



MACROJOURNALS

# The Journal of **MacroTrends** in **Social Science**

## **Abortion (Iskat-ı Cenin) Law in Ottoman Empire**

**Süleyman Emre Zorlu**

Selçuk University, Konya, TURKEY

### **Abstract**

*It is beneficial to give some foreinformation about Ottoman Judicial System before covering law enforcement about abortion and precautions to prevent abortion during the Ottoman Empire era. In Ottoman Empire, Islamic Law is applied. Ottoman Law is based on religious rules, in other words, Koran, Sunnah, ijma and qiyas and also consists of sharia laws which were made within rules in fiqh procedures by interpreters of fiqh books, and customary law made by sovereign based upon human reason. Customary Law cannot be against Islamic Law.*

Keywords: *Abortion Law, Ottoman Empire*

### **Introduction**

It is beneficial to give some foreinformation about Ottoman Judicial System before covering law enforcement about abortion and precautions to prevent abortion during the Ottoman Empire era.

In Ottoman Empire, Islamic Law is applied. Ottoman Law is based on religious rules, in other words, Koran, Sunnah, ijma and qiyas and also consists of sharia laws which were made within rules in fiqh procedures by interpreters of fiqh books, and customary law made by sovereign based upon human reason. Customary Law cannot be against Islamic Law<sup>1</sup>.

Termination of pregnancy is elemination of embryo which has started to form in the womb with a medical intervention<sup>2</sup>. Concept of deliberate termination of pregnancy corresponds "Iskat-ı cenin (abortion)" for both Ottoman Empire and *fiqh* literatüre. Women who

---

<sup>1</sup> Customary Law was not propounded to abolish some parts of Sharia Law's provisions. On the contrary it made some arrangements related to free positions; Schact, Joseph, *İslam Hukukuna Giriş*, Translate: M. Dağ/A. Şener), Ankara, 1986, p. 99; AVCI, *Türk Hukuk Tarihi Dersleri*, Editörler: Mehmet Aykanat, İbrahim Ülker, Süleyman Emre Zorlu, Melikşah Aydın, Konya, 2015, p. 85.

<sup>2</sup> BAYRAKTAR, Köksal, *Hekimin Tedavi Nedeniyle Sorumluluğu*, İstanbul, 1972, p. 194; AYAN, *Tıbbi Müdahaleden Doğan Hukuki Sorumluluk*, Ankara, 1991, p. 28.

makes abortion were called "muscid" and women who routinize this action were called "*Miskat*"<sup>3</sup>. In arabic they were called "*ichad*" and "*imlas*"<sup>4</sup>.

There are two different ideas about abortion among Islamic jurists. First group thinks that without a valid excuse it is not convenient to terminate pregnancy (none of the phases of pregnancy). Second group thinks that during the beginning of the pregnancy there is no problem with abortion. Some thinks it is *mekruh* and some thinks it is *mubah*. However, there is no whole agreement about the last time to terminate pregnancy. (what is the last suitable period to terminate pregnancy). Arguments about "until which phase abortion is suitable" generally reflects scientific informations about their eras<sup>5</sup>.

Some of Islamic jurists who claim that there is no banning of terminate pregnancy until the end of 120 days, are based on the following Hadith. But this hadith is about to blow the soul, is not about abortion. Due to not blown the soul, there are Islamic jurists to claim the form of abortion can be made. Some of Islamic jurists who claim that there is no banning of terminate pregnancy until the end of 120 days, are based on the following hadith<sup>6</sup>.

Narrated: Abdullah bin Masud

*"The Messenger of Allah (saw), the true and truly inspired one, told us that: 'The creation of one of you is put together in his mother's womb for forty days, then it becomes a clot for a similar length of time, then it becomes a chewed lump of flesh for a similar length of time. Then Allah sends the angel to him and commands him to write down four things. He says, "Write down his deeds, his life span, his provision, and whether he is doomed (destined for Hell) or blessed (destined for Paradise)."*"<sup>7</sup>

According to Islamic Law, during pregnancy, termination of pregnancy is not permissible without any legitimate reason such as in case of emergency<sup>8</sup> and was forbidden. Based on

<sup>3</sup> BİLMEN, Ömer Nasuhi, Hukuki İslamiyye İstılahat-ı Fıkhiyye Kamusu, İstanbul, 1972, Vol. III, p. 147.

<sup>4</sup> AVCI, Mustafa, Osmanlı Ceza Hukuku Özel Hükümler, Konya, 2014, p. 177; EKŞİ, Ahmet, İslam Tıp Hukuku, İstanbul, 2011, p. 124.

