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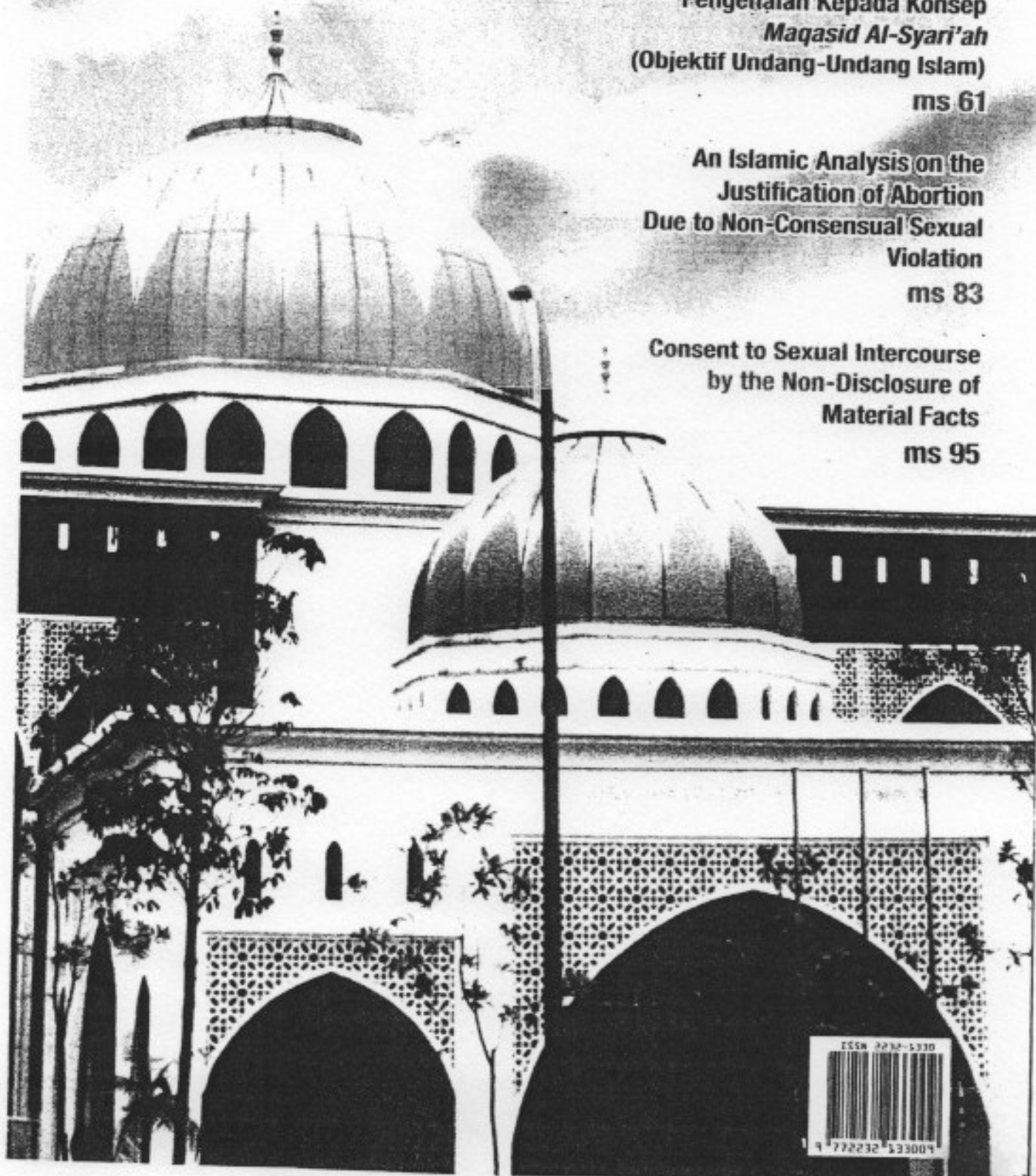
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AN ISLAMIC ANALYSIS ON THE JUSTIFICATION OF ABORTION DUE TO NON-CONSENSUAL SEXUAL VIOLATION

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Abstract

Many Muslim women have often become a target for the scavenging creatures of humanity, who do not fear Allah or any deterrent, as is the case in many countries in the Muslim world, and as has happened in Bosnia and Herzegovina, in the Philippines, in Chechnya, in Eritrea, and in the prisons of some of the contemptible systems of the Arab world. What can those Muslim women do who have been sexually assaulted and became pregnant as a result of rape? Is it permissible for them to abort the foetus or not?

