



## RESEARCH ARTICLE

## Crime Against the Fetus: A Comparative Study in Islamic Law and Sudanese Law

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ARTICLE INFO	ABSTRACT
Received: Jan 14, 2025	This research deals with talking about the topic of felony crime on the fetus, where we defined it, mentioned its types, and its legal judgment, then we talked about the punishment for this crime, and the financial compensation related to it, which is blood money or Ghurrah, in the doctrines of Islamic jurisprudence, and Sudanese law, as felony can be on a human being, while he is in his mother's womb. Based on this, the right of the fetus while it is in its mother's womb has been established, the right to life has been established for it, and penalties have been imposed on anyone who causes its miscarriage, whether the perpetrator is a mother or father or others, and this is evidence of the Islamic Sharia's concern for the fetus, deciding that its right to life does not belong to anyone, even if it is one of its parents. One of the most important conclusions is that It is never permissible to commit a crime against a fetus unless there is an excuse that is considered and recognized by the law. The life of the fetus is proven by all signs of life, such as initiation, suckling, breathing, sneezing, and drinking milk. If the fetus is killed as a result of a felony, its value is one-fifth of a camel, which is the opinion of most scholars The Sudanese Criminal Code adopts the provisions of Islamic law relating to fetal homicide.
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### INTRODUCTION

Praise be to Allah, and may peace and blessings be upon the Messenger of Allah, his family, his companions, and those who follow him. As for what follows:

Islam has given man a great status and utmost importance, as it has honored him and favored him with what no other creature has attained in terms of honor and favor. Allah Almighty created him with His own hands, breathed into him from His spirit, made His angels prostrate to him, and subjected to him whatever is in the heavens and the earth, and made him free of will and choice. In addition to that, He sent to him the messengers and revealed with them the books, and guided him to what would save him in his afterlife and make him happy in this world. He did not leave him to stumble in the valleys of misguidance. Allah Almighty has honored man over all other creatures, and made this honor general for all the children of Adam, and then whoever obeys among them will increase in honor upon honor. Allah the Almighty said: {And We have certainly honored the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what We have created, with [definite] preference.} This dignity that Allah has bestowed upon man over other creatures has different dimensions; it is divine protection for man that includes respect for his mind, freedom, and will, and also includes his right to security for himself, his wealth, and his offspring. In order to ensure divine protection for man, Islamic law has defined five objectives to confirm this protection; namely: preserving life, preserving religion, preserving the mind, preserving wealth, and preserving offspring. These five objectives all aim to protect man whom Allah the Almighty has honored, and they represent the basic rules of human rights. Islamic law has given great attention to the soul, and has legislated rulings that bring benefits to it and ward off harm from it, in order to preserve and protect it and prevent aggression against it. Therefore, aggression against the right to life or the deliberate and aggressive killing of a human soul - in the view of Islam - is a major crime committed not only against the victim, his relatives, or his community, but against all of humanity. Aggression can be against a human being while he is in his

mother's womb, and based on that, the right of the fetus while he is in his mother's womb has been established, so the right to life has been established for him, and penalties have been imposed on anyone who causes his miscarriage, whether the one who caused it is the mother, father, or someone else. This is evidence of the Islamic law's concern for the fetus, establishing that his right to life does not belong to anyone, even if it is one of his parents. This study shows us that it is absolutely not permissible to commit a crime against a fetus unless there is an excuse that is considered by Sharia and approved by the law, and the life of the fetus is proven by everything that indicates life, such as crying, breastfeeding, breathing, sneezing, and drinking milk. Also, if the fetus falls as a result of the crime, it is obligatory to pay a blood money of five camels, and this is the opinion of most scholars, because jurists, doctors, biologists, and embryologists consider the fetus from the beginning of its creation to be a living being and a miniature human being in the smallest form, gradually growing and developing. It is a living being that it is not permissible to attack it, and no father, mother, or anyone else has the authority to attack it.

### **Research Problem**

The current research problem crystallized in answering the following questions:

1. What does crime mean to jurists in general, and what does crime against the fetus mean in particular?
2. What is the reality of crime against the fetus? What are the stages of fetal development and its legal ruling according to jurists?
3. What is the opinion of Islamic Sharia scholars and Sudanese law regarding the stage at which the fetus is considered a stage that deserves compensation or punishment?
4. What is the punishment prescribed by Islamic Sharia scholars and Sudanese law for a crime against the fetus?

Research objectives:

1. Define the crime and the crime against the fetus, and explain the stages of fetal development and its legal ruling according to jurists.
2. Clarify the opinions of Islamic Sharia scholars and Sudanese criminal law regarding a crime against the fetus.
3. Explain the legal assessment of the fetus (punishment), which is called ghara, and how to estimate it.
4. Explain the justice of Islamic Sharia and its ability to accommodate all the different developments in life.

Research topic: The research topic is an important topic to address an important issue related to human life, while in the womb of his mother, which Islam has protected from assault and murder, which is (crime against the fetus), and to clarify the stages of fetal development and its legal ruling according to jurists, and the Sudanese criminal law that applied Islamic law, and this research serves an important segment of society, which is the segment of the fetus in the womb of his mother, whether before or after the soul is breathed into it, and the importance of any topic stems from the extent of the need for it, and there is no doubt that the research topic has become an urgent need for it due to the increase in cases of crime against the fetus, and the reasons for it may be multiple, whether it is to prevent childbirth, or the occurrence of an illegitimate relationship or otherwise.

