

ABORTION AND ITS PUNISHMENT WITH SPECIAL REFERENCE TO ISLAMIC CRIMINAL LAW AND COMMON LAW PROVISIONS A COMPARATIVE ANALYSIS

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Introduction

Undeniably, the issue of abortion is an interesting issue which has been discussed and debated by Muslim scholars as well as western writers. It has been discussed in various books, fiqh seminars and many short detailed works have been compiled on the subject. It must be remarked here that issue of abortion which generally *haram* (forbidden) in Islamic point of view is possible to us to find express rulings concerning it in the classical work. As such, inference could be made on it. However, it is important to note there are certain exceptions from the general ruling which requires the scholars and jurist would be given and laid down their opinion based on the general and broad guidelines of sharia'h. It has been noted that while Islam permits preventing pregnancy for valid reason, it does not allow doing violence to it once it occurs.

It was observed that Imam al-Ghazali points out that abortion is a crime against an existing being. It follows from this that there are stages of existence. The first stages of existence are the settling of the semen in the womb and its mixing with the secretions of the woman. Then come to the gestational stage while disturbing the pregnancy at this stage is a crime. When it develops further and become a lump, aborting is a greater crime. When it acquires a soul

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and its creation is completed, the crime becomes more grievous. The crime reaches a maximum seriousness when it is committed after it (the fetus) is separated from the mother's live.

Analysing the above facts, this paper tends to examine the crime of abortion under Islamic criminal law and analyze the possible punishment provided under Islamic Criminal law for the accused committing it. It also tends to further critically points out the position of abortion as well as the punishment regulate under the common law with specific reference to England common law, Abortion Act, Malaysian Penal Code and Infant Life act (Preservation) Act 1929. From this we could be able to make comparative analysis between two existing enforcement of law.

Islamic Law: The Status of Fetus Under Islamic Law

The word fetus in the Arabic language is *janin*, literally stands for anything veiled or covered. Thus, from this definition, the *janin* or fetus would comprise anything that is developing inside the mother's womb from time of conception until birth. One verse of the Qur'an mention of *ajinnah*:

"He (Allah) knows you well when He brings you out of the earth, and when you are hidden (ajinnah) in your mothers' wombs".¹

It was observed that, Muslim scholars in this regard use three different definitions and also differ when the stage of fetus will begin. Imam al-Shafi'i hold that the stage of fetus (*janin* or that

1 Abul Fadl Mohsin Ebrahim, *Abortion, Birth Control, Surrogate Parentings, An Islamic Perspective* (1989), 1st edition, American Trust Publication, p.75. For other definition, fetus could be define as something conceal or hidden from anything. It could also be mean graveyard. Hence, the baby who is inside its mother's womb is called *janin* because it situated in the hidden place. Please refer also Musa Fathullah Harun (1996), *Undang-Undang Jenayah Islam*, Perpustakaan Dewan Bahasa & Pustaka: Kuala Lumpur, p. 89

which is in the womb) begins only when the stages of *al-mudghah* (a chewed lump) and *al-'alaqah* (something that clings) have been completed and it can clearly be made out to be a human possessing differentiated characteristics such as fingers, nails or eyes. Likewise, the third group represented by al- Nuwayri, use the word *janin* (fetus) for that which exists in the womb after ensoulment has taken place.²

In the above mentioned Qur'anic verse, it seems that the verse reference to the fetus in a general in nature. The Qur'an refers to the procreated being inside the woman's body as *janin* (fetus) irrespective of the stage of development and this is the basic definition in Islamic Law compared in Common law. In Common Law, it maintains that the unborn is a fetus in the stage from eight weeks until birth, from which point in time (eight weeks) the fetus would be in possession of the entire necessary human characteristic.

Rights of The Fetus

Another essential point to be noted here is that, Islamic Law does recognize the rights of the fetus irrespective of their stage of development, as long as it connotes a wider connotation which signifies anything developing inside the mother's uterus after fertilization. Briefly speaking, it can be understood that the general sanctity of life has been propounded by Islam and in fact, according to Abu Fadl Mohsin (1989) and Musa Fathullah Harun (1996) they formed a view that Islamic law stipulates that the fetus has right to life. This can be emphasized by the fact that all the schools of Islamic law require postponement of the death penalty for a pregnant woman until after she has given birth and provisions

2 Ibid. For further details on stages of fetal growth, please refer to pp. 76-78

have been made for the child to be suckled by a wet nurse. Ibn Qudamah mentions that the Shafi'i School makes provision for cutting the belly of the dead pregnant mother to remove the fetus, if there is any sign that the fetus alive.³

In the light of the above circumstances, it shows that, the fetus is very much a person in Islamic law. The requirement that the division of the inheritance be postponed until after the fetus birth stipulates that due consideration is given to its existence.

Common Law: Commencement of Legal Personality of Foetus (Unborn Child)

According to Lilian Edwards (1997), she notes that the general rule under the Common law is that the legal personality commences at birth. In addition, the birth of the child itself should be registered and this was done by lodging the birth certificate with the appropriate registrar. Meaning that prior to birth, the foetus or unborn child has no legal rights unless it is born alive. Many cases decided to such effect. In *Re F*⁴ the Court held that, "*The fetus cannot have any right of its own at least until it is born and has separate existence from the mother*".⁵

3 See Abul Fadl Mohsin, pp.78-79. The fetus has also right of inheritance. In normal circumstances, if one does not know whether the fetus will born as a male or female, Islamic Law stipulates that it is proper to await its birth before allotting its share from the inheritance. It was special rules governing the shares to be allotted to the male and female. Besides, he notes that, Islamic law stresses that the miscarried fetus or the stillborn fetus is to be buried. At the moment of birth, it should be given the ceremonial birth (*al ghusl*), named and placed in a piece of cloth: (*kaffan*) and buried but no prayer should be read over it. Please also refer Dr Abas Syauman, Translator: Misbah, (2004), *Hukum Aborsi Dalam Islam*, Dar-At-Tsaqafiyah: Cairo, pp.14-19

