

**LEGAL AND MORAL RIGHTS OF THE FOETUS:
COMPARING THE PRO-CHOICE AND PRO-LIFE
APPROACH OF THE ENGLISH LAW AND ISLAMIC
JURISPRUDENCE**

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ABSTRACT

Foetus is uniquely different from born human being in numerous ways, and this make the issue of foetal rights to be outstandingly treated in many legal systems. Since the landmark case of *Roe v. Wade*¹ where the American Supreme Court, (in ruling that a woman has a constitutionally guaranteed unqualified right to abortion) held that a foetus is not a person under the terms of the Fourteenth Amendment to the U.S. Constitution, foetal rights became a live topic attracting wonderful academic and judicial comments. The *Roe case* was not only about abortion, but also about rights. The Court in that case ruled that the foetus have virtually no rights, while the states have a limited right to protect it, and a woman's right to privacy gives her the majority of power in reproductive decision-making. But then there has been growing number of cases, both criminal and civil, where legal claims kept on to be advanced either for or against the foetus; in some cases, the court decisions are predicated on the foetal distinctive entity or its juridical stance. The case of *Casey v. Planned Parenthood v. Casey*²

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¹ 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147

² 505 U. S. 833(1992).

followed *Roe's case*, so are numerous others. So whereas in medical jurisprudence foetal rights issue is an enthralling subject (and is also known to be promoted by anti-abortion activists), it is more engrossing in legal jurisprudence and to a wide range of scholars in Islamic theology and law. This paper evaluates English law principles on foetal right and contrasts them with those in Islamic jurisprudence. It concludes that the debate revolving around foetal rights has been philosophized for ages. It is clear from the relevant jurisprudential literature and case-laws that this issue is still very much under debate. The paper presents two arguments for distinguishing between what is the position under Islamic jurisprudence and that of the English law.

1. Introduction

A lot of ink has been spilt on the legal rights, if any, of the foetus. Whilst this raises very interesting philosophical and moral questions, the laws dealing with this issue (depending on the legal system), are more problematical than it is thought. In the first place, and in the case of the English law, the legal principles on the rights of the foetus are contradictory and had not been consistent. The case of *Roe v. Wade*³ which denies foetus legal personality and rights was the settled law, *ab initio*. But then other cases followed which in one way or the other overturned the decision. Again, whereas the law of torts recognizes recovery and damages for prenatal injuries or death, the human rights aspect of the law stripped foetus of any status or right in contrast to the privacy right of its mother. Yet again although legalization of abortion (in some jurisdictions) had forced foetal rights to be docile, there are legislation that treat the murder of a pregnant woman a double murder thereby affirming foetal rights in a statutory manner.

The case of Islamic law is not less differing in the context of jurisprudential differences, but its principles are more

³ 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147

dependable and highly ethical. Islamic law has widely recognized the existence of human life from the very moment of conception, and has interest in protecting its (foetal) rights. Although the life of the fetus inside the womb depends upon the mother, it is accorded with a measure of separate personality and rights by Islam law.

This article assesses the legal and moral rights of the foetus in the context of the English and Islamic law. The linkage between the moral and legal status of the foetus is based the validation of how moral are legal orders. Other than this, the article is not about the relationship between morality and law. It is just on the concept of the foetal rights in the two system of laws.

2. The Perspicacity of the Foetus

The word *foetus*, otherwise spelled as *fetus* is widely interchanged by writers with other terms that include “embryo”, “zygote”, “unborn child” and “fertilized egg”. This spelling *foetus*, (with letters -oe-) is the most common in the Commonwealth Nations, while that of *fetus* (with letter -e-) is used in the United States and Canada. The medical literature had equally adopted the later form of spelling. This spelling with -oe- arose in Late Latin, in which the distinction between the vowels sounds -oe- and -e- had been lost. In fact the word *fetus* had originated from the Latin language, and it refers to “offspring”, or “bringing forth”. The word also is related with the Greek semantic that referring “to plant”.

There is no single legal definition of foetus, though the English courts have recognised it as sequential stages in the development of an unborn human.⁴ But in the general parlance, foetus denotes to the prenatal development of the embryo. But then again in medical literature it connotes an unborn offspring, from the embryo stage (the end of the eighth week after conception, when the major structures have formed) until birth. It is the same stage being referred to by some people as the

⁴ Jost T. S., Right of Embryo and Foetus in Private Law, American Journal of Comparative Law, (2003) 633, accessed at <http://scholarlyCommunications&law.wlu.edu/wlufac> @ 22/7/19.

“unborn child”. Prior to the ninth week, it is embryo. Thus, the fetal stage commences at the beginning of the ninth week, with the important systems of the body getting formed (for the survival in the outside world).⁵ The “ninth week” is therefore critical, perhaps, this might have informed the decision of the US Supreme Court in the case of *Roe v. Wade*⁶ when it authorized abortion up to three months of pregnancy. Equally, it is the “ninth week” period that distinguished foetus from zygote which is created from the point of fertilization to the fourth week.

In Islamic law, the jurists (*fuqahah*) have equally found themselves using a number of terms to describe a foetus. In the first place there is *Nutfah* (a drop of water, or as it is interpreted, the zygote), then there is *al-Janin* (hide) which originated from the verb *Janna* or the word *Ijtinan* meaning *Istirar* or “concealment.”⁷ Then there is *al-Haml* which is synonym of *al-Janin* (foetus). Also there is *Mudgha* (chewed lump), and then *Alaqa* (leach like clot).⁸ There is also the word *al-Mujtan*, meaning “the hidden one” which is related to the term *Haml*, denoting “a foetus”.⁹

The *Nutfah* refers to the zygote or the fertilized ovum, which is called in the holy Qur'an *Nutfah Amshaj* (mixed drop) formed by the union of the sperm and the ovum. From the stage of *Nutfah*, it transform to the stage of *Alaqa*, and from *Alaqa* to *Mudgha*. The *Nutfah Amshaj* is formed four days after conception and it reaches the final stage of its growth, when it is completely embedded in the uterine wall with its length reaching up to 0.5 to 0.68 mm.¹⁰ Then the *Alaqa* begins to be

⁵ At that stage, the foetus is typically about 30 millimetres (1.2 inch) in length, and weighs barely about 8 grams, with the head making up nearly half of the size of the foetus.