### **STUDY METHODOLOGY:**

This research followed the descriptive analytical comparative method, by following the opinions of jurists on this, analyzing and comparing them with each other on the one hand, and with the Sudanese Criminal Law of 1991 on the other hand, whether in the objective aspect, as the study included some related jurisprudential and legal comparisons.

### **Study Limits:**

The study limits the crime against the fetus by reviewing the opinions of jurists of Islamic schools of thought and the Sudanese Criminal Law of 1991, with comparison when necessary and preferring the opinion that I see as appropriate.

### **Previous Studies:**

**First Study:** The Ruling on the Crime against the Fetus (Abortion): A Comparative Jurisprudential Study  
Source: Islamic Research Journal  
Source: Islamic Research Journal: Issue 63, 2001  
Publisher: General Presidency of Scientific Research and Ifta  
Author: Al-Ajlan, Abdullah bin Abdul Aziz.

**The second study:** The right of the fetus to life in Islamic law  
Source: Journal of Law and Sharia  
Publisher: Kuwait University - Faculty of Law and Sharia  
Volume/Issue: Vol. 3, No. 3, Year 1978  
Main author: Al-Shazly, Hassan Ali.

**The third study:** The provisions related to the abortion of a deformed fetus in Islamic jurisprudence: A study of its application to conjoined twins: Journal of the Faculty of Sharia and Law, Tanta; Al-Azhar University, Issue No. 37, Vol. 3, Year 2022: Al-Aqila, Ghada bint Muhammad bin Ali.

**Research plan:** The plan of this research can be detailed in an introduction, three chapters, and a conclusion that includes the most important results and recommendations, an index of sources and references, and an index of topics:

**The first chapter:** - Definition of the crime and the fetus and the stages of its development:

**The second chapter:** The place of the crime against the fetus: -

**The third chapter:** The penalties prescribed for the crime against the fetus in Islamic jurisprudence and Sudanese law.

**Section One:** - Definition of crime, fetus and stages of its development:

In this section, we define crime and fetus in general in the Arabic language, and in the jurisprudential terminology, and by that I mean the jurists of Islamic law, exposing the definitions of the different schools of jurisprudence, preferring the definition that I see as the comprehensive definition that excludes the meaning of crime and fetus, then I review the texts of the Sudanese Criminal Law of 1991 AD that stipulated the definition of crime and fetus. Are they identical to the definitions of Muslim jurists, then their definition in positive jurisprudence. Also, I mentioned the stages of fetal development, i.e. the stages of the fetus in the womb.

In light of that, I divided this section into two requirements, where the division came as follows: -

Requirement One: Definition of crime.

Requirement Two: Definition of fetus and stages of its development.

I will detail this as follows: -

**First requirement: Definition of crime: -**

First: Definition of crime in the language

Second: Definition of crime in the jurisprudential terminology

Third: Definition of crime in the Sudanese criminal law

**First: Definition of crime in the language: -**

Criminal: (From (Jana) the sin upon him, he reaps it, a crime that dragged him to it, and the fruit he picked like he picked it and he is a jinn (plural) he picked it and jinna and jinnaun and jinnaun rare and he picked it for him and he picked it for him, and everything that is picked and it is a jinna and jinnat and jinnat and jinnat gold and jinnat ... (He sinned, and it is said that he committed a sin against himself, and committed a sin against his people, and he committed the sin against someone: he dragged him to him, and he picked the fruit and the like, he picked it from its source. And it is said that he picked the fruit for someone, and he picked the fruit for someone, and its plural is (Janat and Jannaa). And from this is the saying of God Almighty: (Reclining on couches whose linings are of brocade, and the fruits of the two gardens are close at hand). And the saying of God Almighty: (And shake toward you the trunk of the palm tree, it will drop upon you fresh, ripe dates). Picking the fruit:

from the root of rama, and (ajtanaha means to pick, and (jana) upon him, he picks (janaya), and (al-tajani) is like tajrim, which is to accuse him of a sin that he did not commit). Someone committed a crime against himself if he committed a crime, he commits a crime against his people, and someone committed a sin against someone, if he attributes it to him while he is innocent, (and he committed a crime against him and he accused him of a crime, and the accusation is like the accusation, which is to accuse you of a sin that you did not commit). And the crime (the source of the criminal who commits a crime against himself and his people, and the criminal is the criminal and the criminal: (the guilty) according to the saying of the Almighty (and let not the hatred of a people prevent you).

### **Second: Definition of crime in the terminology of jurisprudence: -**

Criminal crime in Islamic law (has a general meaning and a specific meaning because crime is originally of two types: crime against animals and inanimate objects and crime against humans). The first general meaning is: (A name for an act forbidden by Islamic law, whether it is against money or a person). It is also defined as follows: - (It is every prohibited act that includes harm to the self or others). Al-Mawardi called it: Crimes and defined it as follows: - (Crimes are legal prohibitions that Allah has forbidden with a prescribed punishment or discretionary punishment, and the prohibited is either doing something forbidden or leaving something commanded).

The second specific meaning is: (The term crime is applied to the assault on the person or his organs, which is killing, wounding and beating). It is the crime committed against a human being.

