



# **THE RIGHTS OF FOETUS FROM ISLAMIC PERSPECTIVE**

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# **THE RIGHTS OF FOETUS FROM ISLAMIC PERSPECTIVE**

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## AUTHOR DECLARATION

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

I hereby declare that the work in this academic project is my own except for quotations and summaries which have been duly acknowledged.

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## ABSTRAK

Kertas projek ini akan melihat kepada semua hak-hak janin secara umum dan khusus dengan mengupas daripada Al-Quran, Hadith, dan pendapat para Mazhab. Seterusnya, hak-hak janin yang paling penting akan dipaparkan. Untuk memperolehi data, beberapa teknik kajian telah digunakan iaitu kajian perpustakaan, meneliti dokumen yang berkaitan, dan temubual. Hasil kajian ini mendapati bahawa terdapat hak-hak janin yang telah Islam gariskan, antaranya hak untuk hidup, hak untuk nasab, hak untuk mendapatkan nafkah, hak untuk mendapatkan perlindungan dan penjagaan kesihatan, hak untuk mewarisi harta, dan hak untuk dikebumikan. Meskipun belum hidup dengan sempurna, janin telah mempunyai hak-hak yang telah ditetapkan ke atasnya dan akan dilaksanakan apabila janin itu telah bersedia untuk dilahirkan selepas kejadiannya sempurna.

## ABSTRACT

This academic project will look into all the rights of a foetus generally and specifically with reference to the Holy Quran, Tradition (Hadith), and the opinions of the different Schools of thought. Subsequently, the most important among these rights will be viewed. The library research, reviewing relevant document, and interview were the tools employed for data gathering purposes. The finding indicate that Islam has granted the certain rights to the foetus such as right to live, right to paternity (*nasab*), right to maintenance, right to protection and health care, right to inherit, and right to be buried. Although the foetus is not yet living its full life, certain rights have been granted to him or her and these rights will be carried out when the foetus is ready to be born.

## ملخص البحث

يستعرض هذا البحث حقوق الجنين بشكل عام وخاص، وذلك بالرجوع إلى القرآن الكريم والحديث الشريف، ورأي فقهاء المذاهب. كما يتناول هذا البحث أهم حقوق الجنين. والمنهج المتبع في هذا البحث هو الدراسة المكتبية، والرجوع إلى الدراسات السابقة، والمقابلات الشفوية. وقد بيّنت هذه الدراسة هي أن في الإسلام، حقوقاً للجنين كحق الحياة، والنسب، والنفقة، والصيانة والصحة، والميراث، وحق الدفن. وإن لم يرزق الجنين بالحياة كبقية البشر، فعنده حقوق ضمنها له الإسلام.

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## CHAPTER 1

### 1. INTRODUCTION

In the Holy Quran, Allah The Almighty says: -

وَلَقَدْ خَلَقْنَا الْإِنْسَانَ مِنْ سُلَالَةٍ مِنْ طِينٍ، ثُمَّ جَعَلْنَاهُ نُطْفَةً فِي قَرَارٍ مَكِينٍ، ثُمَّ خَلَقْنَا  
النُّطْفَةَ عَلَقَةً فَخَلَقْنَا الْعَلَقَةَ مُضْغَةً فَخَلَقْنَا الْمُضْغَةَ عِظَامًا فَكَسَوْنَا الْعِظَامَ لَحْمًا ثُمَّ أَنْشَأْنَاهُ  
خَلْقًا آخَرَ فَتَبَارَكَ اللَّهُ أَحْسَنُ الْخَالِقِينَ .

“We created man from purest (form of clay), then We placed him like (a drop of) semen firmly fixed, in a place of (its) rest, then We made the semen into a mass of half-solidified blood, then from that mass We made an (early embryonic baby-like) lump, then We made from the lump bones and covered the bones with flesh, then We developed from it another creature, so blessed be Allah, the Best to create.”<sup>1</sup>

#### 1.1) Background of Research

This research is focusing on the rights of foetus, which are being ignored by the society because of the lack of information about them and misunderstanding on what

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<sup>1</sup> Al-Quran, A-Mukminun, 23:12-14, (all of the meaning of Quranic verses are based on Syed Vickar Ahamed, 1999, *The Interpretation of the Meaning of the Glorious Quran*, Kuala Lumpur: TR Group of Companies).

foetus is all about. It is very important to know his or her rights because Islam has provided special rights for them even though they were not being born yet.

Basically, Islam encourages its followers to marry, especially to those who have financial capacity. Therefore, the natural human desire can be fulfilled and pious descendents may be begotten. In spite of this, the descendents or offspring must be taken care of even during the pregnancy stage that is during the primacy or foetus level. Even though the foetus is not yet living his or her full life, certain rights have already been granted to him or her and these rights will be carried out when the foetus is ready to part from his or her mother.

There are various rights for the foetus, which have been granted to him or her. Among the rights of foetus that have been provided by Islam are the right to live, the right to paternity (*nasab*), the right to maintenance, the right to protection and health care, the right to inherit, and the right to be buried.