⁶ Cited *supra*.

⁷ *Ibid*.

⁸ Shams al-Din, M, *Nihayat Al-MuhTaj Ila Sharh al-Minhaj Maktabat Wa Matba'at Mustapha, Al-Babi Al-Halabi*, Cairo, 1938. V.7, P, 360.

⁹ Zakariyya, A. A., *Al-lzGhurar Al-Bahiyya Fi Sharh Al-Bahja Al-Wardiyya Lib al-Wardi*. Al-Matba'a Al – Maymaniyya, V.3, P, 201.

¹⁰ Demirel, S., *International Journal of Business and Social Science*, Vol. 2 No.1. January 2011.

gradually formed (by the end of the second week) inside the blastocyst, clinging to draws blood from the pregnant endometrium. Then the *Mudgha* starts to gradually change into the human shape in the period between the 40th to 45th days after fertilization. This is the stage where the major body organs and skeleton are distinctly formed and cell division continues afterwards.¹¹

However, for the sake of easiness, the term foetus will be used in this article to denote the unborn human entity regardless of the phase of development it occupies since, apparently, the scientific distinction between the embryo and foetus has no effect on the moral and legal status to be discussed.

3. Legal Personality and Status of the Foetus

Ascertaining whether the foetus is a legal person is the first step towards assessing its legal status.¹²

In this regard, the unpretentious definition of a person may be “a member of the species *homo sapiens*, the human species,” but the question is, at what stage foetus could be said to become humans. American Supreme Court in the famous case of *Roe v. Wade*,¹³ in which the Court was asked to decide on the legitimacy of abortion, and the authority that States have to prohibit it, claimed that:

[We]...need not resolve the difficult question of when life begins [the point at which the personality of the foetus is claimed to begin]. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

¹¹ Ibid.

¹² Suliman M.K. I., *The Moral and Legal Status of the Human Foetus: A Critical Analysis from an Islamic Perspectives* (Ph.D thesis, 2008).

¹³ Cited *supra*.

Yet again, in *Byrn v. New York City Health and Hospitals*,¹⁴ whilst determining the issue of the status of the foetus, the Court said:

What is a legal person is for the law, including, of course, the Constitution, to say, which simply means that ...legal personality {is} the rights and privileges of a legal person... The process is, indeed, circular, because it is definitional. Whether the law should accord legal personality is a policy question which in most instances devolves on the Legislature, subject of course to the Constitution as it has been 'legally' rendered... The point is that it is a policy determination whether legal personality should attach and not a question of biological or 'natural' correspondence.

In determining whether a fetus qualifies as a person under the Fourteenth Amendment, in the *Roe v. Wade*,¹⁵ the US Supreme Court, though noting that "[t]he Constitution does not define 'person' in so many words" found that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." To reach this conclusion, the Court turned to other portions of the Constitution, specifically the listing of qualifications for Congress and for President, and consequently determined that "in nearly all these instances, the use of the word 'person' was such that it has application only postnatally." The court accordingly rejected the claim that a foetus is a 'person' within the language and meaning of" the American Constitution.

The concept of legal personality is however shrouded in theoretical arguments. Numerous theories abound around it. For instance, there is positivist notion that considers legal personality as a purely legal capacity to have rights and duties, and participate in legal relations that the lawmaker confers to fulfil certain purposes. There is also a theory that deemed

¹⁴ (1972) 286 N.E.2d 887.

¹⁵ *ibid.*

humanity as the basis of the legal personality. The latter theory inevitably means that all humans must be persons and all persons, in the real sense, must be humans. Of course personality and humanity can be said to be two sides of the same coin, but considering the existence of corporate personality, not all legal persons are humans. In other words, the legal personality of a corporation is just as real as and no more real than the legal personality of a normal human being. In either case it is an abstraction, one of the major abstractions of legal science, like title, possession, right and duty.

Another theory predicated legal personality on the ‘born-alive theory’ according to which a child must come into the world alive in order to attain legal personality. The born-alive rule has been justified on two different grounds. On the one hand, live birth is said to derive its significance from being the time when the foetus physically separates from the pregnant woman; on the other, it is claimed that its importance lies in being the time when the foetus becomes capable of existing independently from the pregnant woman. Littledale J explain this theory while directing the jury in *R v. Poulton*¹⁶ by saying that “...with respect to birth, the being born alive must mean that the whole body is brought into the world; it is not sufficient that the child respire in the progress of birth.” Going by this theory, a foetus has no legal personality unless if it is born alive.

The born-alive rule has been widely adopted in so many English cases. In *Paton v. British Pregnancy Advisory Service Trustees and Another*,¹⁷ the court confirmed that: “[t]he foetus cannot, in English law ... have a right of its own at least until it is born and has a separate existence from its mother”. Similarly, in *R v. Tait*,¹⁸ the President of the Family Division said that, “...[t]here can be no doubt, in my view, that in England and Wales the foetus has no right of action, no right at all, until birth”.

¹⁶ (1832) 5 C & P 329.

¹⁷ (1979) 1 QB 276, 279.

¹⁸ (1989) 3 All ER 682.

Accordingly, Australian and English courts kept on holding that the foetus has no legal rights, thereby refusing to grant injunctions sought to stop pregnant women from performing abortions on the basis. Thus, in *Dehler v Ottawa Civic Hospital*¹⁹, an injunction was sought to prevent a hospital from performing an abortion. After pondering about the legal position of the foetus, the Court concluded that, since it was unborn, it had no full legal personality and so no rights of its own. In the court's words:

[T]he law does not regard an unborn child as an independent legal entity prior to birth ... A fetus, whatever its stage of development, is recognized as a person in the full sense only after birth. ... In short, the law has set birth as the line of demarcation at which personhood is realized, at which full and independent legal rights attach, and until a child *en ventre sa mère* sees the light of day it does not have the rights of those already born.

