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This is used to denote that the principle of law established in the case (or the dictum referred to) has been applied in the instant case.

NOT FOLLOWED (not folld) (tidak diikut)

This is used where the court has consciously refused to follow a case although potentially relevant. It implies that the annotated case is wrong. If a case is not followed because of some distinction in the facts or law, the proper annotation would be (distinguished).

DISTINGUISHED (distd) (dibeza)

This is used where the annotated case is not applied in the instant case due to some distinction in the facts or in the law.

OVERRULED (overd) (ditolak)

This is used only where a higher court has held the annotated case to be wrong. Where the court has no power to overrule (eg the Federal Court vis-a-vis a House of Lords decision), the proper annotation would be (not followed).

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**A Abortion Under The Malaysian Penal Code: A Comparative Appraisal**

by

**B**

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and  
Shamshina Mohamad Hanifa<sup>2</sup>

**C Abstract**

**D**

*The objective of this article is to highlight the issue of abortion under the Malaysian Penal Code, its historical and international contexts. By examining the history of abortion and its evolving legal status around the world and Islamic jurisdiction, it is hoped to shed light on how we arrived at our current situation and how the status of the law on abortion in Malaysia can fit into the global picture. This article looks at the selected countries' laws and practices and the effect of restrictive and non-restrictive abortion and family planning policies on the number of abortions and the health of women and their families. It is ended by focusing on Malaysia and analysing the need to have a reform on our law relating to abortion. Looking at abortion throughout time, around the globe and on Islamic law points of view provide an interesting and enlightening dimension on this crucial legal issue.*

**E**

**F**

**INTRODUCTION**

**G**

Literally, the word 'abortion' connotes the termination of a pregnancy before the foetus is viable or able to survive outside the uterus. An abortion may be spontaneous or induced. A spontaneous abortion is one that occurs naturally without interference. Sometimes it is also referred to as miscarriage. An induced abortion is one that is caused by an artificial means such as medications and surgical procedures.<sup>3</sup>

**H**

In 1955, the anthropologist George Devereux demonstrated that abortion

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3 Dr Mohamad Ismail Yunus and Win Syuhada. 2011. *Islamic Family Law: The Rights to Abortion with Special Reference to Rape Victim: An Islamic Perspective*. Vol III. IIUM Press. IIUM; Mohamad Yunus, Mohamad Ismail (2015) *An Islamic Analysis on the Justification to Abortion for Non Consensual Sexual Violation*. Pengaman, Official Magazine Of Royal Malaysia Police, 1 (1/2015) at pp 83-94. ISSN 2232-1330



has been practised in almost all human communities from the earliest times.<sup>4</sup> The patterns of abortion use, in hundreds of societies around the world since before recorded history, have been strikingly similar. Women faced with unwanted pregnancies have turned to abortion, regardless of religious or legal sanction and often at considerable risk.<sup>5</sup> Used to deal with upheavals in personal, family, and community life, abortion has been called 'a fundamental aspect of human behaviour'.<sup>6</sup>

In primitive tribal societies, abortions were induced by using poisonous herbs, sharp sticks, or by sheer pressure on the abdomen until vaginal bleeding occurred. Abortion techniques are described in the oldest known medical texts. The ancient Chinese and Egyptians had their methods and recipes to cause abortion, and Greek and Roman civilisations considered abortion an integral part of maintaining a stable population. Ancient instruments, such as the ones found at Pompeii and Herculaneum, were much like modern surgical instruments. The Greeks and Romans also had various poisons administered in various ways, including through tampons.

Socrates, Plato and Aristotle were all known to suggest abortion. Even Hippocrates, who spoke against abortion because he feared injury to the woman, recommended it on occasion by prescribing violent exercises. Roman morality placed no social stigma on abortion.

Early Christians condemned abortion, but did not view the termination of a pregnancy to be an abortion before 'ensoulment', the definition of when life began in the womb. Up to 400 AD, as the relatively few Christians were widely scattered geographically, the actual practice of abortion among Christians probably varied considerably and was influenced by regional customs and practices.<sup>7</sup>

## EVOLVING POSITION OF THE CHRISTIAN CHURCH

St Augustine (AD 354–430) said, 'There cannot yet be said to be a live soul in a body that lacks sensation', and held that abortion required penance only for the sexual aspect of the sin.<sup>8</sup> He and other early Christian theologians believed,

4 George Devereux, 'A Typological Study of Abortion in 350 Primitive, Ancient and Pre-Industrial Societies', in *Therapeutic Abortion*, Ed Harold Rosen, New York: The Julian Press Inc, 1954.

5 H.P. David, 'Abortion Policies', in *Abortion and Sterilisation: Medical and Social Aspects*, J.E. Hodgson, ed, Grune and Stratton, New York, 1981, at pp 1–40.

6 Nan Chase, 'Abortion: A Long History Can't Be Stopped', *Vancouver Sun*, May 1, 1989.

7 Wendell W Watters, *Compulsory Parenthood: the Truth about Abortion*, McClelland and Stewart, Toronto, 1976, at p 52.

8 Jane Hurst, 'The History of Abortion in the Catholic Church: The Untold Story', *Catholics for a Free Choice*, Washington, DC, 1983.

- A as had Aristotle centuries before, that 'animation', or the coming alive of the foetus, occurred forty days after conception for a boy and eighty days after conception for a girl. The conclusion that early abortion is not homicide is contained in the first authoritative collection of canon law accepted by the church in 1140. As this collection was used as an instruction manual for priests until the new Code of Canon Law of 1917, its view of abortion has had great influence.

- B At the beginning of the 13th century, Pope Innocent III wrote that 'quickening'; the time when a woman first feels the foetus move within her, was the moment at which abortion became homicide; prior to quickening, abortion was a less serious sin. Pope Gregory XIV agreed, designating quickening as occurring after a period of 116 days (about 17 weeks). His declaration in 1591 that early abortion was not grounds for excommunication continued to be the abortion policy of the Catholic Church until 1869.

- C The tolerant approach to abortion which had prevailed in the Roman Catholic Church for centuries ended at the end of the nineteenth century.<sup>9</sup> In 1869, Pope Pius IX officially eliminated the Catholic distinction between an animated and a non-animated foetus and required excommunication for abortions at any stage of pregnancy.

- D This change has been seen by some as a means of countering the rising birth control movement, especially in France, with its declining Catholic population. In Italy, during the years 1848 to 1870, the papal states shrank from almost one-third of the country to what is now Vatican City. It has been argued that the Pope's restriction on abortion was motivated by a need to strengthen the Church's spiritual control over its followers in the face of this declining political power.<sup>10</sup>

## F G EARLY LEGAL OPINION

- H Historically, religious beliefs coloured legal opinion on abortion. From 1307 to 1803, abortion before the foetus moved perceptibly or 'quickened' was not punished under English common law, and not regarded by society at large as a moral problem.<sup>11</sup> Since most of the abortions took place before quickening, punishment was rare.<sup>12</sup> Even if performed after quickening, the offense was

9 Wendell W Watters, at p 79.

10 *Ibid*, at pp 92-93.

11 Alison Prentice et al, *Canadian Women: A History*, Harcourt Brace Jovanovich, Canada, at p 165.

12 Donald P Kommers, 'Abortion in Six Countries: A Comparative Legal Analysis, in *Abortion, Medicine and the Law*, Fourth Ed, J D Butler & DF Walbert, Eds, Facts on File, NY 1992, at p 312.



usually considered a misdemeanour. This was the case until the nineteenth century; the entry of the state into the regulation of abortion has been relatively recent.<sup>13</sup>

Two prominent legal cases from fourteenth century England illustrate prevailing practices at that time. In both the *Twinslayer's* case of 1327 and the *Abortionist's* case of 1348, the judges refused to make causing the death of a foetus a legal offence. The judges were, in this pre-Reformation period, all Roman Catholic.

In 1670, the question of whether abortion was murder came before the English judge, Sir Matthew Hale. Hale decided that if a woman died because of an abortion then the abortionist was guilty of murder. No mention was made of the fetus.<sup>14</sup>

This tolerant common law approach ended in 1803 when a criminal abortion law was codified by Lord Ellenborough. The abortion of a 'quick' fetus became a capital offence, while abortions performed prior to quickening incurred lesser penalties. An article in the 1832 London Legal Examiner justified the new laws on the grounds of protecting women from the dangerous abortion techniques which were popular at the time:

'The reason assigned for the punishment of abortion is not that thereby an embryo human being is destroyed, but that it rarely or ever can be effected with drugs without sacrifice of the mother's life'.

In the United States, similar legislative initiatives began in the 1820's and proceeded state by state as the American frontier moved westward. In 1858, the New Jersey Supreme Court, pronouncing upon the state's new abortion law, said:

'The design of the statute was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against consequences of such attempts'.