4 [1988] 2 ALL E.R. 193

5 See Lilian Edward & Anne Griffith (1997), *Family Law: Green Concise Scots Law*, W. Green & Son Ltd: Edinburgh, p. 2.

It can be understood that, the unborn child can be regarded as being capable of having legal rights at a prenatal time, so long as that child is subsequently born alive, where that is to his or her advantage. The landmark judgment to enable us to understand deeply the status of foetus under the Common Law, reference could also be made in Scotland case of *Hamilton v. Fife Health Board*⁶ where Inner House held that " *An unborn person, a foetus, is not a person in the eyes of the law-at least in relation to the law of civil remedies-and there can be no liability to pay damages for foetus, even although the foetus has sustained injuries resulting from a negligent act or omission*".

Status of The Unborn Child In Criminal Law

Before we discuss the issue of abortion under the common law, it is important to know and have a look on how the legislation of common law solve and regulate the issue of whether causing the death of unborn child who is not yet a legal person according to their law can be regarded as murder or culpable homicide. The case illustrates this point is *McCluskey v. H.M. Advocate*⁷ where the man caused death of the unborn child for reckless driving. He caused an accident to the pregnant woman who was injured, who then gave birth prematurely. The child was delivered alive, but died shortly after. The Court held in this case, there is no crime of murder of foetus which is never subsequently born in Scots law. This approach seems to only protect the interest of fetus, but only after it has been born alive and achieved legal personality. The English Court of Appeal has taken similar approach where the issue was whether murder or manslaughter could be committed where unlawful injury was deliberately inflicted on either a child *in utero*, or a mother carrying

6 1992 S.L.T. 1026 (O.H) and 1993 S.L.T. 624 (Ex. Div.)

7 1989 S.L.T (Notes) 175

a child *in utero*, in circumstances where the child was subsequently born alive but died thereafter, and where the injuries inflicted while *in utero* caused or contributed substantially to the child's death. The Court was in opinion that in this case, causing injury to the fetus can be murder provided the fetus is subsequently born alive.⁸ Therefore, we can infer from the interpretation of the above two cases, it is strong enough to say that the preposition of "foeticide" is not a crime in English law.

Abortion Under Islamic Law: A Definition

Dr Abas Syauman (2004) defines abortion (*ijhadh*) literally means expulsion of incomplete fetus from the womb or incomplete time either the fetus is male or female, or regardless whether it was done intentionally or accidentally. The word *ijhadh* has another synonyms name for instance *isqath* (fell down), *ilqa'* (throw away), *tharah* (melempar) and *imlash* (expulsion). Majma' Al Lughah Al 'Arabiyyah define as *ijhadh* as the existence of fetus before the forth month pregnancy while *isqath* as the expulsion of fetus between the fourth and the seven month pregnancy.⁹

Authorities From Qur'an and Hadith

There were a various Qur'anic verses in the Qur'an which clearly signifies that abortion without justifiable reason is a blameworthy act and it is *haram* (prohibited). Allah also mention the

8 Please refer *Attorney-General's Reference (No.3 of 1994) [1996] 2 All E.R. 10*. it should be noted that in this case, the respondent stabbed his girlfriend, in the knowledge that she was pregnant with their child. The knife penetrated the foetus, and one month later, the girl gave birth to a grossly premature daughter who subsequently died from a lung condition which was unconnected with the knife-wound, but resulted directly from the premature birth. The respondent was charged with the murder of the child.

9 Dr Abbas Syauman (2004), pp.60-61

sanctity of life which has been created by Allah inside the woman's womb. Verse As-Syuraa (42): 49

"To Allah belongs the dominion of the heavens and the earth. He creates what He wills (And plans). He bestows (Children) male or female according to His will (and plan)"

"Nor take life- which Allah has made sacred-except for just cause. And if anyone is slain wrongfully, we have given his heir authority (to demand Qisas or to forgive): but let him not exceed bounds in the matter of taking life: for he is helped (by the Law)"
(Al-Isra' 17/: 33)

"Say: "Come, I will rehearse what Allah hath (really) prohibited you from": join not anything as equal with Him; be good to your parents; kill not your children on a plea of want- We provide sustenance for you and for them- come not nigh to shameful deeds, whether open or secret; take not life, which Allah hath made sacred, except by way of justice and law: Thus doth He command you, that ye may learn wisdom" (Al-An'am 6/: 151)

"Kill not your children for fear of want: We shall provide sustenance for them as well as for you. Verily the killing of them is a great sin" (Al-Isra' 17/: 31)

Hadith narrated from Abdullah Ibn Mas'ud where Prophet s.a.w reported to have said: "I asked Rasulullah s.a.w; What is the major sin prohibited by Allah?" Prophet said: I said; "indeed, that is the major sin." Then, I further asked Rasulullah s.a.w; "Then what?" Prophet said; "You kill your child because of your fear you will suffer poverty". I asked; "Then what?" Prophet s.a.w said: "You commit adultery (zina) with your neighbors' wife"

In the light of the above provision from the respective verses and hadith, it is clearly stipulates to us that the prohibition of killing the child does not only confine when the child was safely borne, but this prohibition also covered the fetus created in the mother's womb.