The *Dehler case* found approval of the Supreme Court of Canada in its ruling in *Tremblay v Daigle*.²⁰ However, this position of born-alive rule, as demonstrated above, is controverted by the profound Islamic law opinion that holds that a human being's legal personality may start from the time of ensoulment in the womb. In this regard, no matter how 'small' human life may be (if there is anything like that), it is a sanctified legal personality. Some Islamic jurists even hold that since individual human life begins at conception, when egg and sperm join, the legal personality is inaugurated at the zygote stage.

Generally, however, classical Muslim jurists are not unanimous as regards their opinions on status of a foetus. Generally, though the foetus receive legal protection and powers associated with human beings (such as the ability to inherit), it is not clearly treated as a full-fledged human being. The authority being relied

¹⁹ (1979) 101 D.L.R (3d) 686

²⁰ (1989) 62 D.L.R (4th) 634.

upon here include a narration of the case of a pregnant woman who was struck with a tent-pole by her co-wife. She died, and the prophet (saw) required that blood money (*diyya*) be paid for the deceased woman, and a payment of *ghurrah* of a male or female slave for the foetus. The value of the *ghurrah* is conventionally set at one-twentieths of the full blood money. Both fines are imposed on the kin group of the offender, resulting one of her male relatives to incantatory rhymed a prose “How can one pay blood money for someone who neither eat or drink, neither utter sound nor cried out after birth? The blood of such goes unavenged” (*Kayfa ya qulu man la akala wa-la sharaba, wa-la mataqa wa-la istahalla, fa-mithlu dhalika yatalu*). In this regards, some jurists argued that the specification of a male or female slave as the compensation for the miscarried foetus suggest that foetus has legal personality. In fact, to some, the *ghurrah* penalty incurred by the death of a foetus in some ways resembles blood money for the death of a human being. Other jurists rationalized a contrary opinion by saying that it parallel the compensation for the loss of body parts such as tooth or finger.

Another authority regarding the legal personality of a foetus in Islam comes from one of the early Islamic scholars, Mujahid ibn Jabr²¹ who accounts that a woman was reported to have messaged (*masabat*) the belly of another woman, and she miscarried. The woman was arraigned before Caliph Umar bn al-Khattab and he ordered that the woman who did the message to perform expiation (*kaffara*) by freeing a slave. On the strength of this, Imam Shafi'i and Imam Hanbali hold that *kaffara* is obligatory for a miscarried or aborted foetus.²² By implication, this means that they accorded legal personality to foetus. But Imam Ibn Abidin,²³ hold the view that a foetus

²¹ (645-722 CE). He was said to have studied under Ali bn Abi Talib and Ibn Abbas.

²² *Radd al-Muhtar ala Durr al-Mukhtar* 1/202)

²³ Ibn Abidin Ash-Shami's real name is Muhammad Ameen ibn Umar ibn Abd-Azeez Abidin (1198-1252 AH/ 1783-1836 AD). He was a prominent Islamic scholar of the Hanafi School of jurisprudence who live in Syria during the Ottoman era.

acquires legal personality only when it becomes human, and it becomes human simply when it display some aspects of a recognizably human being. This view is close to that of Ibn Hazm,²⁴ a notable Zahiri jurist who specified that the foetus should be 120 days after conception by which time there is ensoulment and that gives it legal personality. His analogy was based on the fact that according to the jurists, the soul (*Ruh*) enters the foetus at around 120 days (4 months) from conception. This is based upon a Qur'anic verse and a Hadith of the prophet (SAW). In the Hadith recorded by the two most authentic authorities, Imam al-Bukhari and Imam Muslim (may Allah have mercy on them both) in their respective *Sahih* collections, the Messenger of Allah (SAW) discusses in details the periods elapsing between these stages mentioned in the Qur'an. Abd Allah ibn Mas'ud (RA) narrates that the Messenger of Allah (SAW) said:

Each one of you is constituted in the womb of the mother for forty days, and then he becomes a clot of thick blood for a similar period, and then a piece of flesh for a similar period. Then Allah sends an angel who is ordered to write four things. He is ordered to write down his deeds, his livelihood, his (date of) death, and whether he will be blessed or wretched (in religion). Then the soul is breathed into him...²⁵

Imam Ghazali²⁶ hold a different opinion on legal status of the foetus. According to him, when the sperm enters the ovaries and mixes with the ovum that is the time it is said to acquire potential of life, and that is the time it gets legal personality. At that time, its removal would be a sin because it has right to live. The view of the Maliki jurists slightly differed with this in the

²⁴ Ibn Hazm al-Andalusi, whose real name is Abu Muhammad Ali ibn Ahmad ibn Sa' id ibn Hazm (994-1064) was a leading proponent of the Zahiri School of Islamic jurisprudence who wrote several books on Islamic jurisprudence.

²⁵ Sahih al-Bukhari no: 3036.

²⁶ Imam Ghazali, whose real name is Abu amid Muhammad ibn Muhammad a-usi al-Ghazali (c. 1058-1111), was one the prominent Sunni jurists.

sense that they confer such personality when a foetus passes the stage of *Nutfah*.

The Islamic law position, which exceptionally extend the legal definition of person to include the foetus, was surprisingly similar to some legislation. In California, for instance, the definition of murder in the Penal Code was amended to read "... the unlawful killing of a human being, or a fetus, with malice aforethought"; however, the foetus was not defined in that law. Thus in the case of the *State v. Knapp*,²⁷ a drunken driver was held guilty of manslaughter after colliding with a car driven by a pregnant woman and killing her viable foetus. Similar conclusion was reached in *Commonwealth v. Cass*.²⁸

Obviously, the born-alive English rule was based on the central rationale of independent existence. But not only was it at variance with the Islamic law position, it found rejection even in some English court decisions. In the American case of *People v Chavez*,²⁹ while deciding whether a woman was guilty of the manslaughter of her newborn child, the court expressed doubts about whether such a conviction required proving that the child had been born alive, in the following long but essential quote:

Beyond question, it is a difficult thing to draw a line and lay down a fixed general rule as to the precise time at which an unborn infant, or one in the process of being born, becomes a human being in the technical sense. There is no much change in the child itself between a moment before and a moment after its expulsion from the body of its mother, and normally, while still dependent on its mother, the child, for some time before it is born, has not only the possibility but a strong probability of an ability to live an independent life. It is well known that a baby may live and grow when removed from the

²⁷ 843 SW 2d 345 (1992).