During the nineteenth century, legal barriers to abortion were erected throughout the western world. In 1869 the Canadian Parliament enacted a criminal law which prohibited abortion and punished it with a penalty of life imprisonment. This law mirrored the laws of several provinces in pre-

13 Janine Brodie et al, *The Politics of Abortion*, Oxford University Press, Toronto, 1992, at p 9.

14 Jimmy Kinney, Ms., April 1973, at pp 48-49.



- A Confederation Canada; these statutes were modelled on the English legislation of Lord Ellenborough.<sup>15</sup>

- B Pressure for restrictions was not coming from the public. Physicians were in the forefront of the crusade to criminalise abortion in England,<sup>16</sup> the United States of America<sup>17</sup> and Canada.<sup>18</sup> They were voicing concern for the health of women and the destruction of fetal life. However, 'there is substantial evidence that medical men were concerned not only for the welfare of the potential victims of abortion but also to further the process of establishing and consolidating their status as a profession'<sup>19</sup>. Women were turning to midwives, herbalists, drug dispensers and sometimes quacks to end their pregnancies, and doctors wanted to gain control over the practice of medicine and elevate the status of their profession.<sup>20</sup>

- D Race and class were also factors in the passage of the new wave of anti-abortion laws. Abortion was increasingly being used by white, married, Protestant, middle and upper class women to control their family size. 'Nativists' (those who were 'native-born' to the new country) in Canada, for instance, voiced their concern about what they called the 'race suicide' of the Anglo-Saxon population in relation to the burgeoning French-Canadian and 'foreign' immigrant populations. Anglo-Saxon women who refused maternity by employing contraception or abortion were condemned as 'traitors to the race'. Accordingly, the Canadian Parliament made contraception illegal in 1892, following the example of the United States of America.

- F Another interpretation of the trend towards more restrictive abortion legislation focuses on nation states' demographic concerns. Powerful social pressures for population increase meant that 'the concern was perhaps more for the quantity of human beings than for the quality of human life'<sup>21</sup> In the words of the authors of 'Our Bodies', ourselves:

- G '... just at a time when women's increasing understanding of conception was helping them to avoid pregnancy, certain governments and religious groups desired

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15 A Anne McLellan, 'Abortion Law in Canada', in *Abortion, Medicine and the Law*, op cit, at p 334.

16 Donald P Kommers, at p 317.

17 James C Mohr, *Abortion in America: The Origins and Evolution of National Policy*, New York: Oxford University Press, 1978.

I 18 Constance Backhouse, *Petticoats and Prejudice: Women and the Law in Nineteenth Century Canada*, Women's Press, Toronto.

19 Terry, 'England', in *Abortion and Protection of the Human Fetus 78*, (S Frankowski and G Cole, Eds, 1987).

20 James C Mohr, at p 244.

21 Wendell W Watters, at p xv.

continued population growth to fill growing industries and new farmable territories'.<sup>22</sup>

Despite its criminalisation, women continued to regard induced miscarriage before the foetus 'quickened' as entirely ethical, and were surprised to learn that it was illegal. Women saw themselves as doing what was necessary to bring back their menses, to 'put themselves right'. In the words of historians Angus and Arlene Tigar McLaren:

'Doctors were never to be totally successful in convincing women of the immorality of abortion. For many it was to remain an essential method of fertility control'<sup>23</sup>

Women continued to have abortions in roughly the same proportions as they had prior to its criminalisation. After it was criminalised, abortion simply went underground and became a clandestine and therefore much more dangerous operation for women to undergo.

During the latter part of the nineteenth century, European views on the restriction of abortion were spread by the colonial powers throughout Africa, Asia and beyond. The strict prohibitions of Spain are reflected in many statutes decreed in South America, for example. Towards the end of the 19th century, China and Japan, at the time under the influence of Western powers, also criminalised abortion for the first time.

American historian James C Mohr makes the point that from an historical perspective, the nineteenth century's wave of restrictive abortion laws be a deviation from the norm, a period of interruption of the historically tolerant attitude towards abortion.<sup>24</sup>

## TWENTIETH CENTURY'S PREVAILING VIEW

From the second half of the 19th century, through World War II, abortion was highly restricted almost everywhere. Liberalisation of abortion laws occurred in most of the countries of Eastern and Central Europe in the 1950s and in almost all the remaining developed countries during the 1960s and 1970s. A few developing countries also relaxed their restrictions on abortion during the same

22 Boston Women's Health Book Collective, *Our Bodies, Ourselves*, 2nd Ed (New York: Simon & Shuster, 1971), at pp 216-7.

23 Angus McLaren and Arlene Tigar McLaren, *The Bedroom and the State: The Changing Practices and Politics of Contraception and Abortion in Canada 1880-1980*, M & S, Toronto, 1986, at pp 38-39.

24 James C Mohr, at p 259.



A period, most notably China and India.<sup>25</sup>

Several factors have been recognised as contributing to this liberalising trend. Attitudes toward sexuality and procreation were changing, and the reduced influence of religious institutions was a related factor.<sup>26</sup> In some countries, rubella epidemics and thalidomide created awareness of the need for legal abortion. In others, there was concern about population growth. Illegal abortion had long been a serious public health hazard,<sup>27</sup> and eventually women being injured or dying from unnecessarily dangerous abortions became a concern. Arguments were made in favour of the right of poor women to have access to abortion services. More recently, women's right to control their fertility has been recognised.

While the pace of abortion law reform has slowed, the overall movement is still in the direction of liberalisation. Recently, however, restrictions have increased in a few countries.

As often happens when rapid social change occurs, the movement to legalise abortion has generated resistance and a counter movement. Strenuous efforts are being made to increase restrictions on abortion and to block further liberalisation of laws, especially in the United States ... (and) the former Communist countries, but (anti-abortionists) are also highly visible in Canada, England, France, Germany, Italy ... and other developed as well as developing countries.

The degree of liberalisation has varied from country to country. Abortion laws are usually grouped per 'indications' or circumstances under which abortions can be performed. The most restrictive laws either completely ban abortions or restrict them to cases where the pregnancy poses a risk to the woman's life. Other laws also consider risks to the physical and mental health of the woman or her foetus. Some also allow abortion for social-medical or economic reasons, as in the case where an additional child will bring undue burdens to an existing family. The broadest category allows abortion on request (usually within the first trimester).

## H ABORTION TODAY: LEGAL AND ILLEGAL

At present, almost two-thirds of the world's women reside in countries where abortion may be obtained on request or for a broad range of social, economic

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25 Stanley K Henshaw, 'Induced Abortion: A World Review, 1990', *Family Planning Perspectives*, Vol 22, No 2, March/April 1990, at p 78.

26 Stanley K Henshaw, 'Recent Trends in the Legal Status of Induced Abortion', *Journal of Public Health Policy*, Summer, 1994, at pp 165-172.

27 Wendell W Watters, at p 98.

or personal reasons.<sup>28</sup> Liberalisation has been successful; countries which have developed access to safe, legal abortion have typically lowered the rates of pregnancy-related complications and death<sup>29</sup> as well as infanticide,<sup>30</sup> and improved the health of women and their families.<sup>31</sup>

Abortions are carried out in every country in the world today, regardless of the law.<sup>32</sup> World-wide, it is estimated that 50 million abortions occur every year. More than one-third are illegal abortions occurring mainly in the developing world, and nearly one-half take place outside any health care system.<sup>33</sup>

In those parts of the world where abortion remains prohibited or restricted, clandestine, illegal abortion remains a serious health problem. Much of Muslim Asia, Latin America and Africa fall into this category. These are the same places where safe, affordable means of contraception are the least available. About 100 million women worldwide have an unmet need for contraception.<sup>34</sup>

The methods of illegal abortion vary somewhat from culture to culture. African women may seek abortion from midwives or traditional healers, who insert plant roots or twigs into the cervix, hoping to induce uterine contractions. Desperate Zambian women may attempt to self-induce by drinking detergent or gasoline or taking an overdose of aspirin or chloroquine to cause violent contractions. In rural Indonesia and Thailand, intensive abdominal massage is the method most often used, while in Latin America, abortions are performed with catheters, hangers, knitting needles, caustic substances, toxic herbal teas or drugs.

In many countries, a large proportion of maternal deaths is due to illegal or clandestine abortion: Ethiopia — 54%; Argentina — 35%; Chile — 36%; Zimbabwe — 28%. The estimated number of women worldwide who die from clandestine abortion ranges from less than 100,000 to as many as 200,000

28 Stanley K Henshaw, 1990, at pp 76–77.

29 Sarah L Tietze and Richard Lincoln, Eds *Fertility Regulation and the Public Health: Selected Papers of Christopher Tietze*, Springer-Verlag, New York, 1987.

30 P Stephenson et al, 'Commentary: The Public Health Consequences of Restricted Induced Abortion — Lessons from Romania', *American Journal of Public Health*, Oct 1992, Vol 82, No 10, at pp 1328–31.

31 D Lester, 'Roe v Wade was followed by a Decrease in Neonatal Homicide', letter to the editor, *Journal of the American Medical Association*, 1992, Vol 267, at p 3027.

