِيرِ الْمُؤْمِنِينَ ع عَلَى أَبِي الْحَسَنِ ع فَقَالَ هُوَ صَحِيحٌ وَ كَانَ مِمَّا فِيهِ أَنَّ أَمِيرَ الْمُؤْمِنِينَ ع جَعَلَ دِيَةَ الْجَنِينِ مِائَةَ دِينَارٍ وَ جَعَلَ مَنِيَّ الرَّجُلِ إِلَى أَنْ يَكُونَ جَنِيناً خَمْسَةَ أَجْزَاءٍ فَإِذَا كَانَ جَنِيناً قِيلَ أَنْ يُلِجَ الرُّوحُ فِيهِ مِائَةَ دِينَارٍ وَ ذَلِكَ أَنَّ اللَّهَ عَزَّ وَ جَلَّ خَلَقَ الْإِنْسَانَ مِنْ سُلَالَةٍ «1» وَ هِيَ النَّطْفَةُ فَهَذَا جُزْءٌ ثُمَّ عُلِقَتْ فَهُوَ جُزْءَانِ ثُمَّ مُضِعَّةٌ ثَلَاثَةَ أَجْزَاءٍ ثُمَّ عَظْمٌ فِيهِ أَرْبَعَةُ أَجْزَاءٍ ثُمَّ يَكْسَى لَحْماً جَبِينِيذٌ تَمَّ جَنِيناً فَكَمَلَتْ لَهُ خَمْسَةُ أَجْزَاءٍ مِائَةَ دِينَارٍ وَ الْمِائَةُ دِينَارٍ خَمْسَةُ أَجْزَاءٍ فَجَعَلَ لِلنَّطْفَةِ خُمُسَ الْمِائَةِ عَشْرِينَ دِينَاراً وَ لِلْعُلْقَةِ خُمُسَ الْمِائَةِ أَرْبَعِينَ دِينَاراً وَ لِلْمُضِعَّةِ ثَلَاثَةَ أَجْزَاءٍ مِائَةَ سِتِينَ دِينَاراً وَ لِلْعَظْمِ أَرْبَعَةَ أَجْزَاءٍ مِائَةَ ثَمَانِينَ دِينَاراً فَإِذَا أَنْشَى فِيهِ خَلْقٌ آخَرَ وَ هُوَ الرُّوحُ فَهُوَ جَبِينِيذٌ نَفْسٌ أَلْفٌ دِينَارٍ كَامِلَةٌ إِنْ كَانَ ذَكَراً وَ إِنْ كَانَ أُنْثَى فَخَمْسَمِائَةَ دِينَارٍ وَ إِنْ قُتِلَتْ امْرَأَةٌ وَ هِيَ حُبْلَى فَتَمَّ فَلَمْ تُسَوِّطْ وَلَدَهَا وَ لَمْ يُعْلَمَ أ ذَكَرٌ هُوَ أَمْ أُنْثَى وَ لَمْ يُعْلَمَ أ بَعْدَهَا مَاتَتْ أَمْ قَبَلَهَا فِدْيَتُهُ نِصْفَانِ نِصْفِ دِيَةِ الذَّكَرِ وَ نِصْفِ دِيَةِ الْأُنْثَى وَ دِيَةُ الْمَرْأَةِ كَامِلَةٌ بَعْدَ ذَلِكَ وَ ذَلِكَ سِتَّةُ أَجْزَاءٍ مِنَ الْجَنِينِ وَ أَقْنَى ع فِي مَنِيِّ الرَّجُلِ يُفْرَغُ عَنْ عَرْسِهِ فَعَزَلَ عَنْهَا الْمَاءُ وَ لَمْ يَرُدْ ذَلِكَ نِصْفِ خُمُسِ الْمِائَةِ عَشْرَةَ دِنَانِيرٍ وَ إِنْ أَفْرَعُ فِيهَا عَشْرِينَ دِينَاراً وَ قَضَى فِي دِيَةِ جِرَاحِ الْجَنِينِ مِنْ جِسَابِ الْمِائَةِ عَلَى مَا يَكُونُ مِنْ جِرَاحِ الذَّكَرِ وَ الْأُنْثَى الرَّجُلِ وَ الْمَرْأَةِ كَامِلَةٌ وَ جَعَلَ لَهُ فِي قِصَاصِ جِرَاحَتِهِ وَ مَغْفَلَتِهِ عَلَى قَدْرِ دِيَّتِهِ وَ هِيَ مِائَةُ دِينَارٍ. (كليني، 1407، ج7، ص343)