²⁸ 467 NE 2d 1324 (Mass, 1984).

²⁹ (1947) 77 Cal.App.2d 621.

body of its dead mother by a Caesarian [sic] operation. The mere removal of the baby in such a case or its birth in a normal case does not, of itself and alone, create a human being. While before birth or removal it is in a sense dependent upon its mother for life, there is another sense in which it has started an independent existence after it has reached a state of development where it is capable of living and where it will, in the normal course of nature and with ordinary care, continue to live and grow as a separate being. ...There is no sound reason why an infant should not be considered a human being when born or removed from the body of its mother, when it has reached that stage of development where it is capable of living an independent life as a separate being, and where in the natural course of events it will so live if given normal and reasonable care. It should equally be held that a viable child in the process of being born is a human being within the meaning of the homicide statutes, whether or not the process has been fully completed. It should at least be considered a human being where it is a living baby and where in the natural course of events a birth which is already started would naturally be successfully completed.

The legal authorities depriving the foetus of personality have been criticised for their ambiguity with regard to “what the foetus is”, if it is denied personality. Those legal authorities had merely indicated what the foetus “is not” instead of what “it is”. This is evident in the fact that in most of these English law jurisdictions, there are contradictions either between the foetal protection policies, social policies and medical practices, or between maternal interest and foetus concern. In most instances, women faced prosecutions because they used criminalized drugs while pregnant. The argument then had been that the child abuse law should be interpreted to apply to fertilized eggs, embryos and fetuses. In *Whitner v State*³⁰ the central issue of the case is a

³⁰ 492 SE 2d 777 (1997).

woman harming her foetus during pregnancy. In that case, a woman was found guilty of child abuse because she had taken cocaine at a late stage in her pregnancy. In reaching this decision, the Court interpreted the relevant Act's definition of a child as a "... person under the age of eighteen" as including a viable foetus. Similarly, in *DiDonato v Wortman*³¹, the Court interpreted the term person used in the state wrongful death statute to allow recovery for the death of a foetus. However, later in *State v Beale*,³² the Court refused to interpret the state murder statute to extend criminal responsibility to the killing of a foetus.

The contradictions and ambiguities of the legal personality of the foetus is what makes the laws regarding abortion vary widely by country to country. Some countries are extreme in banning the abortion procedure, while others have liberal attitude towards it. The astounding thing, however, is that both the supporters and the opponents of legal abortion take a pose that their arguments address the fundamental human right. In *Doe v. Doe*,³³ a woman was thirty-five weeks pregnant. Her doctor conducted tests that indicated her foetus was not receiving adequate oxygen. He therefore recommended that the foetus be delivered by cesarean section. Doe objected to the surgical procedure on the basis of her religious beliefs. The doctor and his hospital then contacted the Cook County state's attorney, who petitioned for a court order requiring the woman to undergo the cesarean procedure. The case eventually reached the Illinois Appellate Court, which upheld Doe's right to refuse the cesarean section. The court held that a physician must recognize a woman's right to refuse a cesarean section. It found no statute or Illinois case to support the state's request to force a cesarean on a competent person. It also dismissed the state's argument that *Roe*'s protections of a viable fetus authorized a forced cesarean. Similarly in *In re A. C.*,³⁴ the District of Columbia Court of Appeals ruled that a physician must honor the wishes of a competent woman regarding a cesarean section. The court's opinion

³¹ 358 S.E. 2d 489, 493 (N.C. 1987).

³² 376 S.E. 2d 1, 2 n.3 at 4 (N.C. 1989).

³³ 260 Ill. App. 3d 392, 198 Ill. Dec. 267, 632 N.E.2d 326.

³⁴ (1990) 573 A.2d 1235.

was written after the woman involved in the case, Angela Carder, and her foetus died following a cesarean section forced by a lower court.

4. The Foetal Rights

Foetal rights encompasses the legal or ethical rights of the foetus, and like other categories of human rights, they embraces a complex variety of issues. Such issues include the legal status of the fetus and the competing rights between the foetus and its mother. In *Roe v. Wade* the constitutional question focused on the competing rights of three parties, namely, the foetus, its mother (the pregnant woman) and, the State of Texas. The mother asserted a right to privacy over her own body, as opposed to the foetus's right to life and the state's interest in protecting that right to life. Eventually the Court decided that the Fourteenth Amendment's use of the word "person" did not refer to the foetus, and therefore, there was no constitutional right to life to it. Additionally, the Court found that while the state did have a right to protect the potentiality of the life of a foetus, that interest was not strong enough to completely abrogate the mother's right to privacy.

It needs to be noted that even at the international level, the only instrument that specifically grants rights to foetus is the American Convention on [Human Rights](#) of 1969, also known as the Pact of San José, signed by 24 Latin American countries, which states that human beings have rights beginning at the moment of conception.³⁵

In Islam, human rights generally begin after conception. There are two stages to this, *viz*, after conception until spirit is breathed into it, and from spirit breathing to the birth. As regards English law, the cases of *Roe v. Wade* and *Casey v. Planned Parenthood v. Casey* establishes that as a constitutional matter, foetus don't have any right, but mothers and states do. That is why in the abortion context, a woman could not be

³⁵ This Convention is an [international human rights instrument](#). It was adopted by many countries in the Western Hemisphere in [San José, Costa Rica](#), on 22 November 1969. It came into force after the eleventh instrument of ratification (that of [Grenada](#)) was deposited on 18 July 1978.

coerced into cesarean section, and that it is the right of the state to protect potential life that is legally significant, not the right of the foetus to grow from juridical personhood to natural personhood.