Abortion In Islamic Juridical View

Admittedly, all of Islamic classical and modern jurist of various school of Islamic law unanimously hold that abortion to be a blameworthy act and that it is only permissible if motivated by a worthwhile reason. Meanwhile, Dr Yusuf al-Qaradawi points out that all Muslim jurists hold abortion, after the ensoulment of the fetus, to be *haram* (forbidden) and it is a crime against a living and fully formed being.¹⁰ According to Hanafi jurists, they called abortion as committing *syibhul 'amdi*. They formed a view that the fetus is not considered as a human being in its actual meaning. In fact, it is considered as human being in its formed in one aspect and in another aspect, the fetus is part of its mother. Maliki, Syafi'i and Hanbali jurists meanwhile hold that the abortion is a criminal act committed against the fetus inside the mother's womb.¹¹

Ibn Abidin, one of Hanafi scholars, states that permission to abort is subject to the validity of the reason. The valid reason is only permissible before the four month of pregnancy *is a threat to the life of the nursing infant*. In the event that there is no possibility of getting a wet- nurse to breast feed the already existing infant, and the mother fears her baby will die, therefore, she may abort the

10 Abul Fadl Mohsin Ebrahim, p. 91

11 See Paizah Hj Ismail, *Undang-undang Jenayah Islam* (1991), 1st edition, Dewan Pustaka Islami: Petaling Jaya, Selangor, p.160. The text has been translated by the author. Please also refer Musa Fathullah Harun, p. 89

fetus to save the life of the existing infant. In view of Maliki School, it is stated that it is not permissible to induce abortion once the semen has been retained in the womb, even during the first 40 days of pregnancy. After ensoulment, abortion is absolutely prohibited (haram). Meanwhile, according to Shafi'i School, they formed a view that abortion is a crime against an existing being. Existing has stages.¹² Disturbing it is a crime. When it acquires a soul and its creation is completed, the crime becomes grievous. The crime reaches maximum seriousness when it is committed after the fetus is separated from the mother alive. On contrary, Ibn Qudamah, one of the prominent of Hanbali jurist put the view by stating whoever hits the belly of the pregnant woman and causing the abortion must give the blood wit. Likewise, if the pregnant woman drinks a medicine that results in her aborting the fetus, she has to give the blood wit.

In the light of the above contradiction opinion by Islamic classical jurists, it was it can be concluded that *Hanafi School is the most flexible on abortion because it leaves room for further interpretations to determine other reasons that could be considered valid for inducing an abortion.*¹³ It specifies that before the fourth month of pregnancy, an abortion may induce if a woman's pregnancy poses a threat to the life of her already existing infant. We can see that Maliki position prohibits an abortion after implantation has taken place, while the Shafi'i school maintains that at any stage after fertilization the zygote should not be disturbed and interference with its development would be a crime.

12 The first stage of existence is the setting of the semen in the womb and its mixing with the secretions of the woman. It is then ready to receive life.

13 Abortion may be sanctioned in the following three cases before the fourth month of pregnancy: if the doctors fear that the mother's life is in danger as a result of the pregnancy; if the pregnancy might cause a disease in the body of the mother' and if the new pregnancy severely reduces the mother's production of milk and her already existing infant is absolutely dependent on its mother's milk for survival.

It is important to realize that under Islamic law, in discussing the crime of abortion, it has been noted that there is no such certain requirement that this act should be committed in the certain way by certain aggression. In fact, this could be happen in whatever aggression .Aggression against the fetus implies any action that leads to the termination of its life or to the separation of the fetus from its mother, whether the action is undertaken by the pregnant woman herself or by someone else. Aggressions may take three forms: It might be indirect form of a verbal rebuke or a threat which creates a degree of fear that cause her to have miscarriage. Secondly, the direct form of intentional action designed expel the fetus from the womb for instance when the person strikes the belly of the pregnant woman, and as a result she miscarries and dead fetus is expelled or thirdly, the form of indirect action that may effect the pregnant woman even he had no intention to terminate the pregnancy. It might be in several ways e.g, by starving herself, fasting or by smelling something pungent.¹⁴

Dr Yusuf Al-Qaradawi points out that Muslim jurist have greed unanimously that after the fetus is completely formed and has been given a soul, abortion is *haram*. It addition, it is also a crime, the commission of which is prohibited to the Muslim because it constitutes an offence against a complete, living human being. Jurists insist that the payment of blood money (*diyyat*) becomes incumbent if the baby is aborted alive and then alive, while a fine lesser amount to be paid if it aborted died. However, he further adds that there is one exceptional situation. If, say the jurists, after the baby is completely formed, it is reliably shown that the continuation of the pregnancy would necessarily result in the death of the mother, then in accordance with the general principle of the

14 Abul Fadl Mohsin Ebrahim,pp. 97-98

Sharia'h, that of choosing the lesser of two evils, abortion must be performed. The reason for this is that the mother is the origin of the fetus, moreover, her life is well-established, with duties and responsibilities, and she is also the pillar of the family. It would not possible to sacrifice her life for the life of the fetus which has not yet acquired a personality and which has no responsibilities or obligations to fulfill.¹⁵

Punishment For The Abortion (Feticide)

Having established the general principle of the crime of abortion, another crucial point to be notable here is pertaining to the punishment that has been stipulated by Islamic criminal law. Most of the Muslim writers hold the point that the punishment prescribed by Syaria'h law is differ with each other depend on the consequences (*natijah*) of that offence towards the pregnant woman or the existing fetus itself. Broadly speaking, there are five situations with different consequence cause by the offence of abortion:

1. The existing fetus that was died expelled from its mother's womb
2. The existing fetus born alive and expelled from its mother's womb but later on died due to such act.
3. The existing fetus born alive and expelled from its mother's womb but died later on due to other reasons than such offence.
4. The fetus expelled from its mother's womb after the death of its mother

15 See Dr Yusul Al-Qaradawi, "Is Abortion Permissible in Islam" at <http://thomodernreligion.com/misc/hh>. For further detail, please refer also Ust Hj Zaharuddin Hj Abd Rahman, "The Ruling (Hukm) of Abortion in Islam", at http://al-ahkam.net/home/upload/E-book_

5. The pregnant woman suffer such a serious sickness and injury which might be able to cure or causing death.¹⁶

1. *The fetus that born died was expelled from its mother's womb.*

Form of Compensation: *Al ghurrah* - The punishment for the offence in this case is in the form of *ghurrah*. Literally, *Al ghurrah* means whiteness the size of a dirham on the forehead of a horse. In technical language, however, it refers to the compensation levied for the destroying of a child in the womb.