Subsequently, this research will also discuss on certain rights specifically and generally. For an example, the right to inherit in which the property will first be kept by the other heirs (inheritors) based on the type of beneficiaries whether they are regarded as residuaries (*asabah*) or heirs with fixed shares (*ashabul furudh*) or others, the number of foetus involved whether alone or twins and the foetus sex or gender.

Other right that will be highlighted in this topic is the right to live. It means that, the foetus has a right to live although he or she is not yet a complete human being. Therefore, it is still a crime to those who kill it because it is similar to other living creatures. It is stated that the foetus has a right to live and punishment will still be imposed on the criminals who murder it.

In addition, this topic will elaborate on the rights of foetus in Islam generally and specifically, which is supported by the Ulama' and Fuqaha' from the different school of thoughts that is based on the Holy Quran and Tradition (Hadith).

## 1.2) Aim of Research

The aim of research is a general objective of the research, which is referred to in this topic specifically. Thus, the aim of research for the rights of foetus from Islamic perspective is to give knowledge to the society that Islam has provided certain rights of foetus, which is, should be taken care of seriously and justly.

## 1.3) Objectives of Research

The objective of research is to identify the specific objectives of this topic. In spite of it, it will state the numbers of objectives for this study variously. So, the objectives of this research which have been recognized are to give the meaning of foetus, to identify the rights of foetus according to Islam, to analyze the particular rights of them which has been provided in Islam, and to illustrate the opinions from the Ulama' and the experts.

Besides that, other objectives of this research can also be included such as to measure on the knowledge of the rights of foetus among the society, to evaluate its implementation in Islamic law, to examine the effectiveness of the Islamic law in protecting the rights of foetus, and to give awareness to the public in taking care of the rights of foetus seriously and justly.

The main objective of this research is to give the meaning of foetus. In other words, to elaborate the meaning and definition of foetus by looking into upon the Islamic scope and the scientific scope. In Islamic scope, this research will refer to the meaning of foetus literally and technically. Besides that, it will base upon the views from Ulama' and Fuqaha' from the different schools of thoughts, and also supported by the Holy Quran and Tradition (Hadith).

Subsequently, the definition of the foetus from the scientific scope will look into upon the meaning of the foetus through the science analysis and study. Besides that it will refer to the experts such as doctors and specialist.

Other objectives that will be viewed in this project paper which is very important for the purpose of completing this study is to identify the rights of foetus according to Islamic religion. There are several rights, which have been identified through this research. The rights which have been provided and granted to the foetus are the right to live, the right to inherit, the right to maintenance, the right to be buried, and so forth.

All these objectives are to give the knowledge and awareness to the public generally and to the Muslims society specifically that Islam has provided various rights of foetus, in order for them to play an effective role to take care of its rights seriously and justly.

#### 1.4) Scope of Research

The scope of research is focusing on the subject of research that we chose. In other words, what is the title of our research and also the main point that we want to highlight in the research. Besides that, the scope of research is also to estimate the period of research.

In this topic, the subject of this research is *The Rights of Foetus from the Islamic Perspective*. It will be focusing on certain rights, which have been granted to foetus by Islam. The rights of foetus that will be highlighted in this topic are the right to live, the right to paternity (*nasab*), the right to maintenance, the right to protection and health care, the right to inherit, and others, and also the right to be buried.

The scope of research is also focusing on the period of research that has been estimated in order to complete this research in finding and collecting the information and data systematically. Therefore, the period of this research will be approximately six months.

#### 1.5) Research Methodology

The research methodology is the methods, which are appropriate and shall be used in the research in order to complete the study of our research. In spite of this, the methods of research that are suitable to be used in this research, such as library research. Mostly, this kind of research could be refer to the libraries in Islamic University College of Malaysia (KUIM), Universiti Kebangsaan Malaysia (UKM), Universiti Islam Antarabangsa (UIA), Universiti Malaya (UM), Islamic Centre (Pusat Islam), and others.

The purpose of the library research is to find the relevant books, which discussed the topic generally or specifically. For example, the books that have been discussing on this topic such as *Sistem Pusaka dalam Islam*, written by Abdul Kadir Haji Ismail, *Kedokteran Islam*, written by Ahmad Taha, and many more.

In addition, we could also find the definition and the meaning of the word by referring to the dictionary through the library research. Therefore, the main method that is used in this research is the library research because the library is a rich storage base for collecting the data and information. Besides that, the Holy Quran and Tradition (Hadith) shall also be referred in terms of strengthening and supporting the facts and information in this research.

## 1.6) Literature Review

Literature review is the documentation of a comprehensive review of the published and unpublished work from the secondary sources of data in the areas of specific interest to the researcher. In other words, the literature review is based on the assumption that knowledge accumulates and that people learn from and build on what others have done.<sup>2</sup>

The reviews may vary in scope and different kinds of reviews are stronger at fulfilling one or another. Sometimes, it may take a researcher over a year to complete an extensive professional summary review of all the literature on a broad question.

