

AN OVERVIEW OF THE PROTECTION OF RIGHTS OF UNBORN CHILD UNDER ISLAMIC LAW AND THE LAW IN MALAYSIA*

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Issues on induced abortion and abandonment of fetus are not seemed only to trigger Malaysians but the world at large. Such issues are not seemed to be new but went back to the past several decades, i.e. before the recognition of rights of unborn babies to be protected and safeguarded by the United Nations Declaration of the Rights of the Child in 1959. This is evident when The UNDRC 1959 declares that the child needs special safeguards and care, including appropriate legal protection, before as well as after birth. Unborn babies can be simply and generally understood as babies who are conceived and not yet born regardless of the terms of pregnancy. This paper mainly seeks to examine rights of unborn child under Islamic law (Shari'ah). Under Islamic law, rights are well defined and guaranteed to all categories of human beings regardless of their stages of life, so long as it is within the purview of the Shari'ah. As regards babies and children, protection of their rights begins at the very initial stage of their life i.e. before their birth. The research is based on the hypothesis that Islam is a comprehensive way of life and governs comprehensive rules on child protection. Examination extends to the law in Malaysia especially on the issue of adequate protection of rights of unborn child. The research will adopt a qualitative methodology. The findings of the research will provide a strong theoretical framework on rights of unborn child under Islamic law, so as to provide a sample for protection of rights of unborn child. Finally, the paper will suggest improvement to the law in Malaysia where relevant and appropriate.

Keywords: *Child protection, fetus' rights, child's rights, Islamic law, the law in Malaysia*

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Introduction

Islamic law (*Shari'ah*) is divine in nature. It is generally embodied in the text of the Qur'an and *Sunnah* (Prophetic traditions). As a comprehensive way of life, Islamic law regulates all aspects of human life including rights and obligations. This is to ensure that peace and prosperity are achieved in human life and generation and that no right is transgressed or violated. For that purpose also, human rights are well defined, those include children's rights in all stages of life even if the child is not yet born. To date, the world witnesses violation of fetus' rights especially right to life and be born safely. Cases on abortion are everywhere similarly fetus' dumping and abandonment. A research published in United Nations news in 28th September 2017 reported that from 2010 until 2014, 25 million unsafe abortions occurred every year.¹ As regards fetus' dumping, in Malaysia for example, even though there is no proper statistical report on fetus' dumping, there were reports in the newspapers on the findings of dead fetus.²

What is the unborn child?

According to Black's Law Dictionary, the unborn child refers to a fetus.³ The Arabic term for a fetus is *janīn* which means an embryo that dwells in the abdomen. It is called *janīn* for its fetalization stages and concealing form as its form is being hidden.⁴ It is also said that *janīn* is a blending and the intermixing of darkness because of all of it is covered.⁵ Allah Almighty said in the Holy Qur'an to the effect:

*"He knows you well when He brings you out of the earth, and When ye are hidden in your mothers' wombs."*⁶

Ibn Kathir the Quran commentator states that the above verse describes when Allah the Almighty God commanded the angel to record one's provisions, age, actions and if he would be among the miserable one or the happy one.⁷

The Quran further provides for the stages and development of fetus and embryo as it states to the effect;

"We did create man from a quintessence (of clay - tin); Then We placed him as (a drop of) sperm in a place of rest, firmly fixed; Then We made the

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sperm into a clot of congealed blood; then of that clot We made a (fetus) lump; then we made out of that lump bones and clothed the bones with flesh; then we developed out of it another creature. So blessed be Allah, the best to create.⁸

According to Ibn Kathir, the above verses explains on how Allah the Almighty initially created man from an extract of soil. It was the first creation of man, i.e. Adam (*Alaihissalam*) whom Allah created from sounding clay of altered black smooth mud. Qatadah said, "Adam was created from soil (*tin*)."⁹ This is the most apparent meaning and is closer to the context, for Adam (PBUH) was created from a sticky *tin*, which is a sounding clay of altered black smooth mud, and that is created from dust, as stated in another Qur'anic verse to the effect;

Among His Signs in this, that He created you from dust; and then, - behold, ye are men scattered (far and wide).⁹ The Prophet (saw) said:

Allah created Adam from a handful which he took from the whole of the earth; so the children of Adam are in accordance with the earth: some red, some white, some black, some a mixture, also smooth and rough, bad and good.¹⁰

(Thereafter We made him a *Nutfah*) Here the pronoun refers back to human kind, as in another verse that states to the effect:

He Who has made everything which He has created most good: He began the creation of man with (nothing more than) clay, And made his progeny from a quintessence of the nature of a fluid despised:¹¹ Meaning, weak, as He says:

Have We not created you from a fluid (held) despicable? - The which We placed in a place of rest, firmly fixed,¹² Meaning the womb, which is prepared and readily equipped for that,

For a period (of gestation), determined (according to need)? For We do determine (according to need); for We are the best to determine (things).¹³ Meaning, for a known period of time, until it is established and moves from one stage to the next. Allah says here,

(Then We made the sperm into a clot of congealed blood) meaning, 'Then We made the *Nutfah*, which is the water gushing forth that comes from the loins of a man, i.e., his back, and the ribs of a woman, i.e., the bones of her chest, between the clavicle and the breast. Then

it becomes a red clot, like an elongated clot. Ikrimah said, “This is blood.”