<sup>5</sup> DÖNDÜREN, Hamdi, Delilleriyle Aile İlmihali, İstanbul, 1995, p. 259; ÇEKER, Orhan, "Çocuk Düşürme", DİA, İstanbul, 1993, Vol. 8, p. 364; AVCI, Osmanlı Ceza Hukuku Özel Hükümler, p. 184-185-186; "The common point is that all sects share that abortion is never acceptable except life-threatening danger of mother after 4 months later the fetus aroused at uterus of mother." KONAN, Belkıs, Osmanlı Devletinde Çocuk Düşürme, AÜHFD, Ankara, 2008, p. 323; EKŞİ, Tıp Hukuku, p. 131.

<sup>6</sup> BİLMEN, Vol. III, p. 147; Conditions later 45 and 120 days are some of change phases of being in uterus, and without these change/development phases, being is accepted as alive and human. For example it was mentioned that giving soul to being is after 45 days in rumor and 120 days in another rumors; the meaning of soul is not life; because the fetus is alive before this. This given soul is divine contribution that people do not know"; <http://www.hayrettinkaraman.net/sc/00104.htm>, 02.02.2016; ÇEKER, "Çocuk Düşürme", Vol. 8, p. 364; "According to Hanafi Sect, even though there are legists telling that abortion is sin before giving soul, and common view is that this must based on a necessity."; AVCI, Osmanlı Ceza Hukuku Özel Hükümler, p. 184; EKŞİ, Tıp Hukuku, p. 130-133.

<sup>7</sup> Buhâri, "Bed'ü'l-halk", 6.

<sup>8</sup> "If mother takes compulsory drugs and fetus disappears because of this, to describe this action as a crime or wrongful act is not possible", AVCI, Osmanlı Ceza Hukuku Özel Hükümler, p. 187.

general rules about the termination of pregnancy in Quran, a result is gained. Also, there is no rule special for only this issue<sup>9</sup>.

### **Abortion (Iskat-ı Cenin) Law in Ottoman Empire**

#### **I- Legal Elements of Iskat-ı Cenin (Abortion) in Qur'an and Sunnah**

*“Say: Come I will recite what your Lord has forbidden to you-- (remember) that you do not associate anything with Him and show kindness to your parents, and do not slay your children for (fear of) poverty-- We provide for you and for them-- and do not draw nigh to indecencies, those of them which are apparent and those which are concealed, and do not kill the soul which Allah has forbidden except for the requirements of justice; this He has enjoined you with that you may understand.” EN’AM (The Cattle) 6/151.*

Glossator stated that this rule in a verse from the Quran was sent in respect of issue of burial of alive girls, that was the horrible custom in Jahiliyyah period. However livelihood, which is one of reasons on termination of pregnancy and abortion, was condemned. It was clearly pointed out that not to kill children due to fear of poverty. At the present, pregnancy, which was ended by pair due to reason that it can hinder the working of woman, is clearly concern of livelihood and the demand and will of being more rich. At it seen, termination of pregnancy due to these reasons was clearly banned. Therefore some Islamic scholar stated that these vesicles<sup>10</sup> from Quran banned termination of pregnancy and abortion<sup>11</sup>.

The second one is to recognize rights of children. Because the reason determined as fear of poverty is at the same time the most general reason of termination of pregnancy, the vesicle from Quran was banned the termination of pregnancy and abortion. At present, most of scholars shared same view that miscarriage and abortion actions were ill-gotten whatever it was performed with any methods<sup>12</sup>.

*“O Prophet! When believing women come to thee to take the oath of fealty to thee, that they will not associate in worship any other thing whatever with Allah, that they will not steal, that they will not commit adultery (or fornication), that they will not kill their children, that they will not utter slander, intentionally forging falsehood, and that they will not disobey thee in any just matter,- then do thou receive their fealty, and pray to Allah for the forgiveness (of their sins): for Allah is Oft-Forgiving, Most Merciful.” Mümtehine, (The Examined One) 60/12.* In pursuant of Mümtehine 60/12 vesicle from Quran, whatever the spirit is given to fetus, the termination of pregnancy was banned without a legitimate reason<sup>13</sup>.

<sup>9</sup> BİLMEN, Vol. III, p. 147; HARMAN, Ömer Faruk, Çocuk Düşürme, DİA, İstanbul, 1993, Vol. 8, p. 364; EKŞİ, Tıp Hukuku, p. 136.

<sup>10</sup> Look for other versicle in same direction. EN’AM 6/140, HUD, 11/6.