The goals of literature review are to demonstrate a familiarity with a body of knowledge and establish the credibility, to show the path of prior research and how a current project is linked to it, to integrate and summarize what is known in an area that is a review pulls together and synthesizes different results, and the last goal of literature review is to learn from others and stimulate new ideas that a review tells what others have found so that a researcher can benefit from the effort of others.<sup>3</sup>

There were several studies, which had been made on the rights of foetus previously. However, those particular studies were focusing on different aspects such as the rights of foetus according to the civil law and criminal law. Also, it is discussing on the medical perspective merely.

In spite of this, for instance, the book titled *Biomedical Issues, Islamic Perspective*, written by Abul Fadl Mohsin Ebrahim, is focusing on the pregnancy of the mother and the stage of the foetus growth, the status of foetus, the abortion, and the punishment for foeticide specifically and deeply. However, in that book it has been discussing the rights of foetus generally but not so deeply. In order to make a

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<sup>2</sup> Uma Sekaran, 2000, *Methods For Business*, United States of America: Hermitage Publishing Services, p. 61-62.

<sup>3</sup> Ibid.

comparison with this current research, we shall look upon the main ideas of the research. The main idea of this research is focusing on the rights, which have been granted to foetus by Islam merely. It will also discuss the punishment for foeticide generally, and not to focus on that topic specifically as in the previous research.

Therefore, it is different due to this research. Basically, this research will elaborate on the rights of foetus from the Islamic perspective, which is based on the Holy Quran and Tradition (Hadith), and the opinions from the ulama' and fuqaha'. However, other ideas such as the definition of the foetus and the stage of foetus growth will be referred to this book at the same time in order to fulfill this research.

## CHAPTER 2

### 2) The Definition and The Duration of Pregnancy

#### 2.1 The Definition of Foetus

##### 2.1.1 Islamic Scope

The word foetus whose equivalent in the Arabic Language is *janin* (singular) and *ajinnah* (plural) literally stands for anything, which is veiled or covered. Technically, the *janin* or foetus would comprise anything that is in the offing inside the mother's womb from the time of conception till birth.<sup>4</sup>

There is at least one verse of the Quran which mentions of *ajinnah* (plural of *janin*). Allah, The Almighty says: -

هُوَ أَعْلَمُ بِكُمْ إِذْ أَنْشَأَكُمْ مِنَ الْأَرْضِ وَإِذْ أَنْتُمْ أَجِنَّةٌ فِي بُطُونِ أُمَّهَاتِكُمْ

“He (Allah) knows you well takes you out of the earth, and when you are hidden (*ajinnah*) in your mother's wombs.”<sup>5</sup>

The truth is, there is no specific definition to give the meaning of foetus from the Islamic scope. This is because the fuqaha' is more focusing on the duration of pregnancy rather than the definition of the word foetus. However, there is a number of

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<sup>4</sup> Abul Fadl Mohsin Ebrahim, 1993, *Biomedical Issues, Islamic Perspective*, Kuala Lumpur: A.S. Nordeen, p. 132.

<sup>5</sup> Al-Quran, An-Najm, 53:32.

ulama' from a few school of thoughts, who discussed on the stages of foetal growth, which is similar to the meaning of foetus generally.

In spite of this matter, there are about three views, which discuss the stages of foetal growth, and at the same time, these views may relate to the definition and the meaning of foetus generally.

The first view maintains that the foetus stands for that which is in the mother's womb. It means that, something or anything that is in the mother's womb is to be called *janin* or foetus.<sup>6</sup>

The second view is that of Imam al- Shafi'i who holds that the least stage whereby (that which is in the womb) could be called a foetus is that when the stages of *al-mudghah* (a chewed lump) and *al-'alaqah* (something that clings) have been differentiated and it can clearly be made out to be of human generation, possessing such characteristics as finger, or nail, or eye, or anything else similar to that.<sup>7</sup>

The third view is that of Al-Nuwayri who says that the learned people use the word *janin* (foetus) for that which (exist in the womb) after ensoulment has taken place. From this view, it meant that it will be called *janin* or foetus after the process of ensoulment occurred.<sup>8</sup>

From the three views that have been enumerated, the Imam Shafi'i interpretation seems to be the most plausible one. This is because, his definition of the foetus is closest to that of the present day scientific understanding and study. Moreover, Imam Shafi'i was renowned to be a great linguist and intellectual.

Meanwhile, Abdul Rashid Haji Abdul Latiff in his book stated that, according to the Shafi'i school of thought, foetus is something that can clearly be made out to be of human being or mankind or something that obviously can be seen such as fingernail,

<sup>6</sup> Abu Fadl Mohsin Ebrahim, p. 132, (excerpt from Ronald Munson, 1983, *Intervention and Reflection*, 2<sup>nd</sup> Edition, California: Wadsworth Publishing Co, p. 41).

<sup>7</sup> Abu Fadl Mohsin Ebrahim, p. 132.

<sup>8</sup> Ibid.

hair, eye or others. There were many fuqaha' including Imam Shafi'i viewed that foetus was transformed into a mankind after it can clearly be made out to be of human generation whose possessed a human characteristics such as hand, finger, nail, hair, or anything else similar to that.<sup>9</sup>

Basically, in the Holy Quran and Hadith, there were passages that could be referring as the matter of the stages of foetal growth. Further more, these passages are elaborating on the stages of foetal growth specifically.