32 Jodi L Jacobson, 'The Global Politics of Abortion', *Worldwatch Paper* 97, July 1990, at p 6.

33 Santi Conly et al, 'Expanding Access to Safe Abortion', *Population Action International*, 1993.

34 Dr. Mahmoud Fathalla, ed, 'World Report on Women's Health', FIGO, 1994 as quoted in 'Report slams women's health care worldwide', *Medical Post*, Oct 11, 1994.



A women a year. Most clandestine abortions are performed by non-professionals or are self-induced. And for every woman who dies from an illegal abortion, many more suffer serious (and often lifelong) health problems — among them haemorrhaging, infection, abdominal or intestinal perforations, kidney failure, and infertility.

B The following is a summary of the development of modern abortion legislation around the world. As we will see, there is often a discrepancy between the legal status of abortion in a particular country and the availability of the procedure in practice.

C **THE LAW OF ABORTION IN UNITED STATES OF AMERICA**

D Until the mid-19th century, first trimester abortions were legal in the United States under common law. By 1900, abortion was prohibited by law throughout the United States unless two or more physicians agreed that the procedure was necessary to preserve the life of the pregnant women.<sup>35</sup>

E In the 1960's, complications from illegal abortions accounted for almost 20% of all pregnancy-related admissions to municipal hospitals in New York and California.<sup>36</sup> By the late 1960's, State Legislatures began to reconsider the legalisation of abortion in response to changes in public opinion and calls from national medical, legal, religious, and social welfare organisations. By 1973, 17 states had liberalised their abortion laws.

F In the United States' Supreme Court in *Roe v Wade*<sup>37</sup> recognised abortion as a right under the United States Constitution. Specifically, the court ruled that during the first trimester of pregnancy the state cannot bar any woman from obtaining an abortion from a licensed physician. During the second trimester, the state can regulate the abortion procedure only to protect the woman's health.<sup>38</sup> In the third trimester the state may regulate to protect fetal life, but not at the expense of the woman's life or health.

G A bill passed in 1978 limited Medicaid funding for poor women's abortions to those performed in health-risk or life-threatening situations or in cases of incest. Immediately thereafter, Medicaid-funded abortions dropped 96% from 250,000 to 2,421 per year. In June 1981 Congress eliminated rape and incest as grounds for obtaining federal funds for abortions.

I <sup>35</sup> Council on Scientific Affairs, American Medical Association, 'Induced Termination of Pregnancy Before and After *Roe v Wade*: Trends in the Mortality and Morbidity of Women', JAMA, 1992: Vol 268, No 22, at pp 3231–3239.

<sup>36</sup> Kathryn G Moore, Ed., 'Public Health Implications of Abortion', American College of Obstetricians and Gynaecologists, Washington, DC, Jan 1990.

<sup>37</sup> 93 S Ct 705 (1973).

<sup>38</sup> Alan Guttmacher Institute, Washington Memo, July 11, 1989, at p 1.

The Reagan and Bush administrations worked to restrict abortion through several avenues. In 1981, anti-abortion politicians tried (unsuccessfully) to introduce a 'Human Life Amendment', which would have declared all conceptions to be legal 'persons' and prohibited abortions on all grounds.

To overturn the Supreme Court's ruling of *Roe v Wade*, President Reagan appointed three conservative judges to the United States Supreme Court, and George Bush appointed two more, including Clarence Thomas in 1991. Federal 'gag' rules, which were introduced by the Department of Health and Human Services in 1988 to prohibit federally-funded family planning clinics from discussing abortion with their patients, even if asked, met with broad public opposition and were challenged in Congress and the courts.

On July 3, 1989, the Supreme Court decided a case from Missouri called *Webster v Reproductive Health Services*<sup>39</sup>. The court ruled, 5-4, that states may bar public employees and public hospitals from being used for abortions. States may also require doctors to conduct tests to try to determine whether a foetus can survive outside the womb, although there are no known tests for determining viability. The court also let stand the preamble to the Missouri law, which declared that life begins at conception. After the Webster ruling<sup>40</sup>, many anti-abortion bills were introduced in State Legislatures. Some bills supporting abortion rights were also introduced at the state level. And in 1990, hearings into a Federal Freedom of Choice Act (to establish a national standard for protecting women's access to legal abortion) began in both the House and the Senate.<sup>41</sup>

In 1992, the United States Supreme Court further weakened the right to abortion when the constitutionality of Pennsylvania's abortion law was challenged. In this important decision, called *Planned Parenthood v Casey*, the Supreme Court found that requirements of a mandatory 24-hour delay before an abortion, lectures by doctors against abortion, consent from parents of minors, and reporting requirements did not constitute an 'undue burden' on women seeking to end an unwanted pregnancy. Such provisions were therefore constitutional, the court held.

In *Casey*, the Supreme Court fell one vote short of overturning the 1973 *Roe v Wade* decision (which made abortion a protected, fundamental right).

As for the 'abortion pill' RU 486, the Food and Drug Administration issued an import ban against RU 486 in 1989.

39 109 S Ct 3040 (1989)

40 'Fuel Added to Abortion Debate', The Globe and Mail, July 4, 1989, at p A1.

41 Alan Guttmacher Institute, Washington Memo, March 23, 1990, at p 4.



- A An increase in more militant anti-abortion tactics targeting abortion clinic doctors, staff and patients began in earnest in the mid 1980's and continues today. These tactics include clinic disruptions, blockades, vandalism, bomb threats, death threats, invasions, assaults, arsons, bombings, and kidnappings.<sup>42</sup>
- B On his second day in office, United States' President, Bill Clinton ordered the reversal of a number of abortion-related restrictions from the Reagan/Bush Administrations, including the 'gag rule' banning abortion counselling at federally financed clinics.
- C The new Clinton administration also immediately began encouraging the manufacturer of the 'abortion pill' RU 486 to make the drug available in the United States. This encouragement resulted in the May, 1994 agreement by the company, Roussel Uclaf, to donate its patents on RU 486 to the Population Council, a non-profit organisation that began testing the pill on 2,000 American women at 12 sites.
- D
- E President Clinton appointed to key positions people who are unabashedly pro-choice on abortion, including Dr M Jocelyn Elders as United States Surgeon General and Judge Ruth Bader Ginsburg to the United States' Supreme Court. The fact that Clinton's national health-care plan would have covered most abortions drew the opposition of the United States Roman Catholic Bishops and the anti-abortion lobby.
- F President Clinton also quickly overturned the 'Mexico City Policy', a Reagan administration prohibition on aid to international family planning programs that support abortion. At the 1994 United Nations population conference in Cairo, the United States government supported improved access to contraception and safe abortion in the developing world, despite the Vatican's condemnation. The Clinton's approaches also include efforts to bolster the health and survival of children and improve women's education to lower fertility rates.
- G
- H On May 12, 1994, the Freedom of Access to Clinic Entrances Act ('FACE') was passed by the United States Senate. This law makes the blockading of abortion clinics a federal crime and imposes prison terms and fines on anti-abortion protesters who threaten violence or intimidate clinic workers or patients.
- I The law was propelled by a spate of unusually violent attacks at clinics in 1993, including several fire bombings, the murder of an abortion-provider, Dr David Gunn, at a clinic in Pensacola, Florida, and the shooting of Kansas

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42 Editor, *The Lancet*, Vol 342, No 8877, Oct 16, 1993.

physician Dr George Tiller. In the summer of 1994, a second doctor and his escort were murdered in Pensacola. Anti-abortion activists were convicted in all these attacks on physicians.

On 30 December 1994, a gunman opened fire on staff and patients at two clinics in suburban Boston, killing two women on staff and wounding five other people. The next day, a clinic in Virginia was fired upon, but no one was shot. The police arrested John Salvi, an opponent of abortion, in these incidents.

Stepped up harassment and intimidation of individual doctors has lowered the number of abortion providers and made abortion less available to women in many parts of the country.

Abortion law in the mid-twentieth century differed in the various states of the United States of America. Some, as in New York, were wholly liberal; some, as in Texas, correspond roughly to the English Infant Life (Preservation) Act 1929; but the majority followed variations of the United Kingdom Abortion Act 1967. A series of Supreme Court decisions limits what restrictions states can impose on abortion. The court only allows the states to impose restrictions pertaining to informed consent<sup>43</sup> parental consent<sup>44</sup> parental notice<sup>45</sup> and viability<sup>46</sup>. This appears to be the present status of state laws.

In the same vein, the United States Senate voted overwhelmingly on 22 October 2003 to ban partial-birth abortions in the United States. The bill (as it was then), which had already been passed by the United States House of Representatives, has been sent to President George W Bush to be signed into law. This Act was previously vetoed by former President Bill Clinton in 1996 and 1997 after successfully passing through the House and Senate. The Act is viewed as a very important piece of legislation that will put an end to an abhorrent practice and continue to build a culture of life in America.

43 A woman must be given some information about the abortion procedure itself; fetal development, such as the present state of her baby's organs, general physical appearance, or ability to live outside the womb; and/or alternatives to abortion, like help available to her through state and private programs if she chooses to keep the baby.

