

PROTECTION OF FOETAL RIGHTS IN ISLAMIC LAW: A CONTEMPORARY APPROACH

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ABSTRACT

The rights of foetus are highly neglected by many in the contemporary Muslim societies. The neglect attributable to lack of sound knowledge of what the rights of foetus entail. Due to the current condition of the foetus in the womb of his or her mother, there is widespread misconception that a foetus only acquires right after birth. However, this misconception is wrong under the sound knowledge of Islamic law. Hence, the paper analyses the accruable rights of the foetus from the perspective of the primary sources of Shari'ah. The paper adopts doctrinal methods and content analysis of the various sources of information to discuss the issues relating to the foetal rights. The paper finds that foetus is entitled to right to life and proprietary rights. The paper finds further that aside the two major rights, there are other rights accruable to foetus such as rights to having a healthy and chaste womb, having strong genetic origin, enjoying a healthy life in the womb, maintaining good and benefit of the foetus and having access to halal healthcare system etc. The finds that under right to life accruable to the foetus, abortion is generally forbidden except in exceptional circumstances. The paper by way of recommendation places obligation on the relevant stakeholders towards respecting and implementing the rights of the foetus under Islamic law.

Keywords: Rights and Protections, Foetus, Islamic Law, Systematic Analysis, Accruable Rights

1.0 Introduction

Islam law, as a comprehensive legislation, has not left anything concerning the affairs of Muslims untouched.¹ The rights of both the Creator and the creations have been holistically dealt with. This right extends to the foetus that is regarded as having incomplete legal capacity to inherit or receive.² Many Muslims have shown no regard for the foetus through violations of its rights. This is due to the non-appreciation of the foetal rights under Islamic law. This thus culminates in several abuses of foetal rights. The topmost abuse is inherent in indiscriminate abortion against Islamic injunctions.³ The misconception leading to the abuse is that many assume the foetus only acquires rights after birth.⁴ The abuse of the foetal rights has led some Muslim Countries like Malaysia to criminalise it with imposed punishments.⁵

The purpose of this paper is to shift attention to the importance of foetal rights by examining the protection of foetal rights in Islamic law from a contemporary approach. Specifically, the paper focuses on the concept of foetus under Islamic law, the legal capacity of the foetus, the basis of foetus rights in Qur'anic provisions and Sunnah, the position of the Sunni schools on the right of the foetus and the rights of the foetus as distilled from the sources of Shariah.

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¹ Qur'an Chapter 6:38

² SB Giade, 'Despite the Existence of Al-Dhimmah in Every Human Being, Ability of Certain People to Engage in Contractual Relationship is Curtail' *Journal of Humanities and Social Science* 19(6) (2019) 287-322

³ U Alkali, 'Abortion: An Infringement of the Foetus' Right to Life in Islamic Law' *IIUM Law Journal* (2015) 23

⁴ LJL Simball and TCT Abd, 'The right to life of the unborn from a human rights perspective' *Revista Centro Sur* (2022) 7(2) 1-17

⁵ *ibid*

2.0 Understanding the Concept of Foetus under Islamic Law

In Islamic jurisprudence, the Law Giver prescribed certain rights for foetus after its conception.⁶ The question that comes to mind now is: who is foetus? This question cannot be answered without considering when life begins under Islamic law. According to Islamic jurists (*fuqaha*), the soul enters the foetus around one hundred and twenty (120) days from conception, they have based this duration upon a Qur'anic verse and Hadith of the Prophet (SAW).⁷ Allah states the embryonic development in the mother's womb thus:

And verily We did created man from quintessence (of clay). Then We placed him (as a drop of sperm) in a place of rest firmly fixed. Then we made the sperm into a clot of congealed blood. Then we made out of lump of bones and clotted the bones with flesh. Then We developed out of it another creature (by breathing life into it) so blessed be Allah, the marvelous Creator.⁸

In the hadith recorded by the two most authentic authorities Imam al-Bukhari and Imam Muslim (may Allah have mercy on both of them) in their respective sahih collection, the messenger of Allah (SAW) discuss in detail the periods elapsing between the stages mentioned in the Qur'an Sayyiduna Abd Allah ibn Mas'ud (Allah be pleased with him) narrates that the Messenger of Allah (Allah bless him and give him peace) 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

⁶A Husairi, 'Embryology in the Qur'an and Hadith: Expanded Multidisciplinary Perspective' *Advances in Social Science, Education and Humanities Research*, 353, 459-353

⁷ R Rashid, 'When does Ensoulment in the Human Foetus?' *Journal of the British Islamic Medical Association* (2022) 12(4) 1-7

⁸ Qur'an Chapter 23:12-14

blessed or wretched (in religion). Then the soul is breathed into him...⁹

Jurists have inferred based on the provision of the Qur'an and hadith that the soul enters the body of the foetus around one hundred and twenty (120) days after gestation. In view of the above, Ibn Abidin (Allah have mercy on him) states that "the soul enters the foetus at one hundred and twenty (120) days (4 months) as established by the hadith."¹⁰