In the Holy Quran, Allah The Almighty says: -

وَهُوَ الَّذِي خَلَقَ مِنَ الْمَاءِ بَشَرًا فَجَعَلَهُ نَسَبًا وَصِهْرًا وَكَانَ رَبُّكَ قَدِيرًا

“It is He Who made man from water, then He has set up relationships of family and marriage, because your Lord has power (over all things)”<sup>10</sup>

This passage showed that Allah S.W.T. has a power to make anything and also He who knows everything. We as a human being must refer to the Holy Quran and Hadith when dealing with any issue and problem.

The main Quranic passage that refers to foetal growth is as follow, which is Allah The Almighty says: -

وَلَقَدْ خَلَقْنَا الْإِنْسَانَ مِنْ سُلَالَةٍ مِنْ طِينٍ، ثُمَّ جَعَلْنَاهُ نُطْفَةً فِي قَرَارٍ مَكِينٍ، ثُمَّ خَلَقْنَا  
النُّطْفَةَ عَلَقَةً فَخَلَقْنَا الْعَلَقَةَ مُضْغَةً فَخَلَقْنَا الْمُضْغَةَ عِظَامًا فَكَسَوْنَا الْعِظَامَ لَحْمًا ثُمَّ  
أَنْشَأْنَاهُ خَلْقًا آخَرَ فَتَبَارَكَ اللَّهُ أَحْسَنُ الْخَالِقِينَ .

<sup>9</sup> Abdul Rashid Haji Abdul Latiff, 1997, *Undang-undang Pusaka Dalam Islam, Suatu Kajian Perbandingan*, Kuala Lumpur: Al-Hidayah Publishers, p. 67.

<sup>10</sup> Al-Quran, Al-Furqan, 25:54.

“We created man from purest (form of clay), then We placed him like (a drop of) semen firmly fixed, in a place of (its) rest, then We made the semen into a mass of half-solidified blood, then from that mass We made an (early embryonic baby-like) lump, then We made from the lump bones and covered the bones with flesh, then We developed from it another creature, so blessed be Allah, the Best to create.”<sup>11</sup>

There are at least two significant Hadith which discuss the foetal development. The Holy Prophet S.A.W. says: -

إن أحدكم يجمع خلقه في بطن أمه أربعين يوماً، ثم يكون في ذلك علقة مثل ذلك، ثم يكون في ذلك مضغة مثل ذلك، ثم يرسل الملك فينفخ فيه الروح<sup>12</sup>

“Each of you is constituted in your mother’s womb for forty days as a *nutfah*, then it becomes an *‘alaqah* for an equal period, then a *mudghah* for another equal period, then the angel is sent, and he breathes the soul into it.”<sup>13</sup>

The Holy Prophet S.A.W. is also says: -

يدخل الملك على النطفة بعد ما تستقرّ في الرحم بأربعين، أو خمسة وأربعين ليلة، فيقول: يا ربّ! أشقي أو سعيد؟ فيكتبان، فيقول: أي ربّ! أذكر أو أنثى؟ فيكتبان، ويكتب عمله وأثره وأجله وورزقه، ثم تطوى الصحف، فلا يزداد فيها ولا ينقص<sup>14</sup>

“When forty-two nights have passed over the sperm drops, Allah sends an angel to it, who shapes it and makes its ears, eyes, skin, flesh and bones. Then, he says, “O Lord!

<sup>11</sup> Al-Quran, Al-Mukminun, 23:12-14.

<sup>12</sup> Muslim, 1999, *Sahih Muslim*, Vol.15, Beirut, Lubnan: Darul Ma’rifah, pp. 406 & 407.

<sup>13</sup> Abul Fadl Mohsin Ebrahim p. 134.

<sup>14</sup> Muslim, p. 409.

Is it a male or female? And your Lord decides what He wishes and the angel records it.”<sup>15</sup>

### 2.1.2 Scientific Scope

According to scientific analysis, *janin* or also be known as foetus, is the complete human baby for that exists in the mother’s womb after the ensoulment has taken place. In spite of this, there are four stages in the development of foetus.<sup>16</sup>

The first stage is the zygote. It is the female ovum (egg) that has been fertilized by the male sperm in the fallopian tubes of the woman, where it remains for about three days. During this time, cell division begins.

The second stage is the blastocyst. It is the stage begun with the implantation in the uterus, where rapid cell division continues. Many zygotes never attach, of course, and pass unnoticed through the woman’s menses.

The third stage is the embryo. It is the stage beginning after two weeks from conception. During this time there is organ differentiation. All the internal organs one will ever have are present in rudimentary form by the end of six weeks.

The final stage or the fourth stage is the foetus. It is the stage from eight weeks to birth, during which there is continuous growth or development but nothing new is added, or it means that it is the complete human baby. This is the period of bringing to readiness for birth what has already begun.<sup>17</sup>

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<sup>15</sup> Abul Fadl Mohsin Ebrahim, p.134.

<sup>16</sup> Ibid, p.133

<sup>17</sup> Ibid.