44 If an unmarried girl under 18 wants to have an abortion, she must first get permission from one or both parents, just like she would for any other medical procedure. To be acceptable to the Supreme Court, any such law must have the option that the girl can go to a judge who can authorise an abortion without her parents' consent for various reasons.

45 Similar to parental consent, except that the parents simply have to be told — their permission is not required. Again, the court demands a 'judicial bypass' procedure to allow the girl to get a secret abortion.

46 A baby may not be aborted after reaching 'viability', that is, if he or she could survive outside the womb. To the best of our knowledge, no such law has actually been enforced, but the court did permit it.



A Bush in fact made a remark before the Congress on the need of protecting infants at the very hour of their birth and ends the practice of partial-birth abortion.

B Pro-abortion advocates believe the new law is unconstitutional and believe it will be defeated in the courts. They claim that the primary goal of supporters of this law is to undermine all abortions and make them illegal again in the United States. They point to a 5-4 decision made in 2000 by the United States Supreme Court in the case of *Stenberg v Carhart* that struck down a state law limiting abortions in Nebraska because the law did not specify which procedures could not be performed. However, this new law clearly states that it is the partial-birth abortion procedure that is being prohibited.

C On the other hand, the supporters of the ban believe partial-birth abortions are violent acts of murder against innocent human beings. In a partial-birth abortion, the head of the baby is exposed through the mother's uterus, then hammered by a surgical instrument.

D The Act describes a partial-birth abortion as 'a headfirst presentation', the entire fetal head is outside the body of the mother, or, in the case of the breech presentation, any part of the fetal trunk past the navel is outside the body of the mother for performing an overt act that the person knows will kill the partially delivered living foetus. The penalty for performing partial-birth abortions includes a maximum of two years in jail and/or fines for each offence. If the person receiving the partial-birth abortion is under the age of 18, then the parents will be authorised to sue the doctor to recoup damages under the legislation.

E The case of *Haskell v Taft* is the first one to be decided in accordance with this Act. The Federal Court has ruled that Ohio's state partial-birth abortion ban does not violate the Constitution in any respect. This makes Ohio the first state to have a partial birth abortion ban in effect. While such Act have been introduced and passed in many other states, all have been vetoed or put on hold by the courts. A federal law passed in November 2003 has also been put on hold by the courts. The ruling was issued by a three judge panel of the United States Sixth Circuit Court of Appeals on 17 December 2003, with one of the three judges dissenting.

## THE LAW OF ABORTION IN CANADA

I In 1869, Parliament enacted a criminal law which prohibited abortion and punished it with life imprisonment. In 1892 came the first statutory prohibition against the sale, distribution and advertisement of contraceptives.

These laws were to remain virtually unchanged until 1969.<sup>47</sup>

Contraception and abortion in Canada went underground for the next century, and women's reproductive health suffered greatly as a result. For example, 4,000-6,000 Canadian women died because of bungled illegal abortions between 1926 and 1947.<sup>48</sup>

In the 1960's a push to legalise abortion came from the Canadian Medical Association, the Canadian Bar Association, women's groups, some churches, social welfare agencies, the Canadian Labour Congress, and the Humanist Fellowship of Montreal (whose President was Dr Henry Morgentaler). Estimates of the number of illegal abortions being performed in Canada during this time range from 35,000 to 120,000 annually, a number which is not inconsistent with the number of legal abortions performed today.

In 1969 the criminal law was amended to legalise contraception and certain abortions performed by a qualified physician in an approved hospital. Under s 251 of the Criminal Code, a therapeutic abortion committee of at least three doctors was required to decide whether the continuation of the pregnancy 'would or would be likely to endanger the woman's life or health'. The doctor performing the abortion could not be a member of the committee and the woman did not meet the doctors who sat on the committee. The woman had no right to appeal the decision if her application was rejected.

Hospitals were not compelled by law to set up abortion committees. Roman Catholic hospitals and small hospitals with fewer than four doctors on staff did not have them. Most other hospitals chose not to have committees.

According to the Report of the Committee on the Operation of the Abortion Law (the Badgley Report, 1977), a woman requesting an abortion faced bureaucratic delays which averaged eight weeks from the time she first consulted her doctor about a suspected pregnancy to the time her request was granted. The situation discriminated against women who could not afford to travel to a centre which could provide an abortion.

In addition, s 251 did not define 'health'. Since therapeutic abortion committees interpreted 'health' differently, the reasons for which women

47 For subsequent changes see A Anne McLellan, 'Abortion Law in Canada' in *Abortion, Medicine and the Law* (4th Ed), Butler and Walbert, Eds, Facts on File, NY, 1992 at p 335. (After 1939, the British case *R v Bourne* concluded that an abortion could be performed in good faith to protect the life and health of the pregnant woman, and the *Bourne* defence was subsequently adopted by most common law jurisdictions. It would probably have been applicable in Canada prior to the adoption of a new abortion law in 1969, but was never tested.).

48 Angus McLaren and Arlene Tigar McLaren, at p 51.



A obtained abortions varied widely. This arbitrariness in the application of the law prompted the authors of the Badgley Report to state that:  
the procedure provided in the Criminal Code for obtaining therapeutic abortions is in practice illusory for many Canadian women.<sup>49</sup>

B Despite representations by many national groups urging repeal or radical reform of the law, the Federal Government did not change it. Section 251 remained in place until 1988.

C In August, 1973, the Montreal physician was arrested for performing a technically illegal abortion that is, one done in his clinic without the approval of a therapeutic abortion committee.

D In November of that year, a jury acquitted him of the charge. But in an unprecedented action, the Quebec Court of Appeal overturned the jury verdict and found Dr Morgentaler guilty in April, 1974.

E The doctor appealed his case to the Supreme Court of Canada. In March 1975, the court voted 6-3 to uphold the Quebec Court's conviction and Dr Morgentaler was sentenced to eighteen months in prison. While serving his sentence, he was tried on a second charge. In June 1975, a jury acquitted him again. The Quebec Court of Appeal upheld that acquittal.

F In January, 1976 the Federal Minister of Justice set aside the conviction on the first charge and ordered a new trial. The Minister acted under a new amendment to the Criminal Code. This amendment disallowed the overturning of the jury acquittal by the Court of Appeal. Dr Morgentaler, who had suffered a heart attack in jail, was freed after serving ten months of his sentence. In September 1976, he was acquitted at the retrial of the original charges, the third time a jury had acquitted him. In late 1976, the Quebec government dropped all further charges against Doctor Morgentaler.

G In May, 1983, Dr Morgentaler opened a clinic in Winnipeg. The clinic was raided by police in June and Dr Morgentaler, Dr Robert Scott and seven staff members were charged with conspiracy to procure a miscarriage. Subsequently, the Crown decided to proceed against the doctors and head nurse only.

H Meanwhile, Dr Morgentaler had opened another clinic in Toronto. On July 5, 1983, police raided the Toronto clinic, seizing equipment and charging Drs Morgentaler, Scott and Smoling with conspiracy to procure a miscarriage. A jury acquitted all three doctors after only six hours of deliberation on 8 November 1984. The Toronto clinic reopened the following month, but soon

49 Canada. Report of the Committee on the Operation of the Abortion Law (Badgley Report), (Ottawa: Minister of Supply and Services Canada, 1977), at p 141.

after Drs Morgentaler and Scott were again charged with conspiracy to procure a miscarriage.<sup>50</sup>

The Ontario Attorney General Roy McMurtry announced that he would appeal on the acquittal. In October, 1985, the Ontario Court of Appeal set aside the jury acquittal and ordered a new trial.

Dr Morgentaler appealed. Finally, on January 28, 1988 the Supreme Court of Canada struck down the abortion law as contrary to s 7 of the Charter of Rights and Freedoms (guaranteeing 'life, liberty and security of the person'). Chief Justice Dickson stated that:

Section 251 clearly interferes with a woman's physical and bodily integrity. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus an infringement of security of the person<sup>51</sup>

Anti-abortion activist Joseph Borowski appeared before the Supreme Court in October 1988, trying to end abortion in Canada by claiming foetuses are protected as persons under the Charter of Rights and Freedoms. On March 10, 1989, the court ruled unanimously that, since s 251 had been struck down by the Morgentaler decision, Borowski's challenge to it was moot.<sup>52</sup>

'Operation Rescue', the American anti-abortion strategy of blockading access to abortion clinics, was seen in several Canadian cities during 1988 and 1989. The Vancouver Everywoman's Clinic and the Toronto Morgentaler Clinic successfully obtained injunctions to keep protesters away from their premises.

Dr Morgentaler set up a clinic in Halifax in 1989 to provide service for Atlantic women, hundreds of whom travelled to his Montreal clinic each year because they could not obtain an abortion locally. After publicly promising to 'keep Dr Morgentaler out of Nova Scotia', the provincial government passed legislation outlawing abortions performed in clinics and charged Dr Morgentaler under the provincial law. Once more, Dr Morgentaler was back in court fighting for the right to provide abortions in clinics.