Thus, when the age of the foetus reaches one hundred and twenty (120) days, it is no longer considered a lifeless object; rather, it is a living human being. At this point, all organ differentiation is almost completed, and the child acquires the shape of a human body with certain human attributes and features, such as movement.¹¹

3.0 Legal Capacity of Foetus under Islamic Law

Under Islamic law, the foetus is not only entitled to legal protection of their health and life¹² but is held to be recipient of certain additional rights. To entitle foetus to legal rights, Islamic law invests them with a quality of life known as *dhimma*.¹³ *Dhimma* in Islamic law connotes "a quality by which a person becomes fit for what he (or she) is subjected to."¹⁴ In other words, it is a quality inherent in all human beings that enables them to be repository of rights and obligations. The legal capacity to bear that right and obligations is *ahliyyat al-wujub*. It is an exclusively human quality, since only humans can be recipient of rights

⁹ Sahih al-Bukhari Vol 4 No. 59

¹⁰ MA Muhammad Umar, Radd al-Mukhtar ala Durar al-Mukhtar (Vol. 1/202 Publication, 1855)

¹¹IKK Ibrahim, *et al*, 'A Jurisprudential Analysis of The Fundamental Rights of the Foetus (an unborn child) under the Conventional and Islamic law' *NAKLAS-BUK Journal of Law* 1 (2012) 78-80.

¹² Qur'an Chapter 17:33 and Qur'an Chapter 6: 151

¹³ D Olowu, 'Children's Rights, International Human Rights and the Promise of Islamic Legal Theory' *International Journal of Children's Rights* 10 (2) (2002) 13

¹⁴ Abdallah AA 'legal capacity in Islamic law' monograph series 1978 1 (6) Zaria Nigeria centre for legal studies.

and bearers of responsibilities. To invest foetus with *dhimma* is to recognize their independent human status.¹⁵

Ahliyyat al-wujub is of two types: *Shakhsiyyah Naqisa* (incomplete, partial or limited) and *Kamila* (complete).¹⁶ The foetus is vested with only limited *ahliyyat wujub* which becomes complete the moment the baby is delivered alive. The *ahliyyat wujub* which is acquired at birth makes the child the repository of both rights and obligations; the effect of incomplete *ahliyyat al-wujub* is to divest the foetus of the obligations.

The foetus, therefore, is only the recipient of rights and owes no obligations to anyone. By virtue of his limited legal capacity, he therefore becomes the recipient of certain rights. The rights may be classified into two ways. The first class provides the foetus with safeguards for personal protection; the second class enables him to acquire certain material benefits.¹⁷

4.0 Legal Basis of Foetus' Rights in the Qur'an and Hadith

It is widely accepted that an investigation into any Islamic concern should begin with consulting the Qur'an and the Sunnah of the Prophet, which are the guiding texts of Islamic law. For Muslims, the Qur'an and Sunnah are the main sources of Islamic law; however, neither the Qur'an nor the Sunnah directly addresses intentional abortion. Instead of specifically discussing a pregnant woman seeking a termination of a pregnancy before birth, these sources focused on unwanted children and infanticide. The Qur'an condemns killing generally, as this is considered a transgression against the right of Allah as the creator of man and everything. Almighty Allah prohibits the killing of one another in the following verses: *And do not kill the soul which Allah has forbidden, except by right...*¹⁸

¹⁵ N Saleh, 'The Capacity to Receive Rights and Obligations: Definition and the Formation of Contract under Islamic and Arab laws' *Arab Laws Quarterly* 5(2) (1990) 101-116

¹⁶ M Zahraa, 'Legal Personality in Islamic law' *Arab law Quarterly* 10 (3) (1995) 193-194

¹⁷ *ibid*

¹⁸ Qur'an Chapter 17:33

And those who do not invoke with Allah another deity or kill the soul which Allah has forbidden (to be killed), except by right...And whoever should do that will meet a penalty¹⁹

The killing of children and infanticide out of economic hardship was also discouraged; *And kill not your children for fear of poverty. We provide for them and for you. Surely, the killing of them is a great sin.²⁰*

Furthermore, it is stated in some verses of *Surat Al-An'am* that:

And likewise, to many of the polytheists their partners have made them (to seem) pleasing the killing of their children in order to bring about their destruction and to cover them with confusion in their religion. And if Allah had willed, they would not have done so. So, leave them and that which they invent.²¹

Come, I will recite what your Lord has prohibited to you. (He commands) that you...do not kill your children out of poverty; we will provide for you and them...and do not kill the soul which Allah has forbidden (to be killed)...²²

Indeed, lost are they who have killed their children from folly without knowledge and have forbidden for them, inventing a lie against Allah. They have indeed gone astray and were not guided.²³