(Then of that clot We made a (fetus) lump), which is like a piece of flesh with no shape or features.

(Then we made out of that lump bones) meaning, ‘We gave it shape, with a head, two arms, and two legs, with its bones, nerves, and veins.’

(And clothed the bones with flesh;) meaning, ‘We gave it something to cover it and strengthen it.’

(Then we developed out of it another creature.) Means; ‘Then We breathed the soul into it, and it moved and became a new creature, one that could hear, see, understand and move.’

(So blessed be Allah, the best to create.)¹⁴

The development of the fetus, in the first-trimester,¹⁵ second-trimester,¹⁶ and third-trimester¹⁷ have been explained in detail in the Holy Qurān and have been proven by scientific research at present.¹⁸

Rights of Unborn Fetus under Islamic law

Islamic law has outlined several rights of unborn fetus that are subject to protection by all means. In general, those rights can be categorized into three main rights, namely fundamental rights to life, rights in family relationship and rights to be protected from any form of harm.

1) Fundamental Rights to Life

Right to live is a fundamental right guaranteed to all including fetus. Accordingly, nobody can transgress this right by any means from the first day the fetus develops.

As regards formation of fetus and the creation of man, Messenger of Allah (saw) said to the effect;

“The creation of every one of you starts with the process of collecting the material for his body within forty days and forty nights in the womb of his mother. Then he becomes a clot of thick blood for a similar period (40 days) and then he becomes like a piece of flesh for a similar period. Then an angel is sent to him (by Allah) and the angel is allowed (ordered) to write four things; his livelihood, his (date of) death, his deeds, and whether he will be a wretched one or a blessed one (in the Hereafter) and then the

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*soul have breathed into him. So one of you may do (good) deeds characteristic of the people of Paradise so much that there is nothing except a cubit between him and Paradise but then what has been written for him decides his behavior and he starts doing (evil) deeds characteristic of the people of Hell (Fire) and (ultimately) enters Hell (Fire); and one of you may do (evil) deeds characteristic of the people of Hell (Fire) so much so that there is nothing except a cubit between him and Hell (Fire), then what has been written for him decides his behavior and he starts doing (good) deeds characteristic of the people of Paradise and ultimately enters Paradise.*¹⁹

According to Badr al-Dīn, this hadīth reflects the process and stages of the creation of man in the womb. It shows the miracle and greatness of Allah the almighty. By the word assemble in the hadīth, it means putting the parts of his body together in the womb.²⁰ Each state of the creation takes a period of forty days.²¹ According to Qasīm, the stage of breathing life into the fetus and writing all his good and evil actions will be done when he reaches four months.²² Al-Najdi, on the other hand, stated that the lesson of the *hadīth* is that it teaches us the facts that in the life of human beings, the end result (either in hell fire or paradise) are the most important things.²³

It follows that the fetus in the womb owes right to live and be born alive. Therefore, abortion without permissible reason, according to *Shari'ah* is prohibited in Islam.²⁴ Abortion is the medical procedure of inducing expulsion of a human fetus to terminate a pregnancy.²⁵ The Hanafis,²⁶ Maliki,²⁷ Shafi'i,²⁸ Hanbali,²⁹ and Zahirī,³⁰ are on agreement on the prohibition of abortion after 40 days of its formation as the soul had been blown into it and is considered human. On the other hand, according to al-Ghazali³¹ and one opinion in the Maliki school of thought, abortion is immediately forbidden after the pregnancy begins. This opinion is preferred by Wahbah al-Zuhailī who further asserts that nevertheless, *Shari'ah* makes it flexible where abortion is permissible if there is justified reason such as weak mother, illness, and financial problems. The classical example is a father who is not financially capable of hiring wet nurse to breastfeed his child while his wife is pregnant and affecting her breast milk.³²

Islam prohibits taking of life of a child as the Quran states to the effect;

“Kill not your children on a plea of want; - We provide sustenance for you and for them.³³ Because the idolaters used to kill their children, obeying the lures of the devils. They used to bury their daughters alive for fear of shame, and sometimes kill their sons for fear of poverty.”³⁴