The year 1989 was a pivotal one for two Canadian women whose ex-boyfriends tried to use the courts to prevent them from obtaining abortions. Lower courts in Ontario and Quebec granted injunctions against Barbara Dodd and Chantal Daigle respectively. The Ontario injunction was (relatively)

50 Donn Downey, 'Court Ruling Resolves 20-year-old Battle for Women's Rights', *Globe and Mail*, Jan 29, 1988.

51 *Morgentaler* [1988] 1 SCR 56-57

52 'The Court Waits for Parliament', *The Globe and Mail*, March 10, 1989.



A quickly set aside for technical reasons, but Chantal Daigle had to appeal her case up to the Supreme Court. By the time the court could convene, Ms Daigle would have been 22 weeks pregnant. Her lawyer announced in court that Ms Daigle had been unable to wait any longer and had already obtained her abortion in the United States.

B Nonetheless, and because of the significance of the issue, the court continued to hear her appeal and delivered a unanimous decision overturning the injunction. The court stated that neither the Quebec Charter of Human Rights and Freedoms, the Quebec Civil Code, nor Canadian common law grants the foetus a right to life. The court said that in Quebec, as in other provinces, a foetus does not enjoy rights unless it is born alive<sup>53</sup> The Supreme Court also rejected the argument that a prospective father has an interest in a foetus allowing him to prevent an abortion.

D Chantal Daigle's ordeal was highly publicised and prompted a great deal of public outrage. The federal government's response was to introduce legislation to return abortion to the Criminal Code. Bill C-43 declared abortion a crime punishable by up to two years' imprisonment unless a physician determined that the pregnancy threatened the pregnant woman's physical, mental or psychological health.

E After almost two years of decriminalised abortion, pro-choice groups opposed Bill C-43 as a step backwards for women's reproductive choice. The Canadian Medical Association warned that under such a law, many doctors would stop performing abortions for fear of malicious prosecution and harassment by third parties such as ex-boyfriends and anti-abortion activists. Anti-abortion groups opposed the legislation because it failed to make all abortions illegal.

G The House of Commons passed Bill C-43 without amendment on May 29, 1990, by a narrow vote of 140-131. The bill needed Senate approval to become law. Women needing an abortion at that time were confused about its legality, and cases of illegal abortion began to appear for the first time in Canada in almost twenty years. In Ontario, a 16-year-old Kitchener girl sustained physical injury from a botched abortion started in a pool hall<sup>54</sup> and a Toronto woman died from a self-induced coathanger abortion.<sup>55</sup>

H Bill C-43 was defeated by the Senate on January 31, 1991 in a dramatic tie vote. Although Bill C-43 never became law, surveys at the time showed that a significant number of physicians, wary of legal harassment, stopped

53 *Tremblay v Daigle* [1989] 2 SCR 564

54 'Illegal Abortion', *Globe and Mail*, June 2, 1990.

55 'Self-Induced Abortion: Woman Buried Today', *Toronto Sun*, June 15, 1990.

performing abortions.<sup>56</sup> The legal status of abortion is now the same as other medical procedures, governed by provincial and medical regulations and standards.

Abortion clinics have opened in several major cities in Canada since the Supreme Court's 1988 Morgentaler decision. Nova Scotia's 1989 legislation outlawing abortions performed in clinics was overturned by the Supreme Court of Canada in 1993. Dr Morgentaler successfully challenged similar anti-clinic legislation in New Brunswick in 1994, when he opened a clinic in Fredericton. The New Brunswick government appealed this decision.

Manitoba and Prince Edward Island still refuse to cover clinic abortions under their provincial health insurance plans, meaning that women there have to pay the full cost out of their own pockets if their abortion is done at a clinic. Dr Henry Morgentaler has successfully challenged these provinces' policies in court, but both governments are continuing to fight against coverage.

A firebomb destroyed the Toronto Morgentaler Clinic on May 18, 1992. No one has been charged with the crime. On August 30, 1994, the Ontario government successfully obtained a temporary public injunction against anti-abortion harassment of doctors and patients at certain clinics, doctors' offices and homes in five Ontario cities.

On November 8, 1994, BC gynecologist and abortion provider, Dr Garson Romalis was shot and seriously wounded by a sniper at his home in Vancouver.

The 'abortion pill' RU 486 has not been released in Canada, although requests for its testing have been made by the Ontario and BC health ministries, the national medical associations, and women's groups. The manufacturer is apparently concerned about anti-abortion opposition.

## THE LAW OF ABORTION IN ASEAN COUNTRIES

### (a) Indonesia

Indonesia is the largest Muslim society and the fourth most populous country in the world, spread out over 13,000 islands. An aggressive national family planning program was launched in the early 1970's, and incidents of coercive birth control practices have been reported. However, community involvement, public education, and integration of family planning with other health services have made Indonesia's program a success. Nationally, 47% of married couples use contraceptives.<sup>57</sup>

<sup>56</sup> David Vienneau, '268 MDs To Stop Abortions', *Toronto Star*, Jan 16, 1991.

<sup>57</sup> John Stackhouse, 'Indonesia: A family-planning army invades every village', *Globe and Mail*, Sept 3, 1994.



- A Prior to 1965, abortion was largely carried out by traditional birth attendants using techniques of massage, herbal drinks, and various objects or liquids inserted into the vagina. Indonesia observed an abortion law imposed upon it in 1918 by its Dutch colonisers; one that prohibited abortion under all circumstances until the early 1970s, when the Chief Justice of the Indonesian High Court declared that medical professionals would not be prosecuted for performing abortions if their training and the methods used were appropriate.

- B In other words, although abortion was technically illegal under the criminal code, a judicial interpretation in the early 1970's permitted medical professionals to offer the procedure so long as they were discreet and careful.
- C The numbers of medical abortions carried out in Indonesia rose dramatically, and there was evidence of matching declines in the incidence of morbidity and mortality caused by dangerous illegal procedures<sup>58</sup> Thus, before the law was changed in 1992, some abortions were tolerated in Indonesia<sup>59</sup> The current position is that in Indonesia, abortion is illegal and prohibited in all circumstances, even to save the life of mother.<sup>60</sup>

- D Medical and community groups campaigned for a more liberal abortion law to protect legal practitioners and stamp out illegal traditional practices. But when the Health Law of 1992 was passed, it simply made the situation more confusing. The law is ambiguous: for example, it states that a 'certain medical procedure' could be performed to save the life of a pregnant woman. The word 'abortion' was avoided by legislators to avoid political risk. Unfortunately, abortion's ambiguous legal status has discouraged attempts to improve abortion practices. Women must rely on clandestine abortion methods and untrained practitioners.

- E Indonesian women continue to suffer the highest maternal mortality rate in the region, and improvement is unlikely until the legal status of abortion is clarified.<sup>61</sup> The total number of abortions in Indonesia are estimated as high as 750,000 to 1,000,000.

#### (b) Singapore

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- G
- H Singapore is considered as having the most comprehensive law on abortion in the ASEAN region. At least three Acts are identified to have bearing on the issue of abortion. They are namely Medicine (Advertisement and Sale) Act,

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58 Terrance H. Hull et al, 'Induced Abortion in Indonesia', *Studies in Family Planning* 1993, Vol 24, No 4, at pp 241-251.

59 Hull TH, Sarwono SW and Widyantoro N, *Induced Abortion in Indonesia*, *Studies in Family Planning*, 1993.

60 Section 346 to 349, Penal Code of Indonesia, 1915

61 K Mohamad, 'Taking risks to save lives and Health', *Planned Parenthood Challenges* 1993/1.

Termination of Pregnancy Act and the Penal Code. The former is an act meant to prohibit certain advertisements relating to medical matters and to regulate the sale of substances recommended as a medicine.<sup>62</sup>

Up to 1970, the relevant law in Singapore was like that of Malaysia, but since the passing of the Abortion Act 1970, then the Termination of Pregnancy Act 1974, as amended in 1980, women are given absolute freedom to choose whether to bear a child or not up to 24 weeks of pregnancy unless it is necessary to abort beyond this time limit to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman. Section 3 of the Termination of Pregnancy Act 1974 provides that:

1. Subject to the provisions of this Act, no person shall be guilty of an offence under the law relating to abortion when a pregnancy is terminated by an authorized medical practitioner acting on the request of a pregnant woman and with her written consent.
2. Except as provided by section 10, every treatment to terminate pregnancy shall be carried out by an authorized medical practitioner in an approved institution.
3. No treatment to terminate pregnancy shall be carried out by an authorized medical practitioner unless the pregnant woman:
  - (a) is a citizen of Singapore or is the wife of a citizen of Singapore;
  - (b) is the holder, or is the wife of a holder, of an employment pass or a work permit pass issued under the Immigration Act; or
  - (c) has been resident in Singapore for a period of at least 4 months immediately preceding the date on which such treatment is to be carried out, but this subsection shall not apply to any treatment to terminate pregnancy which is immediately necessary to save the life of the pregnant woman.
4. Any person who contravenes or fails to comply with this section shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$3,000 or to imprisonment for a term not exceeding 3 years or to both.