O prophet when believing women come to you, give You there pledge not to associate anything with Allah in worship, that they shall not steal, that they shall not commit adultery, that they shall not kill their children...then accept their pledge and pray to Allah for their forgiveness, for Allah is Oft-forgiving Most Merciful.²⁴

In the above-mentioned verse of the Qur'an, focus is on the passage "that they shall not killed their children." In the Arabic context the word

¹⁹ Qur'an Chapter 25:68

²⁰ Qur'an Chapter 17:31

²¹ Qur'an Chapter 6:137

²² Qur'an Chapter 6:151

²³ Qur'an Chapter 6:140

²⁴ Qur'an Chapter 60:12

children have a connotation meaning both male and female children. During the pre-Islamic period, the crime of infanticide was known to be committed for three reasons which were burial alive female infants for fear of shame, fulfillment of a pledge to the idols, poverty and inability to sustain a new child.²⁵

Almighty Allah commanded the father in another verse to preserve the life of the foetus by providing maintenance for his mother when they are pregnant: “And if they are pregnant then spend on them until they deliver.”²⁶

The foetus is also treated as having human attributes and certain rights in various traditions of the Prophet (PBUH). Some *Ahadith* of the Prophet (PBUH) state the right of the foetus to personal protection of his or her life and the punishment due to anyone who transgresses this right as shown below:

Allah’s Apostle gave the judgment that a male or female slave should be given in Qisas for an abortion case of a woman from the tribe of Bani Lihyan (as blood money for the foetus) but the lady on whom the penalty has been imposed died, so the prophet ordered that her property be inherited by her offspring and her husband and that the penalty be paid by her Asaba.²⁷

Umar bin al-Khattab asked (the people) about the imlas of a woman, i.e., a woman who has an abortion because of having been beaten on her abdomen, saying, “who among you has heard anything from the prophet about it?” I said, “I did.” He said, “What is that?” I said, “I heard the prophet saying its diyyah (blood money) is either a male or female slave.” Umar said, “Do not leave till you produce witness in support of your statement.” So, I went out and found Muhammad bin Maslama. I brought him, and he bore

²⁵ A Giladi, ‘Some Observations on Infanticide in medieval Muslim Society’ *International Journal of Middle East Study* 22 (1990) 185-200

²⁶ Qur’an Chapter 65:6

²⁷ Sahih al-Bukhari Vol8 No732, Narrated by Abu Hurairah

witness with me that he heard the prophet saying, “its diyiah (blood money) is either a male or a female slave.”²⁸

Ibn Abbas said: “Umar asked about the decision of the Prophet (peace be upon him) about that (i.e. abortion) Haml ibn Malik ibn an-Nabighah got up and said: I was between two women. One of them struck another with a tent-pole killing both she and what was in her womb. So, the Apostle of Allah (peace be upon him) gave judgment that the blood-wit for the foetus should be a male or female slave of the best quality and that she should be killed.”²⁹

Doing well to the expectant woman is mandatory, even if the mother had committed a crime or an offence against the society. Her guardian should delay her punishment so that the foetus will not be affected by it. This is supported by an order given by the prophet to the guardian of the pregnant woman, who had committed adultery and was pregnant to be kind with her.³⁰ The manner of the child’s birth is not his sin, “And no bearer of burden will bear the burden of another.”³¹

It was also narrated that a woman from the tribe of *Ghameed* came to the prophet (peace and blessing of Allah be upon him) and said, “*Here I am with what I have delivered*” He said, “Return and breastfeed him until *fitham* (weaning or the end of nursing period and beginning of eating regular food).” *Fitham* came; she went to the prophet (peace and blessing of Allah be upon Him) with the child, who was eating something from her hand. The prophet (peace and blessing of Allah be upon him) then gave the child to one of the Muslim men and commanded that she should be stoned to death.³²

These provisions of the Qur’an and Sunnah of the Prophet indicate that the legal protection of the foetus is fully guaranteed under the Shari‘ah, and any attempt to violate those rights will amount to a transgression against Almighty Allah, which is a great sin.

²⁸ Sahih Bukhari Vol. 9 No. 420, Narrated by Mughira ibn Shu‘iba

²⁹ Abu Dawood No. 4555, Narrated Umar ibn al-Khattab

³⁰ Ibn Majah 2095

³¹ Qur’an Chapter 35:18

³² Ibn Majah No 2095

5.0 Position of Sunni Schools on the Rights of Foetus

There is broad acceptance in the major schools of Islamic law on the human status of a foetus. The foetus is regarded as a person with certain rights accruing to him, his right to life, inheritance and being the beneficiary of a gift. The foetus is considered the work of God and therefore should not be tampered with. Abortion and intervention with what are in the womb has been an object of controversy amongst Muslim jurists because it is a violation of his right to life.³³