¹⁴ عَلِيُّ بْنُ إِبْرَاهِيمَ عَنْ مُحَمَّدِ بْنِ عَيْسَى عَنْ يُونُسَ أَوْ غَيْرِهِ عَنِ ابْنِ مُسْكَانَ عَنْ أَبِي عَبْدِ اللَّهِ ع قَالَ: دِيَةُ الْجَنِينِ خَمْسَةُ أَجْزَاءٍ خُمُسٌ لِلنَّطْفَةِ عَشْرُونَ دِينَاراً وَ لِلْعُلْقَةِ خُمُسَانِ أَرْبَعُونَ دِينَاراً وَ لِلْمُضِعَّةِ ثَلَاثَةُ أَجْزَاءٍ مِائَةَ سِتُونَ دِينَاراً وَ لِلْعَظْمِ أَرْبَعَةُ أَجْزَاءٍ مِائَةَ ثَمَانُونَ دِينَاراً فَإِذَا تَمَّ الْجَنِينُ كَانَتْ لَهُ مِائَةُ دِينَارٍ فَإِذَا أَنْشَى فِيهِ الرُّوحُ فِدْيَتُهُ أَلْفٌ دِينَارٍ أَوْ عَشْرَةُ أَلْفٍ دِينَارٍ إِنْ كَانَ ذَكَراً وَ إِنْ كَانَ أُنْثَى فَخَمْسَمِائَةَ دِينَارٍ وَ إِنْ قُتِلَتْ الْمَرْأَةُ وَ هِيَ حُبْلَى فَلَمْ يَرُدْ أ ذَكَراً كَانَ وَلَدَهَا أَوْ أُنْثَى فِدْيَةُ الْوَالِدِ نِصْفَانِ نِصْفِ دِيَةِ الذَّكَرِ وَ نِصْفِ دِيَةِ الْأُنْثَى وَ دِيَّتُهَا كَامِلَةٌ.

¹⁵ Amir al-Mu'minin Ali (peace be upon him) stated: If a crime is committed against a pregnant woman when the fetus has formed but the soul has not yet been breathed into it, the blood money (diyah) is one hundred dinars. However, if the soul has been breathed into the fetus, the blood money is one thousand dinars. (Mohaghegh Damad, 2012, p. 214)

¹⁶ أَبَا الْحَسَنِ الرِّضَا (ع): قَالَ أَبُو جَعْفَرٍ (ع) إِنَّ النَّطْفَةَ تَكُونُ فِي الرَّجْمِ أَرْبَعِينَ يَوْماً، ثُمَّ تَصِيرُ عُلْقَةً أَرْبَعِينَ يَوْماً، ثُمَّ تَصِيرُ مُضِعَّةً أَرْبَعِينَ يَوْماً. فَإِذَا كَمَلَ أَرْبَعَةَ أَشْهُرٍ، بَعَثَ اللَّهُ مَلَكَينِ خَلَاقِينَ فَيَقُولَانِ: يَا رَبِّ، مَا تَخْلُقُ ذَكَراً أَوْ أُنْثَى؟ فَيُؤْمَرَانِ، فَيَقُولَانِ: يَا رَبِّ، شَقِيحاً أَوْ سَعِيداً؟ فَيُؤْمَرَانِ، فَيَقُولَانِ: يَا رَبِّ، مَا أَجَلُهُ؟ وَ كُلُّ شَيْءٍ مِنْ حَالِهِ، وَ مِنْ ذَلِكَ أَشْيَاءٌ، وَ يَكْتُبَانِ الْمِيثَاقَ بَيْنَ عَيْنَيْهِ. فَإِذَا أَكْمَلَ اللَّهُ لَهُ الْأَجَلَ، بَعَثَ اللَّهُ مَلَكَاً. (كليني ١٤٠٧ هـ، ق، ج ٤، ص ١٣).