<sup>62</sup> Section 5 states that subject to the provisions of this Act, no person shall take part in the publication of any advertisement referring to any skill or service, or to any article or articles of any description, in terms which are calculated to induce any person to seek the advice of the advertiser or any person referred to in the advertisement in connection with such skill or service, or to lead to the use of that article or articles of that description, for procuring miscarriage of women.



A The Singapore law resembles the English and the Indian abortion law more than the laws in any of the neighbouring countries. Section 3(1) of the Act 1974 allows medical termination of pregnancy subject to two liberal conditions as mentioned above. Section 7 of the Act ensures secrecy and confidentiality of abortion, unless the woman gives permission or disclosure.

B In addition, the abortion law of Singapore has meticulous objection clauses.<sup>63</sup> While the scope of these provisions remains uncertain, they often permit medical and paramedical personnel who oppose abortion on moral or religious grounds to declare their objection and be exempt from having to perform or assist in abortions in non-emergency situations.

C

## THE LAW OF ABORTION UNDER ISLAMIC LAW

### (a) Classical Jurists Theories<sup>64</sup>

D Abortion under the purview of Islamic law is defined as an action which causes separation of the foetus from the mother's womb. The foetus may come out alive or dead. In either case the offence of abortion would be complete. Nevertheless, the punishment would be different in each case. It is not necessary that the act which causes abortion should be an act of particular kindkind. It may be deed or a word, material or non-material. The examples of material act are blow, wound, pressing of the stomach or administering a medicine or a matter into the womb or putting an excessive weight on it.<sup>65</sup>

E

F Abortion is forbidden and punishable except where it is for the sole purpose of saving the life of the mother.<sup>66</sup> Some of the Islamic jurists condone abortion during the first 120 days of gestation, even if it might not be posing a danger to the mother's life. But generally, abortion procured after 120 days is held by jurists as illegal.<sup>67</sup>

G According to the Shariah the foetus in the mother's womb is not a complete living human being. It is partly animate and partly inanimate. Hence, if anyone puts an end to the foetus growing in the womb he will not be treated as a willful killer. He is, however, guilty of a specific offence and will thus be liable to a

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63 Shin M. Singapore, in Library of Congress, Ed, Report for Congress: Abortion Laws and Policies in Selected Foreign Countries, Washington, DC: Library of Congress, 1996, 112 & 114.

64 Abdul Qader Oudah Shaheed, Criminal Law of Islam, Vol 4, International Islamic Publishers, 2000, at pp 349-360.

I 65 Hashia ibn 'Aabideeb, Vol 5, at pp 517 & 519.

66 Isan Ganem, The Response of Islamic Jurisprudence to Ectopic Pregnancies, Frozen Embryo Implantation and Euthanasia, Medical Science Law (1987) Vol 7, No 3, at p 189.

67 See Hashiyat Ibn Abdin, Vol 3, at p 176 and Dasuqi, Hashiyat al Dasugi ala Sharah al Kabir, Vol 2, at pp 266-267.

specific punishment. The Egyptian law is in harmony with the Shariah in this respect. The punishment prescribed for such an offence does not constitute the punishment for willful murder as laid down under article 1/234 of the Egyptian Criminal Law. Doing away with the foetus entails punishment under the Egyptian Criminal Law as provided for in article 260.

According to Imam Ghazali, once semen is mixed with the female ovum in the uterus, it is sinful to destroy it. Once it assumes the form of a clot of blood and a lump of flesh, it is more hateable to destroy it. After life is infused into that lump of flesh, it is most hateable to destroy it. The last limit to this sin is to destroy the child after it is born.<sup>68</sup>

Killing of the embryo cannot be justified at any stage of its evolution, because every stage is inter-connected with the other, and none is superfluous. This evolutionary process is described in the Quran in very accurate language: In surah *Al-Mu'minun* (23), ayat 13–14, Allah SWT says to the effect:

Then we placed him as (a drop of) sperm (nutfah) in a place of rest, firmly fixed. Then We made the sperm (nutfah) into a clot of congealed blood (alaqah). Then of that clot We made a (foetus) lump (mudghah). 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 stages involved under the modern medical science is slightly different. It is universally accepted that the fertilisation of female ovum (egg) with the male sperm in the fallopian tubes of the woman give birth to zygote, which after three days gets implanted in the uterus and becomes blastocyst. Excess zygotes are flushed out with the menses blood. Two weeks after fertilisation, the blastocyst becomes an embryo, and by the end of six weeks all the internal organs appear in their rudimentary form. Eight weeks after conception, the embryo becomes a foetus, which after the period of gestation is born as the child.

The jurists from the four mazahibs have also elaborated on this issue significantly. About to the loss of foetus and abortion, the *Hanafi* jurists have taken the position that it is an offence which constitutes an excess on life in certain other respect. They argue that foetus will be treated as life from one viewpoint and not as life from another viewpoint. It will be treated as having life because it is a human being and on the other hand it has no life because it has not yet left the mother's body. So long as the foetus remains hidden in the mother's womb, it does not involve any appropriate and full responsibility and as such no right is obligatory owing thereto, since it is a part of the mother. But as its life departs from the life of the mother, it has life of its own and as such it

68 Imam Ghazali, *Ihya Ulum id-din*, Vol 2, at pp 44–45, Eng tr by Maulana Fazlul Karim (New Delhi, 1982).



- A does involve responsibility and is entitled to rights. Thus, it deserves the right of inheritance, recognition of descent and bequest.<sup>69</sup>

- B The jurists of the Malikis, Shafi'ee and Hanbali schools describe it as a crime against the foetus or foeticide. But this is just a divergence interpretation. The jurists have arrived at the same conclusion namely the elimination of the foetus and committing excess on it or doing something resulting in the separation of the foetus from the womb of the mother.<sup>70</sup>

- C The crime of abortion in Islam deals in depth with external causes whereby often, they are independent of the woman herself. A clear example of this is an act of the offender hitting the stomach of a woman with baby or administers some medicine to her reducing the obstruction of her stomach or the movement felt within the stomach comes to an end. Apart from that Islamic law also entails punishment for the offender. Imam Abu Hanifa and Imam D Shafi'e hold that when some growth is manifest, the offender will be accountable for his crime.

- E If a lump of flesh does not exhibit the formation of any organ, but the experts opine that it is the beginning of growth and that if this fruit of the womb remained in tact, it would have grown into embryonic form, then the offender would be held accountable.

- F On the other hand, the Hanbalites considers the accountability of the offender based on an abortion involving an embryonic form. If a lump of flesh is miscarried and the experts testify that it contains an embryonic form, the offender will be accountable under criminal law. If they testify that it consists of rudimentary form of human being and had it remained intact it would have grown into a form, there are two different views regarding such a case. According to one opinion it involves no accountability as if it does consist of a form, it is just a clot whilst the basis of accountability is the formation. Another G opinion holds that the offender is accountable in as much as it is the beginning of the birth of human being and bears similarity to the process of embryonic growth.<sup>71</sup>

- H Interestingly, the jurists of Maliki, Shafi'ee and Hanafi schools acknowledge embryo as existing in separation from the mother, even if it is less than six-month-old, but must be alive when separated. Hanbalites, nevertheless opined that the separation of foetus from mother's womb presupposes conception.

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69 Al Bahr-ul-Raiq Vol 8, at p 389.

70 Asni-ul-Matalib, Vol 4, at 89, Hashia ibn 'Aabideen, Vol 5 at p 517; Sharh-ul-Zurqani, Vol 8, at p 33; al-Iqnaa', Vol 4, at p 209.

71 Al-Mughni, Vol 9, at p 539.

Islamic criminal law fully recognises aggression against the foetus as a crime. According to *Mughni al Muhtaj*.

There is no difference between the aggression committed by a third party or by the pregnant woman herself. But if she takes some medicines out of necessity, then as Zarakshi says, she is not liable for any adverse consequences.

Even during the month of Ramadhan it is not incumbent upon her to fast if she fears a miscarriage might occur. So if she does fast and it results in her having a miscarriage then she is to be held responsible as al-Mawardi said and she cannot inherit from the *ghurrah* for she is (held as) the killer (of the foetus).<sup>72</sup>

Ibn Qudamah is of the view that if a pregnant woman takes some medicine resulting in miscarriage, she must pay the *ghurrah* and she has no right to inherit from the dead child.<sup>73</sup> According to a hadith reported in *Sahih Muslim*, the Prophet regarded the killing of an unborn child as a crime, irrespective of the stage of its development, hence, both embryo and foetus are deemed to be covered. The text of the hadith is:

Abu Huraira reported that two women of the tribe of Hudhail fought with each other and one of them flung a stone at the other, killing her and what was in her womb. The case was brought to Allah's Messenger (PBH) and he gave judgment that the *diyat* (indemnity) of the unborn child is a male or female slave of the best quality, ... Hamal b. al-Nabigha al-Hudhali said: Messenger of Allah, why should I pay blood-wit for one who neither drank, nor ate, nor spoke, nor made any noise; it is like a non-entity ... (The Prophet still upheld his judgment and rejected the objection of Hamal and branded him as 'one of the brothers of sooth sayers')<sup>74</sup>

It is therefore perfectly possible to hold a pregnant woman liable under the Islamic law of crimes for anything done by her either intentionally or in sheer disregard of caution which might affect the life or health of the child in her womb.