The majority opinion of the jurists is that abortion is permissible in the first four months of pregnancy, this is however subject to the condition there is a serious reason such as threat to the mother's life or probability of giving birth to a deformed or a defective child.³⁴ The Hanafi School prevalent in Turkey, the Middle East and central Asia, most of the orthodox Muslims following the Hanafi School in later centuries allowed abortion until the end of the first four months.³⁵ According to them a pregnant woman could have an abortion, but she should have a reasonable ground for this act (good causes) for example if the mother is still nursing an infant and fears her milk may run out during pregnancy.³⁶ Abortion before one-hundred and twenty (120) days is regarded as a mere moral transgression and not a crime.³⁷

According to Maliki jurists, they described abortion as completely forbidden. In their view, when the semen settles in the womb, it is expected to develop into a living baby, and it should not be disturbed by anyone. According to ibn Jawziyyah, when the womb has retained the semen, it is not permitted for the husband and wife or master of the slave-girl to induce an abortion. It is prevalent in North and Black African.³⁸ Abortion according to them is akin to murder especially after ensoulment.

³³ R Wahyudi, *et al*, 'Abortion Discourse in the Perspective of Islamic Jurisprudence Scholars' <<https://eudl.eu>> accessed 5 June 2025

³⁴B Alireza and A Leila, 'Abortion in Different Islamic Jurisprudence: Case Commentaries' <http://philpapers.org/rec/BAGAIID> accessed 15th December 2024

³⁵ *ibid*

³⁶ *ibid*

³⁷ *ibid*

³⁸ T Eich, 'Maliki Perspectives on Abortion' available <https://cope.mcw.edu> accessed 8 June 2025

The Shafi'i school dominant in Southeast Asia, Southern Arabia and parts of East Africa differed regarding abortion before the soul is breathed into the foetus. Ramli said in *Nhagat Al-Muhtaj*: “the most correct view is its prohibition (that abortion when the soul is breathed) and permissible before that.”³⁹ This statement indicates the permissibility of abortion before the soul is breathed.

The Hanbali school is predominant in Saudi Arabia and United Arab Emirates. According to the Hanbali jurists, the consensus on the prohibition of abortion after one hundred and twenty (120) days of pregnancy and differed in ruling on abortion before this period. Some of them authorized abortion if the soul has not been breathed in the foetus.⁴⁰ In brief, some Hanbalis prohibited abortion before the soul is breathed, some see prohibition when the pregnancy is at the stage of cloth, and some at the stage of embryo and some see permissibility of abortion without restriction to a certain stage.⁴¹

From the above, it is clear that the majority opinion among the four schools of thought is the permissibility of abortion before one hundred and twenty (120) days, provided there is a reasonable and justifiable reason to do so.

6.0 Rights Accruable to Foetus under Islamic Law

Under Islamic law, certain rights are reserved in favour of the foetus. These rights are meant to be respected and always protected as a form of obedience to the commandment of the Lawgiver. Some of the rights of the foetus under Islamic law are examined below.

6.1 Foetus' Right to Life

A foetus has the right to life and freedom from termination of the pregnancy under Islamic law.⁴² To this end, abortion threatens foetus' right to life. It is important to note that neither the Qur'an nor the Sunnah of the Prophet expressly mentioned abortion. The classical and modern jurists, however, used the elements given in these two sources

³⁹ H Iqbal, *et al*, 'Abortion – an Islamic Perspective' Journal of the British Islamic Medical Association 2(1) (2019) 1-2; see also Wahyudi, *et al*, (n 33)

⁴⁰ Wahyudi, *et al*, (n 33)

⁴¹ *ibid*

⁴² Qur'an Chapter 17: 31

concerning life and the soul of the foetus to determine whether abortion could be said to be a violation of the right to life.⁴³

Abortion in Islam is understood as an interference with the role of the Almighty Allah as the Ultimate owner and decider of life and death. Human life is valued because it is made by Allah.⁴⁴ The word abortion was not expressly mentioned in the Qur'an but the prohibition of the killing of children was talked about in various verses for example:

O prophet when believing women come to you, give them their pledge not to associate anything with Allah in worship, that they shall not steal, that they shall not commit adultery, that they shall not kill their children...then accept their pledge and pray to Allah for their forgiveness, for Allah is Oft-forgiving Most Merciful.⁴⁵

Come, I will recite what your Lord has prohibited to you. (He commands) that you...do not kill your children out of poverty; we will provide for you and them...and do not kill the soul which Allah has forbidden (to be killed)...⁴⁶

And kill not your children for fear of poverty. We provide for them and for you. Surely, the killing of them is a great sin.⁴⁷

In Islam, the foetus is believed to become a living soul after four months of gestation.⁴⁸ Abortion after this period is generally viewed as prohibited. Many Islamic jurists recognized exceptions to this rule for certain circumstances. Most of the Muslim scholars permit abortion although they differ on the stage of fetal development beyond which it

⁴³ Qur'an Chapter 23:12-14 and Sahih al-Bukhari Vol. 4 No. 59

⁴⁴ HA Hanafi 'Right to life and abortion common law and Islamic law perspective' NAKLAS-BUK Journal of Law 2(6) (2013) 172-191.