I. Introduction

In the modern world today, abortion has become a common phenomenon for people who think that it is acceptable to hurt other fellow humans, in order to better their own life condition; or a choice between a child and career; a child and a luxurious life style; child illegitimacy, wrong sex of the child and rape. This phenomenon relates with the tradition of the people during the jahiliyyah period. During this time they practiced killing their daughters due to economic reasons, or convenience. Allah SWT has mentioned in the Holy Qur'an, as follows:-

"Kill not your children for fear of want: it is We who provide sustenance for them as well as for you; for verily killing them is a great sin."

Surah Al-Isra' (17:31).

From the above-mentioned ayah the word *awlad* in Arabic means children. It is used for both born and unborn child.

The main reason for abortion is usually due to economic factors, illegitimacy, unprepared gender sex of the child and the result of being raped. In the case of being raped, where a girl becomes pregnant as a consequence of it, there are still various views

among the jurists. Thus in relation to this issue there are some questions to be asked in this topic such as what happens to those Muslim women who have been sexually assaulted and become pregnant as a result of rape? Is it permissible for them to abort the fetus or not? Does a fetus have rights like any others?

II. Literature Review

The social and legal awareness with reference to the right of a fetus is still at initial level. The problem of a fetus has attracted attention from the society. Few researches had been done in this area. But to date there has not been a comprehensive research focuses on a fetus, with special reference to rape cases. The studies and works conducted touch on the issues of child abortion in general.

As far as Islamic law is concerned, the issues concerning aborted children is now being considered to be due to economic factors, child illegitimacy, wrong sex of the child and rape. These factors can be traced from the work of Wahbah Zuhailly, *Al-Fuqh al-Islamiyyah wa Adillatuhu* and Abdul Qadir 'Audah, *At-Tasyri' al-Jina i al-Islam: Muqaranan bil-Qanun al-Wadhi*.





Then, there are efforts made by several academicians, legal practitioners and pundits to highlight the issue of abortion. They have discussed the problem in general. They try to examine the efficiency of the existing laws regarding abortion. They also tend to concentrate on the general discussions of the rights of the fetus. These can be examined through their works. For example, Qazi Mujahidul Islam Jasmi, *Contemporary Medical Issues in Islamic Jurisprudence*, and Abraheem Abdulla Muhammad Al-Marzouqi, *Human Rights in Islamic Law*. Also in article dealt with the medical factor, for example written by Prof. Dr. Omar Hasan Kasule, "Social and Religious Dimensions of Unwanted Pregnancy: An Islamic Perspective."

The writer of this article tries to conduct a comprehensive study on the right of a fetus from the

Islamic perspective. Abortion is a very complicated problem. It is the reason why this study tries to examine the reason behind it. The writer will examine the law related to the existing problem and provide the remedies towards considering the rights of a fetus.