Therefore, the foetus will emerge from ten weeks to birth, during this time, the process of the development of organs is slowly occurred. This process will continue until it is transformed into complete human baby.

Technically, science maintains that foetus is the stage from eight weeks till birth and that at that point in time (eight weeks) the foetus would be in possession of all the necessary human characteristics.

Nevertheless, we must also look upon the definition of foetus from the science scope. This is because the definition of the word foetus from the science scope is more accurate and detail.

Foetus is a mammalian embryo during the later stages of development within the womb. In man it refers to the products of conception from the beginning of the third month of pregnancy until birth. There are a number of foetuses that have been recognized such as anideus fetus, lithopedian fetus, mummified fetus, parasitic fetus, and sivenomelia fetus.<sup>18</sup>

Besides that, foetus is also the name given to an unborn baby from the beginning of the third month of pregnancy until birth. Before the third month it is usually called an embryo.<sup>19</sup>

In other definition, foetus is the offspring of a viviparous animal while in the uterus. In man, the term is conventionally used during the period from 8 weeks after conception until delivery, before then it is an embryo, afterwards an infant.<sup>20</sup>

Foetus is also known as a term designating the unborn child in the mother's womb and applied usually from the end of the third month of pregnancy until birth.<sup>21</sup>

<sup>18</sup> Oxford, 1980, *Concise Medical Dictionary*, London: Oxford University Press, p. 235.

<sup>19</sup> N.a., 1989, *The Dictionary of Medicine*, England: Galley Press, p. 72.

<sup>20</sup> John Walton, Jeremiah A Barondess, and Stephen Lock, 1994, *The Oxford Medical Companion*, London: Oxford University Press, p. 270.

<sup>21</sup> Morris Fishbein, 1975, *The New Illustrated Medical and Health Encyclopedia*, Vol.2, New york, USA: H.S. Stuttman Co, Inc. Publishers, p. 641.

Foetus could also be defined as the unborn young of a viviparous animal after it has taken form in the uterus, in man, the product of conception from the end of the eighth week to the moment of birth.<sup>22</sup>

Despite this, we are also look upon the law definition of foetus generally. In the Dictionary of Law, foetus could be defined as the embryo of an animal or human being.<sup>23</sup>

In other definition, foetus is an unborn infant that has developed to the stage of being recognisably human (from the sixth until eighth week of pregnancy) with all its organs formed.<sup>24</sup>

As for conclusion, we can see that most of the definitions of foetus are similar to each other and most of them are lacking in discussing the differences between the period of development in the stage of the embryo and foetus. However, we can conclude that, foetus begins to emerge between the eighth until the tenth weeks during the pregnancy.

## 2.2 The Duration of Pregnancy

### 2.2.1 Views of the Ulama' / Fuqaha'.

Firstly, we must know and be well informed on the stages of the foetus in order to identify its rights. However, in Islam there is no specific division for the growth of foetus. This is because, foetus has been defined, as it would comprise anything that is

<sup>22</sup> Isaac Asimov et.al, 1966, *Stedman's Medical Dictionary*, 21<sup>st</sup> Edition, Baltimore, USA: The Williams & Wilkins Company, p. 587.

<sup>23</sup> Sinha & Dheeraj, 1996, *Legal Dictionary*, Kuala Lumpur: International Law Book Services, p.82.

<sup>24</sup> LB Curzon, 1993, *Dictionary of Law*, 4<sup>th</sup> Edition, Kuala Lumpur: International Law book Services, p. 161.

in the offspring inside the mother's womb from the time conception till birth. It also refers to the early stage of its development till birth.

Therefore, we must also know the duration or the period of pregnancy of the human baby. In spite of this, we shall refer to the fuqaha' and the school of thoughts' opinion in discussing the duration of pregnancy. There are several fuqaha' who discussed this matter.<sup>25</sup>

The first view is from Imam Malik. He determined that the maximum of the duration or period of the pregnancy is until five years.

The view from Imam Malik is different from the Shafi'i and Hanbali school of thoughts. They held that the highest duration of the pregnancy of human baby is until four years.

Al-Laith ibn Saad was not agreed with this opinion. His opinion due to the duration of pregnancy is that the maximum of its period is until two years.

The Hanafi school of thought has a similar opinion with that of Al-Laith ibn Saad. This school of thought also viewed that the highest duration of pregnancy of the development of human baby is until two years.

Another opinion is from Muhammad ibn Abdul Hakam who is one of the fuqaha' from Maliki school of thought. He determined that, the duration of pregnancy is until one year. This is because it is appropriate to the normal duration of human pregnancy generally.

The fuqaha' of Az-Zahiri school of thought determines that it is until six months only without stating whether it is referred to maximum or minimum of the duration of pregnancy.

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<sup>25</sup> Abdul Rashid Haji Abdul latiff, p. 76.

From these points of view, we can conclude that the fuqaha' have a different views when determining the duration or period of pregnancy. Some of them viewed that there is a maximum of duration in pregnancy that is five years. This occurred because they assumed that this period might happen. Besides that, they referred to women who were well informed with this kind of matter. Therefore, they took this opinion into consideration in determining the duration of pregnancy of human baby.<sup>26</sup>

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<sup>26</sup> Abdul Rashid Haji Abdul Latiff, pp. 76 & 77.