In a hadith of the Prophet (saw) narrated by ‘Abdullah, “I said: ‘O Messenger of Allah (PBUH), what is the worst sin?’ He said: ‘You make and equal to Allah while it is He who created you.’ I said: ‘Then what?’ He said: ‘That you kill your child fearing that he will eat with you.’ I said: ‘Then what?’ He said: ‘That you commit adultery with your neighbour’s wife.’”³⁵

The killing of children is one of the worst ignorance Arab’s cultures. They fear the birth of a daughter as it will give them the humiliation and weakness. Islam came and abolished this culture.³⁶

As Allah says: When news is brought to one of them of (the birth of) what he sets up as a likeness to (Allah) Most Gracious, his face darkens, and he is filled with inward grief!³⁷

Therefore, among the pledge of allegiance between the Prophet (saw) and Arabs’ women who embrace Islam is do not kill their children.³⁸ As the Qur’an states to the effect;

“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.”³⁹

The rights of the fetus to life is also manifested by the traditions of the Prophet (saw), where in one tradition, the Prophet (saw) punished a pregnant woman only after she delivered her child and finished feeding the child. The Muslim scholars further states that if the sentence for the woman is flogging, she will not be flogged until she gave birth to her baby. This is unanimously agreed by the Muslim scholars.⁴⁰ The narration states to the effect on the occasion of a woman of Ghamid came to the Prophet (saw) and said: I have committed fornication. He (saw) said: Go back. She returned, and on the next day, she came to him again and said: Perhaps you want

to send me back as you did to Ma'iz bin Malik. I swear by Allah, I am pregnant. He (saw) said to her: Go back. She then returned and came to him the next day. He (saw) said to her: Go back until you give birth to a child. She then returned. When she gave birth to a child, she brought the child to him, and said: Here it is! I have given birth to it. He (saw) said: Go back and suckle him until you wean him. When she had weaned him, she brought him (the boy) to him with something in his hand which he was eating. The boy was then given to a certain man of the Muslims and Him (saw) commanded regarding her. So a pit was dug for her, and he gave orders about her and she was stoned to death. Khalid al-Walid was one of those who were throwing stones at her. He threw a stone at her. When a drop blood fell on his cheeks, he abused her. The Prophet (saw) said to him: Gently, Khalid. By Him in whose hand my soul is, she has reported to such an extent that if one who wrongfully takes extra tax were to repent to a like extent, he would be forgiven. Then giving command regarding her, prayed over her and she was buried.⁴¹ This is the affection and love shown by the Prophet (saw) to the woman and her child as Imam Ahmad said that he did not know the Prophet (saw) leave the funeral prayer except for those in debt and those who commit suicide.⁴²

This tradition of the Prophet (saw) guides us the obligation to defer the punishment of pregnant woman until the woman gives birth and breastfeeds her baby, and soon her child is weaned. According to Al-Hadawiyyah, there is no deferment of punishment if there is another woman who is able to breastfeed and nurture the baby.⁴³ In addition, Islam gives relief to pregnant women who are fasting to break their fast so that their fetus will not be adversely affected. Anas bin Malik, a man from Banu Abdullah bin Ka'b said;

“Some cavalryman of the Messenger of Allah came galloping upon us, so I came to the Messenger of Allah and found him having lunch. He said: “Come and eat.” I said: “I am fasting.” So he said: “Come and I will narrate to you about the fast - or fasting. Indeed, Allah Most High lifted (the fast and) half of the Salat from the traveler, and (He lifted) the fast - or fasting - from the pregnant person, or the breastfeeding person.” And by Allah! The Prophet said both of them or one of them. So woe to me! For I did not eat the meal of the Prophet.”⁴⁴

Ibn Abbas, Tirmidhi, and Shawkani said, there is no disagreement of Muslim scholars on the necessity to break the fast for pregnant women and nursing mothers if they fear the fasting will adversely affect themselves and their children.⁴⁵ The analogy is, the pregnant women have a similar condition as to those travelers and sick people. In addition, pregnant women are forbidden to fast if the fast will adversely affect themselves and their fetus.⁴⁶ The Prophet (PBUH) said;

“Allah, the mighty and sublime, have waived fasting and half of the prayer for the traveler and for pregnant and breastfeeding women.”⁴⁷

The pregnant woman who breaks her fast is obliged to replace it when she is capable of performing it without having to pay *fidyah*⁴⁸ according to the Hanafi school of thought. According to the Shafi'i and the Hanbali schools of thought, if the woman fears adverse effect to her child alone, she is obliged to replace it and pay *fidyah*. The Maliki school of thought opined that the pregnant woman who breaks her fast is obliged to replace it and the breastfeeding woman who breaks her fast is obliged to pay *fidyah*.⁴⁹ It was narrated that when the Companion of the Prophet Abdullah bin Umar was asked about pregnant women who break her fast for fears of an adverse effect to the fetus and herself, he said, “The woman may break her fast. She is obliged to pay *fidyah*. For a day, she must feed a quart of wheat to the poor people.⁵⁰