⁴⁵ Qur'an Chapter 60:12

⁴⁶ Qur'an Chapter 6:151

⁴⁷ Qur'an Chapter 17:31

⁴⁸ Sahih al-Bukhari 4:54:430

becomes prohibited.⁴⁹The permissibility of abortion depends on time and extenuating circumstances.

Seyed al-Sabiq, author of *Fiqh al-Sunnah*, has summarized the views of the classical jurists in this regard in the following words:

Abortion is not allowed 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 allowed if necessary. However, in the absence of a reasonable excuse it is detestable. The author of *Subul-ul-Maram* writes: “a woman’s treatment for aborting a baby before the spirit has been blown into it is a matter upon which scholars differed on account of difference of opinion on the matter of Azal (measures to hinder conception). Those who allow Azal consider abortion as allowable and vice versa. The same rule should be applicable on women deciding on sterilization. Imam Ghazzali opines “induced abortion is a sin after conception.” He further says: “the sins incurred thus can be of degrees, when the sperm enters the ovaries, mixes with the ovum and acquires potential life, its removal would be a sin. Aborting it after it grows into a germ or a leech would be a graver sin and the graveness of the sin increases very much if one does so after the stage when the spirit is blown into the foetus and it acquires human form and faculties⁵⁰

6.1.1 Instances where Abortion is Permissible under Islamic Law

The following are situations where abortion is permissible under Islamic law:

- i. Threat to the woman’s life- It is universally agreed that the life of the woman takes precedent over the life of the foetus. This is because the woman is considered “the original source of life”

⁴⁹ T Ehrich, ‘Where does God stand on abortion’ http://usatoday30.usatoday.com/news/opinion/editorials/2006-08-13-forum-abortion_x.htm accessed 20 December 2024

⁵⁰ TM Hashmi, ‘Abortion’ <https://al-mawrid.org/books> Retrieved 20 April 2025

while the foetus is only “a potential life.”⁵¹ 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 this case the physician is considered the best judge.⁵²

- ii. Physical and Mental health- The principle of necessity is applied. Ibrahim Haqqi, a Syrian physician, explains that physical health issues are justifiable reasons for an abortion. For example, poor health of the mother such as weak bladder, a risk of difficult labor requiring a caesarean section, or a disease or malfunctioning of the uterus. Abortion is generally permitted in this instance.⁵³
- iii. Rape- Most Muslim scholars would hold the child of rape is a legitimate child and thus would be sinful to kill it. Scholars permit abortion only if it endangers the life of the mother. This can be seen in the view expressed by Sheika M.A Salami:

“I believe that the value of life is the same whether the embryo is a result of fornication with relatives or non-relatives or valid marriage. In shariah, life has the same value in all cases.”⁵⁴

However, Muslim scholars were urged to make exceptions in the 1990s following rape Kuwait women by Iraqi scholars (in 1991) and Bosnian women by Serab soldiers. In 1991 the grand mufti of Palestine, Ekrima Sa’id Sabri took a different position than mainstream Muslim scholars. He rules that Muslim women raped by their enemies during Kosovo war could take abortifacient medicine, because otherwise born to those women may one day

⁵¹DL Bowen, ‘Contemporary Muslim Ethics of Abortion’ in JE Brockopp, *Islamic Ethics of life: Abortion, War and Euthanasia* (Columbia S.C University of South Carolina Press) 64

⁵² Da’wah Institute, *Shari’ah Intelligence Book II; The Basic Maxims and Higher Objectives of Islamic Jurisprudence – An Introduction to Qawa’id al-Fiqhiyyah and Maqasid al-Shari’ah* (3rd Ed, Islamic Education Trust, Minna, Niger State. Nigeria, 2019) 31-33

⁵³ AA Islahi, *Tadabbur-i-Quran* (2nd Ed, Vol. 1, Lahore: Faran Foundation, 1986) 546.

⁵⁴ *ibid*

fight against Muslims.⁵⁵ This is, however, subject to the condition that the foetus is less than one hundred and twenty (120) days.⁵⁶

iv. Foetal deformity: Some Muslim scholars also argue that abortion is permitted if the newborn might be sick in some way that would make its care exceptionally difficult for the parent for example deformity, mental retardation etc.⁵⁷ This is supported by a view expressed in 1990, by the Islamic Jurisprudence Council of Mecca (Islamic World League) in its 12th session allowing abortion of the foetus where the foetus is grossly malformed, with untreatable severe condition provided the foetus is less than one hundred and twenty (120) days computed from the moment of conception. This is in line with the Islamic legal maxim: *al-Mashaqqah tajlib at-Taysir* and *ad-Darurah Tubihu Mahdhuuraat* (hardship begets ease).