<sup>11</sup> EKŞİ, Ahmet, “Ailede Hayata Saygı Bağlamında Kürtaj Meselesi”, Uluslararası Aile Konferansı, 11-15 Temmuz 2012, Saraybosna/Bosna Hersek, Bildiri Kitabı, Ankara, 2013, p. 309,

<sup>12</sup> Kur’an Yolu, Türkçe Meal ve Tefsir, Diyanet İşleri Başkanlığı Yayınları, Ankara, 2003, Vol. II, p. 382; EKŞİ, “Ailede Hayata Saygı Bağlamında Kürtaj Meselesi”, p. 310; Yazır, Muhammed Hamdi, Hak Dini Kur’an Dili, İstanbul, 1996, Vol. III, p. 545.

<sup>13</sup> YAZIR, VII/4917; BİLMEN, Vol. III, p. 149, No: 450; AVCI, Osmanlı Ceza Hukuku Özel Hükümler, p. 179.

Many group of Islamic Scholar argue that the right to life begins with fertilization and parents or anyone else can not violate the right to life<sup>14</sup>. The right of live was given to fetus by Allah (c.c.). mother and father has the right to have child at the beginning, however they do not have the right to terminate pregnancy<sup>15</sup>.

According to Islamic Law, even if the child is a result of adultery, he/she has to right of life. Hz. Muhammed said to a woman from Gamidiye, who got pregnant as a result of adultery, to give birth and then said that her penalty was subjected to deferment after the birth until breast-feeding<sup>16</sup>.

It was seen that termination of pregnancy without any legitimate condition was banned in hadith of Hz. Muhammed. *“Two women from Huzeyl tribe fought with each other, one of them caused the pregnant one to have a miscarriage because of stone thrown by her, Hz. Muhammed made a decision that gurre (a slave or odalisque) would be given.”*<sup>17</sup>

There is a fetwa of High Council of Religious Affairs about termination of pregnancy in accordance Islamic Law in Turkey. This fetwa was given for Bosnia-Herzegovinan women who were victims of rape. In Bosnia-Herzegovina, Serbians raped systematically in order to make he occupation permanent. They used the rape as tools of war. Many Bosnia-Herzegovinan women killed themselves due to their pregnancy occurred as a result of this horrible action performed in order to destroy Bosnia-Herzegovinan Muslim people. Therefore High Council of Religious Affairs gace a fetwa for victims of rape that the pregnancy could be ended without mount restriction<sup>18</sup>.

According to Islamic Law, the pregnancy could be ended at only compulsory conditions. This medical operation must have the terms of compliance with laws in other medical operations. By taking informed consent of patient by a doctor having adequate information and experience, the pregnancy could be ended with the aim of medical operation and with the reason of compulsory condition such as that this pregnancy can create life-threatening<sup>19</sup>.

## II- Perpetrator and Legal Interest Protected of Iskat-ı Cenin Crime

Offender of any crime can be anyone. Generally this crime was committed by a mother and father who do not want to be parent<sup>20</sup>. Legal interest protected in abortion crime is right of

<sup>14</sup> Ebu Zahra who was Islamic legist in 20th century accepted the beginning of right of life as impregnation. AVCI, Osmanlı Ceza Hukuku Özel Hükümler, p. 186; <http://www.hayrettinkaraman.net/sc/00104.htm>, 02.02.2016.

<sup>15</sup> Bardakoğlu, Ali, “Cinsi Hayat”, İlmihâl, İstanbul, 1999, Vol. II, p. 137; EKŞİ, Tıp Hukuku, p. 127.

<sup>16</sup> Müslim, Hudûd, 22, 23, 24; İbn Mâc'e, Diyât, 36; Mâlik, Muvatta', Hudûd, II; El-KAHTÂNÎ, Müsfir b. Ali b. Muhammed/ İslam Hukukuna Göre Anne Rahminde Sakat Olan Çocukların Kürtaj Yoluyla Düşürülmesinin Hükümü, (Çev: Abdullah Kahraman), C. Ü. İlahiyat Fakültesi Dergisi, Kayseri, 2008, Vol. XII, N. 1, p. 465.

<sup>17</sup> Ebu Davud, Diyat, 21.

<sup>18</sup> Din İşleri Yüksek Kurulu Kararı, “Bosna Hersek'te Kürtaj Meselesi,” Diyanet Aylık Dergi, Aralık, 1994, p. 30.

<sup>19</sup> EKŞİ, Tıp Hukuku, p. 135.

<sup>20</sup> *“If person, who caused the abortion, is mother or father or one of other successor of fetus, he/she will lack of heritage, can not acquire share from gurre or blood money”*, BİLMEN, Vol. III, p. 151, No:458; AVCI, Osmanlı Ceza Hukuku Özel Hükümler, p. 194.

life of fetus and pregnant woman, health of pregnant woman, public interest, which will occur not to decrease population of public<sup>21</sup>.