Reference to *al ghurrah* is made in the one hadith. For example, in the Sahih al Bukhari, Abu Hurayrah narrates:

"that two women of the tribe of Hudayl quarreled. One of them threw the stone at the other causing her to have a miscarriage. The Apostle of Allah gave his verdict that the ghurrah (compensation) be given in the form of manumitting a male or female slave"

On the basis of this hadith and other relevant hadith referring directly to *al ghurrah*, the Muslim jurists conclude that the payment of *al ghurrah* is necessary for all three of the above mentioned kinds of aggression against the fetus.

However the issue arises of whether *ghurrah* is obligatory if the fetus is expelled from its mother's body while still in an unformed state. According to Imam Malik, he holds that the *ghurrah* is to be paid even though the fetus is in unformed state. Meanwhile, Imam Abu Hanifah and Shafi'i are of the opinion that it is to be paid as long as whatever comes out of the woman's body can be made out to be the beginning of human creation. Hanbali School opined

16 See Paizah Hj Ismail, pp. 161-162

that if any act to terminate the pregnancy (such as taking certain medicines) is taken within 40 days of conception, the payment of *al ghurrah* is not necessary.

It is said that the value of *al ghurrah* is equivalent to *nisf ushr*, which is 1/20 of the full *diyyah* (or compensation). It may take the form of freeing a male or female slave of the best quality, as mentioned above in the *hadith* of *Abu Hurayrah* in *Sahih al Bukhari*, or of one hundred sheep, as recorded in the *hadith* of *Abu Buraydah* in *Sunan al Nasa'i*, or of five hundred dirhams in cash, as pointed out in the *hadith* of *al Sha'bi* in *Sunan Abu Daud*. Sayyid Sabiq adds that its payment may also be made in the form of five camels.

Abortion directly caused by the pregnant woman herself or indirectly by someone else

It is important to highlight that feticide may be committed directly by the pregnant woman herself or indirectly by someone else whose action, such as assault and battery, against her unintentionally causes the death of the fetus.

The Hanafi and Shafi'i Schools hold that the *ghurrah* should be paid by the family on the father's side of the pregnant woman if she kills the fetus herself, or by the family of the person who indirectly, i.e. unintentionally, causes her to miscarry. In the second case, the person is not himself or herself personally responsible for payment of the *ghurrah* because it cannot be proven that the miscarriage or death of the fetus took place as a result of his or her hostile action, and because the hostile action or aggression was not aimed directly against the fetus but, rather, at the pregnant woman.

The Hanbali School, however, points out that if both fetus and mother die, and the aggression against the mother was a mistake or semi-intentional, the full compensation (for the dead mother), as well as the *ghurrah*, are due from the family of the aggressor. But if the hostile action against the mother was deliberate or intentional, or if the fetus alone dies, the family of the aggressor is not responsible to pay anything. Instead it is the duty of the aggressor alone to pay the *ghurrah*.

Meanwhile, the Maliki School is of the opinion that the aggressor personally, not his family, is responsible for paying the *ghurrah*, because the miscarriage of the fetus as a result of a blow on the pregnant woman's belly was not deliberate. The aggression was intentional as regards the pregnant woman but a mistake as regards the fetus.

Ibn Rushd states that Imams Shafi'i and Abu Hanifah are of the opinion that the heirs (relatives) of the fetus should be the ones to benefit from *al ghurrah*. The rules pertaining to *al qhurrah* and *al diyyah* (blood money) are the same, in that both are inherited. Rabi'ah and al Laith, however, hold that the sole beneficiary should be the mother (of the aborted or miscarried fetus) since it (the fetus) is part and parcel of its mother's body.¹⁷

Ibn Qudamah is of the view that if a pregnant woman takes a medicine and a miscarriage results, she has to pay the *ghurrah* and she has no right to inherit from it.

2. *The Diyyah Kamilah (Full Blood Money)*

17 See Abul Fadl Mohsin Ebrahim, pp 98-99

Aggression to the fetus after 4 month ensoulment

As we have seen, Muslim jurists hold that the fetus is ensouled after the fourth month of pregnancy, on the basis of the directly relevant hadith of the Prophet Muhammad (pbuh). Hence, it follows that any act of aggression against the fetus after the fourth month would be tantamount to taking the life of a human being. Thus the aggressor would be liable to pay *diyyah kamilah* (the full blood money) in compensation, and not the *ghurrah*. The Hanbali School holds, however, that only if the fetus is separated from its mother's body during the sixth month of pregnancy is the *diyyah kamilah* due instead of the *ghurrah*. This school does not deny that ensoulment does take place after the fourth month of pregnancy, but its criterion for determining the time when the full blood money is due as a result of an aggression against the fetus is not the ensoulment but rather the viability of the fetus. This, it holds, can only be when the fetus is in its twenty-fourth week.

All four schools of Islamic Law are of the opinion that any aggression against the fetus would be classified as semi-intentional if the aggressor deliberately intended the act and a mistake if it was not deliberate. Thus, the basis for the necessity of paying the *diyyah kamilah* is the following verse of the Quran:

Never should a believer kill a believer, but (if it so happens) by mistake, (compensation is due): If one so kills a believer, it is ordained that he should free a believing slave and pay compensation (diyyah) to the deceased's family.... (4:92)

How does the payment is made?