The jurists' discussions of it differ, as most of them discuss it under the title of crimes, influenced by what they have come to know of calling these acts a crime, and some discuss it under the title of blood, looking at the result of the act where the blood is, and some talk about it under the title of wounds, looking at the fact that wounds are the most common methods of killing and assaulting the soul and limbs.

**The Hanafis:** talked about killing and its types and assaulting limbs under the title of crimes and defined a crime as: (a name for a forbidden act that is permissible with money or a soul, and the jurists specified usurpation and theft as what is permissible with money and a crime as what is permissible with a soul and limbs).

As for the Malikis, they mentioned the rulings on assaulting the soul and limbs under the title of blood and defined a crime.

As: (it is the act of the offender that requires retaliation).

As for the Shafi'is: they have collected the issues of murder and assault on anything less than the human soul under the title of the Book of Wounds and defined them as follows: (Wounds with a broken jim is the plural of surgery and it is either a soul-killer or a limb-distorting agent. Since surgery sometimes takes the soul either directly or by spreading, and sometimes it disturbs the limb, and sometimes it does nothing, it was collected due to the difference in its types, so the classification by felonies was more appropriate because it includes the felony of wounding such as killing with a heavy object).

As for the Hanbalis, they also included them under the title of the Book of Wounds and defined them as follows: - (Every act of aggression against a person or property, but in custom it is specific to what occurs in the assault on bodies).

In the Zahiri school, they chose a title for the issues of murder and assault on anything less than the soul, which is: (The Book of Blood, Retribution, and Blood Money). In doing so, they followed the Maliki school in mentioning what requires retribution or blood money under one title, which is the Book of Blood, and there was no definition of the felony in it.

As for the Imami Shiites, they mentioned the crime under the title of retaliation: (Retaliation is used in the same way as the crime, and is specific to killing, amputation, beating, or wounding).

As for the Zaidi Shiites, they have mentioned it under the title of blood money and have not provided a definition for it.

As for the Ibadis, they have explained the issues of murder and assault on anything less than the soul in (The Book of Blood and the Book of Blood Money).

The definition chosen by us is the definition of the Hanafis, which is that the crime is the name for a forbidden act that is committed against money or a soul, and the jurists have specified usurpation and theft as what is committed against money and the crime as what is committed against the soul and limbs. This is because this definition is a comprehensive and exclusive definition as it includes every forbidden act that is committed against a person's soul, limbs or money, and its discussion under the title of crimes is also correct for us because the crime in language is the sin and crime to match the linguistic meaning with the technical meaning.

### **Third: Definition of the crime in the Sudanese Criminal Law: -**

The meaning of the crime according to the definitions provided by the jurists, we find that it agrees with the meaning of the crime in the Sudanese Criminal Law of 1991 AD as well as the penal codes that preceded it.

The definition of crime in Article (3) of the Sudanese Penal Code of 1991 is as follows (it includes any act punishable under the provisions of this law or any other law) and it was not defined in the repealed 1983 law, as the legislator in Article (29) of the Penal Code of 1983 was satisfied with the following word crime (it includes a crime under any applicable law unless the text indicates otherwise). This corresponds to Articles (29) of the Penal Code of 1974, (29) of the Penal Code of 1925, and (28) of the Penal Code of the old law of 1899.

### **Few positive laws define crime.**

As for positive jurisprudence, there are multiple definitions. Many commentators have defined crime as follows: (it is an act for which the law imposes a punishment). Another opinion defines crime with its elements as follows: (a crime is an unlawful act issued by a criminal will for which the law prescribes a punishment or precautionary measure). The Sudanese law has defined forms of crimes that, according to jurists, fall under the meaning of felony. For example, we find that the term (harm) falls under this, which Article (3) defines as follows: The word harm means (any harm that occurs in violation of the law that affects a person in his body, mental or psychological health, or in his honor, money, or reputation.) It corresponds to Article (31) of the 1983 Law, Article (31) of the 1974 Law, Article (31) of the 1925 Law, and Article (30) of the 1899 Law. The expression (serious harm) falls under this, as defined by the Sudanese Criminal Law of 1991 in Article (3) as follows (means wounds as defined in this law, with the exception of wounds and cuts to the skin).

The law also defined wounds in Article (138), Paragraph (1) as follows: (Whoever causes a person to lose a limb in his body or to lose the function of the mind, sense or limb, or wounds or cuts in his body, shall have caused him a wound). There is no equivalent for these two articles in the previous laws with the same words, but the definition of harm and wounds was mentioned in Articles (271), (272), (273), (274) and (275) of the Penal Code of 1983, and the laws previous to the 1983 law did not address the definition of wounds.

The expression harm also falls under this, as defined by Article (142), Paragraph (1) as follows: (Whoever causes a person to commit the crime of harm shall be deemed to have committed the crime of harm. (pain or illness) which corresponds to Article (271) of the Penal Code of 1983, Article (271) of the Law of 1974, (271) of the Penal Code of 1925, and (246) of the Penal Code of 1899.

The Sudanese Penal Code of 1991 differentiated between the expression of serious harm and harm, as it limited the latter to causing pain and illness, and intended by the former all crimes committed against anything less than the soul, such as cutting off limbs or removing their meanings, or wounds or injuries according to the expression of the jurists, as it mentioned this under the title of wounds according to the Shafi'i and Hanbali discussion of this.

We note that the definition of wounds in Article (138), Paragraph (1), included wounds and injuries, and the law excluded them in Article (3) when it defined serious harm, which means wounds.