In rescript of Ottoman Empire in 1838, the abortion crime is a social issue rather more than personal issue because it caused to decrease the population of country. Also regular increase in population is necessary for a powerful state. In this rescript detention of marriage of young girls with widows by parents was banned as well as measures related to inhibition of abortion<sup>22</sup>.

### III- Prerequisites of crime

Crime of abortion (Iskat-ı Cenin) to be able to process, first must be present a pregnant woman. In order to understand whether the crime was committed, is not necessarily pregnancy has been detected. For example, it is accepted as crime when miscarriage emerged as a result of physical violence against woman, who is thinking she got fat but she is actually pregnant. The pregnant woman herself is exempted from this condition. In example event, when a pregnant woman had a miscarriage due to negligent offense, a penalty was not imposed to her<sup>23</sup>.

In case that the fetus was left from uterus of woman due to intentional offense of negligent offense, that was not minded that the fetus was born alive or not. It is accepted that the crime was committed. Undoubtedly the role of medical advancement of Ottoman Empire did not have adequate sufficiency to be able to determine this<sup>24</sup>. Whether the fetus died before this mentioned action or not could be detected at the present. If the fetus does not leave from the mother's womb, the existence of Iskat-ı Cenin Crime is debatable<sup>25</sup>.

### Action (Material Element) Intended to Lose Fetus and Result

This material element of the crime, constitute offenses against the dropping of the pregnant woman's child before the normal delivery time. As well as action committed against fetus could be strike, repulse, lacerate, pulling and etc, it can be in forms of frightening, making upset and threatening. This action can occur in form of inaction. However it must be sought causal relation between action and result in every condition in order to mention about the crime. Result of abortion is throwing of fetus from uterus<sup>26</sup>.

According to some Islamic Jurists if someone spreads a rumors about a pregnant woman and causes the pregnant woman to be upset and to lose her child by gossiping about her, he/she will be responsible for miscarriage<sup>27</sup>.

<sup>21</sup> UDEH, Abdulkadir, Mukayeseli İslâm Ceza Hukuku (Translator: Prof. Dr. Ali Şafak) , İstanbul, 2012, Vol. 2, p. 341; KONAN, p. 323.

<sup>22</sup> AVCI, Osmanlı Ceza Hukuku Özel Hükümler, p. 178.

<sup>23</sup> AVCI, Osmanlı Ceza Hukuku Özel Hükümler, p. 186.

<sup>24</sup> In terms of Medical Science, if it was determined health of fetus before the action and that fetus died after the action, it was accepted that the action was committed. This kind of implementation is not against views of prominent imams of the biggest four sects, UDEH, Vol. II, p. 342.

<sup>25</sup> UDEH, Vol. II, p. 349; KONAN, p. 321.

<sup>26</sup> KONAN, p. 325.

<sup>27</sup> UDEH, p. 341.

#### IV- Intention (Moral Element)

Moral element of abortion consists of intention or negligence. Intention must be at case of abortion of fetus from uterus of mother. If offender performs actions to be able to end pregnancy, existence of intention could be mentioned. In case of emergence, termination of pregnancy is exception. In like this case, existence of intention is not important. If mother has life-threatening, abortion could be performed<sup>28</sup>.

Existence of intention is extenuating circumstance for abortion crime. In case of intention, gurre penalty is taken by offender of crime. If the offense is committed with negligence, and also possible intention is within it, the gurre is responsible for family of offender or both the offender and family of offender<sup>29</sup>.

According to article 193 of 1858 Criminal Code of Ottoman Empire, in case that the offense is committed intentionally, temporary oar penalty after blood money is taken<sup>30</sup>.

#### V- Punishment of the Crime

The legal doctrine of the Hanefite school was adopted as the legal framework in the Ottoman Empire as in many other Turco-Islamic states. The punishment of the perpetrators will vary according to the act results. If pregnancy completed six months required full diyet, six months have not completed require Gurre. Gurre is indemnity of fetus or embryo<sup>31</sup>.

Gurre is one-twentieth of the full blood money paid for a healthy man. This amount corresponded in practice to five camels, or 50 dinars or 500 drahmas according to Hanefites. The gender of the aborted child does not change the amount of gurre (indemnity). According to Hanefites (usually the official sect of the ottoman empire) the gurre for an aborted Muslim child is the same for a non-Muslim child<sup>32</sup>.

There was a arrangement in 1858 Ottoman Criminal Code about abortion.