In Pakistan, the abortion law was imposed by the British during colonial rule. Illegal abortions are a serious problem; complications from septic abortions are a leading cause of maternal death.<sup>75</sup> In 1991, this Islamic country replaced the restrictive British laws with more liberal criminal legislation designed to conform to the principles of Islamic law, as delineated in the Quran and other texts.

72 Abu Zakariyya Yahya bin Sharaf Nawawi, *Mughni al-Muhtaj* (1908), Vol 4, at p 103 cited in Abul Fadl Mohsin Ebrahim, *Biomedical Issues – Islamic Perspective* (Mobeni, 1998) at p 142. See also, Abdur Rahman al-Jaziri, *Figh al a Madhahib al-Arabah*, Vol 5 at p 715 (Lahore, 1979) (Urdu tr).

73 Ibn Qudamah, *Al-Mughni*, Vol 7, at p 816, cited in Abul Fadl Mohsin Ebrahim, at p 142.

74 *Sahih Muslim*, Vol III, at p 905, (Eng. tr).

75 International Planned Parenthood Federation, 'Country Profile: Pakistan', August 1992.



- A According to researcher Reed Boland, the new Pakistani legislation retains several features of the old British law. It establishes two stages of pregnancy for punishment purposes and imposes the old penalty for an abortion performed during the earlier stage namely imprisonment up to three years or a fine or both. But the new law says abortion in the earlier stage of pregnancy is no longer a crime if it is carried out to provide 'necessary treatment'. Since the term 'necessary treatment' is not defined, the degree of liberalisation represented by this change is not entirely clear.<sup>76</sup>
- B

- C Only 14% of married women of child-bearing age use contraception in Pakistan. Experts say that cultural factors are responsible as Pakistan has a large rural population and little independence or status for women.

- D Abortion is illegal in Iran except to save the life or physical or mental health of a woman, or in cases of fetal impairment. In practice, abortion is available, however the only obstacle is money. An abortion costs about \$3,000, which is far more than most families make in a year, but is affordable for wealthy families in the larger cities.<sup>77</sup> Among those who cannot afford a safe abortion, septic abortion is on the rise.

- E After the Islamic Revolution in 1979, the government outlawed abortion and sterilisation, closed family planning clinics, rejected the use of contraceptives, imposed regulations governing women's appearance in public apart from making marriage, children and home the first priority for women.<sup>78</sup>
- F During the eight-year war with Iraq, the government encouraged a high birth rate, but, with the end of the war in 1988, the population explosion has been increasingly seen as a major obstacle to economic reconstruction.<sup>79</sup> The government therefore reversed its pro-natalist policies: it began officially promoting family planning and made free contraceptives available, including sterilisation (legal only if the woman has three children and her husband permits it). Financial disincentives for having a fourth child were introduced in 1991.
- G

- H The government's reversal has had little success with the population, however, probably because women's legal and social status, which has not been improved, does not motivate them to control their fertility.<sup>80</sup> Women are not encouraged to work outside the home because Islam forbids the mixing of the

I 76 Reed Boland, 'Selected Legal Developments in Reproductive Health in 1991', *Family Planning Perspectives*, Vol 24, No 4, July/Aug. 1992, at pp 178-185.

77 'Slowly Fighting Back', *Toronto Star*, June 2, 1992.

78 International Planned Parenthood Federation, Open File, Dec, 1992.

79 International Planned Parenthood Federation, Open File, Aug, 1991.

80 *The Lancet*, Vol 340, Dec 5, 1992, at p 1401.

sexes, and having large families has traditionally been a means of financial support for women.

In Kuwait it is allowed to go for abortion to get rid of foetuses suffering from incurable physical or mental defects, detected through modern means.<sup>81</sup> Dar Al Ifta, Riyadh, Saudi Arabia, in its fatwa prohibited abortion on such a ground.<sup>82</sup> Islamic jurists also generally disapprove abortion to terminate pregnancy which is the outcome of rape or adultery, as in their view, 'the killing of the foetus exacerbates the sin already committed in its creation. Besides, the foetus as a living being has a right to exist regardless of the circumstances in which it was conceived'.<sup>83</sup> Adequate medical attention after the rape may successfully eliminate any chances of pregnancy or the growth of the foetus. In view of the uncertainties attending to the questions: at what point of time does human life come into existence or up to what maximum time abortion of a foetus be allowed, it is better to put a blanket prohibition on abortion, with minimal exceptions.

## ASSESSING THE INADEQUACIES OF THE LAW OF ABORTION IN MALAYSIA

### (a) The Present Law

There is no separate enactment dealing with abortion in Malaysia. The Penal Code prescribes punishments for miscarriage. The language of the relevant law is free from loaded expressions, saving it from varying interpretations. The offence miscarriage is enumerated in ss 312, 313, 314, 315 and 316 respectively. Section 312 mandates that:

whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description 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 of either description for a term which may extend to seven years, and shall also be liable to fine.

The explanation to this section states that a woman who causes herself to miscarry falls within the meaning of this provision too. Sections 312 to 316 of the Code have made induced abortion punishable. Section 312 makes the causing of miscarriage with the consent of the woman and s 313 causing miscarriage without the women's consent, punishable. The former requires two essentials, viz: voluntarily causing a woman with child to miscarry; and such

81 Ghanem Isam, *Islamic Medical Jurisprudence*, at p 60, cited in Verdict Respler-Chaim, *Islamic Medical Ethics in the Twentieth Century*, (Leiden, 1993), at p 14.

82 Issued by Dar Al Ifta, No 2484, dated 16 July 1403, cited in Abdul Fadi Mohsin Ibrahim, *Biological Issues-Islamic Perspective*, (Moben, 1988), at p 126.

83 Verdict Rispler-Chaim, *supra* n. 115 at 15, citing various classical sources.



A miscarriage should not have been caused in good faith for saving the life of the woman.

The section speaks of miscarriage only, which has nowhere been defined in the code. However, miscarriage, in its popular sense, is synonymous with abortion, and means expulsion of the immature foetus at any time before it reaches full growth. Miscarriage technically refers to spontaneous abortion, whereas voluntarily causing miscarriage, which constitutes an offence under the Code, stands for criminal abortion. Section 312 makes voluntarily causing miscarriage an offence in two situations, namely, when a woman is 'with child' and 'quick with child'. As per judicial interpretation, a woman is in the former situation as soon as gestations begins, and in the latter situation when the motion is felt by the mother. In other words, quickening is a perception by the mother that movement of the foetus has started. It obviously refers to an advanced stage of pregnancy.

Section 312 permits abortion only on therapeutic (medical) grounds to protect the life of the mother. The unborn child must not be destroyed except for the purpose of preserving the yet more precious life of the mother. The provision by implication recognises the 'foetus' right to life. The threat of life, however, need to be imminent or certain. If the act is done in good faith, the person is entitled to the protection of law. But good faith is deceptive and ambiguous enough to protect most therapeutic abortions so long as they are conducted ostensibly to preserve the mother's life. In fact, what constitutes good faith is not a question of law, but of fact, to be decided in each case according to the facts and circumstances.

The Penal Code (Amendment) Act 1989 (A727) effected changes in the law relating to abortion. The amendment came into force on May 4, 1989. Following the coming into force of the amending statute the words, 'if such miscarriage be not caused in good faith for saving the life of the woman' have been deleted from the section. Instead, an exception in different terms has been introduced, which exception provides that it will not be an offence if: a medical practitioner registered under the Medical Act 1971 undertakes the procedures; and such practitioner is of the opinion, formed in good faith, that the continuance of the pregnancy would involve risk to the life of the pregnant woman or injury to the mental or physical health of the pregnant woman than if the pregnancy were terminated.

The class of persons who may lawfully undertake an abortion has been restricted by the amendments to registered medical practitioners. Further, the strict requirements involved in the phrase 'saving the life of the mother' have given way to more relaxed conditions involving weighing of the reasons for and against continuing a pregnancy. The amendments implicitly require a doctor to exercise clinical judgment in deciding whether to terminate a pregnancy.

Section 313 covers miscarriages without the woman's consent and s 314

covers death caused by intent to cause miscarriage. There seems to be ambiguity because the exception clause does not cover ss 313 and 314. Thus, a medical practitioner may not be at fault for causing miscarriage but if the woman dies, he would be guilty of a criminal offence.