Payment of the *diyyah kamilah* may be made to the deceased's family in the form of one hundred camels, or two hundred cattle, or two thousand sheep, or one thousand dinars, or twelve thousand dirhams. If the pregnant woman herself is the aggressor, then she will be liable to pay the full blood compensation to the heirs of the fetus, and she herself would not have any share in it.

3. *Al-Kaffarah*

In the above verse it is explicitly stated that, besides the compensation one has to give to the family of the deceased as a result of having wrongfully killed another believing person, one has also to free a believing slave. This is one of many penalties designed gradually to eliminate the entire institution of slavery. This act is termed *kaffarah*, which means penance or atonement (for a sin). In the event that no slave is found then the Qur'an stipulates that one should fast (instead) for two consecutive months.

The Shafi'i School and the Hanbali School holds that the *kaffarah* is necessary for any aggression against the fetus along with the payment of *diyyah kamilah*. The Hanafi School, however, says that only if the fetus is separated from its mother's body alive and then dies as a result of the aggression (against it) would the *kaffarah* be compulsory, but does not make it a necessary obligation on the one who has committed an aggression against the fetus. Allah s.w.t stated to the effect that; (an-Nisa'4:92)

The *kaffarah* in our contemporary time would be fasting for two consecutive months, as stated earlier. This creates a problem:

What if someone has started to fast and falls ill before completing the required fasts? And what is the obligation of women who menstruate once every month, since menstruation in itself exempts one from keeping fasts, legally speaking? Al Jassas solves this dilemma by suggesting that the one who falls ill during the two month period should start all over again after he or she is well. Hence, the days already fasted would not be counted when the person concerned renews the fast. This is so, he explains, because sickness in itself does not nullify the fast and in the event that one does not fall ill it is possible to keep the fast for two months consecutively. But the woman who misses some of the fasts as a result of menstruation can add the days fasted to those that she would fast after the termination of the menstruation. Thus she does not have to start all over again, for it is a fact that any woman would normally menstruate each month (before she reaches the age of menopause). Al Jassas explain that the reason for this is that menstruation necessarily nullifies the fast (and as much as a woman would like to continue with the fast, legally speaking, she would not be able to do so). So, just as the night (wherein one cannot legally keep the fast) does not interrupt the consecutive days of the fasts, in the same way, menstruation would not interrupt the sequence of the consecutive fasts if the fasts missed as result of the menstruation are made up immediately after the termination of the menstruation.

Dr. 'Abd al Qadir' Awdah is of the opinion that all persons who are involved in the aggression against the fetus should share in the payment of the *diyah*, and likewise each of them should make the *kaffarah*.

Whether Muslim doctor involved in abortion should be liable?

The question arises whether the Muslim doctor involved in

carrying out the abortion is liable to share in the *diyah* and *kaffarah*? Ibn Rushd states that the Muslims jurists unanimously hold a doctor responsible for any mistake he or she may commit. But the *diyah* or compensation for the mistake is to be paid by the family on the paternal side of the doctor and not from the wealth of the doctor, for the mistake was unintentional. Participation of a Muslim doctor in the act of inducing an abortion would make him or her responsible, unless the abortion is for therapeutic reasons, because abortion, as stated earlier, is a crime. Therefore if he or she induces the abortion after the fourth month (i.e., after ensoulment has taken place) for non-therapeutic reasons, he or she would be liable to pay a share in the *diyah kamilah* and expected to atone for his or her role in it by fasting for two consecutive months (as *kaffarah*). If he or she carries out the abortion for non-therapeutic reasons before the fourth month then he or she should pay the *ghurrah* in compensation.¹⁸

2. *The existing fetus born alive and expelled from its mother's womb but later on died due to such act.*

The punishment for this type of crime of abortion is *Qisas* if the commission of the crime is done intentionally. This is the view of Maliki Jurists which is the best view. The act of aggression could be hurting on the woman's stomach which normally causing death. However, according to Maliki, if the act is done due to mistaken, the aggressor will only liable to pay *diyyat not ghurrah*. The reason is that when the baby crying during delivery, therefore, he or she considered as living human being that make the *diyyat* obligatory.

Meanwhile, according to Hanafi Jurists, they formed a view that the punishment for this type of aggression is *kaffarah*. They

18 Ibid. Please refer Abul Fadl Mohsin Ebrahim, pp. 100-102

further added that if the woman who gives birth also died due to the aggression by the aggressor after the death of the fetus or the fetus delivered after the death of its mother but later on died, thus, it is an obligation to the offender to pay two diyat i.e: mother's diyyat as well as the *diyyat* to the fetus. The reason is that, the offender considered to have killing two people.¹⁹

3. *The fetus expelled from its mother's womb after the death of its mother*

It is important to note that the Islamic law has prescribed the punishment for the above type of the crime of ta'zir as long as there is no clear evidence to show that the death or the abortion of the fetus occurs does not have a connection or link with the criminal act committed as well as with the death of the mother.