Apart from that, it is also crucial to keep fetus healthy especially during 6-7 weeks of pregnancy. For that purpose, it is highly recommended pregnant mothers are to eat nutritious foods that are healthy and exercising a balanced diet from fruit and vegetables, plenty of carbohydrates, protein, some milk and dairy foods, daily. In addition, a pregnant woman should take supplement which contains folic acid, and vitamin D. She should also exercise regularly in building her strength and endurance, coping better with the extra weight of pregnancy and the hard work of labor. Good exercise choices for pregnancy include brisk walking and swimming. In addition, they should avoid alcohol, caffeine, and smoking that will increase the risk of abortion.⁵¹

2. Rights in Family Relationship

The Right to Lineage

Lineage is the basis for family building. It is a lasting bond between family members. In Islam, lineage is a great gift and grace from the Almighty God and with it, the human being is related and loving one another.⁵² The Qur'an states to the effect;

*"It is He Who has created man from water: then has He established relationships of lineage and marriage: for thy Lord has power (over all things)."*⁵³

The lineage of a child from his mother is recognized from every birth, either the way it is realized is in line with Islamic law or against it. The lineage of a child from his father is recognized through valid or *fasid* marriage⁵⁴ *shubbah* sexual intercourse,⁵⁵ and recognition of the lineage itself.⁵⁶ The Prophet (saw) said;

*"The child is for (the owner of) the bed and the stone are for the person who commits illegal sexual intercourse."*⁵⁷ *The hadith means that a child's lineage is back up to his father through legal marriage. In contrast, fornication is not recognized to be the reason of lineage. Therefore, the child as a result of fornication does not deserve the right to lineage from its father. People who are fornicating are entitled to be punished or stoned.*⁵⁸ *The majority of the Islamic scholars expresses that the meaning of 'the owner of the bed' is the wife. In contrast, Abu Hanifah expresses that the meaning of 'the owner of the bed' is the husband.*⁵⁹

Protection of lineage extends to prohibition of denial of paternity. Thus, Islamic law prohibits the father from denying the lineage of his child. Islamic law also prohibits the mother from alleging that her child is a child of the non-real father.⁶⁰ The Prophet (saw) said to the effect;

*"Any woman who brings her family one who does not belong to it has nothing to do with Allah (i.e. Expects no mercy from Allah), and Allah will not bring her into His Paradise. Allah, the Exalted, will veil Himself from any man who disowns his child when he looks at him, and disgrace him in the presence of all creatures, first and last."*⁶¹

In another hadith, The Prophet (saw) also said to the effect;

“If somebody claims to be the son of any other than his real father, knowable he but disbelieves in Allah, and if somebody claims to belong to some folk to whom he does not belong, let such a person take his place in the (Hell) Fire.”⁶² This tradition of the Prophet (saw) indicates the prohibition of claiming a child, not to the real father. Thus, knowledge is the condition in this situation.⁶³

In addition, Islamic law enjoins the waiting period for women who are divorced from their husband. They are forbidden from getting married within that prescribed time. All of these are intended to keep the lineage of the fetus (if any) from being mixed and could not be determined.⁶⁴ Allah Almighty said regarding the waiting period;

“Divorced women shall wait concerning themselves for three monthly periods. Nor is it lawful for them to hide what Allah Hath created in their wombs if they have faith in Allah and the Last Day.”⁶⁵ Allah Almighty said regarding the prohibition of the pregnant woman to get married until delivery of the baby;

“For those who carry (life within their wombs), their period is until they deliver their burdens.”⁶⁶

Earlier than that, Islamic law enjoins the wedding feast that is intended to inform the public that the couple was married. People who have attended the wedding feast will become the witnesses that the couple was married and the dispute on the lineage of the couple’s child will not arise after they had a child.⁶⁷ The Prophet (saw) stated to the effect;

“Publicize this marriage, and hold it in the mosque, and beat the tambourines for it.”⁶⁸

The Right to Maintenance (Nafaqah)

Al-nafaqah is derived from *al-infaq* which means spending money.⁶⁹ Literally, *al-nafaqah* refers to anything that a man spent for his family. Technically, *al-nafaqah* is the adequacy of daily needs such as food, clothing and housing.⁷⁰ The Qur’an states to the effect;

“And when they are told, ‘Spend ye of (the bounties) with which Allah has provided you,’⁷¹ i.e. when they are told to spend of that which Allah has provided to them on the poor and needy among the Muslims.⁷²