Most philosophies of natural rights would hold that foetus have rights when they become sentient or self-aware, which presumes a neurophysiological definition of personhood. Such self-awareness consist of substantial neocortical development, which seems to occur at or near twenty-three week. In the premodern era, self-awareness was most often presumed to occur at quickening, which generally takes place around the 20th week of pregnancy.

4.1 Right to Live

Human life is highly revered by both English and Islamic laws. In the case of *Munn v. Illinois*, J. Field observed: “By the term life.....it meant something more than the animal existence.....The deprivation not only of life but of whatever God has given to everyone with life or its growth and enjoyment is prohibited...” The cardinal issue however is whether the foetus could be said to possess ‘life’ prenatally, and if so, what are the capabilities and capacities of ensuring such right. In the English case of *State v Winthrop*,³⁶ the issue was whether the killing of a full-term foetus before being completely separated from the pregnant woman constituted the killing of a person or homicide. The trial court concluded that the child was totally separated from the pregnant woman, though the umbilical cord was not yet cut, hence it had independent life and was a human being. Instructing the jury, it said:

If the child is fully delivered from the body of the mother, while the after birth is not, and the two are connected by the umbilical cord, and the child has independent life, no matter whether it has breathed or not, or an independent circulation has been established or not, it is a human being ...

³⁶ 43 Iowa 519 (1876).

In the case of *Jefferson v. Griffin Spalding County Hospital Authority*,³⁷ the Georgia Supreme Court considered that the foetus, having reached certain stage, has right to live. It held that an expectant mother in her last weeks of pregnancy did not have the right to refuse surgery or other medical treatment if the life of the foetus was at stake. More so in *Norfolk and Norwich Healthcare (NHS) Trust v W*,³⁸ and *Glossop Acute Services Trust v CH (a Patient)*³⁹ the courts respectively allowed caesarean sections despite the pregnant women's refusal, thereby upholding the foetus right to live.

Conversely, in contradiction to the above reasoning, in the case of *Paton v. United Kingdom*,⁴⁰ in order to prevent his partner from having an abortion, the applicant claimed that by allowing abortion, United Kingdom law infringed the foetus's right to life protected by Article 2 of the Convention. The Commission stated that though used extensively, the term "everyone" is not defined in the Convention, and in the light of other Articles using the same term, (such as that protecting the right to liberty and security, that protecting the right to a fair trial, and that protecting the right to respect for private and family life), the term could not, except in rare cases, be applied to the foetus as it is linked to rights that could not be enjoyed prenatally. The Commission avoided giving an answer to whether the foetus has any right to life during the whole period of gestation. Instead, it restricted itself to the circumstances of the case in hand where the woman was ten weeks pregnant, and her physical and mental health were endangered by the continuation of pregnancy. It merely concluded that the abortion was justified thereby mulling the right of the foetus to live. The contradiction in the judgments of the English courts concerning foetus were so deepening to the level that in *Litowitz v. Litowitz*,⁴¹ the court treated foetus gotten in *in vitro* fertilization as property. In this case the Washington

³⁷ 247 Ga. 86, 274 S.E.2d 457.

³⁸ (1997) 1 FCR 269.

³⁹ (1996) 1 FLR 762 (QBD).

⁴⁰ (1981) 3 E.H.R.R. 408.

⁴¹ 48 P.2d 261 (Wash. Sup. Ct. 2002)

Supreme Court enforced cryopreservation contract, interpreting it to provide that the foetus was to be destroyed under the terms of the contract since five years had elapsed since the creation of the foetus.

It is significant to note that the core of the judgment in *Roe v. Wade* is to the effect that the foetus is not a legal person, and as such, does not enjoy the right to live especially if it is in the first trimester when it cannot exist independent of the mother. At that stage, it is dependably attached to the mother by the placenta and umbilical cord.

The position in Islamic law is that, killing children is specifically condemned as they are the helpless victims in every society. In this regard, the Qur'an says: "You shall not kill your children due to fear of poverty. We provide for them, as well as for you. Killing them is a gross offense."⁴²

As regards the life of a foetus, in Islamic law, if the foetus is still alive in the womb after the death of its mother and there is the possibility of its survival after its removal from the womb (for instance where its movement is detected within the uterus), then, it is not recommended to bury the dead pregnant mother immediately. In the circumstances, Imam Ibn Qudamah⁴³ endorses the cutting of the belly of the dead pregnant woman in order to remove such foetus. This is because the right of the living supersedes consideration over the dead.⁴⁴ Some jurists made such immediate removal obligatory. But then in the event where the death of the foetus is not ascertained inside the womb and a live foetus was buried along with its mother, if even after burial there is the possibility of its survival, it is necessary to exhumate the body and remove the foetus from her womb.

⁴² *Surat Al-Isra*, 17:31.

⁴³ Ibn Qudamah al-Maqdisi Muwaffaq al-Din Abu Muhammad Abd-Allah bn Ahmad bn Muhammad (1147-1223) is a renowned Sunni jurist who authored many books on Islamic jurisprudence.

⁴⁴ Alireza B. A., *Islamic Bioethics: Current Issues and Challenges*, (2017, World Scientific), p. 120.

The provision of the Islamic law is that if the pregnant mother is attacked and the foetus at any stage is intentionally or unintentionally destroyed or injured, the *ghurrah* blood money should be paid. In such case, the mother or the father of the foetus could put a claim in Islamic law. The award of the claim sanctifies the foetus, while at the same time the sanctity is not much like a fully-born person, which its destruction may attract death sentence or payment of full *diyya*. But some jurists maintain a calculation that if the terminated foetus is inside the uterus, 2 % of full *diyyah* should be paid. If it is in clot stage, then it is 4 % of full *diyyah*. But if it is at the stage of *mudgha*, then it is 6 % of full *diyyah*. However, some jurists simply held that if the foetus is at the stage when flesh and bone is formed but spirit is not breathed in it, then 10 % of full *diyyah* must be paid. But once the spirit is breathed in after 120 days (4 lunar months plus 10 days, equal to 19 weeks and one day or 134 days passed last menstruation), the foetus acquires perception and volition (i.e. becomes a person), and is entitled to the same rights as a living being and its abortion will be an instance of homicide.