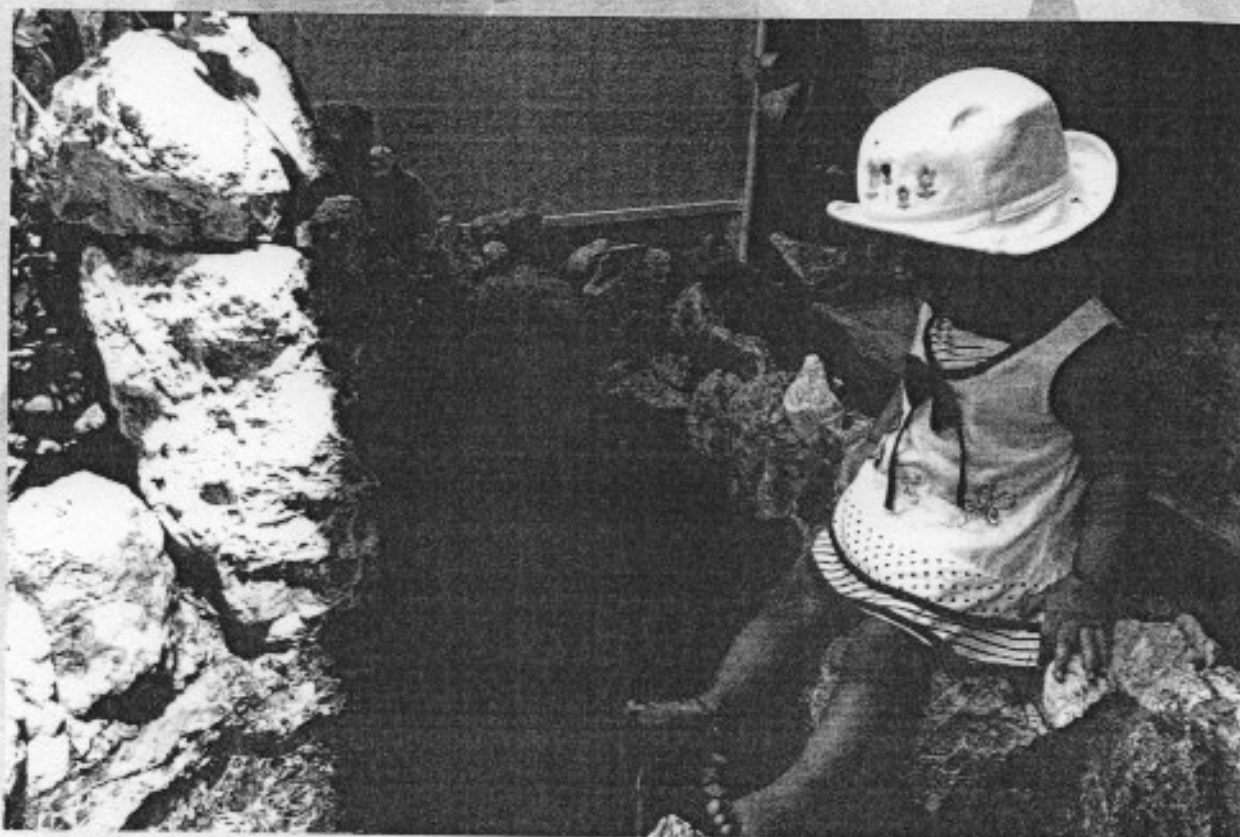
III. Definition of Sexual Violation (Rape)

The Muslim jurists have yet to give a clear definition of rape. In Arabic, rape may be termed as *ighitis ab al untha*, which literally means 'taking by force something from someone against his or her will'. According to Prof. Anwarullah, rape means to force a woman to submit to sexual intercourse against her will or to make sexual intercourse with a girl who has not reached the age of consent, which is usually the age of thirteen years, with or without her consent.

Furthermore, a more technical and appropriate definition of rape can be derived from the discussion of the definition of zina, since zina and rape are similar in many aspects. From these definitions, the elements extracted will be used as part of the definition of rape.

According to the Malikis, zina is defined as vaginal intercourse by a man who is *baligh* (age of puberty) and is *'aqil* (sane), with a woman who is not married to him wilfully and with consent by both parties. As to the act of committing sexual intercourse through





the anus, the Maliki, Shafi'i and Hanbali schools opine that it falls under the same category with zina however; Abu Hanifah holds that zina will only be vaginal and not anal.