6.2 Foetus' Right to Personal Protection

Islamic law confers on the foetus certain rights under Islamic criminal law and law of tort for personal protection with respect to his "life" and "health." To this end, if any person commits an aggression against a pregnant woman such that the foetus is aborted, such a person is held liable for killing the child in addition to any other liability the aggressor might owe to the mother. The aggressor is liable to pay compensation called *ghurra*, which most scholars agree is not an additional payment but an independent right of the foetus to be inherited by its heirs.⁵⁸ If the child whose mother was the victim of such aggression was delivered alive and then dies from the injury it sustained in the womb, the compensation will be a full *diyyah* (blood money).⁵⁹ If the aggressor acts deliberately may also be liable to other punishments.⁶⁰

⁵⁵ VT Rispler-Chaim, 'The Right not to be born: Abortion of disadvantaged foetus in contemporary fatwa' in JE Brockopp, *Islamic Ethics of Life: Abortion, War and Euthanasia*, (SC university of South Carolina Press) 87-88

⁵⁶ Islahi, (n 53)

⁵⁷ T Ehrich, 'Where does God stand on abortion?' http://usatoday30.usatoday.com/news/opinion/editorials/2006-08-13-forum-abortion_x.htm accessed 20 December 2024

⁵⁸ YY Bambale, *Crimes and Punishments in Islamic Law* (3rd Edition, Malthouse Press Limited, Zaria, 2023) 187-188

⁵⁹ *ibid*, 189

⁶⁰ *ibid*, 189-190

Another right under this category is the obligation to provide feeding to the foetus through the mother even if they are separated.⁶¹ Allah stated in the Holy Qur'an thus: "And if they are pregnant then spend on them until they deliver."⁶²

6.3 Proprietary Rights of the Foetus

The legal capacity of a foetus though limited enables him to acquire proprietary rights through wills and gifts made in his favour and by way of inheritance.

a) Wills and Gifts

Although under Islamic law *hiba* (gift) and *wassiyah* (legacy) must be accepted by the donee or legatee, an exception is allowed in the case of foetus.⁶³ However, the need for acceptance is not dispensed completely. Generally, for gift or legacy to take effect the foetus must be in existence at the time the bequest or gift is made. This means that if the mother is a married woman, the child must be born within six months of making the will or donation of gift since that is the minimum period of gestation. If the mother is a divorcee or a widow and she is observing the *iddah* (pregnancy period)⁶⁴ the child 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, and Hanbali school) to be counted from the termination of the marriage.⁶⁵ These dates are set to ensure that the foetus had been conceived at the time of making the gift or bequest. However, according to the Maliki School no such requirement applies in the case

⁶¹ Qur'an Chapter 65:6

⁶² *ibid*

⁶³ AS Aminu, *An Application of the Principles of Gift (Hibah) in Islamic Law and its Application in Kaduna, Kano and Kebbi States* (LL.M Dissertation, Ahmadu Bello University, 2015) 30

⁶⁴ In Islamic law, a divorced woman must wait at least three months, and a widow at least four months and ten days, before they can marry again. The main objective appears to be that there should be no doubts as to the identity of the father if the woman gives birth to a child later. Within this period, it should become obvious whether a woman is pregnant. If she turns out to be pregnant, then her waiting period lasts until the birth of the child; otherwise, she is free to remarry after the three months are over. See AA Islahi, *Tadabbur-i-Quran* (2nd Ed, Vol. 1, Lahore: Faran Foundation, 1986) 546.

⁶⁵ Islahi, (n 53) 546.

of bequest since it is valid in their view to make bequest in favor of people who are yet to be conceived. For any gift or bequest in favor of foetus to take effect the child must be born alive.⁶⁶ Thus, in case of a stillborn the property reverts to the testator or donor.

b) Inheritance

It is the mandatory legal right of a foetus to inherit if born alive. Foetus is entitled like any other person, to a prescribed portion of the estate of his or her deceased father, mother or other relatives.⁶⁷ The child receives full share as though he or she was present at the time of the death. His right to inheritance is, however, subject to fulfillment of certain conditions:

- i. The foetus is proved to be conceived within the minimum of six months gestation period.⁶⁸
- ii. The foetus is born alive, if not the property reverts to the estate of the deceased.
- iii. The child is conceived and given birth to in a legal marriage, a child born out of wedlock (*waladul zina*) cannot inherit from his father's or the father's relative's estate, he can only inherit from the estate of his mother or her relatives.⁶⁹

There are always controversies as to whether the child is born alive or dead when the deceased dies. This problem was addressed by the Prophet (peace be upon him) "it was narrated by Yasir that, the prophet said; "*when a newborn has raised his voice (and then dies) it is treated as an heir*"⁷⁰ The *fukah* have different opinions whether the whole body of the foetus must be born alive or partially. The Shafi'i, Maliki and Hanbali *Madhahib* (schools) require that the foetus must be born alive. If only some parts of the foetus are born alive and then it passes

⁶⁶ Aminu, (n 63)

⁶⁷ Z Amin, *et al*, 'Right of Foetus (Janin) in Islamic and Western Law: A Comparative and Analytical Study' *Journal of Positive School Psychology* 6(8) (2022) 5731-5743