In general, there are three reasons for maintenance, marriage, kinship, and slavery.⁷³ The word *al-nafaqah* is not used in all spending except in good spending. There are two types of *al-nafaqah*; first is *al-nafaqah* which is obligatory for a man to himself. Thus, a man should prioritize himself than others. Second is *al-nafaqah* which is obligatory for a man to other people.⁷⁴ The Messenger of Allah (PBUH) said to the effect;

“The best alms is that which is given when one is rich, and a giving hand is better than a taking one, and you should start first to support your dependents.”⁷⁵ It was narrated that Tariq Al-Muharibi said: “We came to Al-Madinah and the Messenger of Allah was standing on the Minbar addressing the people and saying: “The hand which gives is the upper hand. Start with those for whom you are responsible; your mother, your father, your sister, your brother, then the next closest, and the next closest.”⁷⁶ The Quran states to the effect;

“But he shall bear the cost of their food and clothing on equitable terms.”⁷⁷ This means that the father bear the expenses of his child because of the birth of the child, as he is obligatory to bear expenses of his wife who is pregnant and delivering the child.⁷⁸ It is narrated by ‘Aisha to the effect;

Hind bint ‘Utbah said to the Messenger of Allah, “Abu Sufyan is a miserly man and I need to take some money from his wealth.” The Messenger of Allah (saw) said, “Take what is sufficient for you and your children.”⁷⁹ According to al-Shawkani, the hadith indicates that, the husband is compulsory to provide maintenance to his wife and children.⁸⁰

The Islamic scholars have discussed the responsibility and obligation of the maintenance upon the father of the fetus. The Maliki school of thought view that the father of the fetus is obliged to pay maintenance to the fetus provided that the father and the fetus are not slaves (where the mother is a slave). In addition, the fetus is the father’s descendent. The maintenance of a child is not compulsory on the father if the status of the child is still disputed. Furthermore, there are two opinions of Shafi’i and Hanbali schools of thought. The first opinion is that, it is the right of the fetus to the maintenance and the right is being erased when it is separated from its mother.

The second opinion is that, it is compulsory for the husband to provide the maintenance for his pregnant wife, whether the pregnant wife is rich or poor.⁸¹

The Right to Inherit or own Property

Inheritance (*al-mirath*) or allotments (*al-faraid*) are prescribed in the Holy Quran and the traditions of the Prophet (PBUH). Both of the terms mean the distribution of an estate amongst certain relatives and fix the proportion of the estate allotted to each.⁸² The Quran states to the effect;

“Allah (thus) directs you as regards your Children’s (Inheritance): to the male, a portion equal to that of two females.”⁸³ Al-Qurtubi said, “If a man dies and leaves behind his wife pregnant, then the inheritance should not be divided until it becomes clear what she gives birth to. The Muslim scholars agreed on a consensus that if a man dies while his wife is pregnant, the fetus that is in her womb inherits and his relatives inherit from him if it is born alive and shouted or cried at the moment of birth. They said, if the fetus is born lifeless, it will not inherit. Some of them said that the fetus will not inherit if the fetus is born alive, but it did not shout or cry. Some others like Malik,⁸⁴ Al-Qasim Ibn Muhammad, Ibn Sirin, Sha’bi, Al-Zuhri, and Qatadah said that the fetus will not inherit despite it is moving rapidly and sneezing, but it did not shout or cry. In addition, Al-Shafi’i, Sufyan Al-Thauri, and Al-Awzai said that if it is known that the baby is alive by the sign of moving or shouting or suckling or the other sign of life, the baby is considered alive.”⁸⁵ Umar ibn Al-Khattab had instructed a newly delivered child to get inherit if the child is shouting and crying. This is also the opinion of Hassan ibn Ali. Ibn Abbas added that the child will also be inherited. Jabir ibn Abdillah said that the fetus will inherit if it is born alive and people heard its voice.⁸⁶

Imam Abu Hanifah viewed that the fetus will inherit and will be inherited provided that it is born alive.⁸⁷ The fetus will inherit if it is born alive and much of its body separated from its mother.⁸⁸ In contrast, the majority of Muslims’ scholars are in consensus opinion that the fetus will not inherit. The reason is the life of the fetus is uncertain. Thus, it does not have the capacity to possess so as inherit.