According to some jurists rape comes under zina with force; and the person who commits rape shall be liable to *hadd* or zina. But according to other jurists rape does not come under zina and is a separate offence from zina. They argue that the ingredients of zina is the willingness of the parties to make sexual intercourse without being married to each other; while in the case of rape the willingness of the victim does not exist.

Moreover in the case of rape the victim is usually taken away from a house or any safe place of custody forcibly; and is threatened, beaten or injured. These jurists consider the offence of rape more heinous than zina and liable to a severe punishment, such as death or imprisonment for a long term; irrespective of whether the offender is married or unmarried. Muhammad Iqbal Siddiqi is of the opinion that the one who commits rape or zina in fact proves that his humanity has been overwhelmed by his animality and he is not fit to live as a virtuous member of the society.

It is submitted that the general definition of rape is a vaginal or anal sexual intercourse by a man with a woman who is not married to him and without her consent. This shows that there are no major differences between these two crimes, i.e. zina and rape; and it is also clear from the above definition that the lack of willingness or consent of the woman is considered as the most vital element of rape. If the act is carried out with the consent of woman and/or without force, the act is considered as zina; however, if the act is done without the consent of the woman or by force, it will be considered as rape.

IV. Is the Fetus a Human Being?

Much of the lack of consensus over the abortion issue arises from the fundamental need to decide exactly when life begins. As many consider that the termination of pregnancy can be justified if the embryo or fetus is not yet regarded as a living human being, on the grounds that only living human beings can have "rights". To look at exactly when life begins we can identify it from many angles.

Traditionally, birth has been held to mark the beginning of human life. At birth, the fetus is separated from its mother and is no longer

physiologically dependent on her. Birth as a dividing line has the advantage of being objective and definite. Our birth certificate marks the day, hour, and even minute we were born.

The Holy Qur'an states that there are five stages of the development of a human being in the womb of the mother.

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

The above phrase shows the process of human creation as the offspring of Adam. There are five stages of the development of human being in the womb of a mother. First stage is a sperm (*nutfah*), second is congealed blood (*'alaqah*), third is a fetus (*mudghah*), fourth is bones (*'izaama*) and finally is the clothing of the bones with flesh.

When does the ensoulment occur? Al-Qur'an is silent about it, except that Allah has mentioned

about the time of ensoulment of Adam in the Qur'an. Nevertheless, the answer for it is found in a hadith with a few versions of it, which is narrated by Abdullah, that the Holy Prophet Muhammad SAW said,

"Verily every one of you is created in the womb of a mother for forty days, after that you will change into congealed blood (*'alaqah*) during the following forty days; then you will change into fetus (*mudghah*) during the following forty days; then an angel is sent to you, so the soul is breathed into it."

From the statement of the two sources above, there is a consensus among the jurists that the spirit is blown into the fetus within four months or the end of one hundred and twenty days.

If we look at the medical/scientific viewpoints, Prof. Steinbok stated that the fetus will look recognizably human between twelve and sixteen weeks of the gestation age. Its eyes are obvious, though it does not yet have eyelids. It still has ear slits rather than ears. Its hands, still covered in an enveloping membrane, have well demarcated fingers and thumb. It may not look much like a baby, but it is clearly a human fetus.

A fetus is considered alive when there is proof from the beginning, such as crying, suckling, breathing, sneezing and other obvious signs, but not to solely rely upon the fetus' quick movement. The fetus can be regarded as a human being according to some jurisdictions only from the time of "quickening" or "viability". Probably the view that human life begins at quickening stems from an inaccurate view that the fetus is not alive before it moves. Since we know that even the single-celled zygote is alive, there is no reason on the fetus's ability to move; and even less reason to make it depend on its mother's alertness in detecting movement.

Another opinion suggests that human life begins when the brain waves first appear, at about eight weeks. The rationale for this view is that it provides symmetry between the criterion for the end and the beginning of life. Both are marked by the absence of brain function when the brain stops functioning once a person dies and goes out of existence. On the same reasoning, the fetus "comes into humanity" when its brain begins to function.