From the above discussion, it is clear that in Islamic thought feticide is not included in the crime of homicide. Nevertheless, it is considered a crime and the Shari'ah prescribes certain punishments for anyone guilty of an aggression against the fetus, whether the act is deliberately aimed at killing the fetus as in the case of abortion, as we know it today, or if the act is not aimed at the fetus directly, as in the case of striking the belly of a pregnant woman, but nevertheless, results in the death of the fetus through miscarriage. The different schools of Islamic law do indeed differ in the punishments to be meted out for feticide. But the differences of opinion among them are of no major consequence. The important thing is that all the schools hold feticide to be a crime and are in agreement that the punishments should take the form of either al

19 Refer to Musa Fathullah Harun, pp. 93-95. For further reading and clarification, please also refer pp. 96-97 For deeper understanding on the punishment for feticide reference could also be made to Dr Abas Syauman, Translator: Misbah, (2004), *Hukum Aborsi Dalam Islam*, Dar-At-Tsaqafiyah: Cairo, pp.133- 151

ghurrah or *diyah kamilah*, with the *kaffarah* depending on the stage of fetal development at the time of the aggression.

Abortion and Laws Governing It In England

Having established the status and commencement of legal personality of the unborn child in the eyes of common law, then lead us naturally to the issue of abortion and its treatment in the criminal law. Lilian (1997) in her writings described abortion as unemotionally as the elective termination of pregnancy. In legal terminology, a Roy D. Weinberg (1979) note in his writings that "abortion" denotes an intentional interruption of pregnancy by removal of the embryo from the womb.²⁰ Meanwhile, H A Finlay & J E Sihombing (1978) formed a view that abortion is the expulsion of a fetus from the womb. In addition, they opine that this occurs without outside influences or aid and up to the fourth month of pregnancy, it is called a spontaneous abortion. The abortion occurring between the fourth and six months of pregnancy is called a miscarriage. Likewise, where an abortion is effected by external aids or devices it is called an induced abortion.²¹ In light of the above discussion, it seems that, most of the states which adopt the Common Law; the stage of abortion has been categories before any further criminal prosecution for abortion could be executed.

In the United Kingdom, abortion is dealt with on statutory basis in the Abortion Act 1967, as amended by section 37 of the Human Fertilisation and Embryology Act 1990. It was observed that prior to the 1967 Act, abortion was a crime at common law in

20 See Roy D. Weinberg (1979), *Family Planning And The Law*, 2nd Edition, Oceana Publications Inc: New York, p.1.

21 Refer HA Finlay & JE Sihombing (1978), *Family Planning and the Law*, 2nd Edition, Butterworth Pty Ltd: p.61

Scotland and in England under the Offences Against the Person Act of 1861, section 58 and 59, although in both jurisdictions defences were available. The Infant Life (Preservation) Act 1929 also introduced the crime (in English law only) of "child destruction" that is causing the death of a child capable of being born alive before it has an existence independent of its mother.

Abortion Act 1967²²

Under the 1967 Act, section 1(1) state that *a person will not be guilty of an offence if a pregnancy is terminated by a medical practitioner when they are of the opinion formed in good faith.* In other words, an abortion may be carried out without breaching the criminal law if these two conditions are met.²³ Under this a section, termination by good faith by a doctor would be mean one out of the four conditions laid down must be fulfilled prior the termination. The question of "good faith" of a medical practitioner is to be decided by the jury, which may take medical evidence. The first ground upon which an abortion may be justified is where *"the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated or injury to the physical or mental health of the pregnant woman or any existing children of her family"* (Section 1(1) (a)). This involves what are often referred to as "social conditions" justifying abortion. HA Finlay (1978) adds this sometimes described as the 'social clause', but the

22 The Abortion Act 1967 was passed in Britain in response to the years of pressure by reformers who brought to the attention of the public the plight of women with unwanted pregnancy-the dangers of back street abortion, the poor health of women continually pregnant The Abortion Act 1967 is an Act of the Parliament of the United Kingdom to regulate abortion by registered practitioners, and the free provision of such medical aid through the National Health Service.

23 i.e first, the pregnancy must be terminated by a registered medical practitioner. Secondly, normally two registered practitioners must have formed the opinion, prior termination and in good faith, that one of four conditions laid down in section 1 (1) is met.

24 See HA Finlay & JE Sihombing (1978),p. 159

law only allows a woman's social circumstances to be taken into account in so far it affect her health. They cannot, on their own, be considered as ground for abortion²⁴ In fact, this is the most common ground which abortion is performed in the United Kingdom and an abortion carried out under this ground must be performed before the pregnancy exceeds its 24th week.²⁵

It was further observed the other ground for abortion found in section 1(1) are not subject to time limit for the legal termination of pregnancies. These are:

- *That the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman.*²⁶
- *That the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater if the pregnancy were terminated.*²⁷ or
- *That there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.*²⁸

By virtue of S.37(4) of the Human Fertilisation and Embryologyb Act 1990 (HFEA 1990) it inserted the proviso in S.5 (1) of the 1967 Act that no doctor performing a lawful abortion under Abortion Act 1967 commits a crime under the Infant Life (Preservation) Act 1929. However, as far as statute of Infant Life (Preservation) Act 1929 is concerned, pertaining to the destruction

25 See Lilian Edward & Anne Griffith (1997), p. 14. It should be noted that in determining whether a ground exists under section 1 (1)(a), doctor may take into account the pregnant woman's "actual or reasonably foreseeable environment" (Section 1 (2))

26 S. 1(1)(b)

27 s.1 (1)(c)27

28 s.1 (1)(d)

of children at or before birth, it declares a fetus to be capable of independent life after twenty-eight weeks of pregnancy. A termination of pregnancy after that period would amount to child destruction, punishable under the earlier statute. To sum up, it seems that to perform a lawful abortion under this common law, it is enough to have consent by two doctors and the girls under 16 years usually require the involvement of parents/guardians or social worker if they are in care except in exceptional circumstances when it is left to the doctors clinical judgment. In principle, there is no charge for abortions in the United Kingdom under the National Health System.²⁹