In my opinion, this is a clear error that the legislator must correct.

The second requirement: Definition of the fetus and its stages of development:

First: Definition of the fetus

### **Definition of the fetus: -**

The fetus is known in the language: It is the child in the womb, and the plural is ajnan and ajnan, and it is derived from jinn, meaning to hide, and it is called a fetus because it is hidden in its mother's womb, and the human fetus is the creature that is formed in the womb of the woman as a result of the fertilization of her egg with the sperm contained in the man's water, and the name fetus is given to this creature as long as it is in its mother's womb, to achieve its concealment in it, so it includes all its stages from the time of its formation until the time of its birth.

The fetus is the name of the child as long as it is in its mother's womb, taken from ijtanah, which means concealment, and from it the fetus was named that).

It is also the child in the womb, and the plural is ajnanah and ajnunu. The fetus is everything that is covered, and the jinn in the womb is jinn, which means it is covered, and the pregnant woman covered it. The fetus is the substance that is formed in the womb from the two elements of the sperm and the egg. This is what supports the meaning of the word "fetus," as it refers to the concealment that is achieved by this meaning, and from it the madman is called because his mind is concealed, and the jinn is called because he is concealed from the eyes of people. The fetus in the original language is: the one who is concealed in his mother's womb between three layers of darkness. Allah the Almighty said: {He creates you in the wombs of your mothers, creation after creation, within three darkneses.} Definition of the fetus in terminology: Definition of the fetus in terminology of jurisprudence, as Muslim jurists use the word fetus in the same way it is used in the language, except that some of them restricted it to the pregnancy from which something of the creation of the human being is evident, and did not apply it to anything less than that, and it does not deviate from the linguistic meaning. However, Al-Muzani, one of the Shafi'i jurists, quoted Imam Al-Shafi'i as saying: The real use of the fetus is after the embryo stage, and its use before that is a metaphor. His statement: Al-Shafi'i said about the fetus: The least that can be considered a fetus is that it leaves the lump of flesh and the clot until some of its human nature becomes distinct. "

The definition of the fetus in the Sudanese Criminal Law of 1991 did not include a definition of this term (the fetus or the crime against the fetus), but rather defined this type of crime as abortion, in Article (135) Paragraph (1) thereof, where it defined it as follows: (The perpetrator of the crime of abortion is considered to be the one who intentionally causes the miscarriage of a woman's fetus), and it was also defined in Article (136) as follows: (Whoever commits an act that leads to the miscarriage of a pregnant woman while knowing that she is pregnant...) and the law also defined it in Article (137) Paragraph (1) as follows (Whoever commits an act that leads to the death of the fetus in its mother's womb or leads to its being born dead or to its death after birth, without the act being necessary to save the mother's life or protect her from serious harm...). It is clear that the Sudanese legislator was influenced by positive laws in the definition contained in Article (135) Paragraph (1). It was also influenced by Islamic law in the definition contained in Article (137) Paragraph (1). Some doctors use the term fetus to refer to the child in the womb of its mother when the human character appears in it with the formation of the known human organs, and this is between the third month of pregnancy and the time of birth, and some of them limit it to the child in the womb of its mother when its structure is complete, and it could live if it came out of its mother's womb alive, and this is in the period between the beginning of the seventh month and the time of birth. As for embryologists, the term fetus is used to refer to the period between the implantation of the fertilized egg in the wall of the uterus and the end of the eighth week, then they call it "pregnant" after that until it is born. Second:

### **The stages of the fetus in the womb:**

The fetus has stages that are mentioned in the text of the Almighty's saying: {And We have certainly created man from an extract of clay. Then We placed him as a sperm-drop in a firm lodging. Then We made the sperm-drop into a clinging clot, then We made the clot into a lump of flesh, then We made the lump of flesh into bones, then We covered the bones with flesh, then We developed him into another creation. So blessed be Allah, the best of creators.} The origin of the human fetus is from clay, as indicated by the aforementioned verse. Each stage of the fetus has a legal ruling related to it. The following is a statement of the stages of the fetus:

#### **A - The sperm:**

The sperm in the language means; a little water, or pure water, little or much, and the sperm in the terminology; the man's water, which is semen, and it was also said the woman's water, and the sperm is the gametes; It is the man's water and the woman's water when they come together, and it is the fertilized sperm and is known as the fertilized egg, and it is the connection of the male sperm, i.e. the sperm, with the female sperm, i.e. the egg, and its fertilization, and this process is called fertilization. God Almighty said: (Indeed, We created man from a sperm-drop mixture that We may try him) Some interpreters have said that the sperm is the man's water alone, because God Almighty has made it clear that He created man from {spurting water} and the flow only comes from the man, as is apparent. It was said that it is a drop of semen from the man and woman, and its plural is "nutaf". It contains all the powers, and this is what the majority of scholars and commentators agree upon, and it is clear from the saying of the Messenger, may God bless him and grant him peace, in what was narrated from him: If the man's semen precedes the woman's semen, the child will be born, and if the woman's semen precedes, she will be born. It is clear from the wording of the hadith that the fetus is formed from the sperm mixed from the man's semen and the woman's semen. There are rulings related to semen in terms of purity and impurity. The Hanafis and Malikis, and it is a narration from Ahmad - contrary to the well-known opinion - are of the view that it is impure, and there is no difference in impurity between the semen of a man and the semen of a woman. The Shafi'is are of the view, and it is the well-known opinion from Ahmad, that it is pure. Those who say that it is absolutely impure also consider it necessary to wash the woman's semen, whether it is wet or dry. Those who say that it is pure consider it recommended to wash the wet semen and to rub the man's semen. Thus you see that purity or impurity does not differ between what comes out of a man and what comes out of a woman. It was narrated from Ahmad that rubbing occurs only in the semen of a man and not in the semen of a woman because it is thin. Its details are in the term: (Purity and Impurity). B - The Alaqah:

It is the stage after the sperm attaches to the wall of the uterus. God Almighty said: (Then We created the sperm into a clot), and the Alaqah means the thick, solid blood due to its attachment to each other, and it continues from after the first week until the end of the third week, during which the Alaqah grows until the length of the embryonic plate becomes two and a half millimeters, then this Alaqah becomes a lump of flesh.

Many of the commentators interpret the Alaqah as a solid drop of blood, and this is based on what was mentioned in some of its linguistic interpretations, and the Alaqah in this stage enters into A different stage, and therefore it deserved to be described as creation in His saying, Glory be to Him, the Most High: {He created man from a clot}.

### **C- The morsel:**

A lump of flesh is the amount that is chewed, and what is meant here is a piece of meat the amount that is chewed. Imam Al-Razi says when interpreting the words of Allah the Most High: {Then We created the clot into a lump of flesh}. He called the transformation of the clot into a lump of flesh creation; Because He, glory be to Him, destroys some of its accidents and creates other accidents, so He called the creation of accidents a creation of them, as if He, glory be to Him, creates in them additional parts. D- Bones: God Almighty said: (So We created the lump of flesh into bones), in this stage the lump of flesh, which is a piece of flesh, turns into a skeleton in the seventh week specifically to be in the form of a human being. God Almighty said: (So We created the lump of flesh into bones and covered the bones with flesh), so this verse indicates that the bones are formed in the beginning; Then Allah Almighty covers it with muscles and flesh, and this stage remains until the end of the second month (the eighth week), and after that the formation and development of the fetus begins, and the embryo stage ends according to what scientists describe. .

E- Breathing the soul into the fetus Breathing the soul is the final stage of the stages of human creation, and Allah - the Almighty - has explained the difference between this stage and the previous stages; as He - the Almighty - said: (Then We produced him as another creation. So blessed be Allah, the best of creators). The secret of the difference in this stage is that the life of the fetus begins at this stage, the fetus transforms from a piece of solid blood into a living being that feels and is affected. Scientists have said that the soul is breathed into the fetus on the forty-second day, or after the one hundred and twenty day.

Second Topic: The location of the crime against the fetus and the conditions for its establishment: -

In light of that, I divided this topic into two requirements, where the division came as follows: -

First requirement: The location of the crime against the fetus.

Second requirement: - Conditions for the establishment of the crime.

The first requirement: The place of the crime against the fetus: -

The crime against the fetus or the crime against what is a soul in one respect but not in another, which is the expression of the Hanafis, and they mean by it: (The crime against the fetus in its mother's womb, because the fetus in its mother's womb is considered a soul in one respect because it is human, and it is entitled to the right of inheritance, lineage, and will...etc. and it is not considered as such because it has not been separated from its mother). The rest of the jurists express this crime: (The crime against the fetus, and the fetus is the name of the child as long as it is in its mother's womb, taken from the word "ijtanān" which means concealment, and from it the fetus was named that).

The place of this crime according to all jurists is the criminal act committed against a pregnant woman that results in the separation of the fetus from her womb or everything that leads to the separation of the fetus from its mother. This crime occurs (by striking the abdomen of a pregnant woman, or striking her back, or her side, or her head, or one of her limbs). And also (by word such as threatening and intimidating that leads to miscarriage, or by action such as beating and drinking medicine that causes the miscarriage, or by omission such as preventing her from eating and drinking until she miscarries, or fasting even in Ramadan until she miscarries) The jurists differed on the stage at which the fetus is considered a stage for which he deserves financial compensation. The Malikis went to: (that everything that she expelled from a lump of flesh or a clot that is known to be a boy). The Hanafis stipulated (that some of its characteristics are clear such as a fingernail and hair, and if it is not clear then there is nothing wrong with it because it is not a fetus but rather a lump of flesh). The Shafi'is said (whether it is complete or missing limbs, even if it is flesh).

The Hanbalis said: (If she miscarried something that did not have a human form, then there is nothing wrong with it because we do not know that it is a fetus. If she miscarried a lump of flesh and trustworthy midwives testified that it had a hidden form, then there is a fine. If she testified that it was the beginning of human creation, if it remained a form, then there are two views: - The most correct: There is nothing wrong with it because it was not conceived, so it is not required in it like a clot, and because the original principle is innocence, so we do not occupy it with doubt. The second: There is a fine because it is the beginning of human creation, similar to if it was conceived, and this is nullified by the sperm and the clot). The Zahiris: They distinguished between the breathing of the soul and its absence, and they said: (If the soul was not breathed into it, then the fine is on her. If the soul was breathed into it, and she did not intend to kill him, then the fine is also on her family, and the expiation is on her. If she intended to kill him, then the retaliation is on her). Likewise, the Imami Shiites: They differentiated between the entry of the soul and its non-entry, and they said: (If the fetus belongs to a free Muslim, its blood money is one hundred dinars if its creation is complete and the soul has not entered it, whether it is male, female, or hermaphrodite. If it has entered it, the full blood money is one thousand dinars if it is male, or five hundred if it is female with certainty of life).