V. Can the Rape Victim Commit an Abortion?

In order to deliberate over issues related to abortion, we should take into consideration its various stages. The jurists have classified these into two categories. According to them, the whole period of pregnancy can be divided into two stages: the first one hundred and twenty days, and the remaining period before childbirth.

Basically Islam does not allow abortion on matter of choice between a child and a career, or between a child and a luxurious life style, child's illegitimacy, wrong sex of the child and rape. However, in the case of rape it is different. There are different viewpoints among the jurists.

a. Allowance for Abortion

According to the majority of jurists abortion is allowed before the four month or until the end of the one hundred and twenty days from the beginning of the pregnancy. Imam Hanafi is of the opinion (predominant in Turkey, the Middle East and Central Asia) that abortion is allowed to take place principally until the one hundred and twentieth day of pregnancy.

The Hanafi school of thought keeps four month's period as a genuine period for the development of a fetus into a spirited being.

For Imam Maliki School (prevalent in North and Sub-Saharan Africa) an abortion is permissible with the consent of both parents up to the fortieth day of pregnancy; it is not allowed after that. According to Imam Shafi'i (Southeast Asia, Southern Arabia, and parts of East Africa) abortion is allowed to be performed up to the one hundred and twentieth day after pregnancy. Imam Ahmad bin Hanbal has the same opinion with Imam Hanafi that abortion is allowed up to four months or up to the one hundred and twenty day of pregnancy, before the soul is breathed into it.

Qazi Mujahidul Islam Qasimi is of the opinion that if an unmarried girl becomes pregnant due to rape then her pregnancy would lead her to a life-long social persecution and it would therefore be better for her to be permitted to opt for abortion within one hundred and twenty days from the day of conception; since the conception has not yet become alive.



In the case of the raped woman who tried her utmost best to resist thugs and their ilk, she cannot be held guilty of any sin, because she was forced into it, and the one who is forced to do something is not guilty of sin. In case of kufr, which is worse than zina (unlawful sexual activity) as Allah says (interpretation of the meaning):

".....except him who is forced thereto and whose heart is at rest with Faith..."

The Prophet Muhammad SAW said:

"Allah has forgiven for my ummah for their mistakes, what they forget and what they are forced to do."

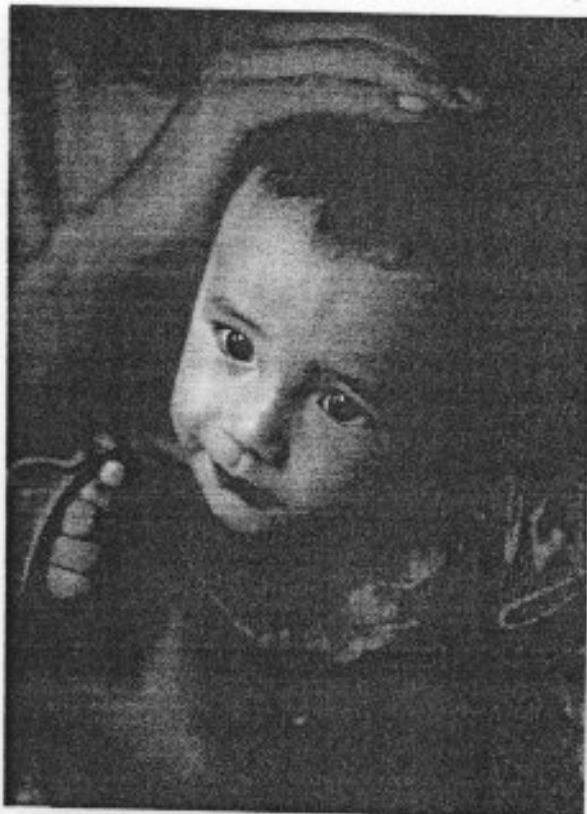
The Muslim woman who has fallen prey to a rapist will be rewarded for bearing this calamity with patience, if she seeks reward with Allah for the harm that has befallen her. The Prophet Muhammad SAW said:

"No stress or exhaustion befalls the Muslim; nor worry or distress, even a thorn which pricks"



him, but Allah will expiate for his sins because of that."