192. Article: *"If someone to cause dropping a child (fetus or embryo) with hit to pregnant woman or like this action, give şeri diyet (Gurre or Full Diyet), if he or she committed this action intentionally, punish with also (after gave şer'i diyet) rowing penalty (serve as rowers in the fleet)"*<sup>33</sup>.

<sup>28</sup> BİLMEN, Vol. III, p. 152; KONAN, p. 325.

<sup>29</sup> *"If a woman without the consent of his housband perform Iskat-ı Cenin, should give Gurre and can't be heir to dropped child, if this occurs with the consent of her husband, do not give gurre and not disinherited."* Ömer Hilmi Karınabadizade, Mi'yar-ı Adalet, İstanbul, 1301, m.135; UDEH, p. 349; AVCI, Osmanlı Ceza Hukuku Özel Hükümler, p. 194.

<sup>30</sup> Düstur, I. Tertip, Vol.1, p. 578.

<sup>31</sup> ŞAFAK, Ali, Mezhepler Arası Mukayeseli İslam Ceza Hukuku, Erzurum, 1977, p.110; "Fetus, who is at least 6 months years, can live in case that he was born prematurely or was terminated, and can show indications that it is alive. Because fetus, who dropped before this, has no chance to live, his motions are not paid attention. For miscarriage of this fetus, blood money is not paid but only gurre must be paid."; AVCI, Osmanlı Ceza Hukuku Özel Hükümler, p. 181.

<sup>32</sup> BİLMEN, Vol. III, p. 151, No: 457; UDEH, Vol. II, p. 348-349; AVCI, Osmanlı Ceza Hukuku Özel Hükümler, p. 193-194.

<sup>33</sup> Düstur, I. Tertip, Vol.1, p.578.

193. Article: “Giving the drug to make abortion or showing the way to abortion regardless of the consent of the pregnant woman be punished with 6 months to 2 years imprisonment”<sup>34</sup>.

In criminal cases, would not be punished without evidence according to Islamic law, in the Ottoman Empire. This is also valid in the crime of Iskat-ı Cenin (Abortion). For example According to a Şeriyye record Magır V. Mıgırdıç blamed to İsmail Beşe b. Ahmed to hit his wife whose name is Tamam bt. Serkis and cause dropped her child(Embrio or Fetus) in Süleymanağa quarter in İstanbul. İsmail Beşe due to lack of evidence Judge (Kadı) had been offered the oath and was released<sup>35</sup>.

### **Examples Related to Implementation of Abortion in Ottoman Empire and Historical Process**

These rules in Islamic Law occurred same in Ottoman Empire and applied. In Ottoman Empire, who had an abortion was given *gurre* compensation and *Ta'zir* penalty.

*“If Hind dropped her child with her wish, what should be done.*

*Answer: Ta'zir punish will be needed, She can't be heir to aborted child.”*<sup>36</sup>

Fetwa given above it was stated that when the woman ended the pregnancy voluntarily, she must be imposed a *Ta'zir* penalty.

There is interesting document about termination of pregnancy is petition dated on 16.06.1766 and submitted to Divan-ı Hümayun (supreme court in ottoman empire) by Ebubekir, who resides in İzmit and citizen of Ottoman Empire, learned his wife ended thrice her pregnancy without informing her husband and complained about her and wanted his blood Money<sup>37</sup>.

On article 22 of Bozok Law, *Ta'zir* of causing miscarriage by mean of shooting and frightening was decided to be 8 gold coin<sup>38</sup>.

In accordance Islamic Law, in Ottoman Empire, termination of pregnancy was banned and variety measures were taken in order to prevent abortion (termination of pregnancy) in every phase. For example, following the accession of III. Selim to the throne, he declared a rescript which precluded the doctors and pharmacists to sell drugs causing to miscarriage<sup>39</sup>.

At the age of II, Mahmut, variety measures were taken in order to prevent abortion. Especially in a document dated 11 March 1827, a Jewish nurse and other two women were relegated to Salonica in order to be warning for others displaying such like bad actions, because

<sup>34</sup> Düstur, I. Tertip, Vol.1, p.578.

<sup>35</sup> İstanbul Kadı Sicilleri, İstanbul Mahkemesi 12 Numaralı Sicil, İstanbul, 2010, Vol. 16, p. 739; Another record in the same direction, İstanbul Kadı Sicilleri, İstanbul Mahkemesi 3 Numaralı Sicil, İstanbul, 2010, Vol. 17, p. 569.

<sup>36</sup> D, vr. 36a, akt. İNANIR, Ahmet, İbn Kemal'in Fetvaları Işığında Osmanlıda İslam Hukuku, İÜSBE Doktora Tezi, İstanbul, 2008, p. 298.