The fetus will not be inherited except *diyyah* (the blood-money)⁸⁹ as the fetus is considered to be alive only on this occasion. Al-Laith Ibn Saad and Al-Rabiah bin Abdul Rahman believe that the fetus will not be inherited because of its death as its life could not be ascertained during the crime against it. The compensation of *diyyah* is for its mother as the crime is against her.⁹⁰

The right to Receive Wills

There is no dissenting opinion of the Muslim scholars from any school of thought on the validity of the wills to the fetus. The reason is that wills is similar to inheritance. The fetus is capable of inheriting and it's also capable to become the recipient of the wills. Thus, the wills to the fetus is valid. The majority of scholars such as Al-Zailai', Al-Sha'bi, authors of *Al-Dar* and *Al-Hidayah* from the Hanafi school of thought, the Shafi' school of thought, the Hanbali school of thought, and Dr. Wahbah Al-Zuhayli are contending that the recipient of wills must exist when the wills is made. In fetus's case, it must be born alive and it is born less than 6 months from the date when the wills is made. If the fetus is born lifeless, the wills will be void. If the wills to the fetus is made and the husband of a pregnant woman is dead, the wills is valid if the fetus is born alive less than a period of 2 years from the death of the husband. This also applies to a woman who is divorced by *talaq bain*.⁹¹ The Shafi'i and Hanbali schools of thought are contending that the period of 4 years from the death of the husband. This means if the divorced wife who was pregnant gave birth less than a period of 4 years, the wills to the fetus is valid. The first opinion of the Maliki school of thought is contending that the wills is valid either the recipients are existing or not at the time of the wills. It is meant; this opinion does not make a condition of the existence of a fetus when the will is made. The second opinion of the Maliki school of thought is that the fetus is not eligible to become the recipient of the wills as it does not possess the ability to hold property.⁹²

3. Right to be Protected from any Form of Harm

Islamic law generally enjoins doing good and be merciful to all creatures including animals as the Quran states to the effect;

*“...and do good, you may prosper..”*⁹³

In a hadith, the Prophet (saw) also used to say to the effect;

*“The best deed after faith in Allah is to honor the command of Allah and to be merciful to Allah’s creatures”*⁹⁴

At the same time Islam prohibits any form of causing harm to others, as the Prophet (Pbuh) states to the effect;

*“There is no harm and there is reciprocal of harm”*⁹⁵

Therefore, in general, a fetus is entitled to protection from any form of harm be it from its mother or from any other factor that may cause harm to it.

Although the womb provides protection, the fetus remains indirectly connected to the outside world through its mother. Several factors that are linked to the mother can harm the fetus like poor nutrition, use of alcohol, smoking, use of certain prescription or over-the-counter drugs, and use of recreational drugs such as cocaine, sedatives, and narcotics.

Mothers who drink heavily during pregnancy may have babies with fetal alcohol syndrome. Babies with this syndrome may have problems such as small head size, heart defects, irritability, hyperactivity, mental retardation, or slowed motor development. Fetal alcohol syndrome is incurable.⁹⁶ It was first discovered in 1973 by doctors in the United States. The condition describes a number of fetal abnormalities which occur in the babies of women who have abused alcohol during their pregnancy, affecting the way a baby’s brain develops. The syndrome is believed to affect as many as 1 in 500 babies born in Western countries, with worldwide estimates of 0.97 cases per 1000 births.⁹⁷ It is estimated that 0.5-2 live births per 1000 in the United States, 40 per 1000 children in Italy, and 89 per 1000 in the Western Cape province in South Africa occurs in fetal alcohol syndrome.⁹⁸

Neonatal abstinence syndrome (NAS) is a group of problems that occur in a newborn who was exposed to addictive opiate drugs while in the mother’s womb. It occurs because of a pregnant woman takes opiate or narcotic drugs such as heroin, codeine, methadone,

etc. These and other substances pass through the placenta that connects the baby to its mother in the womb. The baby becomes addicted along with the mother. At birth, the baby is still dependent on the drug. Symptoms of withdrawal may occur because the baby is no longer getting the drug after birth, such as excessive crying, poor feeding, fever, slow weight gain, sleep problem, sweating, yawning and gastrointestinal disturbances. There are some other possible complications which will be affecting the fetus, such as birth defects, low birth weight, premature birth, small head circumference, sudden infant death syndrome (SIDS), HIV and AIDS.⁹⁹

The Quran enjoins eating of good food as it states to the effect;

“O ye who believe! Eat of the good things that We have provided for you, and be grateful to Allah, if it is Him ye worship.”¹⁰⁰

In the verse, Allah commands His believing servants to eat from the pure things that He has created for them and to thank Him for it, if they are truly His servants. Eating from pure sources is a cause for the acceptance of the supplications and acts of worship, just as eating from impure sources prevents the acceptance of the supplications and acts of worship.¹⁰¹ Allah the Almighty God also commands the believers to eat foods which are Lawful and good. This commandment is in four different verses in the Holy Qur'an that states to the effect;