Undoubtedly the rape of a Muslim woman by an enemy is a strong reason for the Muslim woman and her family to have an abortion; for she will hate this fetus, the result of this iniquitous attack, and she will want to get rid of it. So, this concession is to be given because of necessity, especially in the first days of pregnancy.



One of the basic principles of Islam is to relieve distress and hardship. So, where a Muslim girl who is keen to remain chaste is exposed to aggression and fears the effect that this may have on her reputation or her honor, i.e. she fears that she may suffer psychological or nervous breakdown; or that her sanity may be affected, she cannot be blamed for that.

Furthermore, shame may be brought upon her family for a matter in which she is not guilty of any sin; or that her child will not find any place of safety. Hence under such circumstances, there is nothing wrong for her to abort the fetus before the soul is breathed into it; especially nowadays that it has become easy for a woman to find out whether she is pregnant or not, with medical advances in detecting pregnancy in the first week of pregnancy.

b. Prohibition of Abortion

There is a consensus among other jurists that abortion is forbidden, i.e. haram, after the spirit is blown into the fetus i.e., after four months or the end of one hundred and twenty days of pregnancy. With regards to abortion, the basic principle concerning it is that it is haram and is not allowed from the moment of conception when it becomes a new being and is "placed in a place of safety", i.e. the womb, even if this being is the result of a haram relationship, such as zina or rape.



The Hanafi scholars, who comprised the majority of orthodox Muslims in later centuries, prohibited abortion after the four months. The majority of the Maliki jurists however, regard abortion as completely forbidden. In their view when the semen settles in the womb it is expected to develop into a living baby and it should not be disturbed by anyone. According to Ibn Jawziyyah, when the womb has retained the semen, it is not permitted for the husband and wife, or one of them or the master of the slave-wife, to induce an abortion.

Based on this, Muslim jurists have deduced that the first four months or one hundred and twenty days of gestation is the critical time period. After this the fetus is regarded as being "alive" and all abortion is not permissible for any reason whatsoever, and if performed would constitute murder.

Hence there is nothing wrong with a Muslim woman who has suffered such misfortune in keeping the fetus, without being forced to get rid of it. If it is decreed that it should remain in her womb for the usual term and she gives birth to it, then it will be a Muslim child, as the Prophet Muhammad SAW said:

"Every new born is born in a state of fitrah (the natural state of man)."

The fitrah is the religion of Tawheed, i.e. Islam. It has been stated in fiqh that if the parents have different religions, the child should follow the parent who has the best religion. This is in cases where the father is known, but what about the child who has no father? He is a Muslim child, no doubt, and the Muslim society is obliged to take care of his upbringing, to spend on him and to bring him up well. They should not leave the burden to his poor, suffering mother.

VI. The Right of a Fetus of Rape: Islamic Perspective

According to Islamic law the new born has social rights that cannot be fulfilled if the pregnancy is unwanted. The law guarantees the rights to inheritance for a fetus. The new born has a right to a good name, nutrition and health care. The following have to be done for the newborn; *adhan* and *iqamat* at birth; naming, *tasmiyat*, with choice of a good name that will not embarrass him or her; circumcision, *khitan*, shaving the hair, *halq al sha'r*, and *aqiqah*, that is a community welcome for the new born. All the above rights are the entitlement

of the child born with legal parents. Otherwise if the child is a fetus as a result of rape is it possible for him to possess all these rights?

A fetus as result of rape has as much rights to equal treatment as other children, especially right to life before they are born or even created. Hence, in this paper the emphasis is made on the right to life, protection and inheritance.