<sup>37</sup> BOA., Vol.ADL-80/4825; ŞİMŞEK, Fatma/EROĞLU, Haldun/DİNÇ, Güven, Osmanlı İmparatorluğunda Iskat-ı Cenin Çocuk Düşürme, Uluslararası Sosyal Araştırmalar Dergisi, Vol. 2/6, p. 597.

<sup>38</sup> AVCI, Osmanlı Ceza Hukuku Özel Hükümler, p. 193.

<sup>39</sup> Somel, Selçuk Akşin, “Osmanlı Son Döneminde Iskat-ı Cenin Meselesi”, Kebikeç, Ankara, 2002, S. 13, p.71; ŞİMŞEK/EROĞLU/DİNÇ, p. 597.

the Jewish nurse called as Killer Nurse (İlya Makzi) and other two women performing this action did not give up to help abortion even though they were warned<sup>40</sup>.

In 1838, rescript having a broaden content was declared within struggle of abortion. Rescript was declared according to a report made by Meclis-i Umurı Nafia, Dar-ı Şura-yı Babı Ali ve Meclis-i Vala-yı Ahkam-ı Adliye. In first part of the report, it was stated that population was important for power and fame of the state, that causes decreasing the population must be struggled as well as to take precauting to improve increase of population was compulsory, that abortion was big sin in terms of Islam and persons performing this bad action disrespected to right of life. On the second part of report it was stated that the sovereign cared leaving the abortion practice because tasks of sovereign were to apply the Islam by protecting it as it was and to provide his people to live with peace and welfare<sup>41</sup>.

According to this report, there are two reason to apply abortion. These were determined to be hodenism and self-indulgence. Therefore Meclis-i Umur-ı Nafia will struggle persons who made abortion done and will help financially to persons who have financial difficulties<sup>42</sup>. At the lat part, there are necessary measures to end the abortion practice. These precautions are that doctors of chief physician would warn do midwives and pharmacists not to purchase drugs having features of terminating the pregnancy, that sovereign's rescripts must be declared fot that non-Muslim sects and pharmacists will swear not to sell drugs having features of terminating the pregnancy via patricians and chief rabbi, and that Muslim midwives would swear about same issue in front of the kadı via neighborhood imams. In report also it was determined that every family must be at least 5 children, that one of these children, who have financial conditions, must be informed to kadı via neighborhood imams, and that financial aid must be given the family<sup>43</sup>.

Also it was understood that these precautions about abortion were not taken only for Muslims, that variety precautions were also appealed for Zimmi<sup>44</sup>. With orders written to Rum and Armenia Patricians and Chief Rabbi, it was that Muslims and non-Muslims must not perform abortion implementation, otherwise if they are denounced, they will be taken criminal action<sup>45</sup>.

Wars, which occurred especially at this century and did not end in no way, caused extremely negatively the population and important decrease in Ottoman Empire occurred while other countries population rapidly increased. Therefore Ottoman Empire, who speeded up the struggle with reasons reducing the population, concentrated the campaign with abortion which is one of factors reducing the population<sup>46</sup>.

We see that then it made a regulation for 1858 Ottoman Criminal Code to be about abortion. The articles remained in force until 1936.

<sup>40</sup> SOMEL, "Osmanlı Son Döneminde İskat-ı Cenin Meselesi", p. 71; KONAN, p. 327.

<sup>41</sup> SOMEL, p. 72-73.

<sup>42</sup> Aiding to poor families having more than five children mentioned in documents of Meclis-i Umuru Nafia, Dar-ı Şura-yı Bab-ı Ali ve Meclis-i Vala was arranged at rescript.; SOMEL, p. 77.

<sup>43</sup> SOMEL, p. 74.

<sup>44</sup> AVCI, Osmanlı Ceza Hukuku Özel Hükümler, p. 179.

<sup>45</sup> BOA., Vol.SH-9/437; SOMEL, p. 71-72; ŞİMŞEK/EROĞLU/DİNÇ, p. 597-598.

<sup>46</sup> BOA., Y.TPK.AZJ-46/19; SOMEL, p. 83; ŞİMŞEK/EROĞLU/DİNÇ, p. 595-596.



192. Article: *“If someone to cause dropping a child (fetus or embryo) with hit to pregnant woman or like this action, give şeri diyet (Gurre or Full Diyet), if he or she committed this action intentionally, punish with also (after gave şer’i diyet) rowing penalty (serve as rowers in the fleet)”*<sup>47</sup>.

According to this article, if any pregnant woman causes the miscarriage of her child by shooting the child or by such as action, he will be required to pay 1/20 of blood Money called gurre. After this payment is taken, if she committed this action intentionally, as he will be sentenced temporary penal servitude<sup>48</sup>.