## CHAPTER 3

### 3. Rights of Foetus From Islamic Perspective

The entire moral values such as justice, equality, and honesty must be practised in every matter in our daily life. These moral values were believed as a sacred and honorable thing in religion especially Islam.

Therefore, Allah The Almighty says in the Holy Quran: -

إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا  
بِالْعَدْلِ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا

“Allah commands you to fulfill your trusts to those to whom they (your trusts) are due, and when you judge between man and man, that you judge with justice. Surely how excellent is the teaching, which He gives you! For Allah is He who hears and see all things.”<sup>27</sup>

Thus, creatures that have been created by Allah S.W.T. own their freedom and rights including the foetus. However, all rights are depend on the capacity of their creation. A ground for capacity is life and humanity.

Every human-being including foetus that is in the offing inside the mother's womb has a personal capacity (*ahliyyah al-wujub*). According to Islamic jurisprudence, the capacity began since the early life of human. It becomes one of the

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<sup>27</sup> Al-Quran, An-Nisa', 4:58.

characteristics quality or nature to the mankind beginning the early life as a foetus offing in the womb until he comes to the end of a period of validity.<sup>28</sup>

The personal capacity is divided to two types. There are *naqisah* (non-complete) and *kamilah* (complete). Basically, the personal capacity for foetus is *naqisah* (non-complete) that is the appropriate rights, which have been granted to him or her. It means that, the foetus is granted with certain rights such as maintenance like food, home, and so forth.<sup>29</sup>

In spite of this, the foetus has its own rights. Islam already determines these rights and it will be implemented when the foetus is ready to part from its mother or the period of bringing to readiness for birth.

Generally, there are various rights for the foetus, which have been granted to him or her. Among the rights of foetus from Islamic perspective are the right to live, the right to paternity (*nasab*), the right to maintenance, the right to protection and health care, the right to inherit, and the right to be buried.

### 3.1) Right To Live

A foetus has a right to live and this right is similar to the child and infant. Their safety and life are guaranteed and it is similar to the adults. This is the reason for Allah S.W.T. to command the *qisas* to those who have killed others intentionally in order to guarantee other safety and life in this world.<sup>30</sup>

In the Holy Quran Allah The Almighty says: -

<sup>28</sup> Wahbah Al-Zuhaili, 1997, *Fiqh & Perundangan Islam*, Vol.4, Ahmad Shahbari Salamon et.al, (trans.), Kuala Lumpur: Dewan Bahasa dan Pustaka, pp. 118 & 119.

<sup>29</sup> Ibid, p. 119.

<sup>30</sup> Mamud Saedon Awang Othman, 1998, "*Hak Kanak-kanak Menurut Pandangan Islam*", *Al-Ahkam*, Vol.6, Kuala Lumpur: Dewan Bahasa dan Pustaka, p. 96.

مِنْ أَجْلِ ذَلِكَ كَتَبْنَا عَلَىٰ بَنِي إِسْرَائِيلَ أَنَّهُ مَنْ قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِي الْأَرْضِ  
فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا وَلَقَدْ جَاءَتْهُمْ رُسُلُنَا  
بِالْبَيِّنَاتِ ثُمَّ إِن كَثِيرًا مِنْهُمْ بَعْدَ ذَلِكَ فِي الْأَرْضِ لَمُسْرِفُونَ

“On that basis: We ordained for the children of Israel that if anyone killed a person unless it be for murder or for spreading mischief in the land it would be as if he killed all the people, and if anyone saved a life, it would be as if he saved the life of all the people. Then although there came to them Our messengers with clear signs, yet even after that, many of them continued to commit excesses (and do injustices) in the land.”<sup>31</sup>

Generally, the Islamic law and civil law agreed that the human soul is sacred and divine. Also, it is blessed and honored by Allah S.W.T. Besides that, they all agreed that human soul should not be expunged by killing without the right reason or killing intentionally.

Islam holds that a woman who is having a child must take a good care of her pregnancy and this is her responsibility towards Allah S.W.T. A mother who has faith to the day of hereafter must do this responsibility willingly in the eyes of Allah, The Almighty solely.<sup>32</sup>

For this, Allah, The Almighty says in the Holy Quran: -

وَلَا يَحِلُّ لَهُنَّ أَنْ يَكْتُمْنَ مَا خَلَقَ اللَّهُ فِي أَرْحَامِهِنَّ إِن كُنَّ يُؤْمِنُنَّ بِاللَّهِ وَالْيَوْمِ الْآخِرِ

<sup>31</sup> Al-Quran, Al-Maidah, 5:32.

<sup>32</sup> Ahmad Taha, 1992, *Kedokteran Islam*, Ismail Ibrahim (trans.), Kuala Lumpur: Dewan Bahasa dan Pustaka, pp. 114 & 119.