A fetus when still in the initial stage, is entitled to many rights such as the right to life, protection and inheritance. Nevertheless, the embryo is not bound by any duty, whether religiously or legally; before another person. This sort of eligibility of the embryo is called incomplete competency.

a. The Rights to Life

The fetus's right to life is strictly protected. It is reported in a hadith narrated by Abu Hurairah, that:-

"Two women from the tribe of Hudhail (fought with each other) and one of them threw a stone at a pregnant woman and she had a miscarriage and Allah's Messenger gave his verdict that the killer (of the fetus) should give a male or female slaves (as a diyyat)."

If the offender does not possess any slave, the diyyat should be replaced with the value of the gurrat, according to jurists, the value is one twentieth, equivalent to five camels; or fifty Dinars or six hundred Dirhams. According to as-Sha'bi and the Hanafi School, the value is five hundred Dirhams. The value of six hundred Dirhams is opined by some jurists, like Malik and Shafi'i.

Muhammad Taqi Jafari is of the opinion that abortion is prohibited. He stated that it is a matter of consensus among the schools of jurisprudence and the one who causes an abortion is regarded as a murderer and must pay blood-money, for the period the embryo has been in the womb. In an authentic narration, which was mentioned in many documents, it is quoted that:-

"The Commander of the Faithful set the blood-money of the embryo as one hundred Dinars because God created man out of clay, whose beginning is the embryo, consisting of

one part; then it turns into congealed blood, consisting of two parts; then into clot consisting of three parts; then the stage when the bones start growing, consisting of four parts; then the stage when the bones are covered with flesh. In this stage the blood-money of the embryo is one hundred Dinars and this amount will be divided into the five parts of the embryo accordingly; one-fifth for the embryo, and congealed blood, three-fifth for clot and one-fifth for the bone; and when the bones are covered with flesh, the blood-money is one hundred Dinars. And when the soul came upon it, if it is aborted, the blood-money would be the one for a complete man."

According to this general rule in Islamic jurisprudence it is explicitly proved that the right to life begins with the formation of the embryo and those who do not pay attention to their duties, though they conceive an embryo, are regarded as murderers; and must pay the blood money. Furthermore in Islamic jurisprudence the soul is highly respected. It is strongly forbidden to do any harm to the life of the respected soul and the one who does so is considered guilty and subject to punishment.

In relation to the right to life belonging to the fetus, Prof. Dr. Omar Hasan Kasule divided it into two categories, i.e. prenatal care and postnatal care.

In the prenatal care the fetus has inalienable rights to health protection and health promotion. This includes health care and nutrition in pregnancy and post-natal. The law prescribes measures to ensure that the pregnant mother is in the best physical and mental health for the infant's birth. A pregnant woman is excused from fasting. A woman in advanced pregnancy has limited ability to do physical work at home or outside the home; and has to be excused. The legal punishment of hudud cannot be carried out in pregnancy, until after delivery and breast-feeding of the baby for two years.

For the postnatal care, the following rights of mother must be respected to ensure infant welfare: the right to health care and nutrition; and catering for the breast-feeding. The infant has the right to be breast-fed. The Qur'an set the statutory period of breast-feeding as two full years. Breast-feeding is not merely nutrition. It involves



a more intimate biological and psychological interaction between the infant and the lactating woman. A nursing mother may not fast, but make up for the fast later.

b. The Rights to Inheritance

The Sunni jurists are unanimous that a fetus who is a prospective heir shall inherit if it already exists, as an embryo, at the time of death of the propositus, and if it is later born alive. Indeed there is difference of opinion on the point as to the maximum time limit within which it is born alive after death of the propositus, there is also a difference of opinion about the maximum period of gestation.

The shortest period of pregnancy is held to be six months; there is consensus of the Ummah on this. Furthermore, the maximum period of pregnancy according to Imam Hanafi is two years. Imam Maliki and Shafi'i are of the view, is four years. Imam Hanbali also holds that the maximum period of pregnancy is four years. If the death occurs while the wife is

observing her iddat, the child shall inherit if born within the maximum duration of pregnancy.