It is in the quest to protect the life of the foetus that generally, in Islamic law, abortion is considered prohibited after four months have passed since conception, because at that time it is akin to taking a life, an act that entails penalty in this world and in the Hereafter. As regards the matter of abortion before this period elapses, it is considered allowed if necessary. However, in the absence of a reasonable excuse, it is detestable. The arguments of the jurists is predicated on their opinion on the matter of *Azal* (*coitus interruptus*). Those who allow *Azal* consider that the foetus has no right to live and hence, abortion as allowable. The same ruling should be applicable for women deciding on sterilization.

It needs to be noted that Muslim jurists are unanimous in holding that the life of the woman (as the mother of the foetus) takes precedence over the life of the foetus. This is because the woman is considered the "original source of life", while the foetus is only a "potential life". Muslim jurists agree that abortion is allowed based on the principle that "the greater evil

[the woman's death] should be warded off by the lesser evil [abortion]." In these cases, the physician is considered a better judge than the scholar.

4.2 Right to be Safe and Protected

Both the English and Islamic law have considerable concerns over prenatal negligence resulting in the birth of injured or disabled children. Under English law, it is on record that the English courts have been deciding on claims of damages in cases relating to the foetus without recourse to the foetal legal status. They mostly concern themselves with the issues of duty of care towards the foetus, especially when one's behaviour is likely to cause harm to the foetus. In *Duval v Seguin*,⁴⁵ the High Court of Ontario judge stated that: "[A foetus] falls well within the area of potential danger which the driver is required to foresee and take reasonable care to avoid. ... [I]t is not necessary in the present case to consider whether the unborn child was a person in law or at which stage she became a person." The same approach was adopted by the English Court of Appeal in *Burton v Islington Health Authority*.⁴⁶

In Islamic, provisions are abound to safeguard a foetus. For example, some religious duties, which hitherto are compulsory, have been taken away from the pregnant women. For example, fasting of the month of *Ramadan* is compulsory to every able bodied Muslim. But if there is the fear of harm to the foetus, the obligation was removed from a pregnant woman. Also in the case of violation of law whereby a pregnant woman is to be punished by *hadd* (fixed punishment in the Qur'an and hadith for crimes) or *ta'azir* (discretionary punishments), such punishment shall be delayed until she gives birth. This is to prevent any harm to the foetus. The Holy Quran clearly provided that no one is to be punished for the sin the other one has committed; thus, a foetus should not be made to suffer the punishment given to its mother. It was reported that once an

⁴⁵ (1972) 26 D.L.R (3d) 418 and 433.

⁴⁶ (1992) 3 W.L.R. 637.

adulterous woman got conviction for her crime, but Caliph Ali bn Abi Talib (AS) said: "Take care of her until she delivers the baby and when the child is born and someone was found to take care after the child, then punish her." Again, the jurists have agreed to delay the application of *Qasas* (retribution) to a pregnant until she gives birth. In one narration, a woman from the Ghaamidi tribe was reported to have come to the Prophet Muhammad (SAW) and demanded to be purified for indulging in adultery. After her several confession, the prophet (SAW) told her "Wait till you deliver your baby."

In addition to the above, the Islamic law confers on the foetus rights to be safe under the caption of the Islamic criminal law and Islamic law of torts. Thus, in Islamic criminal law, if a person commits aggression against a pregnant woman that resulted in the loss of her foetus, then such person could be held liable to pay compensation of *ghurrah*. But if the foetus is delivered alive and then later dies due to the effects of the injury it sustained in the womb, then the compensation will be a full *diyyah* (blood money). Similarly, it is in the protective interest of the foetus that made the jurists to forbid abortion, except where it is for the sole purpose of saving the life of the mother.

4.3 Right to Maintenance and Nourishment

A foetus in the womb enjoys right of maintenance in Islamic law. Here maintenance means making all the arrangements necessary for the sustenance of a foetus out of its own father's pocket. It includes the expenditure for the proper feeding, nutrition, medical care and nourishment of the mother and the foetus. Under the law it is the father of the foetus who is obliged to provide sufficient maintenance to the foetus and its mother who is pregnant at that time. The mother is included to enable the foetus in her womb to maintain a healthy status up to delivery. The extent of his liability depends on the father's financial position. But he is expected to maintain his pregnant wife even when he divorced her. Some jurists however have gone for "an enhanced maintenance" justifying it to the additional nourishment needed by the mother on account of the pregnancy. Significantly, foetus mother can even sue her

husband for the maintenance of the foetus (her pregnancy) because the pregnant woman's husband is deeply involved in the care of the duo.

4.4 Right to Inheritance

In English law, the general rule is that a foetus must be born alive before he or she becomes eligible for an inheritance. This was clearly demonstrated in the case of *Marsellis v Thalhimer*⁴⁷ where the court indicated that the foetus, even if made beneficiary by a testator, must be capable of independent existence in order for it to qualify for bequest or inheritance. In the words of the court:

Although by the civil law of successions, a posthumous child was entitled to the same rights as those who were born in the life time of the decedent, it was only on the condition that they were born alive, and under such circumstances that the law presumed they would survive.... Children in the mother's womb are considered, in whatever relates to themselves, as if already born; but children born dead, or in such an early state of pregnancy as to be incapable of living, although they be not actually dead at the time of their birth, are considered as if they had never been born or conceived.