“...It is not lawful for them to hide what Allah has created in their wombs, if they have faith in Allah and the Last Day...”.<sup>33</sup>

Islam declares foetus as one living creature although it is a part of its mother. Therefore, it has a status in law like human soul. So, if it is being terminated of the pregnancy intentionally, the aggressor will be convicted by *qisas*, but if he or she does it non-intentionally, he or she will be asked to pay a *diyah* or *kafarah*.<sup>34</sup>

The Holy Quran has already mentioned on the sanctity of life of human being. Thus, the Islamic Law stipulates that the foetus has the right to life. This can be substantiated by the fact that all the Schools of Islamic Law hold it necessary to postpone the carrying out of the death sentence on a pregnant woman until after she has given a birth, and provisions having been made for the child to be suckled by a wet nurse.

Moreover, Ibn Qudamah mentioned that the Shafi’i School of thought makes provision for the sectioning of the belly of the dead pregnant mother so as to remove the foetus, if there is any sign that the foetus is alive or today this process would be called as *caesarian* operation.<sup>35</sup>

Islam holds that killing someone especially Muslim is a vicious and despicable crime. For those who commits such act shall be put in hell although he or she already been punished by *had’*. However, this law is not only guaranteed to adults, but to child and foetus as well. The foetus shall not be killed without any reason such as poverty or starvation.<sup>36</sup>

Literally speaking, crime means sins or breaking of a religious or moral law, or nefarious act by someone. In technical terms, crime could be defined as such act which has been prohibited by *Syara’* whether it is involving life or property or others.

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<sup>33</sup> Al-Quran, Al-Baqarah, 2:228.

<sup>34</sup> Ahmad Taha, p. 120, (excerp from Ibn Hazm opinion).

<sup>35</sup> Abul Fadl Mohsin Ebrahim, pp. 135 & 136.

<sup>36</sup> Abdur Rahman I.DoI, 1995, *Undang-undang Syariah*, Rohani Abdul Rahim (trans.), Kuala Lumpur: Dewan Bahasa dan Pustaka, p. 298.

According to fuqaha', crime is an encroachment to human life, or human sense, or human body through assaulting, hitting, killing, or to cause pain and injury.<sup>37</sup>

Therefore, killing or murder is one of the crimes. According to Islamic law, killing means an act, which has been committed by human in purpose to expunge other's life. Also, it is done intentionally without being approved or permissible by Islamic Law. This is because, Islamic law determines that there are two killings, which are approved by Islam and it is applied to the apostasy and those who commit adultery after marriage.<sup>38</sup>

Generally, there are two kinds of killing a foetus whether it is committed by its own parents intentionally because of various factors such as economy (financial problems) or poverty and starvation, or the killing is committed by others intentionally or non-intentionally.<sup>39</sup>

The killing of a foetus, which is, committed by its own parents, is also been identified as an abortion or foeticide. However, if it is committed by its father, it will be considered as homicide, just like others. It means that the punishment for murder is similar to other aggressors as well. On the other hand, if the killing is committed by its mother, it will be identified as an abortion and the punishment that will be given depends to the reason of doing such act.<sup>40</sup>

In spite of this, a foeticide could be committed intentionally or because of other reasons such as health problem, financial problem, poverty, starvation, or so forth. Therefore, it is important to know what is meant by abortion.

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<sup>37</sup> Wahbah Al-Zuhaili, p. 229.

<sup>38</sup> Paizah Haji Ismail, 1996, *Undang-undang Jenayah Islam*, Petaling Jaya: Dewan Pustaka Islam, pp. 107 & 108.

<sup>39</sup> Ibid, p. 109 & 110.

<sup>40</sup> Al-Ghazali, 1988, *Ihya' Ulumuddin*, Vol.3, Ismail Yaakob (trans.), Kuala Lumpur: Victoria Agency, p. 200.

Abortion could be defined as the termination of pregnancy. It may be spontaneous as a result of some internal biomedical disorder or it may be deliberate through human intervention.<sup>41</sup>

It means that this may either be by the partaking of certain drugs with the intention of terminating the pregnancy or by visiting a physician with the aim of seeking his or her advice in ending the pregnancy. This could be done either by emptying the uterus of its contents through the process of suction or by dilating the cervix and scraping its contents.

According to Shafi'i School of thought, abortion means a half murder crime. In other words, crime against which is a person on one hand and a non-person on the other hand. It also means that any aggression against the foetus, which is considered a person since it, is of human constitution and a non-person in view of the fact that it is still not separated from its mother's body.

The Shafi'i and Hanbali School of thought considered that abortion is a nefarious act to foetus, which is in the offing inside the mother's womb. Therefore, any aggression against the foetus is to be considered as vicious and despicable crime.<sup>42</sup>

Any abortion that occurs spontaneously as a result of internal biomedical factors is commonly known as a miscarriage. Such is not a matter of controversy. Ethics, law, and religion are concerned with abortions that occur as a result of direct human intervention, whether self-inflicted or otherwise. These will have religious, ethical and legal implication.

Generally, the abortion is divided into two categories. First category is the abortion which is been approved and permissible by Islam and secondly, the abortion which is not being approved and not permissible in Islamic law.