Furthermore, if a person dies while his wife is pregnant, the distribution of his estate will be postponed if possible, until childbirth. The schools differ regarding the share to be withheld. According to Imam Hanafi the shares of four male or female children, whichever be greater, shall be kept in reserve for the children in the womb. The reason seems to be that Imam Hanafi has the actual experience of four children being born from one pregnancy. Imam Malik and Shafi'i stated that a share of four sons and four daughters would be withheld; and according to Imam Ahmad bin Hanbal is the quantum of two son's share is larger, then the share of two sons shall be withheld out of the state.

The discussion above refers to the fetus that has a legal father. Thus the question may arise here as to how about the fetus of an unknown father (illegal), i.e. a fetus as a result of fornication or

ape; whether he or she is also entitled to the right of inheritance?

There is a consensus among the Muslim jurists that an illegitimate child (as a result of rape or zina) absolutely has no right in the inheritance between him and his father because there is no lineage between them. However an illegitimate child may inherit from his mother and her relatives.

From the discussion above we can conclude that illegitimate children (as a result of fornication or rape) have no right of inheritance from their father. However, they can inherit from their mother and her relatives, furthermore, a fetus cannot be deprived of inheritance. If a fetus is disinherited, he will have no resources to support him in his childhood.

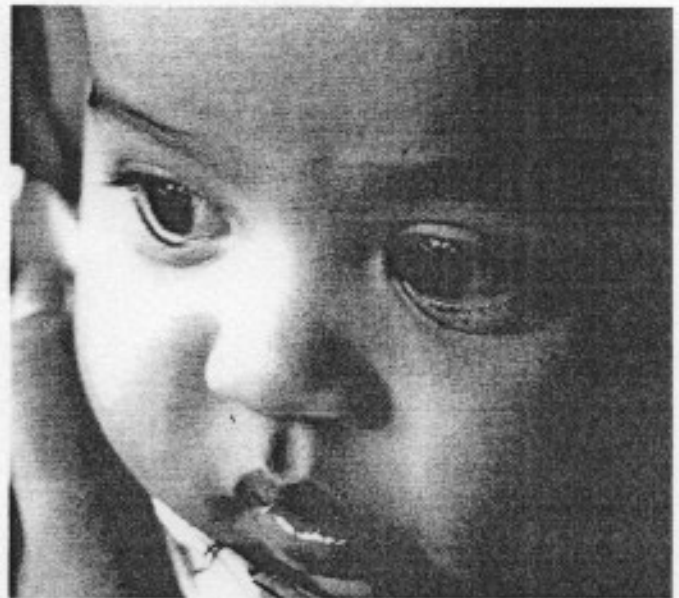
II. Conclusion

Nowadays some Muslims stand by the Qur'anic commands never to kill the children or - by interpretation - the fetus. For them, the Qur'an's celebration of life in the womb as an embryo is enough. Abortion is therefore a sinful act.

However, even for those Muslims who hold this view, the exception to this rule is when the mother's life is

threatened, in which case an abortion is necessary. This exception has always been encouraged in Islam as the mother's life takes precedence.

In Islam, a fetus as a result of zina or rape is entitled to many rights such as the rights to life, protection and inheritance. This is because the soul is highly respected. It is strongly forbidden to do any harm to the life of the respected soul. The one who does so is considered guilty and subject to punishment as well as to cater for the fetus's in order to enable the child to support himself in his childhood.



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- Technically, the term "fetus" refers to the unborn after eight weeks of gestation. Eight weeks after fertilization, the embryo has developed most of its organs and is now called a fetus.
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- Wahbah Zuhaily, *Al-Fiqh al-Islamiyyah wa Adillatuhu*, Vol. 4, Darnasqus: Dar al-Fikr, 1997, at p. 2646.
- Zaleha Kamaruddin, Mahmood Sanusi and Nik Rahim Nik Wajis, "Women, Rape and the Law: Comparative Perspective", *IIU Law Journal*, Vol. 7, No. 2, 1999.