Conversely, in *Re the Estate of K*,⁴⁸ the Tasmanian Supreme Court, setting aside philosophical or biological question of the life of the foetus, granted frozen foetus the right to inheritance. The court in so holding, made extra-legal considerations by analogy of assumption; it deemed the foetus to be alive at the death of the intestate and so entitled to inherit from them,

In Islamic Law, the general rule is that a foetus conceived at the time of the death of his parents shall be considered an heir provided it is born alive. Some jurists maintained that this right

⁴⁷ 2 Paige Ch.24 (N.Y.1830).

⁴⁸ (1996) 5 Tas R 365.

starts *in utero* when the foetus is in the womb.⁴⁹ Others argued otherwise, because a still-born could not inherit. But Sheik Sarakhsi,⁵⁰ had argued that the foetus is entitled to inherit even if it dies at birth provided three-quarters of the foetus body had emerged before its death. The Islamic law of inheritance protect this right of the foetus to the level that, even if the foetus dies thereafter (after been born alive), it still inherits and, its inherited shares could then be distributed to the foetus heirs. All the jurists agrees to this. However, such inheritance rights of the foetus are subject to certain conditions, viz;

- a. The foetus must be in existence with certainty (*yaqinan*) or presumptively (*Zannan*), at the time of death of the person it is inheriting.⁵¹ The jurists maintained that the existence of the foetus could be establish through either conventional knowledge of conception, or gestational rule.
- b. There must be live birth of the foetus. This is demonstrated by show of signs of a stable life. The jurists cited a prophetic hadith that declares that; “if a new born performs *istihlij* (signs of life) it is to inherit”. According to Imam Maliki, the term *istihlij* means “screaming”. Other jurists enlarge the scope to include “sneezing”, “yawning”, “suckling”, “coughing”, “movement”, and “crying”.

But considering that the gender of the foetus has to be known to determine its exact share, and that in the case of foetus such information could not be ascertained, there are number of juristic opinions on how to deal with a deceased’s estate when a foetus is one of the heirs.⁵² These include;

⁴⁹ Sarakhsi, S., *Kitab Al-Mabsut.*, Vo. 29, *Matba’at Al-Sa’ada*, Cairo. Pp, 50 -51.

⁵⁰ Sarakhsi, whose real name is Muhammad bn Ahmad bn Abi Sahl Abu Bakr al-Sarakhsi is an 11th Century Hanafi scholar.

⁵¹ Jamal, S., *Hashiyat Al-Jamal Ala-Sharh Al-Minhaj Li-Sheikh Al-Islam Zakariyya Al-Ansari*, Vol.4, P. 32.

⁵² Ibn Juzzayy, *Al-Qawanin Al-Fiqhiyya*, *Dar Al-Kalam*, P. 259.

- i. Suspending the distribution of the estate until the birth of the foetus.
- ii. Partial distribution of the estate, with those heirs whose portions are unaffected by the birth of the foetus getting their shares, while the rest of the estate is kept until after the birth of the foetus.
- iii. Partial distribution of the estate, with those heirs whose right to inherit depends on the birth and gender of the foetus are not given any part of the estate until the latter's birth.
- iv. Partial distribution of the estate, with those heirs whose portion of inheritance may change depending on the gender of the foetus given the minimum amount that they may inherit.
- v. Partial distribution of the estate, with the application of *istiqri* principle involving setting aside the shares of four males until after the birth of the foetus, while the rest of the heirs get their shares.
- vi. The share of a single male is to be kept aside for the foetus until its birth and the rest of the estate is to be divided up. This decision was particularly popular among the Hanafi School of Law and is based on the assumption that "the norm is for women to beget one child in each pregnancy. Hence any legal ruling must be based on the norm and not on rare occurrences such as multiple births. It also shows a desire on the part of Jurists espousing it to ground their thought in reality and not to inflict undue financial hardship on the other heirs.
- vii. The share of two males is to be kept aside until the foetus is born⁵³ because twins were not very rare according to some jurists.

4.5 Right to own property

Historically, English property law does not generally favour ownership of property by foetus. The latter review of some English law legislation recognised its proprietary interest but

⁵³ Bahuti, M., *Al-Rawd Al-Muraba Fi-Sharh Zad Al- Mustanqa*. Vol. 2, Al-Matba'a Al- Salafiyya, 1960 P. 195.

with a condition that a prior "interest" has to be created. This means that there cannot be a direct transfer to the foetus. If a trust is not formed, the property must be transferred in favor of a living person and then to the foetus. It is for this reason that the English law uses the expression "for the benefit of" and not "transfer to an unborn person".

In Islamic jurisprudence, foetus is accorded with the receptive legal capacity that enables it to acquire proprietary rights through inheritance, bequest and gifts made in his favour.⁵⁴ The Islamic law of inheritance had guaranteed the foetus right to inheritance, as discussed above. In addition to that, the Islamic property law had provided that a gift (*Hiba*) could validly be given to the foetus. In this case, even though the law requires a donee to accept the gift before it becomes effective, an exception was made in the case of foetus. The only conditions are that the foetus must be conceived at the time the gift is declared, and that the foetus is born alive within six months from the date which the gift was made. This means that, if the mother is a married woman, the foetus must be born within six months of the making of the gift since that is the minimum period of gestation. If the mother is a divorcee or a widow and she is observing her *iddah* (pregnancy period), the foetus is entitled if it is born within the maximum period of gestation which the various schools of Islamic law fix at two years, (Hanafi School), four years (Maliki, Shafi'i, and Hanbali Schools) and ten months (Shi'ite School), to be counted from the termination of the marriage.⁵⁵ These periods are set in order to ensure that the foetus had in fact, been conceived at the time of making the gift or bequest.

⁵⁴ Imam et al, A Jurisprudential Analysis of the Fundamental Rights of Fetus (an Unborn Child) Under the Conventional and Islamic Law (June 18, 2011), available at SSRN < <https://ssrn.com/abstract=1866666> or <http://dx.doi.org/10.2139/ssrn.1866666> > @ 20/7/19.

⁵⁵ Chaudhary, A., "Human Rights: Comparison between the Declaration of Human Rights and Divine Rights in Islam" .P. 24. Available at < <http://downloads.islambase.co.uk/booksOBMhumanrights.pdf>. > accessed on 15/10/2015.