193. Article: *“Giving the drug to make abortion or showing the way for abortion, regardless of the consent of the pregnant woman, be punished with 6 months to 2 years imprisonment.”*<sup>49</sup>

According to this article, it was determined that from 6 months to 2 years prison sentence was given to person who teach pregnant women, whatever their consents or not, drugs or methods of miscarriage. The most conspicuous point at this article, doctor or pharmacist performing this action were imposed heavier penal servitude<sup>50</sup>.

With these articles, the article, which gives penalty both to mother and father intentionally was removed 1858. After 1858, in Ottoman Empire, mother, who had a abortion intentionally and father, who condoned or supported were not punished. This is not accepted to be completely against Islamic Law and undoubtedly it is reflection to the return to Hanafi sect<sup>51</sup>. Unfortunately some historians claim that Ottoman Empire left the Islamic Law with Imperial Edict of Gülhane (1839 administrative reforms), consisted the new legal regulation with idiocratical customary arrangements. This reference can impact other historians<sup>52</sup>. However while Ottoman Empire was fulfilling systematic legalizing activities, it turned terms determined in Islamic Law into regulations accordance only legal systematic. As we saw in example, one of sect view in Islam Law became the law Of Ottoman Empire<sup>53</sup>.

It was understood that a letter of advice was delivered in document dated 30 June 1890 at Yıldız Palace the head composition and additional measures were advised to sovereign to prevent abortion. Letter of advice of two persons, who denounced abortion implementations they saw while travelling and additional measures were advised what must be done to prevent abortion. In document, it was stated that Muslim population of Ottoman Empire started to

<sup>47</sup> Düstur, I. Tertip, Vol.1, p. 578.

<sup>48</sup> KONAN, p. 330.

<sup>49</sup> Düstur, I. Tertip, Vol.1, p. 578.

<sup>50</sup> KONAN, Osmanlı Devletinde Çocuk Düşürme, p. 331.

<sup>51</sup> SOMEL, p. 79.

<sup>52</sup> “This code of laws is basically adaptation of French Penal Law dated 1810, and involves within itself many legal arrangements, which do not exist in Sharia Law.”; H. Veldet, “Kanunlaştırma Hareketleri ve Tanzimat” Tanzimat I, 2. Baskı, İstanbul, 1999, p. 198; SOMEL, p. 78.

<sup>53</sup> “*Na-meşru olan nesneye emr-i sultani olmaz.*”, “*Orders of Sultan can’t be opposite direction of God’s commandments*” This fatwa comes from Ebu Suud Efendi who was Grand Mufti (supreme judge) in Ottoman Empire., HEYD, Uriel, Studies in Old Ottoman Criminal Law, Oxford 1973, s.191-192; DÜZDAĞ, Ertuğrul, Ebussuud Efendi Fetvâları Işığında 16. Asır Türk Hayatı, İstanbul, 1983, s.181, s.98; AVCI, Türk Hukuk Tarihi Dersleri, s. 85-86.

disappear in some regions due to both recruiting and abortion implementations. It is suggested that Teveem payment must be given to persons who had more than 4 children and cannot care them. Also, it was suggested that it must be determined by doctor whether the fetus was fallen or not otherwise the burial cannot be permitted, and that following with report which demonstrated whether punishment in criminal laws were applied or not for abortion in every province, and that sending inspector to where proceedings of persons committing this action, are as additional measures, which will be taken within struggling with the abortion<sup>54</sup>.

In document submitted to sovereign by Yıldız Palace, the head composition in 1981, the same points pointed out, aid campaign was hold to be 30 kuruş from subdivision of treasury to person, who have more than 4 children and cannot care them<sup>55</sup>.

It was obvious that Ottoman Empire put up efficient resistance institutionally against abortion. For example. Madam Zibold, who was citizen of Germany, made a diplomatic struggle for sending a nurse from Russia abroad<sup>56</sup>.

In Ottoman Empire, with 1858 Criminal Law, who made abortion intentionally was not sentenced. However helper of abortion was responsible<sup>57</sup>. Kirmastı District Governor Süleyman Rauf Bey, who was high-ranking official, was taken to court<sup>58</sup>. Also, Abdülvahap Efendi from Makriköy, Osmaniye was arrested for advising to someone to abortion to his wife<sup>59</sup>.