In view of all the above grounds, it is interesting to note that it is the forming of the opinion in good faith by the requisite number of doctors that a section 1(1) ground exists that renders the abortion lawful. In understanding the above statutory provision, it can be further analyzed that the Abortion Act did not decriminalize abortion; instead what it did was just to set up a number of statutory defenses which can be claimed by the doctors to protect themselves from prosecution for the crime of abortion. However, if there is a case of failure to adhere with the process of abortion as authorized by 1967 Act, the act will still be consider as unlawful and thus the parties involved will be liable to prosecution. In addition, the effect of this provision is that, United Kingdom enjoys such a liberal regime of access to lawful abortion, but the nothing in their law gives a pregnant woman herself right to an abortion. It is also important to realize that the impact of abortion law on the legal status of the fetus, again, the provisions of the 1967 Act are structured neither to protect the right of the women nor of the right of the unborn child but only to safeguard doctors and patients from prosecution under

29 Article: *United Kingdom;Termination Of Pregnancy* ,retrieved at www.answers.com/topic/abortion-in-the-uk

the criminal law. Abortion is only legal there if the life or the mental or physical health of the woman is at "serious risk".

Legislative Remedies and Penalties

Civil Penalty

Under England Common Law, it was observed that, in the aims of both decreasing the number of abortions performed and making sure pregnant women get proper health care the following legislation is proposed. Since this is a civil law, suits may only be initiated by the mother, thus any medical information turned over to the court will be with her blessing.

*"Any physician intentionally terminating the life of a fetus after the first month of gestation without cause shall be subject to civil damages of \$250,000. Proper cause shall be defined as a documented physical condition putting the mothers' health at risk or a letter of recommendation from a board certified psychiatrist. In the interest of preventing frivolous litigation the state medical board shall have the power to dismiss any claims under this statute they find without merit. The statute of limitations for filing a claim will be 10 years from the date of fetal termination."*³⁰

From the above discussion, it seems that, abortion had been historically legal under common law in England, Scotland and Wales. Under English common law, abortions prior to 'quickening' - when the fetus could first be felt to move by the pregnant woman were thought to be morally and legally acceptable. Under Scottish common law, abortion was defined as a criminal offence unless performed for 'reputable medical reasons,' a definition sufficiently broad as to essentially preclude prosecution. Following protests

30 <http://en.wikipedia.org/wiki/Abortion-Act-1967>

from medical professionals, who worried about the dangers of the procedure and that it was regularly carried out by non-medical personnel, abortion was made a *crime in 1803*, subject to the *death penalty or exile* (i.e., transportation for life to Australia or another penal colony). It later was regulated under the Offences Against the Person Act of 1837, which eliminated the *death penalty* as a possible punishment, and S. 58/9 Offences Against The Person Act 1861, which eliminated *exile* as a possible punishment and made abortion or attempts to "*procure a miscarriage*" illegal under all and any circumstances, providing:

58. Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof *shall be liable ... to be kept in penal servitude for life ...*
59. Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor, and being convicted thereof shall be liable ... to be kept in penal servitude....

The criminality of abortion was relaxed in 1929 when the Infant Life (Preservation) Act was passed. The Act allowed for abortion

31 <http://www.answers.com/topic/1967>. Refer also Criminal Law: Free Legal Information & Research on all Law Subjects. www.Findlaw.com.

prior to 28 weeks if necessary to preserve the life of the woman on physical grounds. Social, psychological and other factors were still discounted.³¹

Malaysian Provision

Malaysian Penal Code (Act 574)

It is notable here that our Penal Code also provide certain punishment and penalties to those who intentionally causing miscarriage to other women. However, it still preserve that such penalties does not extend to any medical practitioner who terminates the pregnancy in good faith with certain reason. It seems that Malaysian common law adopted the provision under Abortion act 1967 which laid down certain grounds for the abortion become permissible.

S.312 of Penal Code provides whoever *voluntarily causes a woman with child to miscarry* shall be punished with *imprisonment* for a term which may extend to three years, or with fine, or with both; and if the woman be quick with child, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

S. 313 of Penal Code provides whoever commits the offence defined in section 312, without the consent of the woman, whether the woman is quick with child or not, shall be punished with *imprisonment* for a term which may extend to twenty years, and shall also be *liable to fine*.

S. 314 of Penal Code provides whoever, with intent to cause the miscarriage of a woman with child, does any act which *causes the death of such woman*, shall be punished with *imprisonment* for a term which may extend to ten years, and shall also be liable to

fine; and if the act is done without the consent of the woman, shall be punished with imprisonment for a term which may extend to twenty years.

S. 315 of Penal Code provides whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive, or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act is not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment for a term which may extend to ten years, or with fine, or with both.

S. 316 of Penal Code provides whoever does any act under such circumstances that if he thereby *caused death* he would be guilty of *culpable homicide*, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment for a term which may extend to ten years, and shall also be liable to *fine*.

Abortion & Foetal Rights

It is essential to note that abortion is seen in many jurisdiction, notably in the United States and Canada, as an issue of basic legal rights where the health, welfare and wishes of the mother must be balanced with the rights and interest with the unborn child. It is recognized law in these states that during the first "trimester" the woman has an unfettered right to abortion. However, during the second trimester, and third trimester, according to Lilian Edwards (1997), she stresses that the state has a compelling interest to intervene and protect the life of the fetus though it is not detrimental

32 See Lilian Edward & Anne Griffith (1997), p.15. She further notes that the Abortion Act 1967 itself fails to give any right to a woman to have an abortion as well as it says nothing about the right of the fetus.

to the life of the woman.³² By contrast, the different approach could be seen in the United Kingdom where abortion law tends to avoid the debate about the rights of the fetus as compared with the right of the mother.