The foetus could also be a beneficiary of a bequest in Islamic law. In this regard, Imam Malik validated such bequest even if made prior to the conception of the foetus. In case of a stillbirth, the property reverts to the testator or donor. But some jurists of the Shafi'i School of jurisprudence objected to the drawing up of a bequest benefiting someone who has not yet been born. They predicated their arguments on the rationale that, bequests necessitate ownership, and a human being who does not exist cannot own anything. Therefore, "bestowing ownership on a non-existent human being is not allowed."⁵⁶ This opinion is however, in direct contrast with the view of Imam Shafi'i himself who had allowed foetus to benefit from bequest.

4.6 Right to Parental Affection and Dignity

In Islam, the law had accorded dignity to the foetus in several ways. Prior to its conception, there are guidelines set for choosing a suitable father for the foetus. This dignified way in which a woman gets married radiate back to the foetus. Marriage to its mother was witnessed by witnesses, and that gives it the self-respect of being a "legitimate" product. The law even provides punishment for anyone who accuses its mother of adultery without sufficient evidence.⁵⁷ This is because where an imputation of adultery is made on a foetus that is carried by his mother, it is sufficient to believe that the accused intended to harm not only the mother but also the foetus she bears. In other ways, even if it is gotten illicitly, the Islamic law dignified the foetus to inherit its mother if born alive.

Another dignity given by the Islamic law is in respect of the obligation of the foetus father to provide not only sustenance and nourishment, but also housing for its proper up-keeping. The law likewise accords it with the right to be given a beautiful name, and the naming ceremony to be celebrated with *walima*

⁵⁶ Ramfi, S., *Nihayat Al-Mujtaf, Dar Al-Ihya Al-Turath Al-Arabia*, Beirut. Vol. 6, pp. 42-43.

⁵⁷ This assertion has been testified by the Qur'an thus; "And those who accuse free woman then do not bring four witnesses, flog each one of them (eighty lashes) and do not admit any evidence from them ever, and these are the transgressors."

(banquet) on the seventh day involving (where affordable) slaughtered sheep.

4.7 Right of Spirituality

English law had not addressed the spirituality, but Islamic law is particular about this aspect. A foetus mother could sue for the enforcement of the foetus birth rites, if delivered alive and had live for seven days. The birth rites involve choice of good name (for the baby), slaughtering a sheep and then distributing the meat to family members, neighbors and the poor. This banquet ceremony symbolises the legitimacy of the child. The celebration form part of the rights of the foetus (if born alive). Still, on the basis of hadith, part of the birth rites include whispering call-to-prayer into the baby's ears by his or her father. It is therefore foetus right to have that call as its first words in the ears. Also prophetic hadith gives the foetus the right to test chewed date. Other rites include shaving of the baby's head (on the seventh day), and circumcising the males.

Islamic law stipulates that in the case of the death of the foetus after ensoulment (the moment at which a human being gains a soul), all ordinary rites and rituals for burying the adult dead must be observed for the dead foetus as well. And in the case of miscarried foetus, if it is four months old or more, ritual washing should be done to it, and should be wrapped in a fabric and be buried. At any rate, it should not to be thrown in the garbage when it is born prematurely.⁵⁸ But if it is less than four months, then according to the jurists, it may not need the ritual birth or the funeral prayer. Nevertheless, majority of jurists maintain that a foetus that is more than four lunar months old in its mother's womb, even if it does not utter a sound or show any sign of life at the moment of birth, should be given a ritual bath, but no funeral prayer over it. This may apply to both the formed and unformed foetus. Significantly, the jurists have consensus that in the event where the baby that dies after even a few minutes of showing an indubitable sign or signs of life must be

⁵⁸ Shawkani, M., *Nayi al-Awtar min Ahadith Sayyid al-Akhyar. Sharh Muntaqa al-Akhbar*. Dar – al – Ju Beirut. Vol. 4 P. 82.

given a name and accorded all burial rituals in Islam as if it were an adult.⁵⁹

4.8 Right to free its mother from slavery

As part of its efforts to curtail or eradicate slavery, the law allows a Muslim to marry a slave girl or to take one or more of his slaves as concubines.⁶⁰ However, it stipulates for that the status of the foetus that is born out of this latter relationship follows that of its father's status.⁶¹ In this case, Islamic law dictates that if the concubine becomes pregnant in the exercise, she can never be sold by her master again whether the foetus is born alive, still born, or miscarried. And if she is not chanced to be freed by her master during his life time, she is automatically set free by law at his death. The foetus of her master carried by the slave earns her the freedom in the unanimous opinion of all the Islamic schools of jurisprudence.

5. Conclusion

The English laws relating to the foetus are far from consistency and this shows the deep division of the courts on the issue. In contrast to that, Islamic law rules on the issue, though with no sufficient consensus, is more consistent and constant.⁶² In fact, the English concept of foetal rights is embellished in contradictions and controversies. At one instance, there is recognition, at another there is denial. Thus, while the English law recognizes feticide as crime, the right of the bodily integrity given to women negates the noble idea of the former rights. But the Islamic law is careful in balancing the competing rights of the mother, the state authority and the foetus. Again, in Islamic law, foetal right is not limited to supporting the right to live through banning abortion or other means of ending the life of the foetus. Rather it is a wider concept that covers not only

⁵⁹ Al – Jaziri, A. *Kitab al-Fiqh al Madhab al-Arba'ah*. Dar – al Ihya' al – Turath Al – Arabia Vol. 1, P, 503.

⁶⁰ Al – Tusi, A. J., *Al-Nihayat Fi Mujarrad al-Fiqh wal Fatawa*. Dar al-Arabi, Beirut 1980 P, 546.

⁶¹ *Ibid*.

⁶² White H.M., *Unborn Child: Can you be protected?* University of Richmond Law Review, Vol, 22, Issue 2 (1988) P. 288.

mundane issues but also spiritual ones. That is why in the context of the Islamic law, the legal issues are matted with the moral aspects.