¹⁷ قَالَ: إِنَّ اللَّهَ عَزَّ وَ جَلَّ إِذَا أَرَادَ أَنْ يَخْلُقَ النَّطْفَةَ، الَّتِي أَخَذَ عَلَيْهَا الْمِيثَاقَ فِي صُلْبِ آدَمَ أَوْ مَا يَبْدُو لَهُ فِيهِ، وَ أَوْحَى إِلَى الرَّجْمِ أَنْ أَتَجِي بِأَبْنِكَ حَتَّى يُلِجَ فِيكَ خَلْقِي وَ قَضَائِي النَّافِذَ وَ قَدْرِي. عُلْقَةً يَوْماً، ثُمَّ تَصِيرُ مُضِعَّةً أَرْبَعِينَ يَوْماً، ثُمَّ تَصِيرُ الرَّجْمَ بَابِهَا فَتَنْصَلُ إِلَى الرَّجْمِ، فَتَرُدُّ فِيهِ أَرْبَعِينَ مُسْتَبِكَةً. ثُمَّ يَبْعَثُ اللَّهُ مَلَكَينِ خَلَاقِينَ يَخْلُقَانِ فِي الْأَرْحَامِ مَا يَشَاءُ اللَّهُ، فَيَقْتَحِمَانِ فِي بَطْنِ مَنْ فَمِ الْقَدِيمَةِ الْمُنْقُولَةِ فِي أَصْلَابِ الرِّجَالِ وَ الْأَرْحَامِ النِّسَاءِ، فَيَنْفَخَانِ فِيهَا رُوحَ الْحَيَاةِ وَ الْبَقَاءِ، وَ يَشْفَقَانِ حَ وَ جَمِيعَ مَا فِي الْبَطْنِ بِإِذْنِ اللَّهِ. ثُمَّ يُوْحَى إِلَى الْمَلَكَينِ: اكْتُبَا عَلَيْهِ قَضَائِي وَ قَدْرِي وَ نَافِذَ أَمْرِي وَ اسْتَرْطَأْ لِي الْبِدَاءَ فِيمَا تَكْتُبَانِ (كليني ١٤٠٧ هـ، ق، ج ٤، صص ١٣ و ١٤).

¹⁸ عَنْ يُونُسَ الشَّيْبَانِيِّ عَنْ أَبِي عَبْدِ اللَّهِ (ع) قَالَ: يَا أَبَا شَيْبَةَ، إِذَا مَضَتْ الْخَمْسَةُ أَشْهُرُ، فَقَدْ صَارَتْ فِيهَا الْحَيَاةُ وَ قَدْ اسْتَوْجَبَتْ الدِّيَةَ (طوسي ١٤٠٧ هـ، ج ١٠، ص ٢٨٤).

C: Physical Signs

Some narrations mention physical signs for the ensoulment of the fetus, such as the fetus crying (after birth)¹⁹, fetal movement²⁰, and the opening of eyes and ears²¹.

Based on the aforementioned points, we can conclude:

There is no doubt that the criterion for the realization of life is the possession of a soul, which the Quran refers to as "creating another creation." According to narrations from the infallible Imams (peace be upon them), the infusion of the soul occurs after the completion of the stage where bones are covered with flesh. At this point, with the formation of the body structure, the human form becomes apparent in the fetus, as mentioned in the narrations. Therefore, we can conclude that when the fetus is complete and takes human form at the end of the fourth month of pregnancy, the body becomes capable of receiving the soul. However, it seems there is a time gap between the completion of the fetus and the granting of the soul. The common opinion among jurists that the soul is breathed into the fetus at the end of the fourth month of pregnancy lacks strong narrative and jurisprudential support (Mohaghegh Damad, 2014, p. 219).

Most narrations supporting ensoulment at 4 months either face issues with the chain of narrators, are reported from Sunni sources or are not sufficiently indicative of the intended meaning. Additionally, the narration referring to a written inquiry to Imam Sadiq (peace be upon him) is considered weak by Allamah Majlisi (Azin, 2021, p. 193). From the sum of narrations, we can conclude that the granting of the soul occurs over a month, from the end of the fourth month to the end of the fifth month of pregnancy. However, the exact time is known only to God Almighty and is not discernible to us (Mohaghegh Damad, 2014, p. 220).

Considering the verses and narrations in narrative and jurisprudential sources, no precise indication for ensoulment has been recorded. Many fetal movements before four months are spontaneous and not due to the infusion of the soul. It seems that obtaining fatwas from grand ayatollahs, reconciling the views of early and later jurists, and seeking assistance from medical professionals could lead us to a certain time for ensoulment. Therefore, at present, determining the time of ensoulment and identifying its signs is not a matter of certainty for judges. There is no consensus among great jurists on this matter, and if the decision regarding ensoulment or its signs in the fetus is left to judges, each judge might consider different signs for ensoulment and rule differently on the permissibility of abortion, leading to inconsistent verdicts.