⁶⁸ Qur'an Chapter 46:15 and Q31 v 14

⁶⁹ MY Aminu. 'Illegitimate Child (Walad Al-Zina) and His Position in Islamic Succession' *IOSR Journal of Humanities and Social Science (IOSR-JHSS)* (2015) 20(12)(II) 25-27

⁷⁰ Sahih Bukhari No. 3036

away, the foetus is not entitled to inherit the inheritance even though the birth was followed by a cry.⁷¹

There are divergent opinions as to the *modus operandi* of distributing the estate of the deceased with respect to the share of the foetus. While some say the share of a male child should be set aside, others opine that distribution of the estate should be postponed till the child is born, the Maliki schools are of this opinion.⁷²

6.3 Other Rights Accruable to the Foetus

The rights of the foetus are not limited to the above two rights, other rights which accrue to the foetus are:⁷³

i. The right of having known and contracted lineage

One of the simplest foetus rights is to have one known lineage. Islam put some regulations and restrictions to the sexual relationships and bound it to marriage. Further, marriage is legislated under Islamic law, and it was stated as the only way for people to procreate⁷⁴ and have children Allah says: “*your wives are as a tilth unto you,*”⁷⁵ He made the womb like a soil where the sperm is the seed that a husband cultivates.

To have a true marriage contract, Witnesses must either be present at the wedding or be notified before consummation.⁷⁶ When a Muslim Couple is getting married, it is necessary for the other Muslims to

⁷¹ RA Mohd, *The Islamic Inheritance Law (Faraid): The Manifestation of Comprehensive Inheritance Management in Islam* (SC university of South Carolina press) 8

⁷² Al-Mawarittul fil Sharittin Islamiyyah by Sheikh Muhammad Al-Suabun, 169-175. See also, MA Arifi, ‘Death and Inheritance (the Islamic way)’ (Idara Isha’at-E-Diniyat Ltd, 1995) 185-186

⁷³ NK Abou and EL Atta, Foetus Rights in Islam’ <http://thequranmiracles.canalblog.com/archives/2006/11/13/3154016.html> accessed on 25 March 2025.

⁷⁴ AA Muhammed-Mikaaeel and AT Saludeen, ‘Systematic Exposition to the Consequential Implications of Procreation under the Qur’an and Hadith’ *Aqwal: Journal of Qur’an and Hadis Studies* 5(2) (2024) 207-223. See also, AA Muhammed-Mikaaeel, ‘Legal Implication of Quran Chapter 4 Verse 3 on Muslim Marital Affairs’ *Jurnal Hukum Novelty* 12 (02) (2021) 204-224

⁷⁵ Qur’an Chapter 5:71

⁷⁶ IM Said, ‘Thematic Hadits Studies: A Syar’i Study of Hadits on Marriage Witness’ *Indonesian Journal of Multidisciplinary Science* 2(6) (2023) 2688-2697

witness such marriage contract and thus protecting the rights of the foetus to have two known and married parents. To announce marriage, is another requirement for a true marriage contract as by this act Islam differentiates between illegitimate sexual relationships and marriage.⁷⁷ Therefore, the act of announcement means letting the public learn that those two people are bound by the sacred bond of marriage.

Islam prescribed a period of waiting for the wife, '*Iddah*', to make sure that her womb is free, and she is not pregnant for her ex-husband.⁷⁸ Accordingly, this protects the foetus right to know who its father is.

ii. The right to have a healthy and chaste womb environment

Womb is the first environment that foetus touches and this is where it stays to grow.⁷⁹ It is figured more likely as a soil where the sperm is cultivated. Islam has granted this soil some sort of sanctity as it bounds the sexual relationship to marriage where only the husband can sow the seed to reap the harvest. Islam banned sex offences for a higher and virtuous reason; that is to keep such soil healthy and chaste rather than exhausted or injured.

iii. The right to have a strong genetic origin

From the scientific point of view, foetus is formed because of the integration of the hereditary substance. In other words, chromosomes of both man and woman, where these chromosomes carry the genetic characteristics of both parents. In fact, marriage, which is exclusive to the relatives of one's family, is not favourable. According to the prophetic tradition, Muhammad (PBUH), marriages reflected this.⁸⁰ This is to make people place a preference on marrying non-relatives so as to have a strong genetic origin. Prophet Muhammad (PBUH) advises those who wish to get married to choose their wives carefully to make sure that they are free from any deformity.⁸¹

⁷⁷ *ibid*

⁷⁸ Qur'an Chapter 2: 228

⁷⁹ Qur'an Chapter 23:13

⁸⁰ Sahih Bukhari 5081, Book 67, Hadith 19

⁸¹ Sahih Bukhari 5090, Book 67, Hadith 28

iv. *The right to have true faith*

Marriage is the most intimate relationship, combining spiritual harmony with a physical bond. This is a vital matter that affects both parties and largely influences their potential choice. The main aim of both parties is to seek the right and good partner rather than an unbeliever! God says: *“Do not marry unbelieving women (idolaters) until they believe. A slave woman who believes is better than an unbelieving woman, even though she allures you.”*⁸²