Several case laws have been decided based on these Penal Code provisions. In *Munah binti Ali v Public Prosecutor*,<sup>84</sup> the accused, trying to procure an illegal abortion, inserted an instrument into a woman's vagina with a view to thereby causing a miscarriage. Unknown to the parties the woman was not in fact pregnant and thus it was impossible to cause her to have a miscarriage. The question for decision in this reference to the Court of Appeal was whether it was necessary for the court and the accused doctor to know that the woman was with child before convicting him for the offence of miscarriage, in view of the wordings of s 312 of the Penal Code that 'whoever voluntarily causes a woman with child to miscarry shall ...'.

The question was answered in the negative by most the judges for two reasons. First, on the analogy of s 58 of the Offences Against the Person Act 1861 (of England), if a woman administers drugs to herself with intent to procure her miscarriage, it is a crime only in the event of the woman being with child, whereas if other persons administer drugs to a woman with intent to procure miscarriage, the act is criminal, whether the woman is with child or not. Secondly, a person not knowing for sure that a woman is or is not with child does something to cause miscarriage, is punishable under s 511 of the Penal Code.

In *Chan Phuat Khoon v Public Prosecutor*,<sup>85</sup> the appellant was prosecuted at the Johore Assizes on a charge that on 14 October 1961, at Segamat he did, with intent to cause miscarriage of a woman named Pang Ngee Moi, an act which caused the death of the said woman and he thereby committed an offence punishable under s 314 of the Penal Code. He was convicted of that offence and sentenced to four years' imprisonment.

In another case of 1954<sup>86</sup>, Mathew CJ, Wilson and Taylor JJ of the Court of Appeal upheld a judgment in which a doctor was punished for causing miscarriage without a 'bona fide belief that in so causing her to miscarry he was doing so to save the woman's life'. Considering the doctor's age and long professional career, the Court of Appeal reduced the sentence from five years' imprisonment to two years.

In 1985, Wan Mohd J fined a doctor under s 312, a sum of RM3,500 and

84 [1958] 1 MLJ 159.

85 [1962] 1 MLJ 127b.

86 *Public Prosecutor v Dr Ong Bak Hin* [1954] MLJ xxxiii



- A in default four months' imprisonment for causing abortion. The judge said:  
 'Procuring an abortion is a serious matter and it should only be done as a last resort  
 to save the life of a woman or to save a woman from becoming a mental wreck. In  
 this case, although it is argued that accused had performed the abortion on the  
 woman in good faith to save her life or to save her from becoming a mental wreck,  
 B I find that the argument cannot hold water because from evidence adduced before  
 me the accused had not given reasonable thought and had not taken enough steps  
 to examine the woman further. His finding that the woman had enlarged or bad  
 varicose veins is no other than the result of his mere clinical examination.
- C For reasons stated above, I come to the conclusion that the accused has failed  
 to rebut or throw any reasonable doubt into the case for the prosecution and I  
 therefore find the accused guilty of the charge'.<sup>87</sup>
- D In *Mary Shim v Public Prosecutor*<sup>88</sup> the Court of Appeal upheld the  
 sentencing of a midwife to nine months' imprisonment under s 314 for doing  
 an act with intent to cause miscarriage and which resulted in the death of a  
 pregnant woman.
- (b) The Need to Have an Independent Act on Abortion
- E According to Prof Dr Syed Khalid Rashid<sup>89</sup> although we have only the Penal  
 Code to rely on, the way the misuse of abortion is successfully checked in  
 Malaysia proves that simple laws coupled with strict implementation do surely  
 send the right signal to the would-be offenders to desist from abusing abortion.  
 Nevertheless, I believe there is a need and it is a high time now to regulate a  
 separate law governing abortion cases due to the following factors:
- F (a) The existing provisions in the Penal Code are too limited in governing  
 abortion and miscarriage cases. No definition of miscarriage is provided in the  
 Code, when it is so essential to distinguish abortion from that of miscarriage.  
 Both connote different meanings.
- G (b) With the advances of technology and the increase in the crime rate, an  
 independent law would be necessary to tackle new emerging cases like abortion  
 for experimentation on human embryos, abortion by a rape victim, criminal  
 liability of a mother for pre-natal injuries to her child and etc.
- H (c) Since the Singapore's Termination of Pregnancy Act resembles very much the  
 English and Indian Acts, we should resort to some other laws which are more  
 favourable to our local needs and circumstances. The latest law passed in the  
 United States of America namely the Partial-Birth Abortion Act could be taken  
 as a model law. The English laws on abortion are so much liberalised. For  
 example, (after the 1990 amendment of the Abortion Act 1967, a doctor in  
 United Kingdom is allowed to perform abortion in four situations, which are

<sup>87</sup> *Public Prosecutor v Dr Nadason Kanagalingam* [1985] 2 MLJ 122 at p 124.

<sup>88</sup> [1962] 1 MLJ 132.

<sup>89</sup> *Legal Protection of the Unborn Child: A Comparative Perspective* [1996] 4 CLJ  
xvi.

worded in such a vague manner as to allow very liberal interpretations:

- (a) 'risk of physical or mental injury' to the pregnant woman;
- (b) 'necessary to prevent grave permanent injury to physical or mental health'
- (c) 'risk to life'
- (d) substantial risk that if the child were born, it would suffer from such physical and mental abnormalities as to be seriously handicapped'.

In case of sub-sections (b) and (c) it is not necessary to seek the opinion of two registered medical practitioners, a single doctor may decide. The doctors are allowed to act with complete immunity from prosecution, provided they conform to the provisions of the amended Act.

In India, the Medical Termination of Pregnancy Act, 1971 made it possible for a woman to seek abortion on six liberal grounds, including 'failure of any device or method used by the married couple for the purpose of limiting the number of children' (s 3(2)). Yet this is subject to many liberal exceptions (s 8). Abortion in India has become virtually on demand and is officially encouraged in the interest of population control.

(d) To have a separate law does not mean that we are opening the door of liberalisation in interpreting abortion cases. We should follow certain guidelines and safeguards in choosing the best-suited law.<sup>90</sup>

## CONCLUSION

The way the life and the health of the unborn child are being compromised today, the chances are that it might soon become the world's most endangered species. Yet, instead of initiating rescue measures, many countries and the United Nations either ignore or take up very casually this serious problem for reasons never acknowledged honestly but which in reality, include succumbing to the pressure of the 'pro-choice' lobby, conceding to the demands of political expediencies, and the reluctance to take a firm stand on many bio-medical issues. Consequently, the protection of the unborn child does not even receive as much support as is generally given to issues like the preservation of the flora and fauna of tropical rain forests!

In this scheme of things, a very low place is given to the life and limb of the unborn child, which stands virtually abandoned in many parts of this world.

<sup>90</sup> It seems like liberal interpretation and approach can be apparently seen in France whereby a law on abortion was passed in 1975 allowing voluntary termination within the first 10 weeks of pregnancy with no question asked.



- A No one cares to ask why the unborn child should be made to pay the price of our sins with its own life and blood? The cruelty must be stopped.

- B The human embryo deserves our highest respect. Any interference in the human reproductive process is unethical. To say that the embryo is not human is to doubt our own origin. If the embryo were not human, then experimentation would have little purpose. What is more objectionable is that life is now created simply for laboratory experimentation, however noble the purpose of that experimentation may be.<sup>91</sup>

- C On the other hand, although women's ability to choose abortion remains controversial, a majority of the world's women live in nations where abortion is legal under many circumstances. The recent judicial trend in the United States to uphold laws that discourage abortion is welcome development which need to be emulated.

- D Similar to that of United States, Canada has a federal system of government in which each constituent portion of the federation usually a local state may regulate abortion differently. Local abortion regulations in Canada are subjected to federal limitations concerning the degree to which abortion can be restricted by local governments. The most significant change occurred in 1988, where the nation's highest court struck down a national abortion law. No Canadian federal criminal law has replaced the voided abortion law. While abortion regulations have been introduced in the provinces, those that tend to criminalise abortion are likely to be struck down as an unconstitutional infringement on the Federal Government's exclusive power to enact criminal law. For example, in 1993, Canada's Supreme Court nullified a provincial law that prohibited abortions from being performed in facilities other than hospitals.

- G In ASEAN region, Singapore is said to have a far-reaching statute on abortion. However, Singapore is following the liberalised trend which often fails to suit our local scenario. Indonesia is still relying on its Penal Code in providing a way out for her abortion cases. Islamic law excels in serving as guidelines on this issue. Apart from that, the fatwa issued by Dar Al Ifta that disapproves abortion which is the outcome of rape, or adultery should also be considered in formulating our own Act.

- I It is hoped that the Legislature will look into the inadequacy of the existing provisions in the Penal Code and realise the need to have an

91 Speech of the Earl of 'D', House of Lords, Official Report, 26 March, 1990, col. 247, cited in Derek Morgan & Robert G Lee Human Fertilization and Embryology Act, 1990: Abortion and Embryo Research, The New Law (London, 1991), at p 75.

independent Act governing abortion cases to keep pace with the globalisation wave.

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