Conflict between Patient Information Recording and the Principle of Confidentiality

In both clauses 2 and 3 of this law, entering information into the patient's electronic health record and the system mentioned in Article 54 of this law contradicts and conflicts with the principle of confidentiality and protection of the patient's privacy. The Family Protection and Population Growth Law, which aims to increase the population, has adopted methods and approaches to achieve this goal that, in terms of restricting fetal health screening and therapeutic abortion, will result in nothing but loss and ruin. This is because the severe restriction of screening and therapeutic abortion, which is the subject of Articles 53 and 56 of this law, will subject the mental and physical health of families and society to irrational changes and new harms (Akrami et al., 2021, p. 99).

CONCLUSION

Upon reflection on the approach of Article 56 of the Family Protection and Population Growth Law, we find that this article takes a deterrent approach to issues of abortion and non-childbearing. The legislator, by adopting a

¹⁹ عَنْ أَبِي عَبْدِ اللَّهِ (ع): «فِي النُّطْفَةِ عَشْرُونَ دِينَارًا وَ فِي الْعَلَقَةِ أَرْبَعُونَ دِينَارًا وَ فِي الْمَضْغَةِ سِتُّونَ دِينَارًا وَ فِي الْعَظْمِ ثَمَانُونَ دِينَارًا فَإِذَا كَسِيَ اللَّحْمُ فَمَانَةُ دِينَارٍ ثُمَّ هِيَ مَانَةُ دِينَارٍ حَتَّى يَسْتَهْلَ قَالَ فَإِذَا اسْتَهَلَ فَالذِّيَّةُ كَامِلَةٌ» (طوسي، ١٤٠٧ هـ، ج ١٠، ص ٢٨١).

²⁰ عَنْ أَبِي عَبْدِ اللَّهِ (ع) قَالَ فِي الْمُنْفُوسِ: «إِذَا تَحَرَّكَ وَرَثَ إِنَّهُ رَبَّمَا كَانَ أَحْرَسَ» (كليني ١٤٠٧ هـ، ج ٧، ص ١٥٥).

²¹ عَنْ أَبِي جَعْفَرٍ (ع) قَالَ: «إِنَّ اللَّهَ عَزَّ وَجَلَّ إِذَا أَرَادَ أَنْ يَخْلُقَ النُّطْفَةَ الَّتِي مِمَّا أَخَذَ عَلَيْهَا الْمِيثَاقَ فِي صُلْبِ آدَمَ أَوْ مَا يَبْدُو لَهُ فِيهِ... ثُمَّ يَبْعَثُ اللَّهُ مَلَكَينِ خَلِيفَتَيْنِ يَخْلُقَانِ فِي الْأَرْحَامِ مَا يَشَاءُ اللَّهُ... فَيَنْفُخَانِ فِيهَا رُوحَ الْحَيَاةِ وَالْبَقَاءِ وَيَسْتَنَانُ لَهُ السَّمْعَ وَالْبَصَرَ جَمِيعَ الْجَوَارِحِ وَ جَمِيعَ مَا فِي الْبَطْنِ بِإِذْنِ اللَّهِ» (كليني ١٤٠٧ هـ، ج ٦، صص ١٣ و ١٤).

punitive approach in this article, aims to minimize abortion and increase population. However, the deterrent approach must be appropriate to conditions, time, and place. Regarding population growth and childbearing issues, it is also necessary to pay sufficient attention to the conditions of couples, especially the mother. Based on the obtained information, the most important deficiencies and gaps in this article are:

1. One of the conditions mentioned in the Family Protection and Population Growth Law for issuing a therapeutic abortion permit is "establishing the mother's hardship". Meanwhile, we witness a lack of attention to the father's hardship as the child's guardian, while in cases of fetal abnormality, the father's hardship after birth is no less than the mother's. Not only is the father responsible for caring for the abnormal child, but he is also responsible for providing the costs of treatment or care, and this issue should not be overlooked.
2. Through examination of the works of jurists and legal scholars, we found that the time of ensoulment in the fetus is not specified and is a matter that, except for the Divine Essence, is not accessible to humans. Therefore, limiting therapeutic abortion to establishing the absence of ensoulment is unreasonable and practically impossible to determine. Delegating the determination of this issue to judges will result in nothing but conflicting opinions and the possibility of issuing erroneous permits for therapeutic abortion.
3. Given that the Family Protection and Population Growth Law has repealed the single article on therapeutic abortion and has made the process of issuing therapeutic abortion permits more difficult, taking steps to address the legal gaps in the single article on therapeutic abortion and the Family Protection and Population Growth Law could be an effective measure in reducing the number of underground abortions.

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