The Zaidi Shiites: They said: (If it comes out dead and it is known that the soul has been breathed into it, then the offender must pay the blood money).

I think that in this era, after medical methods have advanced, if it is medically possible to ascertain the existence of the fetus and its death due to the offender, then the punishment must be imposed on the offender.

**The second requirement:** - Conditions for the crime to be committed: -

The jurists stipulate that for this crime to be committed, the fetus must be separated from its mother. So whoever strikes a woman on her stomach or gives her medicine that removes the swelling in her stomach or silences a movement she felt in her stomach is not considered to have committed a crime against the fetus, because the ruling on the child is not established except by its exit, because the movement may be due to wind in the stomach that has subsided, so there is doubt about the presence or death of the fetus, and punishment is not required based on doubt. This is the opinion of the four jurists and its basis is the lack of certainty about the presence or death of the fetus.



I see that after the development of medicine in this era, it is possible to know the presence or death of the fetus, and decide the punishment based on that.

The life of the fetus is established by everything that indicates life from the first signs, breastfeeding, breathing, sneezing, and drinking milk.

(And the obligation in the case of a fetus that is aborted as a result of a crime is a blood money of five camels. This is the opinion of most scholars, including Umar ibn al-Khattab, Ata', al-Sha'bi, al-Nakha'i, al-Zuhri, Malik, al-Thawri, al-Shafi'i, Ishaq, Abu Thawr, and the people of opinion). It was narrated on the authority of Umar - may Allah be pleased with him - that he consulted the people about the miscarriage of a woman. Al-Mughirah ibn Shu'bah said: I witnessed the Prophet - may Allah's prayers and peace be upon him - rule that the blood money should be a male or female slave. He said: Bring someone to testify with you, so Muhammad ibn Maslamah testified for him. And on the authority of Abu Hurayrah - may Allah be pleased with him - he said: Two women from Hudhayl fought, and one of them threw a stone at the other, killing her and what was in her womb. They brought their dispute to the Messenger of Allah - may Allah's prayers and peace be upon him - and the Messenger of Allah - may Allah's prayers and peace be upon him - ruled (that the blood money for her fetus is the blood money of a male or female slave. He ruled that the blood money for the woman should be paid by her kin, and her children and those with them should inherit her). There is no difference whether the fetus is male or female, because the Sunnah does not differentiate between them.

### **Section Three: -**

Penalties prescribed for fetal abuse in Islamic jurisprudence and Sudanese law: -

In light of this, I divided this section into two sections, where the division came as follows: -

Section One: - Penalties prescribed for fetal abuse in Islamic jurisprudence.

Section Two: - Penalties prescribed for fetal abuse in Sudanese law.

Section One: - Penalties prescribed for fetal abuse in Islamic jurisprudence:

The results of the perpetrator's action in this crime do not go beyond five cases: -

First case: - That the fetus is separated from its mother dead.

Second case: - That the fetus is separated from its mother alive and then dies due to the action.

Third case: - That the fetus is separated from its mother alive and then lives or dies due to another cause other than the action.

Fourth case: - That the fetus is not separated from its mother or is separated after her death.

Fifth case: - That the action results in harming the mother or causing her injuries that she recovers from or leads to her death.

The penalties prescribed for the crime against the fetus vary according to these results, as follows: -

**1/ The penalties in the first case:** - It is the blood money of the fetus (the blood money for a male or female fetus, intentionally or by mistake, is the blood money of a slave or his mother, the value of which is five camels, i.e. half a tenth of the blood money or its equivalent, which is fifty dinars or five hundred dirhams according to the Hanafis and Zaidi Shiites). Or (six hundred dirhams according to the majority). Contrary to the evaluation of the dinar by the dirham. The evidence for that is (the hadiths that were mentioned).

The Zahiris deviated, as they see: (Evaluating the blood money by the dirham and the dinar is a mistake that is not permissible, because it is not required by the Qur'an, Sunnah, or consensus).

Likewise, the Zaidi Shiites say: (It is not permissible to give dirhams, except after the slave and the female slave are not available).

From these sayings, and in our present time, it is necessary to take what is equivalent to the value of the ghara, which is half a tenth of the full blood money for a man if the fetus is male, and if the fetus is female, the ghara is half a tenth of the full blood money for a woman and is estimated at the value of five camels for its availability.

The ghara is obligatory if the crime was intentional, and this is what is imagined by the Malikis (so it is aggravated and immediate from the cash, so the use of cash in solutions and the cash, and it is from the offender's money, unless it reaches a third of his blood money, then it is on the aqila) because the intentional person may intentionally cause the fetus to miscarry, and therefore he takes the rulings of intentional.

As for (in the case of error or quasi-intentional, and this is what is imagined by the majority, then the aqila bears the blood money and the offender is one of the aqila) according to the majority, based on the hadith of the Messenger - may God bless him and grant him peace - in the hadith of the two fighting women from Hudhayl mentioned above, and because beating is considered a type of mistake, so it is obligatory on the aqila.

**2/ The punishment in the second case:** - It is retaliation according to those who see it as intentional, and they are the Malikis, and they say: (If the act leads to death, usually, such as hitting the stomach or back). Or the full blood money according to those who see it otherwise, as well as the blood money by agreement in the event that the crime was a mistake.