#### REFERENCES

- AYAN, Tıbbi Müdahaleden Doğan Hukuki Sorumluluk, Ankara, 1991.
- AVCI, Türk Hukuk Tarihi Dersleri, Editörler: Mehmet Aykanat, İbrahim Ülker, Süleyman Emre Zorlu, Melikşah Aydın, Konya, 2015.
- AVCI, Mustafa, Osmanlı Ceza Hukuku Özel Hükümler, Konya, 2014.
- BARDAKOĞLU, Ali, "Cinsi Hayat", İlmihâl, İstanbul, 1999.
- BAYRAKTAR, Köksal, Hekimin Tedavi Nedeniyle Sorumluluğu, İstanbul, 1972.
- BİLMEN, Ömer Nasuhi, Hukuki İslamiyye İstılahat-ı Fıkhiyye Kamusu, İstanbul, 1972.
- ÇEKER, Orhan, "Çocuk Düşürme", DİA, İstanbul, 1993.
- Diyamet Aylık Dergi, Ankara, Aralık, 1994.
- DÖNDÜREN, Hamdi, Delilleriyle Aile İlmihali, İstanbul, 1995.
- DÜZDAĞ, Ertuğrul, Ebussuud Efendi Fetvâları Işığında 16. Asır Türk Hayatı, İstanbul, 1983.
- EKŞİ, Ahmet, "Ailede Hayata Saygı Bağlamında Kürtaj Meselesi", Uluslararası Aile Konferansı, 11-15 Temmuz 2012, Saraybosna/Bosna Hersek, Bildiri Kitabı, Ankara, 2013.
- EKŞİ, Ahmet, İslam Tıp Hukuku, İstanbul, 2011.

<sup>54</sup> BOA., İ.DAH-1185/92723; ŞİMŞEK/EROĞLU/DİNÇ, p. 600

<sup>55</sup> BOA., İ.DAH-1214/95051; ŞİMŞEK/EROĞLU/DİNÇ, p. 602-603.

<sup>56</sup> BOA., Y.A.HUS-481/76; BOA., İ.HUS-124/1322.L-37; Karakışla, Y. S. Arşivden Bir Belge Kürtaj Mütchassısı Alman Doktor Madam Mari Zibold (An Archival Document about the German Specialist on Abortion, Madam Mari Zibold), Toplumsal Tarih (Social History), no. 82, Ekim 2000 (October 2000): 39-44.

<sup>57</sup> KONAN, s. 331.

<sup>58</sup> BOA., İ.AZN-66/1324 R-01.; ŞİMŞEK/EROĞLU/DİNÇ, p. 605.

<sup>59</sup> BOA., DH.EUM.AYS-61/27.; ŞİMŞEK/EROĞLU/DİNÇ, p. 605

- EL-KAHTÂNÎ, Müsfir b. Ali b. Muhammed/ İslam Hukukuna Göre Anne Rahminde Sakat Olan Çocukların Kürtaj Yoluyla Düşürülmesinin Hükümü, (Çev: Abdullah Kahraman), C. Ü. İlahiyat Fakültesi Dergisi, Kayseri, 2008.
- HEYD, Uriel, *Studies in Old Ottoman Criminal Law*, Oxford 1973.
- HIFZÎ, Veldet, “Kanunlaştırma Hareketleri ve Tanzimat” Tanzimat I, İstanbul, 1999.
- HARMAN, Ömer Faruk, *Çocuk Düşürme*, DİA, İstanbul, 1993.
- İNANIR, Ahmet, *İbn Kemal’in Fetvaları Işığında Osmanlıda İslam Hukuku*, İÜSBE Doktora Tezi, İstanbul, 2008.
- KONAN, Belkıs, *Osmanlı Devletinde Çocuk Düşürme*, AÜHFD, Ankara, 2008.
- Kur’an Yolu, *Türkçe Meal ve Tefsir*, Diyanet İşleri Başkanlığı Yayınları, Ankara, 2003,
- SOMEL, Selçuk Akşin, “Osmanlı Son Döneminde İskat-ı Cenin Meselesi”, *Kebikeç*, Ankara, 2002.
- Schact, Joseph, *İslam Hukukuna Giriş*, Translate: M. Dağ/A. Şener), Ankara, 1986.
- ŞAFAK, Ali, *Mezhepler Arası Mukayeseli İslam Ceza Hukuku*, Erzurum, 1977.
- ŞİMŞEK, Fatma/EROĞLU, Haldun/DİNÇ, Güven, *Osmanlı İmparatorluğunda İskat-ı Cenin Çocuk Düşürme*, *Uluslararası Sosyal Araştırmalar Dergisi*, 2009.
- UDEH, Abdulkadir, *Mukayeseli İslâm Ceza Hukuku* (Translator: Prof. Dr. Ali Şafak) , İstanbul, 2012.
- Yazır, Muhammed Hamdi, *Hak Dini Kur’an Dili*, İstanbul, 1996.