It is submitted, what we can infer from the above regulate law in two western countries, In United Kingdom neither the right of the mother who wish to abort her fetus due to certain grounds nor the right of the unborn child given consideration. However, they try to treat the whole issue of abortion or having right to expulse of the fetus from the womb primarily as a matter for the medical profession, as long as they act in good faith. Even, where the third party such as the father of the child sought indirect ways to defend the interest of unborn child faced with abortion at the request of the mother, again, generally, these attempts to extend foetal rights have always been resisted by the courts which adopted common law.

The landmark case which illustrates the above points could be seen in English case of *Paton v. B.P.A.S. Trustees*³³ where a woman was granted a medical certificate stating there were grounds for abortion. Her husband applied for an injunction to restrain her from having the abortion without his consent. The Court held that since an unborn child had no rights of his own, and a father had no rights at common law over a child born outside marriage, the husband's rights to apply for an injunction had to be based on his status as a husband. The husband has no right to be consulted under the 1967

33 [1979] 1 Q.B. 276. Please also refer *Paton v. UK* [1981] 3 E.H.R.R.408 where the husband took the case before the European Commission on Human Rights on two grounds. First the UK legislation has violated the unborn child's right to life under Article 2 of the Convention Human Rights; and secondly, that it constituted an unjustified interference with the applicant's right to respect the family life contained in Article 8. Article 2 states that "Everyone's right to life shall be protected by law". The Commission ruled that this provision was subject to an implied limitation justifying termination of pregnancy in its early stage in order to protect the life and health of the woman at that stage. On this basis it ruled that an abortion of a 10 week old fetus under common law to protect the physical and mental health of a pregnant woman was not in breach of Article 2.

Abortion Act and that the husband has no right in law, either to prevent his wife from abortion, or to stop the doctors from carrying it out.

Observation and Conclusion

Analyzing from the above statute and case law, it is notable here that the right of the unborn child under the common law such as the right to life subject to certain implied limitations where the consensus of the civil and criminal law both in Scotland and England does not recognize an absolute right to life belonging to the unborn child. In fact the unborn child according to them is not a legal person and thus has no understanding in law. It is only if the fetus born or survive to be born alive, they become a legal person with legal rights like anyone else and may make any civil claims in negligence in respect of ante-natal injury. Moreover, in the issue of abortion, it was observed that the unborn child is in theory given the protection of the criminal law, but in practice the decision as to whether abortion is justified and lawful under the Abortion Act 1967 Act is one left to the good faith of the medical profession; It shows that the Act gives neither the fetus nor the husband or partner of the mother rights to oppose or restrain the abortion.

In addition, by analyzing the punishment provided under the Islamic law and Common Law particularly in England and our provision and statute, it is submitted that it is a vast differences in terms of the penalties sanctions for criminal act of feticide or abortion without firm and reasonable grounds permitted to do it. Islamic law seems to be given deep scrutiny and certain punishment imposed depending the level of such act done towards the fetus as well as to the pregnant women for instance, *al-ghurrah*, *paying diyah kamilah*, *Qisas* and *kaffarah* It shows that Islamic law preserve

the dignity of human being life and put it on the sacred level where we can infer from the above discussion that harsh punishment should be imposed in the event where the criminal act of abortion causing death to the fetus and the woman. In contrary, by looking at the common law provision and statute, the only punishment enacted was imprisonment and liable to pay fine without regulate any definite amount of fine. In Malaysia, since the crime of abortion is under the Jurisdiction Of Civil Court and not within the Syariah jurisdiction, thus the concept of *Qisas* (retaliation) as set out under Islamic law has no room to be practiced under the Common law. In addition we could infer that the punishment provided under the existing Common law as well as Malaysian Provision are not adequately provide as a deterrent punishment as provided by Sharia'h fiqhi ruling to the accused who commit such crime. Thus the author is of the opinion the crime of abortion which become rampant nowadays without deterrent punishment would destruct the family institution as well as stability of society at large.

Bibliography

- 1) Abdullah Yusuf Ali, *The meaning of The Holy Qur'an New Edition with Revised Translation & Commentary*, Amanat Corporation, 1993
- 2) Abul Fadl Monsin Ebrahim, *Abortion, Birth Control & Surrogate Parentings (An. Islam perspective) 1st Edition*, American Trust Publication, 1989
- 3) David Bradley Sweet & Maxwell, *Family Law & Political Culture*, Led London, 1996 (p. 242-244)
- 4) Dr Abbas Syauman, *Hukum Aborsi Dalam Islam*, Cairo, 2004
- 5) Dr Ahmad Fathi Bahansi, *Al-Fiqh Al-Jana'ih Al-Islami 4th Edition*, Darul Syuruq, Kaheerah, 1989 (refer p. 169): Umar al-Khattab (Hadith), Hadith Abu Hurairah, Bani Hasil p.169-170
- 6) Faizah Ismail, *Undang-undang Jenayah Islam 1st Edition*, Dewan Pustaka Islami, Petaling Jaya, Selangor, 1991
- 7) HA Finlay & JE Sinaming, *Family Planning and The Law 2nd Edition*, Butterworth Pty Ltd, Australia, 1978
- 8) Lilian Edwards & Anne Griffiths, *Family Law*, W. Green & Sons Ltd, England, 1997
- 9) Musa Fathullah Harun, *Undang-undang & Jenayah Islam*,

Dewan Bahasa Pustaka, Kuala Lumpur, 1996

- 10) Roy D. Weinberg, *Family Planning & The Law 2nd Edition*, Oceana Publications, Inc , USA, 1979
- 11) Ust Hj Zaharuddin Hj Abd Rahman, "*The Ruling (Hukm) of Abortion in Islam*", at http://al-ahkam.net/home/upload/E-book_
- 12) Yusuf al-Qardawi, *Art: Is Abortion Permissible in Islam*, <http://www.islam.set.com>