The difference between the blood money for intentional, quasi-intentional and accidental killing is not in the number of camels, but in their characteristics, or it is the difference between severity and mitigation. Also, the blood money for intentional killing is from the offender's money and is always his condition, while the blood money for quasi-intentional and accidental killing is not a condition and is borne by the aqila alone or with the offender according to the different opinions.

The full blood money for the fetus differs according to the type of fetus. The blood money for a male is the blood money for a man, and the blood money for a female is the blood money for a woman. Also, the blood money varies according to the number of fetuses.

**3/ Punishment in the third case:** - It is discretionary punishment

**4/ Punishment in the fourth case:** - It is also discretionary punishment.

**5/ Punishment in the fifth case:** - In this case, the perpetrator is punished with the punishment for the actions he committed regardless of the punishments prescribed for the fetus crime.

**The second requirement:** - The penalties stipulated for the crime of fetus in Sudanese law:

The provisions of the crime of fetus in the Sudanese Criminal Law of 1991 were mentioned in Article (135) Paragraph (1) thereof, which defined it as follows: (The perpetrator of the crime of abortion is considered to be the one who intentionally causes the miscarriage of a woman's fetus, unless the miscarriage occurs in any of the following cases: -

A/ If the miscarriage is necessary to preserve the life of the mother.

B/ If the pregnancy is the result of a rape crime and has not reached ninety days and the woman desires the miscarriage.

C/ If it is proven that the fetus was dead in its mother's womb. It was also defined in Article (136) as follows: (Whoever commits an act that leads to the miscarriage of a pregnant woman while knowing that she is pregnant...) The law also defined it in Article (137) Paragraph (1) as follows (Whoever commits an act that leads to the death of the fetus in its mother's womb or leads to its being born dead or to its death after birth, without the act being necessary to save the life of the mother or Protecting it from serious harm...).

Although the crime against the fetus in Islamic law is identical to the crime of abortion in positive laws, in my opinion there was no reason for the two texts to be included in Article (135) Paragraph (1) and (137) Paragraph (1), as it would have been sufficient to define Article (137) Paragraph (1) only. It is clear that the Sudanese legislator was influenced by positive laws in the definition contained in Article (135) Paragraph (1). It was also influenced by Islamic law in the definition contained in Article (137) Paragraph (1).

The punishment in the law was different as a result of the confusion between the definitions of this crime in Sharia and law, as the law included the two definitions even though they are one crime, so the legislator had to be satisfied with one comprehensive and exclusive definition of this crime or felony.

The Sudanese law decided the punishment for this crime in the articles in which it was defined, which were as follows: - Article (135) Paragraph (2) states (Whoever commits the crime of abortion shall be punished with imprisonment for a period not exceeding three years or with a fine or with both penalties, without prejudice to the right to blood money), and Article (136) states (Whoever commits an act that leads to the abortion of a pregnant woman, knowing that she is pregnant, shall be punished with imprisonment for a period not exceeding one year or with a fine or with both penalties, without prejudice to the right to blood money), and Article (137) Paragraph (2) states (Whoever is punished with imprisonment for a period not exceeding two years or with a fine or with both penalties, without prejudice to the right to blood money). Conclusion

With the help and guidance of Allah, I have finished what I wanted to explain and detail in this research, and it remains for me to conclude it with the most important results and recommendations that I reached through the study: -

#### **First: The most important results:**

1. Crime is the name of a forbidden act that is permissible with money or a soul, because it is a comprehensive and exclusive definition, and it is the definition of the Hanafis.
2. Crime against the fetus is absolutely not permissible unless there is an excuse that is considered by the Sharia and approved by the law.
3. The duty in the crime against (the fetus) is a blood money and its value is estimated at five camels for the male or female.
4. It became clear to me that there is a discrepancy in the punishment for this crime in the law, and this is attributed to the confusion between the definitions of this crime in the Sharia and the law.

Second: The most important recommendations:

1. That the terms mentioned in Sudanese law and all Islamic countries be defined according to the definition of Muslim jurists of the four schools of thought.
2. That the laws and regulations in Islamic countries take into account the agreed upon punishment for this crime, which is a fine, the value of which is estimated at five camels for a male or female.
3. Unifying the definition of fetal murder in Sudanese criminal law according to Islamic law.
4. Using medical means to prove the existence of the fetus and its death by the perpetrator.

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## MARGINALIZATION

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. سورة المائدة: الآية (8).1

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974م، أقضي قضاة عصره من العلماء المؤلفين أصحاب التصانيف - . الماوردي: (هو علي بن محمد بن حبيب أبو الحسن الماوردي، ولد في البصرة عام 364هـ 1

الكثيرة النافعة انتقل إلى بغداد، جعل اقضى القضاة في عهد القائم بأمر الله العباس، له تصانيف في الاصول والفقه والحديث والتفسير والسياسة توفي عام

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- . بدائع الصنائع: مرجع سابق، ج 7 ص (325). 1
- . حاشية الدسوقي: مرجع سابق، ج 4 ص (268)، حاشية رد المختار: مرجع سابق، ج 6 ص (626). 1
- . القاموس المحيط: مرجع سابق، ج 4 ص (360). 1
- . حاشية رد المختار: مرجع سابق، ج 6 ص (636). 1
- . حاشية الباجوري: مرجع سابق، ج 2 ص (222). 1
- . بداية المجتهد ونهاية المقتصد: مرجع سابق ج 2 ص (657). 1