When Allah (SWT) commands that Muslims are to be married to believers and never to unbelievers, it was to ensure a true faith and powerful religion for the coming children and not to be subjected to the whims of an unbelieving father or mother.⁸³

v. *The right to equality with other foetuses*

Islam stipulated that it is only He, God, the Almighty, Who grants people baby boys or girls.⁸⁴ So, it is up to God only to determine the foetus sex, whether it is a boy or a girl. In other words, foetus is helpless when the matter of sex is concerned and this makes all foetuses equal, girls and boys.

vi. *The right to enjoy a healthy life in the womb*

In Islam, the responsibility of foetus is resorted to parents as it is to be considered one of their duties. In the Hadith of the Prophet, he was reported to have said: "You are all guardians and each one of you is responsible for his own subjects,"⁸⁵ or that is to say, "good shepherd is responsible for his own sheep." Islam stipulated that the husband shall spend on his pregnant wife and socially protect her. This provides the right of foetus to enjoy serenity and good food *“Let the women live (in Iddah) in the same style as ye live, according to your means: annoy them not, so as to restrict them. And if they carry (life in their wombs), then spend (your substance on them until they deliver their burden...”*⁸⁶

⁸² Qur'an Chapter 2:221

⁸³ ibid

⁸⁴ Qur'an Chapter 31:34

⁸⁵ Sahih Bukhari, Book 20, Kitaab al-Imara (Book on Government)

⁸⁶ Qur'an Chapter 65:6. See also, MI Sarhan, 'Rulings on Iddah in Islamic Sharia: A Jurisprudential Study' *Migration Letters* 20(9) (2023) 698-707

For the foetus' sake, Islamic law gives the permission to the pregnant mother to eat in Ramadan and not fast.⁸⁷ The Prophet Muhammad (PBUH) observed this during his life. He used to exempt pregnant or suckling mothers from fasting especially when it will pose greater risk on their health conditions.⁸⁸ This is with a view to accord them halal healthcare.

Halal healthcare system is that which conforms to the tenets of Shariah in all ramifications.⁸⁹ The right of foetus to Shari'ah-compliant healthcare system is an indirect one. The right is exercised through his or her mother. Exploring medical treatment is permissible under Shari'ah in the best interest of the foetus. Such medical treatment must align with Shariah principle of *halal* medical treatment.⁹⁰ This is because exposing foetus to *haram* medical treatment and healthcare could have indirect negative effect⁹¹ on the foetus during pregnancy and afterbirth.

7.0 Conclusion

Islamic law provides for the rights of foetus the same way as other humans and such rights are regarded as sacred and should not be infringed upon. Anybody who transgresses these rights thereby causing the death of the foetus is liable to pay compensation called *ghurra*. Thus, the paper found that the rights of foetus include rights to life (i.e. protection from abortion) and personal protection as well as the proprietary rights. The right to life safeguards the foetus while in the womb of his or her mother prior to birth. The rights places obligation on the relevant stakeholders⁹² to deal with the foetus gently. However, the right to life of a foetus may be violated in certain instances where

⁸⁷ Qur'an Chapter 2:184

⁸⁸ This is narrated by *Tirmithi* in the Fasting section

⁸⁹ AA Muhammed-Mikaaeel, *et al*, 'Conceptual and Theoretical Approaches to the Rights of Muslim Patients under Shari'ah' *Nnamdi Azikwe University Journal of Commercial and Property Law* 12(2) (2025) 75-76

⁹⁰ *ibid*

⁹¹ RB Desa and MN Zain, 'The Ministry of Health (MOH) Malaysia Policy Regarding the Use of Medications Containing Non-*Halal* Ingredients: An Analysis from the Shari'ah Perspective' *HALASPHERE* 5(1) (2025) 37-41

⁹² These include the couples and medical personnel who come in contact with the pregnant mother.

the continuation of the pregnancy will constitute a threat to the mother's life and health, in cases of rape and foetal deformity.

With respect to the proprietary rights, the set of rights make him or her the beneficiary of bequests and gifts upon fulfillment of certain conditions as analysed by the scholars and other notable Muslim jurists. Apart from the two major rights accruable to the foetus, the paper found that the rights of foetus go beyond that. Everything that will actualise the two major rights also accrues as right to the foetus. Hence, the paper reveals that foetus also have several rights accruable to them such as the rights to having a healthy and chaste womb, having a strong genetic origin, enjoying a healthy life in the womb, maintaining good and benefit of the foetus and having access to halal healthcare system etc. It is important to note that many of these rights are neglected by the couples, medical personnel and other stakeholders in the society. It is therefore high time to accord foetus with all their accruable rights as form of obedience to Allah (SWT).