O ye people! Eat of what is on earth, Lawful and good; and do not follow the footsteps of the evil one, for he is to you an avowed enemy.¹⁰² In this verse, Allah stated that He is the Sustainer of all creations. He mentioned a favor that He granted them; He has allowed them to eat any of the pure, lawful things on the earth that do not cause harm to the body or the mind. He also forbade them from following the footsteps of *Shaytan* (Devil), meaning his ways and methods with which he misguides his followers.¹⁰³

Therefore, husband and wife should practice a healthy diet and avoid the harmful foods, particularly pregnant woman. This is based on the fact that healthy fetus comes from a healthy parent. Based on the fundamentals of *fiqh* ruling (*Usul al-fiqh*),¹⁰⁴ ‘Whatever is required to fulfill an obligation is itself an obligation’, a healthy diet and avoiding harmful foods seems to be obligatory.¹⁰⁵

The healthy diets include fruits and vegetables, bread and grains, protein, and dairy products. Fruits and vegetables contain many important nutrients for pregnancy especially, Vitamin C and Folic Acid. Pregnant women need at least 70 mg of Vitamin C daily, which is contained in fruits such as oranges, grapefruits, and honeydew, and vegetables such as broccoli, tomatoes, and Brussels' sprouts.¹⁰⁶

The Law in Malaysia

The law that protects children in Malaysia is the Child Act 2001.¹⁰⁷ Nevertheless, the Child Act 2001 did not provide any provision for unborn baby. Under the Child Act 2001, a child is defined as a person under the age of eighteen years old.¹⁰⁸ No indication that shows that the Child Act 2001 provides provision that protects the unborn baby. Similarly the Child (Amendment Act 2016).¹⁰⁹ The reason might be the focus of the Act that is more on protection of born child and its development and upbringing.¹¹⁰ Nevertheless, the Malaysian Penal Code provides quite detail provisions on protection of life of unborn child. The Penal Code provides for offences of causing miscarriage and causing injuries to unborn child as well as offences on concealment of birth by secretly disposal of dead body.¹¹¹ For example, the Penal Code states that;

“Who ever voluntarily causes a woman with child to miscarry shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both..”¹¹²

As regards Islamic Family Law Enactment, so far there is no direct provision on protection of the unborn child, but the law follows the *Shari'ah* in its original form, e.g. husband's duty to maintain pregnant mothers.¹¹³

At the International level, protection of rights of unborn child to health is further protected by the United Nations Convention on the Rights of the Child 1989 where it provides among others on unborn child right to good health that State parties are to ensure healthcare of prenatal and post natal mothers.¹¹⁴ And finally protection of unborn child to life is also protected under the Convention of the Child's Right in Islam 2004 that provides inter

ali that abortion is prohibited unless based on necessity or interest of the mother or fetus.¹¹⁵

Conclusion

Islamic law seems to clearly define children rights including the unborn child. This is to indicate the importance of children as future leaders and generation. The fundamental rights to life of unborn child are further guaranteed and protected under the law in Malaysia which special recognition of its infringement as criminal offences. The recognition of such right is further enhanced at International level by the United Nations Conventions on the Rights of the Child 1989 as well as the Convention on the Rights of the Child in Islam 2004, even though the provisions are not that comprehensive. With the legal development and the advance of technology, perhaps it is timely to provide additional provisions on protection of rights of unborn child where relevant and necessary. As regards further rights of unborn child to be protected from any form of harm, this can be seen very common in the society to give priority seat to pregnant ladies in public transport. Furthermore, society is made aware of nutritious and healthy food for pregnant women. They are also campaigned towards having good care of their pregnancies till the day the baby is safely delivered. This practice to a certain extent reflects the indirect awareness in the society as to the rights of the unborn child especially to life and care.

Notes

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88. Ibn Nujaym Al-Misr, Zain Al-Din ibn Ibrahim ibn Muhammad, *Al-Bahr Raiq sharh Kanzu al-Daqaiq*, (n.p.: Dar al-Kitab al-Islamiy, n.d.), vol.8, p.574.
89. Allah Almighty said, "O ye who believe! the law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude, this is a concession and a Mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty." *Al-Qur'an*, (Surah Al-Baqarah), 2: 178. The verse is the basis of diyah in Islamic law. See, Nisrine Abiad and Farkhanda Zia Mansoor, *Criminal Law and the Rights of the Child in Muslim States: A Comparative and Analytical Perspective*, (London: British Institute of International and Comparative Law, 2010), p.72. It is the payment to be delivered to the family of the deceased unless they forfeit their right in which the diyah does not become necessary. See, Muhammad Saed Abdul-Rahman, *The Meaning and Explanation of the Glorious Qur'an*, 2nd Edition, (London: MSA Publication Limited, 2009), vol.2, p.241.
90. Al-Zuhayly, Wahbah ibn Mustafa, *Al-Fiqh al-Islami wa Adillatuhu*, (Dimasyk: Dar al-Fikr, n.d.), vol.10, p.7708-7709.