1. بدائع الصنائع: مرجع سابق، ج 7 ص (325).
1. حاشية الباجوري: مرجع سابق، ج 2 ص (222).
1. الغرة: (أصلها البياض في وجه الفرس والمقصود بما دية الجنين في بطن أمه وهي عبدٌ أو وليدةٌ وبدلها نصف عشر الدية).
1. بدائع الصنائع: مرجع سابق، ج 7 ص (325).
1. الخلى: مرجع سابق، ج 11 ص (31).
1. سلسلة الينايع الفقهية: مرجع سابق مجلد 25 ج 2 ص (621).
1. القاضي العلامة احمد بن قاسم العنسي اليماني الصنعاني: التاج المذهب لأحكام المذهب، شرح متن الأزهار في فقه الأئمة الأطهار، ط2، مصر (دار إحياء الكتب العربية، عيسى البابي الحلبي وشركاه)، عام 1380هـ-1961م، ج4 ص 298.
1. المغنى والشرح الكبير: مرجع سابق ج 9 ص (538). بداية المجتهد ونهاية المقتصد: مرجع سابق ج 2 ص (656). حاشية ابنعابدين: مرجع سابق ج 6 ص 1 (628).
1. عطاء: (هو أبو محمد عطاء بن أبي رباح مفي اهل مكة ومحدثهم (ت 114هـ) أنظر: الأعلام للزركلي ج 5 ص 29.
1. الشعبي: (هو عامر بن شراحيل الشعبي أبو عمر ثقة فقيه فاضل مات بعد المائة) أنظر: الأعلام للزركلي ج 5 ص 69.
1. النخعي: (هو حفص بن غياث بن طلق بن معاوية النخعي الأسدي الكوفي أبو عمر قاضي من أهل الكوفة صاحب الإمام أبو حنيفة (ت 194) انظر: الأعلام للزركلي، ج 2 ص 291-292.
1. الزهري: (هو أبو بكر محمد بن مسلم بن عبيد الله بن عبد الله بن شهاب الزهري حدث عن ابن عمر وانس بن مالك (ت 124هـ) أنظر: تهذيب التهذيب ج 9 ص 445-451.
1. الثوري: (هو سفيان بن سعيد الثوري، يدعي أمير المؤمنين في الحديث توفي في البصرة 161هـ) الأعلام للزركلي ج 3 ص 158.
1. إسحاق: (هو إسحاق بن إبراهيم بن مخلد أبو يعقوب بن رآهويه عالم خراساني أخذ عن احمد والبخاري ومسلم) أنظر: تهذيب التهذيب ج 1 ص 216.
1. أبو ثور: (هو إبراهيم بن خالد البغدادي الفقيه صاحب الشافعي (ت 240هـ) أنظر: الأعلام للزركلي، ج 1 ص 30. تهذيب التهذيب: مرجع سابق، ج 1 ص 188.
1. المغنى والشرح الكبير: مرجع سابق، ج 9 ص (536).
1. إئلاص: (إئلاص المرأة بكسر الهمزة وسكون الميم، أي الجنين الساقط سمي بذلك لنزوله قبل مواعده).
1. المغيرة: (هو المغيرة بن شعبة بن أبي عامر بن مسعود الثقفي أبو عبد الله أحد دهاة العرب وقادتهم وولاتهم صحابي أسلم عام 5هـ شهد الحديبية واليمامة وفتح الشام، 670م) انظر: الأعلام للزركلي ج 7 ص 277- روى 136 حديثا توفي عام 50هـ.
1. و 46 باب الكهانة ج 10 ص 216 حديث رقم (5758) ورواه مسلم في باب القسامة ج 3 ص 1309 حديث رقم (1681).
1. محمد بن مسلمة: (هو محمد بن مسلمة الأوسي الانصاري الحارثي أبو عبد الرحمن صحابي من الأمراء من أهل المدينة شهد بدرًا وما بعدها (ت 43هـ-663م) انظر: 1: الأعلام للزركلي، ج 7 ص 97.
1. رواه البخاري 87 كتاب الديات 25 باب جنين المرأة ج 12 ص 247 حديث رقم (6905). ورواه مسلم في باب القسامة ج 3 ص 1311 حديث رقم 1 (1689).
1. رواه البخاري 76 كتاب الطب .
1. حاشية رد المختار: مرجع سابق ج 6 ص (627). بدائع الصنائع: مرجع سابق، ج 7 ص (325). التاج المذهب: مرجع سابق ج 4 ص 299.
1. المغنى والشرح الكبير: مرجع سابق، ج 9 ص (535). بدائع الصنائع: مرجع سابق، ج 7 ص (325).
1. حديث أبو هريرة وحديث عمر رضى الله عنهما عن المغيرة بن شعبة.
1. الخلى: مرجع سابق، ج 11 ص (36).
1. التاج المذهب: مرجع سابق، ج 4 ص 299.
1. حاشية الدسوقي: مرجع سابق، ج 4 ص (268).
1. بدائع الصنائع: مرجع سابق، ج 7 ص (325). حاشية رد المختار: مرجع سابق، ج 6 ص (627).
1. حاشية الدسوقي: مرجع سابق، ج 4 ص (369).