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<sup>41</sup> Abul Fadl Mohsin Ebrahim, p. 121.

<sup>42</sup> Al-Ghazali, p. 160.

The abortion, which is being approved and permissible by Islam, is caused by a health problem. Also, the pregnant woman herself is not causing such act, or it is out of her control and unwillingly. This is because the termination of pregnancy happens naturally.

For an example, the circumstances where the pregnant woman delivered a foetus before reaching the age of 28 weeks and this event had happened frequently, when the research had been carried out and it showed that a total of 100 woman who has being pregnant for the first time, out of 25 will be miscarriaged.<sup>43</sup>

Besides that, other factors that lead to miscarriage is the foetus itself. The foetus itself is having a health problem, or the position of foetus inside the mother's womb, or also the problem of genetic diseases that might lead to the abortion naturally.<sup>44</sup>

Therefore, from these statements, we can conclude that Islam approved the abortion in order to maintain a mother's health and life in condition that a doctor who's an authority gives consent to commit an abortion.<sup>45</sup>

The second category is the abortion, which has not been approved and not permissible by Islam. In this category, it is divided into two types. Firstly, the abortion, which is, committed intentionally. Secondly, the abortion because of the economic problems and social.

In the first type, that is the abortion, which is committed intentionally, it means that such an action may be undertaken by the pregnant woman herself. A woman who does such act may be for the purpose of avoiding herself from feeling humiliated because of her pregnancy as a result of illegitimate sex or pregnancy as a result of rape. Therefore, the easiest way to avoid this matter is to terminate her pregnancy.

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<sup>43</sup> Zaleha Kamaruddin, 1999, *Wanita & Keadilan*, Kuala Lumpur: ANZ Charisma, p. 139.

<sup>44</sup> *Ibid*, p. 140.

<sup>45</sup> Ahmad Taha, p. 121.

According to Imam al-Ghazali – one of the eminent scholars of Shafi'i School- in his *Ihya' Ulumuddin* stated that contraception is not like abortion or *wa'd* (burying of the infant girl alive). This is so because abortion is a crime against an existing being.<sup>46</sup>

Furthermore, the existences of a human are divided into stages. 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. 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 foetus is separated from the mother alive.<sup>47</sup>

The different Schools of Islamic Law unanimously hold abortion to be a blameworthy act and that it is in no way permissible except if it is motivated by a worthwhile reason. Also, all Muslim jurists hold abortion, after the ensoulment of the foetus, to be forbidden and a crime against a living being and fully formed creature.<sup>48</sup>

Therefore, Islam has forbidden the foeticide and it is considered as homicide or murder. Regardless in any circumstances, the pregnant woman shall not be hurt. If she is hurt, it might cause a bad effect to the foetus. All the jurists of the four Schools of Islamic jurisprudence have reached consensus on this issue, that abortion after life has been infused in the embryo is unlawful and amounts to the crime of taking a life. Once the pregnancy reaches for months, it is medically proven, just as the great jurists of the four Schools indicated a long time ago, that the embryo becomes a fully-fledged child.<sup>49</sup>

The second category of the abortion, which has not been approved or not permissible in Islamic Law, is because of the economic and social. This matter regards to the problem where the parents of the foetus are engaged in the economic and social aspect.

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<sup>46</sup> Abul Fadl Mohsin Ebrahim, p. 154.

<sup>47</sup> Ahmad Taha, p. 120.

<sup>48</sup> Abul Fadl Mohsin Ebrahim, p. 153.

<sup>49</sup> Abdur Rahman I.Do, 1990, *Woman In Shariah (Islamic Law)*, Kuala Lumpur: A.S. Nordeen, p. 133.

Islamic law has prohibited an abortion in whatsoever reason including from the economic aspect. It means that someone had to terminate the pregnancy because of his or her fear of getting involved in some special financial commitment or does not have a capacity in financing his life and family.

In spite of instability of economy, the parents had to kill the foetus. Allah S.W.T. has not permitted such act because Allah S.W.T. determined that every child is a livelihood to its parents. Thus, they should not be killed or murdered because of the problem of poverty and starvation.

In the Holy Quran, Allah The Almighty has stated that: -

وَلَا تَقْتُلُوا أَوْلَادَكُمْ خَشْيَةَ إِمْلَاقٍ نَحْنُ نَرْزُقُهُمْ وَإِيَّاكُمْ إِنَّ قَتْلَهُمْ كَانَ خِطْئًا كَبِيرًا

“Do not kill your children because of the fear of want, We shall give livelihood to them and also to you. Surely, killing them is a terrible sin.”<sup>50</sup>

From the social aspect, the reason for abortion is because of the feeling embarrassment with the deformed fetuses or the foetus will suffer if he or she is born. This is unreasonable and illogical opinion.

In spite of this, every foetus or child is awarded by Allah, The Almighty to every parents and this is also a blessing from Allah S.W.T. Therefore, it is a responsibility for the parents to take care of their child regardless whether they are perfectly healthy or suffering from physical or mental disability.

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<sup>50</sup> Al-Quran, Al-Isra', 17: 31.