91. Talaw bain is divorce that cannot be reconciled because it has been spoken three times. See, Syafiq Hasyim, *Understanding Women in Islam: An Indonesian Perspective*, (Jakarta: Solstice Publishing, 2006), p.115.
92. Al-Zuhayli, Wahbah ibn Mustafa, *Al-Fiqh al-Islami wa Adillatuhu*, (Dimasyk: Dar al-Fikr, n.d.), vol.10, p.7464-7466.
93. Surah al-Hajj, 22: 77.
94. Abu 'Isa Muhammad ibn 'Isa ibn Surah al-Tarmidhi, *al-Jami' al-sahih*, Abwab al-birr wa al-silah, Beirut, Dar al-Fikr, 1980/ 1400, Vol. 4, p. 215.
95. Reported by Ibn Majah, Ahmad, al-Dar qutni, al-Hakim.
96. SparkNotes Editors. "Prenatal Development." SparkNotes LLC. 2005. <<http://www.sparknotes.com/psychology/psych101/development/section2.rhtml>> (accessed April 12, 2016).
97. -, "Fetal Alcohol Syndrome," Foundation for People with Learning Disabilities, <<http://www.learningdisabilities.org.uk/help-information/learning-disability-a-z/ffas-foetal-alcohol-syndrome/>> (accessed 28 April, 2016).
98. Dr. Mary Harding, "Fetal Alcohol Syndrome," Patient: Trusted Medical Information and Support, <<http://patient.info/doctor/fetal-alcohol-syndrome-pro>> (accessed 28 April, 2016).
99. Kimberly G. Lee, "Neonatal Abstinence Syndrome," Medline Plus: Trusted Health Information for you, <<https://www.nlm.nih.gov/medlineplus/ency/article/007313.htm>> (accessed 28 April, 2016); See also, -, "Neonatal Abstinence Syndrome," PubMed Health <<http://www.ncbi.nlm.nih.gov/pubmedhealth/PMHT0024264/>> (accessed 28 April, 2016); See also, -, "Neonatal Abstinence Syndrome," Stanford Children's Health: Lucile Packard Children's Hospital Stanford <<http://www.stanfordchildrens.org/en/topic/default?id=neonatal-abstinence-syndrome-90-P02387>> (accessed 28 April, 2016).
100. *Al-Qurān*, (Surah Al-Baqarah), 2: 172.
101. Ibn Kathir, Abu Al-Fida Ismail bin 'Amr Al-Quraisyi bin Katsir Al-Bashri Ad-Dimasyqi Imaduddin, *Tafsīr al-Qurān al-'a'īm*, (n.p.: Dar Toyyibah li nasyr wa al-tauziq, 1999AD/1420H), vol.1, p.480.
102. *Al-Qurān*, (Surah Al-Baqarah), 2: 168; (Surah Al-Maidah), 5: 88; (Surah Al-Anfal), 8: 69; (Surah Al-Nahl), 16: 114.

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103. Ibn Kathir, Abu Al-Fida Ismail bin 'Amr Al-Quraisyi bin Katsir Al-Bashri Ad-Dimasyqi Imaduddin, *Tafsīr al-Qurān al-'a'īm*, (n.p.: Dar Toyyibah li nasyr wa al-tauziq, 1999AD/1420H), vol.1, p.478.
104. Al-Ghazali defined it as the fundamental sources or roots from which Islamic jurisprudence (fiqh) can be derived. See, Abdulrahman Yahya Baamir, "*Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia*," (New York: Ashgate Publishing, 2010), p.9.
105. Al-Amidi, Abu Al-Hasan Syed Al-Din Ali ibn Abi Ali ibn Muhammad ibn Salim Al-Tha'taby, *Al-Abkam fi Usul Al-Abkam*, (Beirut: Al-Maktab Al-Islamiy, n.d.), vol.1, p.110.
106. -, "Diet During Pregnancy," American Pregnancy Association, <<http://americanpregnancy.org/pregnancy-health/diet-during-pregnancy/>> (accessed 26 April, 2016).
107. Act 611.
108. Child Act 2001, s. 2.
109. Act A1511
110. See the Preamble of the Child Act 2001.
111. See the Penal Code, ss. 312 to 318.
112. Penal Code of Malaysia, s. 312.
113. See for example husband's duty to maintain the wife and exwife (in iddah period), Islamic Family Law (Federal Territories) Act 1984, ss. 59 & 65.
114. See the Convention of the Rights of the Child 1989, art.24(d).
115. See the Convention of the Child Rights in Islam 2004, art. 6.